

SIXTEENTH ANNUAL WILLEM C. VIS
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
VIENNA – 3 TO 9 APRIL 2009

MEMORANDUM FOR RESPONDENT



JOHANNES - GUTENBERG - UNIVERSITÄT MAINZ

On behalf of

Universal Auto Manufacturers, S.A.
47 Industrial Road
Oceanside
Equatoriana

(SECOND RESPONDENT)

Against

Reliable Auto Imports
Mr. Joseph Tisk
114 Outer Ring Road
Fortune City
Mediterraneo

(CLAIMANT)

COUNSEL

Jan Frohloff · Nils Jennewein · Max W. Oehm
Emma Reynolds · Michaela Streibelt



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INDEX OF ABBREVIATIONS

Abbreviation	Explanation
A.B.	Aktiebolag (Public Limited Company) [Sweden]
A.G.	Aktiengesellschaft (Public Limited Company) [Germany]
<i>ab initio</i>	from the beginning
Agency Convention	Convention on Agency in the International Sale of Goods of 1983
Art.	Article
BG	Bundesgericht (Swiss Federal Supreme Court)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH	Bundesgerichtshof (German Federal Supreme Court)
<i>cf.</i>	<i>conferatur</i> (compare)
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna Convention of 1980
CISG-Online	CISG Database (http://www.cisg-online.ch)
Corp.	Corporation
EC Regulation Rome I	European Community Regulation of June 17 th 2008 on the law applicable to contractual obligations
ECU	Engine Control Unit
<i>et al.</i>	<i>et alii, et aliae, et alia</i> (and others)
<i>et seq.</i>	<i>et sequentes</i> (and following)
F.	Federal Reporter
Hague Convention	Convention on the Law Applicable to Contracts for the International Sale of Goods (1986)
<i>i.e.</i>	<i>id est</i> (that is)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
IDR	Journal of International Dispute Resolution
Inc.	Incorporated
Int.	International
Ltd.	Limited Company
No.	Number
New York Convention	UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958



OLG	Oberlandesgericht (German Regional Court of Appeals)
p. / pp.	page / pages
para. / paras.	paragraph / paragraphs
PLC	Public Limited Company [UK]
Rome Convention	Convention on the Law Applicable to Contractual Obligations (80/934(EEC))
S.A.	Société Anonyme (Anonymous Company) [France]
SCC	Stockholm Chamber of Commerce
S.p.A.	Societate per Azioni (Public Limited Company)[Italy]
<i>supra</i>	See above
UAM	Universal Automobile Manufacturers Distributors Oceania Ltd.
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL ML	UNCITRAL Model Law on International Commercial Arbitration of 1985 (with Amendments adopted as 2006)
UNCITRAL <i>Model Insolvency Law</i>	UNCITRAL Model Law on Cross-Border Insolvency of 1997
Universal	Universal Automobile Manufacturer S.A.
US	United States of America
USD	United States Dollar
<i>v.</i>	<i>versus</i> (against)
Vol.	Volume



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STATEMENT OF FACTS

- 1 Mr. Joseph Tisk (“CLAIMANT”), doing business under the trade name of Reliable Auto Imports is a sole trader car dealer in Mediterraneo who purchases new and used cars in foreign countries and imports them for sale.
- 2 UAM Distributors Oceania Ltd. (“UAM”), first respondent, is a corporation organised in Oceania. At the time of the events leading to this arbitration, UAM had a non-exclusive right to sell cars manufactured by Universal Auto Manufacturers S.A. (“Universal”) into Mediterraneo. Insolvency proceedings were commenced in regard to UAM on April 9th 2008.
- 3 Universal, second respondent, is a corporation organised in Equatoriana. It is a major manufacturer of automotive products and sells through subsidiaries, main importers and franchised dealers in more than 120 countries. One of its products is the Tera small car.
- 4 On January 18th 2008, CLAIMANT and UAM signed a contract for the purchase of 100 Tera cars. This contract contained an arbitration clause which states that any disputes that might arise should be resolved according to the SCC-Rules for International Arbitration. Vindobona, Danubia, was designated as the place of arbitration.
- 5 The first consignment of 25 cars arrived in Fortune City on February 11th 2008. As these cars were driven from the port to the showroom and to the storage area on February 18th 2008, it was noted that the cars were defective. On February 21st 2008, CLAIMANT’s mechanic inspected ten of the cars but he was not able to determine the problem, though he did suggest that an Engine Control Unit (ECU) problem seemed likely.
- 6 On February 22nd 2008, CLAIMANT informed the Sales Manager of UAM, Mr. Samuel High, about the defect. During the period from February 22nd 2008 to February 27th 2008, CLAIMANT had contact with both its contractual partner UAM and with Universal, the manufacturer of the cars. Universal constantly offered to diagnose and repair the defective cars because it was liable to UAM for their condition and did not wish



there to be any doubt about the reliability of the Tera cars. It even suggested to send personnel and equipment to Mediterraneo and offered to repair the cars on its own account. Universal expressly stated in this context that this was not an admission of liability as only UAM was contractually liable to CLAIMANT. Universal further stated that its personnel would arrive within three days and the necessary tools and equipment would be shipped to Mediterraneo by air.

- 7 On February 12th 2008, CLAIMANT had been approached by Patria Importers with an offer of 20 new Indo cars; cars of the same class of automobile as the Tera car. After a telephone conversation with Mr. Rudolph Holzman, General Manager of Patria, CLAIMANT accepted the offer for the Indo cars on February 29th 2008.
- 8 Later that day, CLAIMANT sent a message to Mr. High from UAM to notify him that it was cancelling the contract, alleging that it was likely to face insolvency. CLAIMANT further stated that Mr. High should cancel any plans he might have had to ship the remaining 75 cars. CLAIMANT also demanded return of its down payment of USD 380,000.00. It then sent a message to Mr. Harold Steiner, Regional Manager of Universal, to notify him of the cancellation of the contract with UAM so that Mr. Steiner could cancel his plans to send service personnel and equipment to Mediterraneo.
- 9 After CLAIMANT's avoidance of the contract the ownership of the cars reverted to UAM. As Universal was interested in determining the source of the problem, it repurchased the 25 defective Tera cars from UAM's insolvency representative Ms. Judith Powers. The defective cars were shipped from Mediterraneo to Universal in Equatoriana on May 17th 2008. On June 19th 2008, Mr. Steiner sent a letter to CLAIMANT stating that all 25 of the Tera cars that had been returned to Universal had been repaired easily. The source of the problem was detected and fixed on the first day of repair. All of the 25 cars were fixed within five working days. Mr. Steiner stated that they also could have been repaired while they were in Mediterraneo.
- 10 On April 11th 2008, CLAIMANT was informed by Ms. Powers that UAM had entered insolvency proceedings and that she had been appointed as the insolvency representative



by the court in Oceania. Under the law of Oceania, any forum selection clause contained in any contract with UAM, including an arbitration clause, is void *ab initio*.

- 11 On August 15th 2008, CLAIMANT instituted arbitration against UAM based on the arbitration agreement contained in the sales contract between UAM and CLAIMANT. Although Universal was never a party to that contract, CLAIMANT also instituted arbitration against Universal on the basis of the same agreement.
- 12 In response to Procedural Order No. 1 paras. 12 and 13, and with regard to the present facts, Universal respectfully requests the Tribunal
 - to find that Universal is not bound by the arbitration agreement contained in the sales contract of UAM and CLAIMANT **[Issue I]**;
 - to declare that the arbitration clause contained in the sales contract of UAM and CLAIMANT is void *ab initio* **[Issue II]**;
 - to find that Universal is not liable for the breach of contract **[Issue III]**; and
 - to find that the delivery of the defective cars does not constitute a fundamental breach of contract authorising CLAIMANT to avoid the contract **[Issue IV]**.



ARGUMENT ON THE PROCEDURAL ISSUES

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

- 13 The Tribunal is respectfully requested to find that Universal is not bound by the arbitration agreement in the sales contract of January 18th 2008, concluded between UAM and CLAIMANT. Within this contract, UAM and CLAIMANT agreed upon the purchase of 100 Tera cars which were manufactured by Universal. The first consignment of 25 cars that was delivered by UAM to CLAIMANT on February 18th 2008, was defective [*Statement of Claim paras. 10, 11*]. Since CLAIMANT's contractual partner, UAM, has become insolvent, CLAIMANT wishes to hold Universal liable and to institute arbitration against it. This attempt however, is bound to fail because Universal is neither a party to the sales contract nor to the arbitration agreement. The crucial requirement for the jurisdiction of an arbitral tribunal over a party, according to Art. II New York Convention, is an arbitration agreement "signed by the parties". In the present case, it is undisputed that Universal never signed an arbitration agreement with CLAIMANT. The present sales contract [*Claimant's Exhibit No. 1*] and the arbitration clause contained therein is only signed by UAM and CLAIMANT.
- 14 In spite of this, CLAIMANT tries to compel Universal as a non-signatory into arbitration proceedings it never agreed to. CLAIMANT alleges that Universal should be bound to the arbitration agreement between UAM and CLAIMANT by virtue of the theories of agency [*Memorandum for Claimant paras. 36-42*], estoppel [*Memorandum for Claimant paras. 57-59*] and alter ego [*Memorandum for Claimant paras. 43-56*]. However, none of these attempts must bind Universal as a non-signatory to the agreement between UAM and CLAIMANT. Contrary to CLAIMANT's allegations, UAM did not act as Universal's agent [1]. Furthermore, the principle of equitable estoppel can not bind Universal to the agreement between UAM and CLAIMANT [2]. It is also clearly not possible to bind Universal by virtue of the theory of alter ego [3]. Additionally, if CLAIMANT should raise the allegation that Universal is bound through the group of companies doctrine, this



assertion would fail. The group of companies doctrine is also not applicable to the present case nor are any of its requirements satisfied [4].

1. Universal is not bound by way of agency

15 Contrary to CLAIMANT's allegations [*Memorandum for Claimant paras. 36-42*], UAM did not act as Universal's agent. The Agency Convention is applicable to the present dispute [*Procedural Order No. 2 para. 7*]. However, Universal is not bound under it as the Convention's requirements are not met. The structure and the performance of the entire sales transaction between UAM, Universal and CLAIMANT clearly show that UAM was acting in its own name and on its own behalf [1.1], that Universal never demonstrated any intention to be bound by UAM's actions [1.2] and that CLAIMANT did not believe reasonably and in good faith that UAM was Universal's duly authorised agent [1.3].

1.1 UAM was acting in its own name and on its own behalf

16 UAM's behaviour clearly shows that it acted in its own name and on its own behalf. The acts of an alleged agent bind only the agent and the third party if it follows from the circumstances of the case that the agent undertakes to bind himself only [*cf. Art. 13 (1) (b) Agency Convention*]. In the present case, UAM evidently wanted to bind itself only. It concluded the contract for the purchase of the 100 Tera cars in its own name and on its own behalf. This is clearly shown by the contract's wording:

“**UAM Distributors Oceania Ltd.** will sell and Mr. Joseph Tisk, doing business as Reliable Auto Imports, will purchase 100 new 2008 model Tera cars” [*Claimant's Exhibit No. 1*] (emphasis added).

17 Furthermore, as CLAIMANT concedes [*Statement of Claim para. 9*], the cars it had bought on January 18th 2008 were delivered directly from UAM in Oceania to CLAIMANT in Mediterraneo and the purchase price was paid to UAM. Prior to the conclusion of the sales contract between UAM and CLAIMANT, UAM had bought the Tera cars from Universal and had fully paid for them [*Procedural Order No. 2 para. 20*]. If UAM was an agent, it would not have needed to buy the cars from Universal and pay the purchase price



to them.

- 18 Moreover, the fact that UAM's insolvency representative Ms. Judith Powers sold the 25 defective cars to Universal [*Procedural Order No. 2 para. 21*] shows that UAM was not acting as an agent. Through CLAIMANT's avoidance, the ownership of the cars had reverted to UAM [*id.*]. If UAM was Universal's agent, the ownership of the cars would have reverted to Universal instead of UAM. For these reasons, UAM's behaviour clearly shows that it was not acting as an agent but wanted to bind itself only.

1.2 Universal never showed any intention to be bound by UAM's actions

- 19 Furthermore, Universal's behaviour clearly shows that UAM was not Universal's duly authorised agent [1.2.1] and that Universal did not ratify any of UAM's actions [1.2.2].

1.2.1 Universal's behaviour does not permit the assumption that UAM was Universal's duly authorized agent at the time of the conclusion of the sales contract

- 20 The acts of an agent only bind the principal and the third party directly to each other if the principal authorised the agent to act on its behalf [*Art. 12 Agency Convention*]. However, Universal's behaviour demonstrates that it never conferred authority upon UAM.
- 21 Firstly, Universal's conduct before and at the time of the conclusion of the sales contract between UAM and CLAIMANT shows that Universal never authorised UAM to act on its behalf. The distribution of the cars was not organised as an agency relationship but through two separate sales contracts, *i.e.* one sales contract between UAM and Universal [*cf. Procedural Order No. 2 para. 15*], and a second sales contract between UAM and CLAIMANT [*Claimant's Exhibit No. 1*]. Universal had received full payment for the cars it had sold to UAM [*Procedural Order No. 2 para. 20*], while UAM only received a down payment of half the purchase price from CLAIMANT [*Statement of Claim para. 9, Claimant's Exhibit No. 1*]. Furthermore, if an agency relationship existed, Universal would have been entitled to receive the cars without having to pay Ms. Powers for them



[*Procedural Order No. 2 para. 21; cf. supra para. 18*].

- 22 Secondly, it can not be deduced from Universal's later conduct, *i.e.* from Universal's offer to repair the 25 defective Tera cars, that Universal ever conferred authority upon UAM. Contrary to CLAIMANT's submissions [*Memorandum for Claimant para. 41*], Universal neither offered to repair the cars in order to protect UAM nor because it wanted to take responsibility with regard to CLAIMANT. The reason for Universal's offer to repair the defective cars was a simple one: Universal was liable to UAM for the condition of the cars and had thus concluded a subsequent *ad hoc* agreement with UAM that it would repair the cars [*cf. Procedural Order No. 2 para. 15*]. Hence, Universal did not offer to repair the cars in order to fulfil obligations arising out of the sales contract between UAM and CLAIMANT. It offered to repair the cars in order to fulfil its own obligation arising out of the *ad hoc* agreement and the sales contract it had with UAM [*cf. Procedural Order No. 2 para. 15*].
- 23 Therefore, it can not be deduced from Universal's behaviour that UAM was Universal's duly authorised agent.

1.2.2 Universal clearly showed that it did not ratify any of UAM's actions

- 24 Contrary to CLAIMANT's submissions [*cf. Memorandum for Claimant para. 41*], UAM's acts were not ratified by Universal. The acts of an unauthorised agent may only be ratified if the principal clearly shows its intent to be bound by the contract [*cf. Art. 15 Agency Convention; EVANS para. 94*]. Universal has never shown such intent. On the contrary, as CLAIMANT concedes [*Memorandum for Claimant para. 9*], Universal expressly pointed out that it did not want to be party to the contract. It stated in its email of February 28th 2008:

“UAM is, of course, responsible to you for the condition of the Tera cars it has sold to you. [...] [W]e have agreed with Mr. High [General Manager of UAM] that Universal would undertake the repairs without admission of liability” [*Claimant's Exhibit No. 4*].



25 This email demonstrates that UAM had sold the cars to CLAIMANT, thus that UAM was responsible to CLAIMANT for the condition of the cars and that Universal was not liable. Universal could not have made any clearer that it did not consider itself as a party to that contract and that it did not ratify any of UAM's actions.

1.3 CLAIMANT's behaviour does not permit the assumption that it believed that UAM was Universal's agent

26 From hindsight, CLAIMANT now tries to allege that it reasonably and in good faith believed that UAM was Universal's duly authorised agent [*Memorandum for Claimant paras. 38-42*]. However, CLAIMANT's behaviour at the time of the events leading to this arbitration evidently shows that CLAIMANT was fully aware that it actually contracted with UAM and only with UAM.

27 Firstly, CLAIMANT had paid USD 380,000.00 to UAM and not to Universal, and CLAIMANT had received the cars from UAM and not from Universal [*supra paras. 17, 21; Statement of Claim para. 9*]. Secondly, when problems with the Tera cars arose, CLAIMANT first contacted UAM, and not Universal [*Statement of Claim para. 12*].

28 Despite these clear facts, CLAIMANT nevertheless submits [*Memorandum for Claimant para. 41*] that it was under the belief that UAM was Universal's agent because of UAM's distributor position and because Universal allegedly had given UAM a monopoly position in Mediterraneo. This is both incorrect and legally irrelevant. It is incorrect that UAM had a monopoly position in Mediterraneo because UAM only "had a non-exclusive right to export [cars] to Mediterraneo. Other authorized distributors also had the right to export Universal motor products to Mediterraneo" [*Procedural Order No. 2 para. 20*]. Therefore, Universal did not give UAM a monopoly position in Mediterraneo, regardless of whether or not UAM was actually the only company selling Universal products into Mediterraneo, which is not clear from the stated facts. CLAIMANT's allegation is further legally irrelevant because UAM's non-exclusive right to sell Universal cars into Mediterraneo and its position as Universal's distributor do not show an agent-principal relationship. Rather, it is generally accepted that "a distributor of goods for resale is normally not treated as an



agent for the manufacturer” [*Asante Technologies v. PMC-Sierra (US 2001)*; cf. *Caterpillar v. Usinor Industeel (US 2005)*; *Stansifer v. Chrysler Motor Corp. (US 1973) paras. 24 et seq.*]. Any reasonable car dealer who has experience in importing cars is aware that a distributor is normally not the manufacturer’s agent. If CLAIMANT had had any doubts about its contractual partner it would have enquired this information prior to concluding a contract. Particularly because CLAIMANT had purchased from UAM before [*Procedural Order No. 2 para. 17*], it must have been aware that UAM did not act as Universal’s agent.

2. Furthermore, the principle of equitable estoppel can not bind Universal to the arbitration agreement

29 Contrary to CLAIMANT’s submissions [*Memorandum for Claimant paras. 54-59*], Universal is not bound to the arbitration agreement through the principle of equitable estoppel as the requirements of this principle are not met in the present case.

30 Firstly, CLAIMANT tries to allege that Universal is estopped from avoiding arbitration under the theory of intertwined issue estoppel [*Memorandum for Claimant paras. 55-58*]. This theory covers only those cases in which a non-signatory claimant wants to invoke arbitration against a signatory to an arbitration agreement, if a case of inextricably intertwined claims exist [cf. *Bridas v. Turkmenistan (US 2003) p. 361*; *MOSES p. 35*]. In contrast, it is not possible to apply intertwined issue estoppel to bind a resisting non-signatory respondent who is not otherwise subject to the tribunal’s jurisdiction [cf. *Bridas v. Turkmenistan (US 2003)*]. The Tribunal in the present case is faced with an attempt to compel the non-signatory respondent Universal into arbitration to which it had never consented to. The existence of the parties’ consent however is clearly the key issue in arbitration [*FOUCHARD/GAILLARD/GOLDMAN para. 501*]. Therefore, the theory of intertwined issue estoppel is simply not applicable to the present case.

31 Secondly, the theory of direct benefits estoppel is also not applicable in the present case. According to this theory, a party may only be estopped from avoiding arbitration if it receives a direct benefit out of the contract containing the arbitration clause [*Javitch v. First Union Sec. (US 2003)*; *Thompson-CFS. v. Evans & Sutherland (US 1995) para. 28*; *Intergen N.*



v. Grina and Alstom (US 2003) para. 36; HOSKING p. 294]. Universal never received any benefits out of the sales contract between UAM and CLAIMANT, let alone any direct benefits. Contrary to CLAIMANT's submissions [*cf. Memorandum for Claimant paras. 107-114*], it is of paramount importance that a distinction be drawn between the distributor contract of UAM and Universal, and the sales contract of UAM and CLAIMANT. It could certainly be asserted that Universal gained benefits from the distributor contract it had with UAM. Universal sold cars to UAM, and in exchange for these cars, it received payment. Its entitlements and obligations came to an end with the performance of the contract it had with UAM, and only UAM. However, all benefits Universal might have gained are benefits from the distributor contract between Universal and UAM, and not from the sales contract between UAM and CLAIMANT. Furthermore, contrary to what CLAIMANT might argue, the fact that Universal was a 10% shareholder of UAM is not a direct benefit from the sales contract of UAM and CLAIMANT. The fact that a party is a minority shareholder does not suffice to prove that it gained a direct benefit [*Bouriez v. Carnegie Mellon University (US 2004)*]. Therefore, the theory of direct benefits estoppel is also not applicable in the present case.

3. Universal is also not bound by the arbitration agreement of UAM and CLAIMANT by virtue of the theory of alter ego

32 Contrary to CLAIMANT's submissions [*Memorandum for Claimant paras. 43-54*], Universal is not bound through the theory of alter ego. As CLAIMANT concedes [*Memorandum for Claimant paras. 44-45*], the theory of alter ego only lifts the corporate veil of separate corporate entities and binds a non-signatory to an arbitration agreement if two requirements are met: Firstly, the parent company must exercise complete control over the affiliate. Secondly, it must use this control to commit fraud or wrong that injured the subsidiary's contractual partner [*MOSES p. 36*]. In the present case neither of these criteria are met: Universal neither exercised complete control over UAM nor did it fraudulently injure CLAIMANT.

33 Firstly, CLAIMANT submits [*Memorandum for Claimant para. 46*] that Universal exercised complete control over UAM. However, as CLAIMANT concedes [*Memorandum for*



Claimant para. 47], Universal merely holds 10 % of UAM [*Procedural Order No. 2 para. 12*]. Such a minimal share of 10 % is far from adequate to assume complete control. For example, it would clearly be untenable to allege that the Bank of America now exercises complete control over the General Motors Corporation (GM) simply because it owns a 5 % stake in GM [*Philadelphia Business Journal*]. What is more, Universal only provides for one member of the governing board of UAM which consists of five members [*Procedural Order No. 2 para. 12*]. Universal's representative does not even have a right to block actions agreed upon by a majority of the governing board [*id.*]. Thus, Universal did not have complete control over UAM. Universal's legal lack of control was further demonstrated when Universal strongly resisted against the expansion of UAM's sphere of actions which nevertheless took place regardless of Universal's objections [*Procedural Order No. 2 para. 32*].

- 34 CLAIMANT nevertheless still tries to argue [*Memorandum for Claimant para. 47*] that Universal had complete control over UAM arguing Universal had granted them a monopoly position in Mediterraneo and the two companies had worked closely together for the past fifteen years. This allegation is unsubstantiated. As already shown [*supra para. 28*], UAM did not have a monopoly position in Mediterraneo. It only had a non-exclusive right to export to Mediterraneo [*Procedural Order No. 2 para. 20*]. Further, the close business relationship of two separate corporate entities is not a valid criterion to determine the control one company might have had over the other.
- 35 Secondly, CLAIMANT concedes that “absent of findings of fraud or bad faith, a corporation is entitled to a presumption of separateness” [*Memorandum for Claimant para. 48*]. However, CLAIMANT then tries to rebut this presumption simply by alleging that “Universal tried to exert influence on UAM a year before it became insolvent” and that “this caused the USD 380,000.00 [CLAIMANT] had paid to default” [*Memorandum for Claimant para. 49*]. It is obvious that these allegations are unsubstantiated and do not prove any fraud or bad faith on Universal's part. What is more, Universal had even tried to prevent UAM from undertaking actions that in the end caused its insolvency [*Claimant's Exhibit No. 16; Procedural Order No. 2 para. 32*]. The fact that it is now difficult for



CLAIMANT to retrieve its down payment [*Memorandum for Claimant para. 49*] can not be interpreted as an injury.

4. Universal can not be bound through the group of companies doctrine

- 36 Additionally, CLAIMANT may raise the allegation that Universal is bound through the group of companies doctrine. This argument however would fail. Firstly, the group of companies doctrine is not applicable to the present case and secondly, none of the theory's requirements are met in the present case.
- 37 The group of companies doctrine was developed in the proceedings of *Dow Chemical v. Isover St. Gobain* [*ICC Award No. 4131*]. These proceedings dealt with a claim against Isover St. Gobain by both the parent company Dow Chemical and one of its subsidiaries. The parent company Dow Chemical relied on an arbitration agreement concluded between its subsidiary and Isover St. Gobain which it had not signed. In its decision, the tribunal developed the following rule: A parent company may institute proceedings based on an arbitration clause in a contract which had been signed by its subsidiary and another company, if the parent company appears as a real party to the contract.
- 38 Firstly, the group of companies doctrine is not applicable to the present case because it only covers cases in which a claimant voluntarily assents to arbitration. Similar to what has been stated above [*supra para. 30*], the theory has only been applied successfully (*i.e.* in arbitral proceedings which led to an award which was later enforced by the state court) in cases in which the non-signatory was acting as a claimant that voluntarily intended to arbitrate under the agreement [*ICC Award No. 4131; cf. ICC Award No. 5721; ICC Award No. 6519*]. In the present case however, Universal as a non-signatory respondent is supposed to be compelled into arbitration proceedings. Therefore, the group of companies doctrine is not applicable.
- 39 Secondly, none of the requirements of the group of companies doctrine are met in the present case. Under this theory, different companies must constitute one group of companies and the non-signatory company to the arbitration agreement must appear as a



real party to the contract [*cf. ICC Award No. 4131; WILSKE/SHORE in IDR p. 157; HANOTLAU paras. 104 et seq; SANDROCK p. 98*]. As stated above [*supra para. 33*], Universal only holds 10 % of UAM and has no control over it through the governing board. Therefore, Universal and UAM can not be described as a group of companies. What is more, Universal can not be seen as a real party to the contract because it derived no benefits from it. It has been shown above [*supra para. 31*] that any benefits Universal has derived in the present case stem exclusively from the distributor contract with UAM. Hence, Universal is not bound through the group of companies doctrine.

ISSUE II: THE TRIBUNAL SHALL CONSIDER THE ARBITRATION AGREEMENT VOID AB INITIO ACCORDING TO OCEANIAN INSOLVENCY LAW

- 40 Even if the Tribunal should follow CLAIMANT's theories regarding the extension of the arbitration agreement [*Memorandum for Claimant paras. 36-59*], it would still have to deny its own jurisdiction. The arbitration agreement between UAM and CLAIMANT was void *ab initio* according to Oceanian Insolvency Law. This law provides that any forum selection clause, including any arbitration agreement, is voided *ab initio* automatically after the commencement of insolvency proceedings [*Claimant's Exhibit No. 14; Procedural Order No. 2 para. 5*]. Contrary to CLAIMANT's submissions [*Memorandum for Claimant para. 83*], the arbitration agreement between UAM and Universal is void in any case.
- 41 Firstly, the ability of a legal person to enter into an arbitration agreement and to conduct arbitral proceedings is a question of capacity. The capacity of a legal person is always governed by the law where the legal person has its seat of business, *i.e.* Oceanian Law in the present case [1]. Secondly, even if the Tribunal should not regard the Oceanian rule as governing a matter of capacity, the validity of the arbitration agreement would be governed by Oceanian Law [2]. Thirdly, even if the Tribunal should find Danubian Law instead of Oceanian Law applicable to the arbitration agreement, the arbitration



agreement would also be void under Danubian Law [3]. If the Tribunal should not deny its jurisdiction it will render an unenforceable award in any case [4].

1. Oceanian Insolvency Law has to be applied to the present case because it concerns a matter of capacity

- 42 UAM's ability to enter into the arbitration agreement with CLAIMANT, and UAM's ability to be sued in front of this Tribunal are matters of capacity. "Capacity" in this context has to be interpreted in a broad sense, meaning the capability to act, the ability to be sued before court and the valid power of attorney [*Corte di Cassazione, April 23rd 1997, para. 3; WEIGAND/HAAAS part 3 para. 20; BÜHLER/WEBSTER para. 6-109*]. Hence, a rule which provides for the inability to conclude contracts or arbitration agreements after the commencement of insolvency proceedings of a party governs a question of capacity [*BAILEY/GROVES/SMITH p. 554; LACHMANN para. 2178*]. The present rule of Oceanian Insolvency Law denies UAM's ability to conclude arbitration agreements. Thereby, it governs a question of capacity.
- 43 It is generally accepted that matters of capacity are governed by the law of the party's home country. This is reflected in the provisions of the New York Convention and the UNCITRAL Model Law. For example the New York Convention states in Art. V (1) (a) that:
- "Recognition and enforcement of the award may be refused (...) if (...):
The parties to the agreement (...) were, under the law applicable to them, under some incapacity (...)"
- 44 "[T]he law applicable to them" is the law of a person's nationality (in case of a natural person) or the law of a party's seat of business [*ICC Award No. 4381 p. 271; CRAIG/PARK/PAULSSON p. 44*]. Here, UAM has its seat of business in Oceania. The issue of capacity is therefore governed by Oceanian Law which invalidates the arbitration agreement *ab initio*. Universal can not be bound to a void arbitration agreement.



2. Even if the Tribunal should not regard the relevant rule as governing a capacity issue, Oceanian Law has to be applied

- 45 The material validity of the arbitration agreement is governed by Oceanian Law. CLAIMANT argues that the law applicable to procedural issues is Danubian Law as the *lex arbitri* [Memorandum for Claimant para. 83]. This however is irrelevant in the present case because the validity of the arbitration agreement is not a procedural, but a material issue. According to Art. 22 (1) of the SCC-Rules, which are the arbitration rules chosen by the parties, the Tribunal shall apply the law to the substantive issues which it considers to be most appropriate.
- 46 There are two ways to decide which law is most appropriate in the sense of Art. 22 of the SCC-Rules. Both of them lead to the application of Oceanian Law.
- 47 On the one hand, the appropriate law can be defined as the one which would be best suited to determine the matter in dispute. In the case at hand the question is: What are the effects of UAM's insolvency? There is no other law which can more appropriately address this question than the law of the country where the insolvency proceedings were commenced, *i.e.* Oceanian Law. Only the application of this law can lead to a fair and coherent resolution of all questions linked to the insolvency.
- 48 On the other hand, the appropriate law can be defined as the law with the closest connection to the contract as a whole. According to internationally agreed principles, in the case of a sales contract this is the law of the seller's country [Art. 8 (1) *Hague Convention*; Art. 4 (2) *Rome Convention*; Art. 4 (1) (a) *Rome I*], *i.e.* Oceanian Law. Under Oceanian Law such an international sales transaction is generally governed by the CISG [cf. *Statement of Claim para. 25*]. However, the CISG does not provide for any questions of material validity [Art. 4 (a) *CISG*]. Therefore, the domestic law of the seller's country, *i.e.* Oceania, has to be applied.
- 49 Accordingly, the arbitration agreement concluded by UAM and CLAIMANT was void *ab initio* under Oceanian Law. Universal can not be bound by a non-existing arbitration agreement.



3. The arbitration agreement would be void under Danubian Law

50 Even if the Tribunal were to follow CLAIMANT's allegation that Danubian Law is applicable, this would not change the outcome. The arbitration agreement would also be invalid according to Danubian Law.

51 As of now, there is a gap in Danubian Law concerning the effects which insolvency proceedings have on arbitration agreements. The issue has not yet arisen in Danubia [*Procedural Order No. 2 para. 4*]. However, strong and internationally accepted policy reasons militate in favour of centralising claims against an insolvent company in front of the court where the insolvency proceedings were commenced. It is the cornerstone of insolvency proceedings to treat all creditors equally [*KRÖLL Arbitration and Insolvency Proceedings para. 18-38; LAZIC pp. 137, 146-147; ANCEL p. 478; IDOT pp. 629, 630; CRAIG/PARK/POULSSON p. 68*]. Therefore, individual claims, particularly arbitrations against an insolvent debtor after the commencement of insolvency proceedings are to be prevented. Otherwise an individual creditor could for example, obtain an award against the insolvent party and could possibly enforce the award to its full extent in any country worldwide where assets can be found. It is of course possible that the foreign court might refrain from enforcing the award and transfer the funds to the insolvency estate. Yet there is no certainty in that regard because the foreign court might be hostile towards the recognition of insolvency proceedings or might not even have knowledge of them. Only if all claims are centralised in one court, can it be guaranteed that each creditor receives only the quota it is entitled to. Danubian Law is not known to disapprove of the principle of equal treatment of all creditors in insolvency proceedings. For these reasons, Danubian Law will favour the centralisation of all claims in Oceanian courts. The best way to reach the centralisation is by declaring any arbitration agreement void *ab initio*.

4. If the Tribunal should not deny its jurisdiction it would render an unenforceable award

52 The ultimate purpose of an arbitral tribunal is to render an enforceable award [*LEW in ICCA Congress Series p. 118; HORVATH p. 135*]. Art. 47 of the SCC-Rules states:



“In all matters not expressly provided for in these rules, (...), the Arbitral Tribunal (...) shall make every reasonable effort to ensure that all awards are legally enforceable.”

53 To grant an award in ignorance of the Oceanian invalidity rule would render this award neither enforceable against UAM in Oceania [4.1] and Polaria [4.2] nor enforceable against Universal in Equatoriana [4.3].

4.1 An award rendered by this Tribunal will not be enforceable against UAM in Oceania

54 Oceanian courts will refuse enforcement of an award rendered by this Tribunal against UAM because of Art. V (2) (b) New York Convention. This rule states that the recognition and enforcement of an award may be refused, if

“[t]he recognition or enforcement of the award would be contrary to the public policy of that country”.

55 In the present case, the invalidity clause of the Oceanian Insolvency Law forms a part of the public policy of Oceania. A public policy is constituted by a provision which protects individual and community interests generally acknowledged to be essential, or other juridical interests which are, from an ethical point of view, more important than contractual freedom [*ICC Award No. 5622 p. 113*]. The invalidity rule of Oceania stands for the public policy to limit the creditors' losses in case of insolvency as far as possible. Treating every creditor equally is a fundamental community interest of Oceania. Hence, Oceania will not enforce an award in conflict with this invalidity rule.

4.2 An award rendered by this Tribunal will not be enforceable against UAM in Polaria

56 An award could not be effectively enforced against UAM in Polaria because no assets are available against which enforcement would be possible. CLAIMANT might try to object and argue that an award rendered by this Tribunal could indeed be enforced against an undisputed claim UAM has for payment against a debtor in Polaria [*Procedural Order No. 2*



para. 34].

- 57 Assuming but not conceding that the Polarian courts would not refuse recognition of the award under Art. V New York Convention, the enforcement would nevertheless be unsuccessful because there are no assets available. UAM's sole asset, the undisputed claim, will be paid to the estate of UAM. Ms. Powers, insolvency representative of UAM, has requested the court in Polaria to order the payment of this claim to the estate of UAM as part of the assets to be distributed in the insolvency proceedings [*Procedural Order No. 2 para. 34*]. Shortly before that, CLAIMANT requested the court for a preliminary measure in support of the arbitral proceedings it had instituted in Danubia, namely to secure payment of the award CLAIMANT anticipated. Hence, the court will have to answer two questions: Firstly, whether a foreign insolvency representative can appear in front of it. Secondly, whether a Polarian court can issue interim measures in support of foreign proceedings. There are compelling reasons why the court in Polaria will decide both questions in favour of UAM and Universal.
- 58 As to the first question: Ms. Powers will be allowed to appear in front of the Polarian court because there is no reason to doubt that Polaria will recognise foreign insolvency proceedings and thus Ms. Powers' authority to act on behalf of UAM will not be doubted. It is an internationally accepted principle to recognise foreign insolvency proceedings and the effect they have on the entitlement of representation [*WOOD para. 28-019*]. This way of dealing with foreign insolvency proceedings is called the "global approach". As *WOOD* points out, only a few countries are not prepared to recognise foreign insolvency, namely Estonia and Finland. The majority of countries worldwide recognises the validity of foreign representatives based on the notion of reciprocity. This is further strengthened by the fact that the *UNCITRAL Model Insolvency Law* provides for the recognition of foreign insolvency representatives and this law has been embraced by countries worldwide.
- 59 As to the second question in front of the Polarian court: the court will reject CLAIMANT's request to render interim measures in support of the arbitration in Danubia. Such measures can only be granted on a statutory basis. This is demonstrated by



the fact that UNCITRAL felt obliged to amend its rules accordingly. Thus, in the latest version of the Model Law in 2006, UNCITRAL introduced an explicit provision allowing court-ordered interim measures irrespective of the place of the arbitration proceedings. This emphasises the necessity of a statutory rule to provide for court ordered interim measures in support of arbitration.

60 In Polaria, on the contrary, there is no statutory basis for interim measures to support a foreign arbitration [*Procedural Order No. 2 para. 34*]. Thus, the state court will refrain from granting CLAIMANT's request for interim measures to secure UAM's claim. Further, it will allow Ms. Powers to appear before the court and will grant payment of claim to the estate of UAM. As a result, there will be no assets in Polaria against which an award rendered by this Tribunal could be enforced.

4.3 The award will not be enforceable in Equatoriana either

61 An award rendered by this Tribunal against Universal will not be enforceable in Equatoriana according to Art. V New York Convention because Universal was never party to the arbitration agreement [*supra para. 15-28*] and the arbitration agreement was not extended to Universal [*supra para. 29-39*].



ARGUMENT ON THE SUBSTANTIVE ISSUES

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

62 Universal is not liable for the breach of contract committed by UAM. Only UAM and CLAIMANT signed the contract for the sale of 100 Tera cars [*Claimant's Exhibit No. 1*]. CLAIMANT argues that Universal should be responsible for UAM's actions because it was the "seller" to CLAIMANT [*Memorandum for Claimant paras. 103–106*]. However, no contractual relationship between Universal and CLAIMANT exists and hence, Universal has no contractual liability to CLAIMANT [1]. Furthermore, contrary to CLAIMANT's assertions [*Memordandum for Claimant paras. 107–114*], the legal instrument of *action directe* is not applicable in the case at hand [2]. Additionally, contrary to CLAIMANT's submissions [*Memorandum for Claimant paras. 115–119*], Universal can not be held liable merely because of the allegation that the defect had already occurred in Universal's factory [3].

1. There is no contractual relationship between Universal and CLAIMANT

63 Contrary to CLAIMANT's submissions [*Memorandum for Claimant paras. 103-106*], there is no contractual relationship between Universal and CLAIMANT because as already shown, UAM did not act as Universal's agent [*supra paras. 15-28*].

64 CLAIMANT alleges that Universal should be held liable because it was CLAIMANT's "seller" of the cars and therefore its contractual partner [*Memorandum for Claimant paras. 104, 105*]. This argument is bound to fail. In order to become a contractual party, one must either conclude a new contract or voluntarily enter into an existing contract. Both methods require the clear intention to be bound by the contract [*cf. OLG München, March 8th 1995*]. However, as laid down above [*supra paras. 19-23*], Universal did not intend to be bound by the contract between UAM and CLAIMANT. In Universal's email of February 28th 2008 to CLAIMANT, it was explicitly stated that UAM is responsible for the condition of the Tera cars and that Universal would undertake the repairs without



admission of liability [*Claimant's Exhibit No. 4*].

- 65 CLAIMANT nevertheless argues that Universal showed its intention to be bound to the contract firstly, by reviewing UAM's standard forms and secondly, by offering to repair the defective cars [*Memorandum for Claimant paras. 111, 113*].
- 66 As to the first argument based on reviewing the standard forms: CLAIMANT's submission [*Memorandum for Claimant para. 111*] that Universal's act of reviewing the standard forms should be regarded as implicit acceptance of the contract between UAM and CLAIMANT is unsubstantiated. Only the specific contract in question must be taken into account in order to determine a party's intention in regard to this contract. However, Universal never reviewed the specific contract between UAM and CLAIMANT. Even the review of the standard forms took place long before this specific contract was concluded and Universal never mandated any terms or wording of the standard forms [*Procedural Order No. 2 para. 16*]. This is not sufficient enough to infer that Universal implicitly accepted the contract between UAM and CLAIMANT.
- 67 As to the second argument based on the offer to repair: CLAIMANT assumes that Universal's offer to repair shows its intention to be bound by the contract [*Memorandum for Claimant para. 113*]. However, CLAIMANT fails to realise that Universal had stated explicitly in its email of February 28th 2008, that it would undertake the repairs without admission of liability [*Claimant's Exhibit No. 4*]. Furthermore, Universal had only offered to repair the defective cars in order to fulfil its obligations arising both out of a sales contract and an *ad hoc* agreement it had with UAM [*cf. Procedural Order No. 2 para. 15; supra para. 22*]. Therefore, contrary to CLAIMANT's argument, the offer to repair made by Universal demonstrates the fact that two legally separate contracts exist in the present case. Hence, neither of CLAIMANT's allegations show the intention of Universal to be bound by the contract. Thus, as Universal never intended to be bound by the contract, it has never been CLAIMANT's contractual partner.



2. The legal instrument of *action directe* is not applicable in the case at hand

68 The theory of *action directe* is not applicable. Contrary to CLAIMANT's submissions [Memorandum for Claimant paras. 107-114], the two legally separate contracts between Universal and UAM, and between UAM and CLAIMANT can not be seen as one contract, as this would imply the application of the *action directe*. Under the theory of *action directe*, all rights adhere to the goods purchased. In a chain of several sales contracts, the sub-purchaser has the same remedies the first purchaser has against the manufacturer. This means that a sub-purchaser is allowed to claim directly against the manufacturer instead of claiming against its seller [e.g. *Société commerciale v. Union des Assurances et al.*, *Cour de Cassation p. 293 et seq.*]. This legal instrument of *action directe* however is not applicable in any of the countries involved in the dispute [Procedural Order No. 2 para. 6].

3. Universal can also not be held liable merely because of the allegation that the defect had already occurred in Universal's factory

69 CLAIMANT argues that Universal should be liable for the defective cars, simply because the defects had occurred in Universal's factory and because Universal might not have fully inspected the cars [Memorandum for Claimant para. 117]. The fact that the defective cars had been manufactured by Universal might be an argument in a tort claim. However, this allegation is not relevant as Procedural Order No. 1 para. 13 explicitly restricts this memorandum at this stage of the arbitral proceedings to questions of contractual liability only.



ISSUE IV: THERE WAS NO FUNDAMENTAL BREACH AUTHORISING CLAIMANT TO AVOID THE SALES CONTRACT

70 CLAIMANT argues that it was entitled to avoid the sales contract [*Memorandum for Claimant paras. 120-153*]. This argument is bound to fail for three reasons: Firstly, CLAIMANT was prevented from avoidance by virtue of Art. 47 (2) CISG: It had fixed an additional period of time for UAM to repair the defective cars. During that period, avoidance of the contract was not possible [1]. Secondly, there was no fundamental breach authorising CLAIMANT to avoid the contract because UAM made a reasonable offer to cure [2]. Thirdly, even assuming a fundamental breach regarding the 25 delivered cars, CLAIMANT was not entitled to avoid the entire contract (*i.e.* in regard to the remaining 75 cars) [3].

1. CLAIMANT was not entitled to avoid the contract within the additional period of time fixed for performance according to Art. 47 (2) CISG

71 CLAIMANT was not entitled to avoid the contract because it fixed an additional period of time to perform on February 28th 2008. This period had not expired at the time of CLAIMANT's attempt of avoidance on February 29th 2008. In case of the delivery of non-conforming goods, the buyer is allowed to fix an additional period of time for performance according to Art. 47 (1) CISG. If such a period of time is fixed:

“(...) the buyer may not, during that period, resort to any remedy for breach of contract” [*Art. 47 (2) CISG*].

72 Consequently, the right to declare avoidance of the contract is suspended during the additional period even if the breach of contract is fundamental [*SCHLECHTRIEM/SCHWENZER/MÜLLER-CHEN Art. 47 para. 14; MÜNCHKOMMBGB/HUBER Art. 47 para. 17; SCHLECHTRIEM/BUTLER UN Law para. 181; HONNOLD para. 291; BLANCA/BONELL/WILL p. 346; FERRARI/FLECHTNER/BRAND p. 706; ACHILLES Art. 47 para. 6; FERRARI/SAENGER Int. VertragsR Art. 47 CISG para. 7;*



HERBER/CZERWENKA Art. 47 para. 7; FREIBURG p. 245; SOERGEL/LÜDERITZ/SCHÜßLER-LANGEHEINE Art. 47 para. 7; KAROLLUS p. 140]. The purpose of this suspension is to protect the seller from contradictory behaviour of the buyer. In setting an additional period of time, the buyer expresses his continuing interest in the performance of the contract and gives the seller a second chance to perform the contract. The seller must be able to rely on this additional period of time to actually fulfil his obligations.

73 On February 28th 2008, CLAIMANT made clear in its telephone conversation with Mr. Steiner, Regional Manager of Universal, that it would be sufficient if the cars were fixed within ten days [*Statement of Claim para. 17*]. For that reason, UAM could rely on an additional period of time, in which to have the cars ready for sale until March 9th 2008. Only one day after this conversation, and long before the additional period of time expired, CLAIMANT suddenly declared the contract avoided [*Claimant's Exhibit No. 10*]. This step taken by CLAIMANT was contrary to its demand for performance one day earlier. As laid down above, the rule of Art. 47 (2) CISG aims at protecting the seller from exactly this kind of inconsistent behaviour. Therefore, the avoidance of the contract declared on February 29th 2008 was not affected pursuant to Art. 47 (2) CISG.

2. There is no fundamental breach in regard to the 25 delivered cars because UAM and Universal made a reasonable offer to cure

74 In cases of non-conforming goods, a contract can only be avoided by the buyer if the non-conformity amounts to a fundamental breach. The underlying purpose of this is the Convention's strategy to keep the contract in existence as far as possible and to avoid the costs and risks of restitution which would arise out of its termination. In international trade goods have to be shipped across large distances. Costs and administrative efforts are much greater than in domestic trade. Avoidance of a contract leads to the rescission of performances already made. The resulting reshipment of goods causes additional costs and logistical efforts. To reduce these cases to a minimum, the CISG only grants the right to avoid the contract as an *ultima ratio*, i.e. if the breach is fundamental according to Art. 25 CISG [*BGH, April 3rd 1996; OGH, September 7th 2000; BG, October 28th 1998;*



SCHLECHTRIEM/SCHWENZER/MÜLLER-CHEN Art. 49 para. 2; HUBER/MULLIS p. 209; STAUDINGER/MAGNUS Art. 49 para. 4; TROMMLER p. 57; FREIBURG p. 49; ECKERT/MAIFELD/MATTHIESSEN para. 1011; FERRARI/FLECHTNER/BRAND p. 712].

This provision states:

“A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, (...)”
[Art. 25 CISG].

- 75 The question as to whether a buyer is substantially deprived of what he was entitled to expect under the contract has to be decided in the light of all the circumstances and not only based on the severity of the breach [*HONNOLD para. 296; SCHLECHTRIEM/SCHWENZER/MÜLLER-CHEN Art. 48 para. 15; LIU para 3.2*]. In particular, the non-conformity of goods will never amount to a fundamental breach if the seller offers a reasonable cure.
- 76 A breach can not be fundamental when the failure of performance could easily be remedied and the seller has already offered the cure [*HG Aargau, November 5th 2002; OLG Koblenz, January 31st 1997; ICC Award No. 7754; HONNOLD para. 184; HEUZÉ p. 350; LIU para. 3.3; FERRARI/FLECHTNER/BRAND pp. 323, 331; SCHLECHTRIEM UN-Kaufrecht para. 180; UNCITRAL Digest of case law Art. 48 para. 2; Official records of the United Nations Conference Art. 48 para. 41*]. The buyer is in this case not deprived of what he was entitled to expect under the contract, as would be required under Art. 25 CISG. Avoidance of the contract regardless of a possible cure that has already been offered by the seller would be a violation of one of the central principles of the CISG, *i.e.* that avoidance should only be granted as an *ultima ratio*.
- 77 Contrary to CLAIMANT’s submissions [*Memorandum for Claimant paras. 121-125*], UAM and Universal offered CLAIMANT a reasonable cure by emphasising in every email and every telephone conversation that they were absolutely willing to repair the cars at their own expense using all resources available [*Claimant’s Exhibits No. 3, 4, 6, 12; Statement of*



Claim paras. 12, 13, 14, 16, 17]. An offer to cure is reasonable if the defect can be cured in its entirety, without unreasonable delay and without causing the buyer unreasonable inconvenience [*SCHLECHTRIEM/SCHWENZER/MÜLLER-CHEN Art. 48 paras. 6, 10; BLANCA/BONELL/WILL p. 352; KOCH p. 225*]. All these requirements are met in the present case:

- 78 Firstly, it was possible to cure the defect in its entirety. Universal's technical personnel were able to fix all the delivered cars within five days, either in Equatoriana or in Mediterraneo, CLAIMANT's seat of business [*Claimant's Exhibit No. 12; Procedural Order No. 2 paras. 22, 23*]. Secondly, the repairs could have been carried out without unreasonable delay: As Universal's equipment and personnel would have arrived in Mediterraneo within three days, the cars would have been ready for sale by March 7th 2008 [*Claimant's Exhibits No. 4, 5; Procedural Order No. 2 paras. 22, 35*]. That would have been two days earlier than the deadline fixed by CLAIMANT [*supra para. 73*].
- 79 CLAIMANT argues that time was of the essence to it, meaning that it needed the cars ready for sale even earlier [*Memorandum for Claimant paras. 124, 125*]. However, this argument is bound to fail, as time was never of the essence in the contract. According to the sales contract between UAM and CLAIMANT, the cars were to be shipped "as space is available" [*Claimant's Exhibit No. 1; Statement of Claim para. 9*]. It was clear to CLAIMANT that it would take approximately eleven days until any instalment of cars would have been shipped and available to it [*Statement of Claim para. 10*]. Based on these facts, it is evident that time was neither of essence to CLAIMANT nor was it a requirement under the contract.
- 80 CLAIMANT's argument that the risk of becoming insolvent made the time needed for repair unreasonable [*Memorandum for Claimant para. 135*] is not convincing. The situation was never as severe as CLAIMANT alleges. On February 29th 2008, only one day after the additional period of time for performance was fixed, CLAIMANT entered into a contract with Patria Importers Ltd. for the purchase of twenty new Indo cars [*Claimant's Exhibit No. 9*]. The Indo car was even more expensive than the Tera car from Universal. Apparently, CLAIMANT was at that time still able to conclude contracts and handle



larger payments. What is more, CLAIMANT never filed for bankruptcy and is still in business today. Therefore, the credibility of CLAIMANT's allegations concerning the risk of insolvency can not be entrusted and the allegations do not justify the conclusion that the time needed for repair was unreasonable.

- 81 Thirdly, cure would not have caused any inconvenience for CLAIMANT because all repairs would have been performed without any participation of CLAIMANT and without causing any constraint on CLAIMANT's business. CLAIMANT argues that the cure would have been inconvenient since the 25 defective cars "were occupying expensive storage space" [*Memorandum for Claimant para. 134*]. This submission is bound to fail. CLAIMANT ordered 100 Tera cars and must have planned its business activities accordingly, *i.e.* organising enough storage space. It is therefore not conclusive that CLAIMANT has trouble storing 25 cars.
- 82 CLAIMANT might try to argue that the threatened airport strike made the cure offered by UAM inconvenient. However, these developments have no effect on the present case. Firstly, the airport strike did not take place at all [*Procedural Order No. 2 para. 35*]. Therefore, there were no constrictions that would have prevented the cars from being fixed by March 7th 2008. Secondly, even if the airport strike had taken place, the resulting delay would still not have affected the convenience of the cure because the impediment would have been beyond UAM and Universal's control. As a general principle of the CISG [*Art. 7 (2)*], Art. 79 (1) states that a party can not be responsible for an impediment that was beyond its control and could not reasonably have been expected at the time of the conclusion of the contract. This especially includes labour disputes such as strikes [*STAUDINGER/MAGNUS Art. 79 para. 21; HONSELL/MAGNUS Art. 79 para. 12; ENDERLEIN/MASKOW/STROHBACH CISG Art. 79 para. 3.6; ACHILLES Art. 79 para. 6; HERBER/CZERWENKA Art. 79 para. 13*]. It is undisputed that neither UAM nor Universal have any influence on contract negotiations between the airport and its personnel. Furthermore, there is no indication that either UAM or Universal could have reasonably been expected to have taken the impediment into account at the time of the conclusion of the contract, let alone overcome it at a later point. Therefore, the airport strike must



not be considered when determining the convenience of the cure.

83 For these reasons there was a reasonable offer to cure and therefore no fundamental breach committed by UAM.

3. CLAIMANT was not entitled to avoid the contract in regard to the 75 non-delivered cars because it did not have good grounds to conclude that a fundamental breach will occur with respect to these instalments

84 Contrary to CLAIMANT's submissions, [*Memorandum for Claimant paras. 141-153*] avoidance of the entire contract, *i.e.* also in regard to the 75 cars that were still to be delivered, was not justified. As the contract in question was an instalment contract and as only the first instalment delivered was defective, avoidance of the entire contract was subject to the additional requirements of Art. 73 (2) CISG. This rule provides that an avoidance of the entire contract is only possible if,

“(...) the other party [has] good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, (...)”.

85 In the present case, CLAIMANT did not have good grounds to conclude that a fundamental breach of contract would occur in regard to the remaining 75 cars. In order to gain the right of premature avoidance, the buyer must prove that such good grounds existed [*cf. FERRARI Burden of Proof para. III; SCHLECHTRIEM/SCHWENZER/SCHLECHTRIEM Art. 4 para. 22; SCHMIDT/BENICKE Art. 4 para. 23*]. Here, CLAIMANT failed to provide any information that would lead to the assumption that future instalments would have the same defect as the cars already delivered.

86 On the contrary, the facts clearly show that there was no indication that these future instalments would not be in conformity with the contract: Firstly, the defect of the 25 delivered cars could have easily been fixed [*supra para. 78*]. Every future instalment could have been checked and, if necessary, repaired. Secondly, on February 29th 2008, UAM had 105 defective-free cars in its possession [*Procedural Order No. 2 para. 29*], so that every



future instalment of Tera cars could have been made out of this consignment and thus free of defects. CLAIMANT argues that UAM did not use these cars to make a substitute delivery [*Memorandum for Claimant para. 137*]. However, CLAIMANT never showed any interest in a substitute delivery of cars. On the contrary, CLAIMANT jumped to the conclusion that future instalments would be defective and declared the entire contract avoided.

- 87 It is therefore evident that CLAIMANT had neither good reasons nor legal grounds to justify the avoidance of the contract in its entirety. CLAIMANT failed to present any substantial information to prove that future instalments would be defective and is therefore not entitled to avoid the contract in regard to the 75 remaining cars.



REQUEST FOR RELIEF

In light of the submissions above, Universal respectfully requests the Tribunal to declare:

- that Universal is not bound by the arbitration agreement contained in the sales contract between UAM and CLAIMANT **[Issue I]**;
- that the arbitration clause contained in the sales contract of UAM and CLAIMANT is void *ab initio* **[Issue II]**;
- that Universal is not liable for the breach of contract **[Issue III]**; and
- that the delivery of the defective cars does not constitute a fundamental breach of contract authorising CLAIMANT to avoid the contract **[Issue IV]**.

Respectfully submitted on January 22nd 2009 by

_____/s/_____

Jan Frohloff

_____/s/_____

Max W. Oehm

_____/s/_____

Nils Jennewein

_____/s/_____

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_____/s/_____

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