

SIXTH ANNUAL WILLEM C. VIS (EAST)
INTERNATIONAL COMMERCIAL ARBITRATION MOOT
HONG KONG – 23 TO 29 MARCH 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



TABLE OF CONTENTS

TABLE OF CONTENTS	II
INDEX OF ABBREVIATIONS	IV
TABLE OF AUTHORITIES	VI
TABLE OF COURT DECISIONS	XIV
TABLE OF ARBITRAL AWARDS	XVIII
STATEMENT OF FACTS	1
ARGUMENT ON THE PROCEDURAL ISSUES	3
ISSUE I: UNIVERSAL IS NOT BOUND BY THE ARBITRATION AGREEMENT BETWEEN UAM AND CLAIMANT	3
1. Universal is not bound by way of agency	4
1.1 UAM never acted on behalf of Universal but wanted to bind itself only	4
1.2 UAM was not entitled to act on Universal's behalf	5
1.2.1 Universal has never conferred authority upon UAM	5
1.2.2 UAM did not have apparent authority	6
1.2.3 Universal did not ratify any of UAM's actions	8
2. Universal can not be bound by the arbitration agreement between UAM and CLAIMANT according to the group of companies doctrine	9
2.1 The group of companies doctrine can not be applied to the present case	10
2.1.1 The group of companies doctrine is neither part of any law possibly applicable to the present case nor is it widely accepted	10
2.1.2 The theory only covers cases in which a claimant voluntarily assents to arbitration	11
2.1.3 The application of the group of companies doctrine would lead to an unenforceable award under the New York Convention	11
2.2 Alternatively, not a single requirement of the group of companies doctrine is met in the present case	12
2.2.1 Universal and UAM do not constitute a group of companies	13
2.2.2 Universal can not be regarded as a real party to the contract between UAM and CLAIMANT	13
3. Additionally, Universal is not bound by the arbitration agreement through the principle of equitable estoppel	15



ISSUE II: THE TRIBUNAL SHALL CONSIDER THE ARBITRATION AGREEMENT VOID AB INITIO ACCORDING TO OCEANIAN INSOLVENCY LAW	17
1. Oceanian Insolvency Law has to be applied to the present case because it concerns a matter of capacity	17
2. Even if the Tribunal should not regard the relevant rule as governing a capacity issue, Oceanian Law has to be applied	18
3. The invalidity clause of the Oceanian Insolvency Law is applicable because it constitutes an overriding mandatory provision	19
4. The arbitration agreement would be void under Danubian Law	21
5. Without considering Oceanian Insolvency Law, the Tribunal would render an unenforceable award.....	21
5.1 An award rendered by this Tribunal will not be enforceable against UAM in Oceania.....	22
5.2 An award rendered by this Tribunal will not be enforceable against UAM in Polaria	22
5.3 An award will not be enforceable in Equatoriana either.....	24
ARGUMENT ON THE SUBSTANTIVE ISSUES	24
ISSUE III: UNIVERSAL IS NOT LIABLE FOR THE BREACH OF CONTRACT COMMITTED BY UAM	24
1. There is no contractual relationship between Universal and CLAIMANT	25
2. Universal did not give a warranty on the condition of the Tera cars	26
3. The legal instrument of <i>action directe</i> is not applicable to the case at hand.....	27
4. Universal cannot be held liable simply because of the allegation that the defect had already occurred in Universal's factory.....	27
ISSUE IV: THERE WAS NO FUNDAMENTAL BREACH AUTHORISING CLAIMANT TO AVOID THE SALES CONTRACT	28
1. CLAIMANT was not entitled to avoid the contract within the additional period of time fixed for performance according to Art. 47 (2) CISG.....	28
2. There is no fundamental breach in regard to the 25 delivered cars because UAM and Universal made a reasonable offer to cure.....	29
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	33
REQUEST FOR RELIEF	35



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
Arb.	Arbitration
Art.	Article
BG	Bundesgericht (Swiss Federal Supreme Court)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH	Bundesgerichtshof (German Federal Supreme Court)
CAA	Chinese Arbitration Association, Taipei
<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)
CLOUT	Case Law on UNCITRAL Texts (http://www.uncitral.org/clout)
Co.	Company
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
GmbH	Gesellschaft mit beschränkter Haftung (Limited Company) [Germany]
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
<i>i.e.</i>	<i>id est</i> (that is)
<i>id.</i>	<i>idem</i> (the same)
IDR	Journal of International Dispute Resolution



Inc.	Incorporated
Int.	International
L.P.	Limited Partnership [US]
<i>lex arbitri</i>	law of the seat of arbitration
<i>lex causae</i>	law governing the contractual relations and obligations
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]
Rev.	Review
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
Swiss PIL	Switzerland Private International Law of December 18 th 1987
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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PARA. 48

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PARA. 48

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PARA. 48

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PARAS. 39, 44



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PARA. 48



TABLE OF ARBITRAL AWARDS

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Published in: ICCA Yearbook Commercial Arbitration, Volume IX (1984), pp. 131-137

cited as: *ICC Award No. 4131*

PARAS. 32, 37, 40, 41, 44

ICC Court of Arbitration Award No. 4381 (1986)

Published in: Collection of ICC Arbitral Awards 1986-1990, pp. 263-274

cited as: *ICC Award No. 4381 p.*

PARA. 57

ICC Court of Arbitration Award No. 5622 (1988)

Published in: Revue de l'Arbitrage, pp. 327-342

cited as: *ICC Award No. 5622*

PARA. 73

ICC Court of Arbitration Award No. 5721 (1990)

Published in: Collection of ICC Arbitral Awards 1986-1990, pp. 400-410

cited as: *ICC Award No. 5721*

PARA. 37

ICC Court of Arbitration Award No. 6519 (1991)

Published in: Collection of ICC Arbitral Awards 1991-1995, pp. 420-428

cited as: *ICC Award No. 6519*

PARA. 37

ICC Court of Arbitration Award No. 7754 (1995)

Published in: ICC International Court of Arbitration Bulletin Vol. 11 No. 2 (2000), pp. 46-49

cited as: *ICC Award No. 7754*

PARA. 97



STATEMENT OF FACTS

- 1 The basis of the present arbitration is the claim of Mr. Joseph Tisk (hereinafter: CLAIMANT), doing business under the trade name of Reliable Auto Imports, for repayment of the purchase price in the amount of USD 380,000.00. CLAIMANT is a sole trader car dealer in Mediterraneo which imports new and used cars for sale.
- 2 UAM Distributors Oceania Ltd. (hereinafter: 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 export cars manufactured by Universal Auto Manufacturers, S.A. (hereinafter: Universal) into Mediterraneo.
- 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, UAM signed a contract with CLAIMANT for the delivery of 100 Tera small cars, manufactured by Universal. This contract contained an arbitration clause, according to which any dispute should be resolved in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. Vindobona, Danubia should be the place of arbitration.
- 5 On February 18th 2008, the first consignment of 25 Tera cars was available for CLAIMANT in Mediterraneo. As the cars were driven from the port to CLAIMANT's showroom, the engines showed a defect that could not have been detected on immediate inspection. On the evening of February 21st 2008, a mechanic inspected ten of the cars but was not able to determine the problem.
- 6 It was not until February 22nd 2008 that CLAIMANT informed UAM about the defect. During the following period of February 22nd 2008 to February 28th 2008, CLAIMANT was in contact with personnel of Universal and UAM in order to solve the problems with the Tera cars. On numerous occasions Universal offered to arrange the repair procedure,



which required sending the necessary equipment and technical personnel by air to Mediterraneo. Furthermore, Universal was willing to bear the complete costs. However, it made unmistakably clear that it was not contractually liable to CLAIMANT for the defective cars.

- 7 On February 29th 2008, CLAIMANT accepted an offer made by Patria Importers for the purchase of 20 Indo cars; cars of the same class of automobile as the Tera car. Later that day, CLAIMANT sent an email to UAM in which it avoided the sales contract purporting that it was likely to face insolvency. CLAIMANT also sent an email to Universal in order to inform it about the cancellation of the contract. CLAIMANT did not see any further necessity for Universal to send their personnel or equipment to Mediterraneo.
- 8 On April 11th 2008, CLAIMANT received a letter from Ms. Judith Powers declaring that UAM had entered insolvency proceedings and that she had been appointed as the insolvency representative by the court in Oceania, where UAM has its place of business. The letter stated that under the law of Oceania, any forum selection clause contained in any contract with UAM, including an arbitration clause, was automatically void *ab initio*.
- 9 CLAIMANT instituted arbitration against UAM on the basis of the arbitration agreement contained in the sales contract of UAM and CLAIMANT on August 15th 2008. Although Universal was never a party to that contract, let alone to the arbitration agreement contained therein, CLAIMANT also instituted arbitration against Universal on the basis of the same agreement.
- 10 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

- 11 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. UAM and CLAIMANT agreed upon the purchase of 100 Tera cars which were manufactured by Universal. Unfortunately, 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*]. CLAIMANT now tries to force Universal into the arbitration proceedings between UAM and CLAIMANT. Universal however, is neither a party to the sales contract between UAM and CLAIMANT nor to the arbitration clause contained therein because the contract was signed by UAM and CLAIMANT only [*Claimant's Exhibit No. 1*]. No document containing the signature of Universal exists in the present case. This however, is indisputably required under Art. II New York Convention.
- 12 As CLAIMANT's contractual partner UAM is now insolvent [*Claimant's Exhibit No. 14*], CLAIMANT now desperately tries to get around this clear legal situation by employing several legal theories in order to somehow establish a bond between Universal and CLAIMANT through the arbitration agreement signed by UAM and CLAIMANT. 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. 7-22*], group of companies [*cf. Memorandum for Claimant paras. 23-28*] and equitable estoppel [*Memorandum for Claimant paras. 29-34*]. However, in the present case,



none of these attempts can 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]. Moreover, the group of companies doctrine can not bind Universal to the agreement between UAM and CLAIMANT [2]. Additionally, it is also clearly not possible to bind Universal by virtue of the principle of equitable estoppel [3].

1. Universal is not bound by way of agency

- 13 Contrary to CLAIMANT's submissions [*Memorandum for Claimant paras. 7-22*], an agency relationship between UAM and Universal never existed. The agency issue of the present case is governed by the Convention on Agency in the International Sale of Goods (Geneva, February 17th 1983) (Agency Convention) [*Procedural Order No. 2 para. 7*]. The requirements for an effective agency relationship set out by this convention are not satisfied in this case: UAM never acted on behalf of Universal [1.1] nor was it entitled to do so [1.2].

1.1 UAM never acted on behalf of Universal but wanted to bind itself only

- 14 The acts of a party that clearly wants to bind itself only can not bind an alleged principal [*cf. Art. 13 (1) (b) Agency Convention*].
- 15 The facts clearly show that UAM concluded the sales contract for the purchase of 100 Tera cars with CLAIMANT in its own name and on its own behalf. Only UAM and CLAIMANT signed the contract [*Claimant's Exhibit No. 1*]. UAM's intention to bind only itself is illustrated by the wording of the contract which reads:

“**UAM Distributors Oceania Ltd.** will sell and Mr. Joseph Tisk, doing business as Reliable Auto Imports, will purchase 100 new 2008 model Tera cars” [*id.*] (emphasis added).

- 16 Furthermore, the entire performance of the transaction shows that UAM was acting on its own behalf and not as an agent for Universal. The cars were transported from UAM in Oceania directly to CLAIMANT in Mediterraneo [*Statement of Claim para. 9*]. The purchase price was also paid to UAM [*id.*]. Universal however was never even mentioned



within either the conclusion or the performance of the contract between UAM and CLAIMANT. Thus, it is evident that UAM wanted to bind itself only.

1.2 UAM was not entitled to act on Universal's behalf

17 UAM was not entitled to act on Universal's behalf because Universal never conferred authority upon UAM as required by Art. 12 Agency Convention [1.2.1]. The acts of an agent without authority can only bind the principal under very strict requirements: Either if the principal's conduct leads the third party reasonably and in good faith to believe that the purported agent has authority [*apparent authority, Art. 14 (2) Agency Convention*] or if the principal ratifies the agent's actions [*Art. 15 Agency Convention*]. In the present case, UAM neither had apparent authority [1.2.2] nor did Universal ratify any of its actions [1.2.3].

1.2.1 Universal has never conferred authority upon UAM

18 Universal neither conferred express nor implied authority upon UAM to act on its behalf as required by Art. 12 Agency Convention. CLAIMANT's allegations in this regard [*Memorandum for Claimant paras. 10-14*] are unsubstantiated. The whole structure and performance of the sales transaction between CLAIMANT, UAM and Universal clearly show that all three companies acted in the belief that UAM was neither expressly nor impliedly authorised to act on Universal's behalf.

19 Firstly, there were two separate sales contracts in the supply chain, *i.e.* one sales contract between Universal and UAM and a second sales contract between UAM and CLAIMANT. Thus, the distribution of the cars was organised by separate sales contracts along the supply chain and not by an agency construction in which UAM would have sold cars as Universal's agent. On the contrary, if UAM had been Universal's agent, Universal would have been bound to CLAIMANT through the sales contract signed by UAM and CLAIMANT. It would not have concluded a separate sales contract with UAM. Furthermore, as stated above [*supra para. 16*], CLAIMANT had paid the down payment of USD 380,000.00, *i.e.* 50 % of the purchase price for the cars, to UAM [*Statement of Claim para. 9*]. Prior to CLAIMANT's payment, UAM had fully paid Universal for the cars [*cf. Procedural Order No. 2 paras. 15, 20*]. If UAM was Universal's agent, CLAIMANT would



have paid Universal directly or UAM would have forwarded the purchase price to Universal. As UAM had fully paid Universal, it is obvious that UAM was not Universal's authorised agent.

- 20 Secondly, it can not be deduced from Universal's later conduct, *i.e.* from Universal's offer to repair the 25 defective cars, that UAM was Universal's authorised agent at the time of the conclusion of the sales contract. Universal simply offered to repair the defective cars because it was liable to UAM under its own sales contract with UAM. Thus, it had concluded a subsequent *ad hoc* agreement with UAM to diagnose and repair the defective cars [*cf. Procedural Order No. 2 para. 15*]. Therefore, Universal obviously did not feel bound to CLAIMANT, but only to its contractual partner UAM.
- 21 Thirdly, the fact that Universal had paid UAM's insolvency representative Ms. Judith Powers for the defective cars demonstrated that UAM did not act as Universal's authorised agent [*Procedural Order No. 2 para. 21*]. If UAM had been Universal's agent, Universal would have been entitled to receive the cars without having to pay for them. Furthermore, through the rescission of the sales contract the ownership of the cars reverted to UAM and not to Universal [*id.*]. If UAM had acted as an agent for Universal, Universal instead of UAM would have been the owner of the cars. As Universal paid UAM's insolvency representative for the defective cars and did not gain ownership directly after CLAIMANT's avoidance, UAM clearly never acted as Universal's agent.
- 22 In summary, all the facts of the case clearly refer to a contract between UAM and CLAIMANT and show that Universal never conferred authority upon UAM. Consequently, UAM did not have authority to act on behalf of Universal.

1.2.2 UAM did not have apparent authority

- 23 According to Art. 14 (2) Agency Convention, the principal may only be bound by the acts of an unauthorised agent if the principal's conduct led the third person reasonably and in good faith to believe that the agent had authority at the time of the conclusion of the contract. Universal's behaviour could not have led a reasonable person in good faith to believe that UAM had authority. CLAIMANT argues that UAM acted on behalf of



Universal firstly, because the two companies have similar names and secondly, because UAM was allegedly the only company selling Universal products in Mediterraneo [*Memorandum for Claimant para. 8*]. However, neither of CLAIMANT's arguments are sufficient to prove that it believed reasonably and in good faith that UAM was Universal's duly authorised agent.

- 24 Firstly, the fact that Universal and UAM's names resemble each other is not adequate to support this assertion. UAM always contracted as UAM Distributors Oceania Limited [*Claimant's Exhibit No. 1, 2*], whereas Universal always contracted as Universal Auto Manufacturers S.A. It is widely acknowledged in the automotive industry that distributors or franchise dealers are named similarly to the manufacturer even if the companies are independent of each other [*e.g. Fiat Group Automobiles UK Ltd.; Peugeot Motor Company PLC; Volvo Cars of North America LLC*]. As brand image is crucial in the car business, it is almost inevitable that the distributors use trade names which contain the manufacturer's name irrespective of whether they act on their own behalf or on behalf of the manufacturer. On that basis, no legal relevance can be given to the fact that UAM's name referred to Universal. On the contrary, by adding the word "Distributor", UAM made clear that it must not be regarded as acting for Universal but as an independent distributing entity.
- 25 Secondly, CLAIMANT's statement [*Memorandum for Claimant para. 8*] that UAM was the only company selling Universal products in Mediterraneo is both incorrect and legally irrelevant. It is incorrect because the allegation that only UAM sold cars into Mediterraneo is mere speculation. It is undisputed that UAM only "had a non-exclusive right to export [cars] to Mediterraneo" [*Procedural Order No. 2 para. 20*]. Although there is no information as to whether other distributors sold Universal cars in Mediterraneo, they "also had the right to export Universal motor products to Mediterraneo" [*id.*]. Hence, CLAIMANT's assertion that UAM was the only company distributing Universal cars in Mediterraneo is incorrect. Furthermore, CLAIMANT's submission is legally irrelevant because UAM's position as a distributor could not have led CLAIMANT to believe reasonably and in good faith that UAM had authority to act on Universal's behalf. CLAIMANT is doing business as a sole trader car dealer in Mediterraneo and imports



new and used cars from foreign countries. Any reasonable car dealer who has experience in importing cars is aware that a distributor is not the manufacturer's agent. It is generally accepted that "a distributor of goods for resale is (...) 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.*]. Particularly because CLAIMANT had purchased from UAM before [*Procedural Order No. 2 para. 17*], it must have been aware that UAM was not Universal's duly authorised agent.

- 26 Accordingly, because Universal's acts would not have led a reasonable person in CLAIMANT's position to believe that UAM had authority to act on Universal's behalf, Universal is not bound by UAM's actions.

1.2.3 Universal did not ratify any of UAM's actions

- 27 Contrary to CLAIMANT's submissions [*cf. Memorandum for Claimant paras. 13, 17*], Universal neither ratified any acts of UAM nor failed to emphasise that it did not want to be bound by the contract. CLAIMANT firstly asserts that Universal ratified the acts of UAM by offering to repair the defective cars [*cf. Memorandum for Claimant paras. 17, 21*]. However, the principal can only ratify the acts of an agent if the principal clearly shows its will to be bound by the contract [*cf. Art. 15 Agency Convention, EVANS para. 94*]. Universal has never shown any desire to be bound by the contract. On the contrary, Universal expressly pointed out that it did not want to be bound by it. 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*].

- 28 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.



- 29 Secondly, CLAIMANT argues [*Memorandum for Claimant para. 13*] that it would have been appropriate for Universal to point out that no agency relationship existed when CLAIMANT demanded the return of its down payment on June 20th 2008 [*Claimant's Exhibit No. 13*]. However, CLAIMANT did not ask Universal in this email to clarify whether it was bound. It was not necessary for Universal to repeat that it did not feel bound by the contract because at that time Universal had already pointed out (namely in the cited email of February 28th 2008) that it neither considered itself party to the contract nor wanted to ratify any of UAM's actions [*Claimant's Exhibit No. 4*]. It can not be demanded from Universal to state that it is not liable throughout the entire correspondence.
- 30 As Universal clearly stated that it does not consider itself a party to the sales contract between UAM and CLAIMANT nor liable for the condition of the cars, its conduct can not be interpreted as ratification.
- 31 As a result, UAM did not act as Universal's agent because UAM wanted to bind itself only, because it was not authorised by Universal, because it had no apparent authority, and because Universal did not ratify UAM's actions.

2. Universal can not be bound by the arbitration agreement between UAM and CLAIMANT according to the group of companies doctrine

- 32 In order to compel Universal to arbitrate with UAM, CLAIMANT relies on the group of companies doctrine [*Memorandum for Claimant paras. 23-28*]. However, Universal clearly must not be bound under this theory which was developed in the case *Dow Chemical v. Isover St. Gobain* in 1982 [*ICC Award No. 4131*]. The tribunal had to decide about a claim against Isover St. Gobain by both the parent company Dow Chemical and one of its subsidiaries, relying on an arbitration agreement which the parent company had not signed. In its interim award the tribunal developed the following theory: A parent company may start proceedings based on an arbitration agreement in a contract which had been concluded and signed by its subsidiary and another company, if the parent company appears as a real party to the contract through its participation in the contract.



33 Contrary to CLAIMANT's argument [*cf. Memorandum for Claimant paras. 23-28*], the group of companies doctrine is not applicable to the case at hand [2.1]. Even if the theory were applied, Universal would not be bound because not a single requirement of the theory is met in the present case [2.2].

2.1 The group of companies doctrine can not be applied to the present case

34 The group of companies doctrine is not applicable to the case at hand for three reasons: Firstly, the theory is neither part of any possibly applicable law nor widely accepted [2.1.1]. Secondly, the theory only covers cases where a claimant voluntarily assents to arbitration [2.1.2]. Thirdly, the application of the doctrine would lead to an unenforceable award under the New York Convention [2.1.3].

2.1.1 The group of companies doctrine is neither part of any law possibly applicable to the present case nor is it widely accepted

35 None of the laws possibly applicable in the case at hand provide for the group of companies doctrine. It is not part of the applicable arbitration rules, the law of the seat of arbitration (*lex arbitri*) or the law governing the contractual relations and obligations (*lex causae*). The applicable arbitration rules to these proceedings are the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC-Rules). The *lex arbitri* in the present case is the Danubian Arbitration Law, which has been adopted from the UNCITRAL ML [*Statement of Claim para. 25*], and the *lex causae* is the CISG and the subsidiary domestic Oceanian Law. None of these laws provide for the group of companies doctrine [*for the UNCITRAL ML: cf. REDFERN/HUNTER para. 3-33*].

36 If a tribunal should apply a theory which is not explicitly incorporated into the applicable law, it must at least be generally accepted. However, contrary to CLAIMANT's argument [*cf. Memorandum for Claimant paras. 23, 24*], the group of companies doctrine is not widely accepted. The theory has only been applied by French tribunals and courts. In contrast to this, an overwhelming majority of countries do not recognise the theory, such as Sweden, Italy, USA, Germany, Colombia, Venezuela [*WILSKE/SHORE/AHRENS in Am. Rev. Int. Arb. p. 85; REDFERN/HUNTER para. 3-32*]. For example, it was clearly stated in the case



Peterson Farms v. C&M Farming that “there is no group of companies doctrine in English Law” [*Peterson Farms v. C&M Farming (UK 2004)*].

2.1.2 The theory only covers cases in which a claimant voluntarily assents to arbitration

- 37 The group of companies doctrine furthermore can not be applied to the present case because it only covers cases in which a claimant voluntarily wants to join the proceedings. 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 was willing and striving to arbitrate under the agreement [*cf. ICC Award No. 5721; ICC Award No. 6519*]. The tribunal in the precedent case *Dow Chemical* [*ICC Award No. 4131*] had to decide about a claim of several subsidiaries of the parent Dow Chemical Company against the French company Isover St. Gobain for damages. It could only bind the non-signatory claimant Dow Chemical because Dow Chemical wanted to be bound by the arbitration agreement.
- 38 In contrast, the Tribunal in the present case is faced with the question whether to compel arbitration on a non-signatory respondent which never consented to the arbitral proceedings. The existence of the parties’ consent is clearly the key issue in arbitration [*FOUCHARD/GAILLARD/GOLDMAN para. 501; SCHERER p. 728*]. A non-signatory must not be deprived of its right to litigate a dispute solely because of its affiliation to the same group of companies as a signatory [*SCHERER p. 727*]. Universal, being a respondent, has never consented to be bound to the arbitration agreement between UAM and CLAIMANT. It refuses any jurisdiction of this Tribunal over it. While Dow Chemical voluntarily intended to assent to the arbitration, Universal would be forced into proceedings it never consented to. This important distinction between the cases covered by this “awkward ICC case law” [*WILSKE/SHORE/AHRENS in CAA p. 17*] and the one at hand makes it evident that this theory must not be applied to the present case.

2.1.3 The application of the group of companies doctrine would lead to an unenforceable award under the New York Convention



39 If the Tribunal employed the group of companies doctrine to extend the arbitration agreement between UAM and CLAIMANT to Universal, it would render an unenforceable award. The case *Sarhank v. Oracle* shows that an award granted against a non-signatory based on the group of companies doctrine is not enforceable under Art. V New York Convention [*Sarhank v. Oracle (US 2005)*]. In this case the claimant, Sarhank, tried to compel arbitration against its contractual partner Oracle Systems Inc. and its parent company, Oracle Corporation. While the arbitral tribunal applied the group of companies doctrine, the court which was faced with the question of enforcement decided on the contrary. It stated that under the New York Convention “an agreement to arbitrate must be voluntarily made” and a non-signatory cannot be forced into an arbitration agreement “without clear and unmistakable evidence of consent”. Otherwise, the requirement for an arbitration agreement under the New York Convention would not be satisfied. Applying this to the present case, as stated above [*supra paras. 17-22, 27-30*], Universal never showed any clear and unmistakable consent to be bound by the arbitration agreement. Thus, no arbitration agreement, as required under the New York Convention, exists in the present case and an award rendered by this Tribunal would be unenforceable. However, it is the ultimate purpose of this Tribunal to render an enforceable award [*in general see: HORVATH p. 135*]. Art. 47 of the SCC-Rules states in this regard that “the Arbitral Tribunal (...) shall make every reasonable effort to ensure that all awards are legally enforceable”. Therefore, the group of companies doctrine must not be applied to the present case.

2.2 Alternatively, not a single requirement of the group of companies doctrine is met in the present case

40 Even if the Tribunal should consider the group of companies doctrine to be applicable, it is submitted that none of the requirements set out by this theory are met in the case at hand. The group of companies doctrine essentially has two requirements: Firstly, different companies must constitute one group of companies. Secondly, the non-signatory to the agreement must appear as the real party to the contract, due to its participation in the contract [*cf. ICC Award No. 4131; WILSKE/SHORE in IDR p. 157; HANOTLAU paras. 104 et seq.; SANDROCK p. 98*]. CLAIMANT would have needed to prove that these requirements



are both met, but failed to do so. In fact, Universal and UAM do not constitute a group of companies [2.2.1] and Universal can not be regarded as a real party to the contract between UAM and CLAIMANT [2.2.2].

2.2.1 Universal and UAM do not constitute a group of companies

41 Universal and UAM do not form a group of companies. Even the ICC tribunals and French courts which developed the theory have only applied it to cases where the subsidiaries were fully owned or completely controlled by the parent company [*ICC Award No. 4131; Société Sponsor A.B. v. Lestrade, Court d'Appel de Pau*]. Neither of these two requirements are met in the present case. Universal merely holds 10 % of UAM [*Procedural Order No. 2 para. 12*]. Such a minimal share of 10 % clearly does not amount to full ownership and is therefore far from adequate to mould two legally separate companies into one group of companies. For example, it would clearly be untenable to allege that the Bank of America now constitutes a group of companies with the General Motors Corporation (GM) simply because it owns a 5 % stake in GM [*Philadelphia Business Journal*]. Hence, an arbitration agreement concluded by GM would never be extended on the Bank of America.

42 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.*]. Therefore, Universal did not have control, let alone complete control, over UAM as would be required under the group of companies doctrine. 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*]. Hence, Universal and UAM can not be described as a group of companies.

2.2.2 Universal can not be regarded as a real party to the contract between UAM and CLAIMANT

43 Universal was not a real party to the contract between UAM and CLAIMANT. Universal



stated explicitly that it did not see itself as a party to this contract [*supra para. 27*]. What is more, the acts of Universal do not demonstrate anything to the contrary because Universal did not participate in the conclusion, performance or termination of the contract.

44 CLAIMANT alleges that Universal participated in the conclusion of the contract between UAM and CLAIMANT [*Memorandum for Claimant para. 27*]. This argument is bound to fail. Only UAM and CLAIMANT signed the sales contract for the purchase of 100 Tera cars without any contact with Universal prior to or immediately after the conclusion of the contract. CLAIMANT does not contest this fact. Instead, CLAIMANT relies on the fact that Universal generally reviews the standard forms used by its distributors worldwide [*Procedural Order No. 2 para. 16*]. However, only the specific contract in question must be taken into account in order to determine whether a non-signatory company is a real party to the contract [*cf. ICC Award No. 4131; Sarbank v. Oracle (US 2005); Peterson Farms v. C&M Farming (UK 2004)*]. In the present case, Universal never reviewed the specific contract between UAM and CLAIMANT. What is more, it only reviewed the standard forms in a general manner long before the contract in question was concluded and did not mandate any of the terms or wording [*Procedural Order No. 2 para. 16*]. Thus, it had no relevant influence on the standard forms, let alone the specific contract in question.

45 Secondly, CLAIMANT asserts that Universal participated in the contract because it offered to repair the defective Tera cars [*Memorandum for Claimant para. 25*]. In doing so however, Universal had only performed its own contract with UAM [*supra para. 20; cf. Procedural Order No. 2 para. 20*]. UAM had bought the Tera cars from Universal [*cf. Procedural Order No. 2 para. 20*]. As UAM did not have the necessary resources to repair the cars for CLAIMANT, Universal offered to repair the defective cars directly in Mediterraneo and thus it only fulfilled its contractual obligations to UAM.

46 Thirdly, CLAIMANT might argue that Universal participated in the termination of the contract because the 25 defective cars were shipped back to Universal on May 17th 2008 [*cf. Memorandum for Claimant para. 25*]. However, the cars were only shipped back to Universal because it had bought the cars from Ms. Powers, UAM's insolvency



representative [*Procedural Order No. 2 para. 21*]. The rescission of the contract between UAM and CLAIMANT, and the sales contract between Universal and Ms. Powers are two completely separate transactions. This shows that Universal had no legal involvement in the rescission of the contract between UAM and CLAIMANT.

3. Additionally, Universal is not bound by the arbitration agreement through the principle of equitable estoppel

- 47 Contrary to CLAIMANT's submissions [*Memorandum for Claimant paras. 29-34*], Universal is not bound by the arbitration agreement through the principle of equitable estoppel because it did not derive a direct benefit from the contract between UAM and CLAIMANT.
- 48 The principle of equitable estoppel precludes a non-signatory party from enjoying rights and benefits under a contract, while at the same time avoiding its burdens and obligations [*Amoco v. Bugsier (US 1981)*; *Lowery v. Stovall (US 1996) para. 22*; *First Union v. Nelson, Mullins, Riley and Scarborough (US 1996) para. 20*]. In the case of an arbitration agreement, this means that a party is only estopped from asserting that the lack of its signature on a written contract precludes enforcement of the contract's arbitration clause if it has consistently benefited from the same contract [*In re Weekley Homes, (US 2005) para. 35*]. In determining cases in which equitable estoppel may be applied, courts have to construe benefits narrowly, restricted to direct benefits only [*Javitch v. First Union Sec. (US 2003)*; *Thompson-CFS. v. Evans & Sutherland (US 1995) para. 28*]. This principle would for example be applied in a case where a party who attempts to claim damages under a contract tries at the same time to avoid the requirement of arbitration [*Schwabedissen v. International Paper (US 2000) para. 25*].
- 49 Contrary to CLAIMANT's submissions [*Memorandum for Claimant para. 31*], Universal derived no direct benefit from the sales contract between UAM and CLAIMANT. The benefits which CLAIMANT describes, such as profiting from a market developed by UAM and the possibility of circulating their brand through Mediterraneo, have in fact no connection with the contract concluded between UAM and CLAIMANT, but are characteristics of the distributor contract between UAM and Universal only. It is of



paramount importance that a distinction be drawn between the distributor contract of UAM and Universal on the one hand, and the sales contract of UAM and CLAIMANT on the other hand.

- 50 CLAIMANT's submission [*Memorandum for Claimant para. 31*] that the length of Universal's working relationship with UAM is a direct benefit from the contract between UAM and CLAIMANT, is a grave misunderstanding of the facts of this case. Both Universal's working relationship and the length of this relationship it had with UAM stem from the distributor contract, and not from the sales contract between UAM and CLAIMANT.
- 51 Furthermore, CLAIMANT's allegation [*Memorandum for Claimant para. 31*] that Universal financially benefited from all sales and successes that UAM accumulated because of the 10% share it held in UAM, can not be construed as a direct benefit out of the contract between 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)*]. Otherwise everyone who is in possession of shares of an enterprise would be bound by the arbitration agreements concluded by this enterprise.
- 52 Thus, it is clearly apparent that Universal neither received nor expressed any desire to receive benefits from the contract between UAM and CLAIMANT. Any benefits it may have gained from the distributor contract with UAM are not to be taken into account as this has no connection with the contract between UAM and CLAIMANT. Hence, they are legally irrelevant. Consequently, the principle of equitable estoppel cannot be applied in this case to bind Universal to the arbitration agreement.



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

53 Even if the Tribunal should follow CLAIMANT's theories regarding the extension of the arbitration agreement [*Memorandum for Claimant paras. 2-35*], 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 [*cf. Memorandum for Claimant paras. 36-50*], the arbitration agreement between UAM and Universal is void in any case.

54 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, the Tribunal should find that the Oceanian Insolvency Law is applicable even if it does not apply directly because it constitutes an overriding mandatory provision which must be obeyed irrespective of the applicable law [3]. Fourthly, 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 [4]. Finally, if the Tribunal should not deny its jurisdiction it will render an unenforceable award in any case [5].

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

55 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/HAAS 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.

56 It is generally accepted that matters of capacity are governed by the law of the parties' 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 (...)”.

57 “[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

58 Oceanian Law governs the material validity of the arbitration agreement. CLAIMANT argues that the law applicable to procedural issues is Danubian Law as the *lex arbitri* [*Memorandum for Claimant paras. 1, 38*]. This is however 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.



- 59 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.
- 60 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. Only the application of this law can lead to a fair and coherent resolution of all questions linked to the insolvency. Here, this law is Oceanian Insolvency Law.
- 61 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) EC Regulation Rome I*], *i.e.* Oceanian Law in this case. 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.
- 62 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 invalidity clause of the Oceanian Insolvency Law is applicable because it constitutes an overriding mandatory provision

- 63 Even if the Tribunal should not apply Oceanian Law to the invalidity of the arbitration agreement in general, the relevant rule of Oceanian Insolvency Law must be applied to the present case as an overriding mandatory provision. This must be true because firstly, overriding mandatory provisions have to be considered by an arbitral tribunal even if they are not part of the law governing the arbitration agreement. Secondly, because the invalidity rule of the Oceanian Insolvency Law constitutes an overriding mandatory provision.



- 64 Firstly, an overriding mandatory provision is an imperative rule of law which must be applied to an international relationship irrespective of the law that governs the relationship [*MAYER p. 275*]. There is an internationally agreed standard to recognise overriding mandatory provisions, even if they are from countries other than that which holds the seat of arbitration [*cf. MOSS p. 20; Art. 7 (1) Rome Convention; Art. 19 (1) of the Swiss PIL*].
- 65 An arbitral tribunal would risk the final and binding outcome of the arbitration proceedings if they ignored overriding mandatory provisions. An award rendered adversely to overriding mandatory provisions would be easily contestable and subject to nearly full judicial review because a lot of courts will hesitate to enforce such an award according to the New York Convention [*cf. BARRACLOUGH/WAINCYMER Mandatory Rules*]. Thereby, the main purpose of arbitration - a quick and confidential dispute resolution - would be undermined. Hence, overriding mandatory provisions must always be considered by an arbitral tribunal.
- 66 Secondly, the invalidity rule of the Oceanian Insolvency Law is such an overriding mandatory provision. In order to constitute an overriding mandatory provision, the relevant rule must be regarded as crucial by a country for safeguarding its public interests, irrespective of the law otherwise applicable [*cf. Art. 9 (1) EC Regulation Rome I*].
- 67 The function of the relevant rule of the Oceanian Insolvency Law is to centralise all claims against an insolvent company in front of the court where the insolvency proceedings were commenced. Strong and internationally accepted policy reasons militate this. 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 could 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. The best way to reach the centralisation is by declaring any arbitration agreement void *ab initio*. Therefore, declaring any forum selection clause, including arbitration agreements, void *ab initio* is crucial for safeguarding the public interests of Oceania and constitutes an overriding mandatory provision.

4. The arbitration agreement would be void under Danubian Law

68 Even if the Tribunal were to follow CLAIMANT's allegation [*Memorandum for Claimant paras. 1, 38*] that Danubian Law is applicable, this would not change the outcome. The arbitration agreement would also be invalid according to Danubian Law.

69 As of now, there is a gap in Danubian Law concerning the effects insolvency proceedings have on arbitration agreements. The issue has not yet arisen in Danubia [*Procedural Order No. 2 para. 4*]. However, the same strong and internationally accepted policy reasons as mentioned above [*supra para. 67*], militate in favour of the invalidation of any choice of forum clause, including arbitration agreements. Therefore, even Danubian Law has to invalidate arbitration agreements in case of insolvency.

5. Without considering Oceanian Insolvency Law, the Tribunal would render an unenforceable award

70 The ultimate purpose of arbitral tribunals 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.”

71 An award which ignored the Oceanian invalidity rule would neither be enforceable against UAM in Oceania [5.1] and Polaria [5.2] nor would it be enforceable against Universal in



Equatoriana [5.3].

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

72 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”.

73 In the present case, the invalidity clause of the Oceanian Insolvency Law forms 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’ loss in case of insolvency as far as possible. Treating every creditor equally is a fundamental community interest of Oceania. This interest even constitutes an overriding mandatory provision [*supra paras. 63-67*]. Hence, Oceania will not enforce an award in conflict with this invalidity rule.

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

74 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*].

75 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.

76 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.

77 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.

78 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.

5.3 An award will not be enforceable in Equatoriana either

79 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 paras. 13-31*] and the arbitration agreement was not extended to Universal [*supra paras. 32-52*].

ARGUMENT ON THE SUBSTANTIVE ISSUES

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

80 Universal is not liable for the breach of contract committed by UAM. On January 18th 2008, UAM and CLAIMANT concluded a sales contract for 100 new 2008 model Tera cars. This contract was signed by UAM and CLAIMANT only [*Claimant's Exhibit No. 1*]. Regardless of whether the delivery of the defective 25 cars constitutes a fundamental breach [*see below paras. 92-109*], Universal is not liable to CLAIMANT because no contractual relationship between Universal and CLAIMANT exists [1]. Furthermore, Universal did not give a manufacturer's warranty [2] and there is no *action directe* that allows CLAIMANT to hold Universal liable [3]. What is more, Universal also can not be held liable simply because of the allegation that the defect had already occurred in its factory [4].



1. There is no contractual relationship between Universal and CLAIMANT

81 Contrary to CLAIMANT's submissions [*Memorandum for Claimant paras. 66-70*], there is no contractual relationship between Universal and CLAIMANT. UAM neither acted as Universal's agent [*supra paras. 13-31*] nor did Universal later on enter into the contract between UAM and CLAIMANT.

82 CLAIMANT alleges that Universal entered into the contract between UAM and CLAIMANT "through its extensive participation" [*Memorandum for Claimant paras. 60-65*]. 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 [*OLG München, March 8th 1995*]. However, as laid down above [*supra paras. 27, 31*], Universal did not intend to be bound by the contract between UAM and CLAIMANT. In its email of February 28th 2008 to CLAIMANT, it explicitly stated:

"UAM is, of course, **responsible to you** for the condition of the Tera cars it has sold to you [...] **Universal would undertake the repairs without admission of liability**" [*Claimant's Exhibit No. 4*] (emphasis added).

83 CLAIMANT argues nevertheless that Universal manifested its intention to be bound by the contract by reviewing the standard forms of UAM [*Memorandum for Claimant para. 63*]. However, as stated above [*supra para. 44*], Universal actually did not review the specific contract in question. It only reviewed the standard forms on a very abstract level and long before the specific contract in question was concluded. Therefore, this fact can not be interpreted as an intention to be bound by any transaction UAM might have used them for.

84 Furthermore, CLAIMANT asserts that Universal's intent was demonstrated by its offer to repair the cars [*Memorandum for Claimant para. 64*]. However, Universal had only offered to repair the defective cars in order to fulfil its obligations arising both out of a sales contract and a subsequent *ad hoc* agreement it had with UAM [*cf. Procedural Order No. 2*



para. 15, supra para. 20]. This fact has been made clear to CLAIMANT in the cited email of February 28th 2008. Universal has stated unmistakably that it did not intend to be bound by the contract between UAM and CLAIMANT.

85 Finally, CLAIMANT also argues that Universal did not behave like a “non-party” to the contract and thus demonstrated its intention to enter into it [*Memorandum for Claimant para. 65*]. In order to prove this allegation, CLAIMANT relies again on Universal’s offer to repair the cars and a statement made by Mr. Harold Steiner, Regional Manager of Universal, that he was looking “forward to a long and mutually relationship with you” [*Claimant’s Exhibit No. 4*]. These assertions however do not prove any intention on Universal’s part. As already shown [*supra paras. 20, 27-28*], Universal only offered to repair the cars in order to fulfil its obligations to UAM and made clear that it did not intend to be bound by the contract between UAM and CLAIMANT. Albeit this, Mr. Steiner’s statement clearly did not carry any legal meaning. He only relied on a frequently-used phrase in commercial correspondence. Thus, none of CLAIMANT’s allegations prove any intention of Universal to enter into the contract between UAM and CLAIMANT.

2. Universal did not give a warranty on the condition of the Tera cars

86 CLAIMANT argues that Universal is liable because it gave a warranty on the condition of the Tera cars [*Memorandum for Claimant paras. 51-59*]. However, as pointed out in Procedural Order No. 2 para. 6, “Universal gave **no manufacturer’s guarantee** of quality of the Tera cars that would have been in favour of Mr. Tisk [CLAIMANT]” (emphasis added). Hence, it is evidently not possible to assume any manufacturer’s warranty in the present case.

87 CLAIMANT argues nevertheless that Universal impliedly gave a manufacturer’s warranty because this was an international trade usage according to Art. 9 (2) CISG [*Memorandum for Claimant paras. 51-53*]. However, an international trade usage that a manufacturer generally gives a warranty for the benefit of retailers does not exist. CLAIMANT’s submissions in this regard are unsubstantiated.

88 CLAIMANT fails to realise that where a warranty is given it only operates in favour of



the end-consumer, not in favour of a retailer. Not surprisingly, all warranties provided as evidence by CLAIMANT in its Memorandum [*Memorandum for Claimant para. 52*] only extend to consumers and never to retailers.

89 Secondly, the examples CLAIMANT uses do not support its claim. The burden of proof lies upon CLAIMANT to show that an international trade usage exists. It did however fail to provide evidence for its claim. CLAIMANT argues that a truly international character existed because the manufacturers cited have their place of origin in different countries [*Memorandum for Claimant para. 52*]. As far as the manufacturer's themselves are concerned, this assertion is true. However, the warranties CLAIMANT relies upon are actually provided by the United Kingdom or United States of America representations of the manufacturers [*Fiat Group Automobiles UK Ltd.; Peugeot Motor Company PLC; Toyota Motor Sales U.S.A. Inc.; Volvo Cars of North America LLC*]. Thus, CLAIMANT tries to prove an international character by relying on examples from only two countries. This does not suffice to constitute the international character. Hence, it is not an international trade usage that manufacturers provide for a warranty in favour of retailers.

3. The legal instrument of *action directe* is not applicable to the case at hand

90 What is more, CLAIMANT can not allege that Universal should be liable for the condition of the cars because of the legal instrument *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 that 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. Court 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*].

4. Universal cannot be held liable simply because of the allegation that the defect had already occurred in Universal's factory

91 Universal is not liable for the breach of contract simply because the defective cars were produced in Universal's facilities. 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

92 CLAIMANT argues that it was entitled to avoid the sales contract [*Memorandum for Claimant paras. 71-98*]. 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

93 CLAIMANT was not entitled to avoid the contract because on February 28th 2008, it fixed an additional period of time to perform. 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*].

94 Consequently, the right to declare avoidance of the contract is suspended during the



additional period even if the breach of contract was fundamental [SCHLECHTRIEM/SCHWENZER/MÜLLER-CHEN Art. 47 para. 14; MÜNCHKOMMBGB/HUBER Art. 47 para. 17; SCHLECHTRIEM/BUTLER UN Law para. 181; HONNOLD para. 291; BIANCA/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.

95 On February 28th 2008, CLAIMANT made clear in its telephone conversation with Mr. Steiner 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 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 to protect 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

96 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 over large distances. Costs and administrative efforts are



much greater than in domestic trade. Avoidance of the 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*].

- 97 The question 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 [SCHLECHTRIEM/SCHWENZER/MÜLLER-CHEN *Art. 48 para. 15*; HONNOLD *para. 296*; 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. As CLAIMANT concedes [*Memorandum for Claimant para. 95*], 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*.



- 98 Contrary to CLAIMANT's submissions [*Memorandum for Claimant paras. 92-95*], 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*]. These requirements are all met in the present case:
- 99 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*].
- 100 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 additional period of time fixed by CLAIMANT [*supra para. 95*].
- 101 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. 92-95*]. However, this argument is bound to fail, as time was never of the essence in the contract. According to the sales contract between CLAIMANT and UAM, 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.
- 102 CLAIMANT's argument that the risk of becoming insolvent made the time needed for



repair unreasonable [*Memorandum for Claimant para. 94*] is not convincing. The situation was never as severe as CLAIMANT alleges: CLAIMANT states that it was “unable to engage in the purchase of alternative cars to place on the floor for sale” [*Memorandum for Claimant para. 77*]. This is however incorrect. 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 in business until today. Therefore, the credibility of CLAIMANT’s allegations concerning the risk of insolvency can not be entrusted and thus, the allegations do not justify the conclusion that the time needed for repair was unreasonable.

- 103 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 “would continue to occupy Mr. Tisk’s storage space while the Universal personnel worked” [*Memorandum for Claimant para. 94*]. This submission is unsubstantiated. CLAIMANT ordered 100 Tera Cars and must have planned its business activities accordingly, *i.e.* organising enough storage place. It is therefore not conclusive that CLAIMANT has trouble storing 25 cars.
- 104 Contrary to CLAIMANT’s submissions [*Memorandum for Claimant paras. 82, 90*], the threatened airport strike has no effect on the convenience of the cure for CLAIMANT. 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 have been without effect on 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 be 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 had any influence on contract negotiations between the airport and their personnel. Furthermore, there is no indication that either UAM or Universal could reasonably be 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.

105 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

106 Even if the Tribunal should find that there was a fundamental breach in regard to the 25 delivered cars, CLAIMANT was not justified to avoid the contract in its entirety, *i.e.* also with regard to the 75 cars that were still to be delivered. As the contract in question was an instalment contract and only the first delivered instalment 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, (...)”.

107 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 which were already delivered.

- 108 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 easily be fixed [*supra para. 99*]. 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; UAM could even have made a substitute delivery for the first 25 cars. CLAIMANT never showed any interest in these facts. On the contrary, CLAIMANT jumped to conclusions and declared avoidance before contacting UAM in this matter.
- 109 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 substantiated 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 of 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/

Emma Reynolds

_____/s/

Michaela Streibelt