

ALBERT-LUDWIGS  
UNIVERSITÄT FREIBURG



MEMORANDUM FOR CLAIMANT

**On behalf of:**

**JOSEPH TISK**  
Reliable Auto Imports  
**CLAIMANT**

**Against:**

**UAM**  
Distributors Oceania Ltd  
**FIRST RESPONDENT**

and

**UNIVERSAL**  
Auto Manufacturers, S.A.  
**SECOND RESPONDENT**



## TABLE OF CONTENTS

<b>INDEX OF ABBREVIATIONS .....</b>	<b>V</b>
<b>INDEX OF AUTHORITIES .....</b>	<b>VII</b>
<b>INDEX OF CASES.....</b>	<b>XVI</b>
<b>INDEX OF AWARDS.....</b>	<b>XX</b>
<b>STATEMENT OF FACTS .....</b>	<b>1</b>
<b>STATEMENT OF PURPOSE .....</b>	<b>3</b>
<b>ISSUE 1: UNIVERSAL IS BOUND BY THE ARBITRATION AGREEMENT BETWEEN UAM AND CLAIMANT.....</b>	<b>4</b>
A. A reasonable person could expect UNIVERSAL to be bound by the arbitration agreement.....	5
I. UNIVERSAL’s conduct contributed to the perception that RESPONDENTS constitute one legal and economic entity .....	5
II. The business organisation of UNIVERSAL and UAM contributed to the perception that RESPONDENTS constitute one legal and economic entity.....	6
B. CLAIMANT expected UNIVERSAL to be bound.....	7
C. UNIVERSAL is responsible for CLAIMANT’s expectation.....	8
Conclusion to Issue 1 .....	9
<b>ISSUE 2: THE INSOLVENCY LAW OF OCEANIA DOES NOT AFFECT THE JURISDICTION OF THE ARBITRAL TRIBUNAL.....</b>	<b>10</b>
A. The insolvency law of Oceania does not affect the Arbitral Tribunal’s jurisdiction over the dispute against UAM and UNIVERSAL .....	10
I. The jurisdiction is solely determined by Danubian law .....	10
II. The jurisdiction of the Arbitral Tribunal is not further affected by the non-enforceability in Oceania .....	11
a. The enforceability of an award is not decisive for determining the Arbitral Tribunal’s jurisdiction .....	11
aa. Considering enforceability at the stage of jurisdiction would contradict the purpose of the New York Convention.....	12
bb. Most awards are effective without legal enforcement.....	12
	II



cc. RESPONDENTS may not argue that Art. 47 SCC Rules requires the Arbitral Tribunal to decline its jurisdiction .....	13
b. An award will be enforceable in Equatoriana and presumably in Polaria .....	14
B. In any case, the Arbitral Tribunal has jurisdiction regarding UNIVERSAL .....	15
I. Oceanian insolvency law does not apply to UNIVERSAL .....	15
II. The arbitration agreement with UNIVERSAL is not void .....	15
Conclusion to Issue 2 .....	16
<b>ISSUE 3: UNIVERSAL IS LIABLE FOR THE BREACH OF CONTRACT .....</b>	<b>17</b>
A. UNIVERSAL is liable for the breach of contract as it gave a representation of quality .....	17
B. UNIVERSAL must be held liable because it entered the contractual relationship .....	19
I. UNIVERSAL impliedly offered to become a party to the contract .....	19
II. UAM and CLAIMANT agreed to modify the sales contract .....	21
Conclusion to Issue 3 .....	21
<b>ISSUE 4: THERE WAS A FUNDAMENTAL BREACH OF THE SALES CONTRACT AUTHORISING CLAIMANT TO AVOID THE CONTRACT .....</b>	<b>22</b>
A. The delivery of defective cars constituted a fundamental breach of contract committed by RESPONDENTS .....	22
I. CLAIMANT suffered a detriment by receiving defective cars .....	22
II. The detriment substantially deprived CLAIMANT of what it was entitled to expect under the contract .....	22
a. CLAIMANT could not reasonably be expected to keep the cars and claim damages .....	23
b. CLAIMANT could not reasonably be expected to await subsequent performance .....	24
aa. It could not be estimated how long it would take to repair the cars .....	24
bb. CLAIMANT faced the risk of insolvency .....	25
cc. CLAIMANT did not have to bear the risk of not having merchantable cars within the near future .....	25
dd. CLAIMANT did not need to await subsequent performance after giving RESPONDENTS the opportunity to cure the defect .....	26
III. The substantial detriment was foreseeable for RESPONDENTS .....	26



B. CLAIMANT had the right to avoid the whole contract..... 27

    I. CLAIMANT was entitled to avoid the contract with regard to  
        the future deliveries of 75 cars according to Art. 73(2) CISG ..... 28

        a. CLAIMANT and UAM concluded an instalment contract..... 28

        b. CLAIMANT had good grounds to expect that there would also be  
            a fundamental breach regarding the future deliveries ..... 29

    II. Alternatively, CLAIMANT could avoid the contract in its entirety pursuant to  
        Art. 49(1)(a) CISG ..... 30

Conclusion to Fourth Issue..... 30

**REQUEST FOR RELIEF..... 31**

**CERTIFICATE ..... 31**



## INDEX OF ABBREVIATIONS

USD	United States Dollar(s)
Art.	Article
Cf.	Confer
Circ.	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods
COMPROMEX	Comisión para la Protección del Comercio Exterior de México (Mexican Commission for the Protection of Foreign Trade)
E.D.N.Y.	Eastern District of New York
e.g.	exempli gratia
emph. add.	emphasis added
et al.	et alia
et seq.	et sequentes (and following)
HGer	Handelsgericht (Swiss/Austrian Commercial Court)
Ibid.	ibidem (the same place)
ICC	International Chamber of Commerce
i.e.	id est
Int. Ct. Russian CCI	Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry
Ltd.	Limited
MüKo-BGB	Münchener Kommentar zum Bürgerlichen Gesetzbuch
MüKo-HGB	Münchener Kommentar zum Handelsgesetzbuch
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
No.	Number
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OLG	Oberlandesgericht (German Upper Regional Court)
p.	page
para.	Paragraph
paras.	Paragraphs



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pp.	pages
Q.B.D.	Queen's Bench Division
S.A.	Société Anonyme
SCC	Stockholm Chamber of Commerce
S.D.N.Y.	Southern District of New York
Supr. Ct.	Supreme Court
UAM	Universal Automobile Manufacturer Distributors Oceania, Ltd.
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL ML	UNCITRAL Model Law on International Commercial Arbitration
Universal	Universal Automobile Manufacturers, S.A.
U.S. Circ. Ct.	United States Circuit Court
U.S. Ct. App.	United States Court of Appeals
U.S. Dist. Ct.	United States District Court
v.	versus



## INDEX OF AUTHORITIES

- ACHILLES, Wilhelm-Albrecht**      Kommentar zum UN-Kaufrechtsübereinkommen (CISG),  
Neuwied (2000)  
(cited: *ACHILLES*, in paras. 83; 104)
- AUDIT, Bernard**      La vente internationale de marchandises,  
Convention des Nations-Unies du 11 avril 1980,  
Paris (1990)  
(cited: *AUDIT*, in para. 130)
- ARFAZADEH, Homayoon**      Arbitrability under the New York Convention:  
the Lex Fori revisited, in:  
Arbitration International (Journal of the London Court  
of International Arbitration) (2001), pp. 73-87  
(cited: *ARFAZADEH*, in paras. 33; 36; 59; 65)
- BIANCA, Cesare Massimo**      Commentary on the International Sales Law  
**BONELL, Michael Joachim**      The 1980 Vienna Sales Convention,  
Milan (1987)  
(cited: *BIANCA/BONELL/AUTHOR*, in para. 115)
- BLESSING, Marc**      The law applicable to the arbitration clause and  
arbitrability, in:  
ICCA Congress Series No. 9 (1998)  
(cited: *BLESSING*, in paras. 3; 6; 8)
- BORN, Gary B.**      International Commercial Arbitration,  
2<sup>nd</sup> Edition (2001)  
(cited: *BORN*, in para. 54)



- BRUNNER, Christoph** UN-Kaufrecht - CISG, Kommentar zum  
Übereinkommen der Vereinten Nationen über Verträge  
über den internationalen Warenkauf von 1980,  
Bern (2004)  
(cited: *BRUNNER*, in paras. 83; 99; 100; 103; 104; 128)
- CARRETTE, Nicolas** Direct Contractual Claim of the Sub-buyer and  
International Sale of Goods: Applicable Law and  
Applicability of the CISG, in:  
European Review of Private Law (2008), pp. 583-605  
(cited: *CARRETTE*, in para. 72)
- DERAINS, Yves** A Guide to the ICC Rules of Arbitration,  
**SCHWARTZ, Eric A.** 2<sup>nd</sup> Edition,  
The Hague (2005)  
(cited: *DERAINS/SCHWARTZ*, in paras. 3; 47)
- ENDERLEIN, Fritz** Internationales Kaufrecht,  
**MASKOW, Dietrich** Kaufrechtskonvention, Verjährungskonvention,  
**STROHBACH, Heinz** Vertretungskonvention, Rechtsanwendungskonvention,  
Berlin (1991)  
(cited: *ENDERLEIN/MASKOW/STROHBACH*, in para. 100)
- FERRARI, Franco** The Draft UNCITRAL Digest and Beyond : cases,  
**FLECHTNER, Harry** analysis and unresolved issues in the  
**BRAND, Roland A.** UN Sales Convention,  
München, London (2004)  
(cited: *FERRARI/FLECHTNER/BRAND/FERRARI*, in para. 72)



- FLECHTNER, Harry** Issues Relating to the Applicability of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”), in:  
Legal Studies Research Paper Series, Working Paper No. 2008-07 (2008)  
(cited: *FLECHTNER*, in paras. 71 and 72)
- FOUCHARD, Philippe**  
**GAILLARD, Emmanuel**  
**GOLDMAN, Berthold** On international commercial arbitration,  
The Hague (et. al.) (1999)  
(cited: *FOUCHARD/GAILLARD/GOLDMAN*, in paras. 3; 65; 67)
- GAILLARD, Emmanuel** L'interdiction de se contredire au détriment d'autrui  
comme principe général du droit du commerce  
international, in:  
Review Arbitration (1984), pp. 241 et seq.  
(cited: *GAILLARD*, in para. 6)
- GALSTON, Nina M.**  
**SMIT, Hans** International Sales: The United Nation Convention on  
Contracts for the International Sale of Goods,  
New York (1984)  
(cited: *GALSTON/SMIT*, in para. 100)
- HABEGGER, Phillip** Federal Tribunal (1<sup>st</sup> Civil Court), 16 October 2003;  
Extention of arbitration agreements  
to non-signatories and requirements of form, in:  
ASA Bulletin Vol. 22 No. 2 (2004), pp. 398-410  
(cited: *HABEGGER*, in para. 6)
- HANOTIAU, Bernard** Complex Arbitrations: Multi-Issue and Class Actions  
The Hague (2005)  
(cited: *HANOTIAU*, in para. 4)



- HEILMANN, Jan** Mängelgewährleistung im UN-Kaufrecht,  
Voraussetzungen und Rechtsfolgen im Vergleich zum  
deutschen internen Kaufrecht und zu den Haager  
Einheitlichen Kaufgesetzen,  
Berlin (1994)  
(cited: *HEILMANN*, in paras. 100; 130)
- HERBER, Rolf**  
**CZERWENKA, Beate** Internationales Kaufrecht,  
UN-Übereinkommen über Verträge über den  
internationalen Warenkauf, Kommentar,  
München (1991)  
(cited: *HERBER/CZERWENKA*, in para. 83)
- HEUZÉ, Vincent** Du 5 janvier 1999 – Cour de cassation (1<sup>re</sup> Ch. civ.) –  
MM. Lemontrey, prés., Ancel, rapp., Sainte-Rose av.  
gén. – SCP Delaporte et Briard, M. Cossa, SCP Célice,  
Blancpain et Soltner, in:  
Revue critique de droit international privé 88 (1999),  
pp. 520-526  
(cited: *HEUZÉ*, in para. 72)
- HONNOLD, John O.** Uniform Law for International Sales under the 1980  
United Nations Convention,  
2<sup>nd</sup> Edition,  
Deventer, Boston (1991)  
(cited: *HONNOLD*, in paras. 71; 75; 78; 100)
- HONSELL, Heinrich** Kommentar zum UN-Kaufrecht,  
Berlin, Heidelberg (1997)  
(cited: *HONSELL/AUTHOR*, in para. 128)
- HUBER, Peter**  
**MULLIS, Alastair** The CISG,  
A new textbook for students and practitioners,  
(cited: *HUBER/MULLIS*, in paras. 93; 100)



- KAROLLUS, Martin** UN-Kaufrecht,  
Eine systematische Darstellung für Studium und Praxis,  
Wien (1991)  
(cited: *KAROLLUS*, in paras. 71; 87)
- KAUFMANN-KOHLER, Gabrielle** Arbitrage international,  
**RIGOZZI, Antonio** Droit et pratique à la lumière de la LDIP,  
Bern (2006)  
(cited: *KAUFMANN-KOHLER/RIGOZZI*, in paras. 42; 65)
- KRITZER, Albert H.** Guide to Practical Applications of the United Nations  
Convention On Contracts for the International Sale  
of Goods,  
Deventer, Boston (1989)  
(cited: *KRITZER*, in para. 87)
- LAZIC, Vesna** The effect of arbitration agreements in insolvency  
proceedings, in:  
The Hague Yearbook of International Law (1995)  
(cited: *LAZIC*, in para. 65)
- LEHMANN, Matthias** Schiedsfähigkeit wirtschaftsrechtlicher Streitigkeiten  
als transnationales Rechtsprinzip,  
Baden-Baden (2003)  
(cited: *LEHMANN*, in paras. 54; 63)
- LEW, Julian D. M.** Comparative International Commercial Arbitration,  
**MISTELIS, Loukas A.** The Hague (2003)  
**KRÖLL, Stefan M.** (cited: *LEW/MISTELIS/KRÖLL*, in paras. 33; 37; 63;  
65; 67)



- LOOKOFSKY, Joseph** Understanding the CISG, A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods, 3<sup>rd</sup> (worldwide) Edition, Alphen aan den Rijn (and others) (2008) (cited: *LOOKOFSKY*, in para. 113)
- MANTILLA-SERRANO, Fernando** International Arbitration and Insolvency Proceedings, in: 11 Arbitration International (1995), pp. 51-74 (cited: *MANTILLA-SERRANO*, in para. 43)
- MOSES, Margaret L.** The Principles and Practice of International Commercial Arbitration, Cambridge et al. (2008) (cited: *MOSES*, in paras. 3; 37; 46; 54; 59; 65)
- PILTZ, Burghard** Internationales Kaufrecht, 2<sup>nd</sup> Edition, München (2008) (cited: *PILTZ*, in para. 100)
- POUDRET, Jean-François**  
**BESSON, Sébastien** Comparative law of international arbitration, 2<sup>nd</sup> Edition, London (2007) (cited: *POUDRET/BESSON*, in paras. 3; 33)
- RAYNARD, Jacques** Sources Européennes Communautaires, in: Revue trimestrielle de droit civil (1997), pp. 1015-1024 (cited: *RAYNARD*, in para. 72)



- REDFERN, Alan**  
**HUNTER, Martin**  
Law and Practice of International Commercial Arbitration,  
4<sup>th</sup> Edition,  
London (2004)  
(cited: *REDFERN/HUNTER*, in paras. 3; 65; 67)
- SACHS, Klaus**  
Erstreckung von Schiedsvereinbarungen auf Konzernunternehmen, in: Tagungsbeiträge zur DIS-Vertragsveranstaltung “Schiedsgerichtsbarkeit bei M&A”, 24 and 25 April 2001 (DIS-Materialien Bd., Dresden) VIII/01, at p. 54  
(cited: *SACHS*, in para. 3)
- SÄCKER, Franz Jürgen**  
**RIXECKER, Roland**  
Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 3, Schuldrecht – Besonderer Teil,  
München (2008)  
(cited: *MÜKO-BGB/AUTHOR*, in para. 72)
- SANDROCK, Otto**  
The Extension of Arbitration Agreements to Non-signatories: an enigma still unresolved, in: Corporations, Capital Markets and Business in the Law, Liber amicorum Richard M. Buxbaum  
The Hague (2000)  
(cited: *SANDROCK*, in para. 3)
- SCHLECHTRIEM, Peter**  
Internationales UN-Kaufrecht,  
4<sup>th</sup> Edition,  
Tübingen (2007)  
(cited: *SCHLECHTRIEM*, in para. 72)
- SCHLECHTRIEM, Peter**  
Kommentar zum Einheitlichen UN-Kaufrecht,  
3<sup>rd</sup> Edition,  
München (2000)  
(cited: *SCHLECHTRIEM/AUTHOR*, (3<sup>rd</sup> Ed.), in para. 91)



- SCHLECHTRIEM, Peter**                      Kommentar zum Einheitlichen UN-Kaufrecht,  
5<sup>th</sup> Edition,  
München, Basel (2008)  
(cited: *SCHLECHTRIEM/AUTHOR*, in paras. 99; 100; 113;  
114; 116; 128)
- SCHLOSSER, Peter**                      Das Recht der internationalen privaten  
Schiedsgerichtsbarkeit,  
2<sup>nd</sup> Edition,  
Tübingen (1989)  
(cited: *SCHLOSSER*, in para. 46)
- SCHMIDT-AHRENDTS, Nils**              Das Verhältnis von Erfüllung, Schadensersatz und  
Vertragsaufhebung im CISG,  
Tübingen (2007)  
(cited: *SCHMIDT-AHRENDTS*, in para. 116)
- SCHMIDT, Karsten**                      Münchener Kommentar zum Handelsgesetzbuch-CISG  
**GRUNEWALD, Barbara**              2nd Edition,  
München (2007)  
(cited: *MÜKO-HGB/AUTHOR*, in paras. 99; 100; 128)
- SCHMIDT-KESSEL, Martin**              Vertragsaufhebung nach UN- Kaufrecht, in: Recht der  
internationalen Wirtschaft (1996), pp. 60-65  
(cited: *SCHMIDT-KESSEL*, in para. 83)
- STAUDINGER, Julius von**              Kommentar zum Bürgerlichen Gesetzbuch,  
**MAGNUS, Ulrich**                      UN-Kaufrecht,  
Berlin (1999)  
(cited: *STAUDINGER/MAGNUS*, in paras. 93; 104)
- STUCKI, Blaise**                      Extention of arbitration agreements to non-signatories  
in ASA Below 40 - Conference of 29 September 2006  
(cited: *STUCKI*, in para. 3)



**VAN DEN BERG, Jan**

The New York Convention of 1958,  
Denver (1981)

(cited: *VAN DEN BERG*, in para. 33)

**WITZ, Wolfgang**

**SALGER, Hanns-Christian**

International Einheitliches Kaufrecht,  
Praktiker-Kommentar und Vertragsgestaltung  
zum CISG,

Heidelberg (2000)

(cited: *WITZ/SALGER/AUTHOR*, in para. 87)



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## INDEX OF CASES

### Austria

Oberster Gerichtshof,  
29 June 1999,  
CISG-online No. 483  
(cited: *OGH, 29 June 1999*, in para. 83)

Oberster Gerichtshof,  
5 July 2001,  
CISG-online No. 652  
(cited: *OGH, 5 July 2001*, in para. 116)

### Belgium

Hof van Beroep Gent, (Appellate Court)  
NV A.R. (Belgium) v. NV I (France)  
15 May 2002,  
CISG-online No. 746  
(cited: *Hof van Beroep Gent, 15 May 2002*, in para. 93)

Cour d'Appel Bruxelles,  
4 October 1985,  
XIV Yearbook of Commercial Arbitration. (1989), pp. 618 - 620  
(cited: *Cour d'Appel Bruxelles, 4 October 1985*, in paras. 42 ; 46)

### France

Cour d'Appel Paris,  
Korsnas Marma v. Durand- Auzias  
Revue d'Arbitrage 1989, pp. 691 et seq.  
30 November 1988,  
(cited: *Cour d'Appel Paris, 30 November 1988*, in para. 23)



Cour d'Appel Paris

V 2000 (formerly Jaguar France) v. Renault

7 December 1994,

Revue Arbitrage (1996), p. 245

(cited: *Cour d'Appel Paris, 7 December 1994*, in para. 4)

Cour d'Appel Grenoble,

Thermo King v. CIGNA Insurance Company of Europe SA-NV, Transports Norbert  
Dentressangle S.A., Frappa S.A., Sorhfroid SARL

15 May 1996.

CISG-online No. 219

(cited: *Cour d'Appel Grenoble, 15 May 1996*, in para. 73)

## **Germany**

OLG Stuttgart,

Seller (Austria) v. Buyer (Germany),

12 March 2001,

CISG-online No. 841

(cited: *OLG Stuttgart, 12 March 2001*, in para. 104)

OLG München,

29 November 2005,

CISG-online No. 1567

(cited: *OLG München, 29 November 2005*, in para. 103)

## **Great Britain**

High Court, Queen's Bench Division (1992),

Union of India v. McDonnell Douglas Cor.,

2 Lloyd's Law Rep. 48

(cited: *UNION OF INDIA V. MCDONNELL DOUGLAS COR., Q.B.D. (Commercial Court)*, in  
para. 34)



## Japan

Tokyo High Court,

30 May 1994,

XX. Yearbook of Commercial Arbitration, p. 745 et seq.

(cited: *Tokyo High Court, 30 May 1994*, in para. 34)

## Switzerland

Schweizerisches Bundesgericht,

Fincantieri- Cantieri navali italiani SpA and Oto Melara SpA (Italy) v. M (Switzerland) and  
arbitral tribunal (nationality not indicated)

23 June 1992,

Schweizerische Zeitschrift für internationales und europäisches Recht (1994), pp. 111-113

(cited: *Schweizerisches Bundesgericht, 23 June 1992* in para. 59)

Schweizerisches Bundesgericht,

1 September 1993

ASA Bulletin 4/1996, pp. 623-629

(cited: *Schweizerisches Bundesgericht, 1 September 1993*, in paras. 5; 14; 23)

Schweizerisches Bundesgericht,

16 Oktober 2003,

BGE 129 III 727

(cited: *Schweizerisches Bundesgericht, 16 Oktober 2003*, in para. 3)

Handelsgericht Zürich (Handelsgericht= Commercial Court),

Buyer (Liechtenstein) v. Seller (Switzerland),

30 November 1998,

Schweizerische Zeitschrift für Internationales und Europäisches Recht (SZIER)/Revue suisse  
de droit international et de droit européen (1999), pp. 186-188

(cited: *HGer Zurich, 30 November 1998*, in para. 128)



## United States of America

Bridas SAPIC v. Government of Turkmenistan and Concern Balkannebitgazsenagat  
United States Court of Appeals for the 5<sup>th</sup> Circuit  
345 F.3d 347, 358

(cited: *BRIDAS V. TURKMENISTAN*, U.S. Ct. App. 5<sup>th</sup> Circ., in para. 3)

Sunkist Softdrinks, Inc. v. Sunkist Growers, Inc.  
U.S. Court of Appeals for the Eleventh Circuit (1993),  
10 F. 3d 753

(cited: *SUNKIST SOFTDRINKS V. SUNKIST GROWERS*, U.S. Ct. App. 11<sup>th</sup> Circ., in para. 3)

Meadows Indemnity Co. Ltd v. Baccala Ins Co. et alia,  
U. S. District Court- Eastern District of New York,  
XVII Y. B. Com. Arb. (1992), pp. 686 - 695

(cited: *MEADOWS INDEMNITY CO. LTD V. BACCALA INS CO. ET ALIA*, US Dist. Ct. (E.D.N.Y. , in paras. 42; 54)

Asante Technologies v. PMC-Sierra,  
U.S. District Court, Northern District of California, San Jose Division (27 July 2001),  
LXXVI Florida Bar Journal (2002) , pp. 28-30

(cited: *ASANTE TECHNOLOGIES V. PMC-SIERRA*, Fed. Dist. Ct. California, in para. 73)

Rhône Méditerranée v. Achille Lauro, et al.,  
U.S. District Court, District of St. Thomas and St. John  
District Court: 555 F. Supp. 481 (1982);

IX Y. B. CA 1984, pp. 474-481

(cited: *RHÔNE MÉDITERRANÉE V. ACHILLE LAURO, ET AL.*, District of St. Thomas and St. John, in para. 46)



## INDEX OF AWARDS

**COMPROMEX** (Comisión para la Protección del Comercio Exterior de México = Mexican Commission for the Protection of Foreign Trade),

Buyer (Mexico) v. Seller (Argentina)

29 April 1996 (arbitration decree in this case a "dictamen" (non-binding opinion)),

Diario oficial 16 July (1996), pp. 12-17

(cited: *COMPROMEX*, 29 April 1996, in paras. 86; 113)

**Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry,**

15 April 1994,

CISG-online No. 449

(cited: *Int. Ct. Russian CCI*, 15 April 1994, in para. 87)

### **International Chamber of Commerce**

ICC Case No. 1434 (1975)

National Enterprise v Company

JDI 1976, pp. 978-989

(cited: *ICC Case No. 1434*, in para.3)

ICC Case No. 2375 (1975)

Company (France) v Company (Spain), Company, parent of first defendant (Bahamas)

JDI 1976, pp. 973-978

(cited: *ICC Case 2375*, in para. 3)

ICC Case No. 4131 (1982),

Dow Chemical v. Isover Gobain,

JDI (1983), pp. 899 et seq.

(cited: *ICC Case No. 4131*, in paras. 4; 8)



ICC Case No. 5730 (1988)

Company Elf Aquitaine (France) v Mr. Orri (national of Saudi Arabia, domicile in Egypt),  
Saudi Europe Line SA, member of the Orri Group (Panama), Saudi Europe Lines

JDI 1990, pp. 1029-1039

(cited: *ICC Case No. 5730*, in para. 4)

ICC Case No. 6149 (1990)

Daewoo (Korea) v. Farhat (Jordanian)

Revue de l'arbitrage (1997), pp. 70-75

(cited: *ICC Case No. 6149* in paras. 66; 67)

ICC Case No. 6162 (1990)

Consultant (France) v Egyptian Local Authority (Egypt)

ICCA YB Vol. XVII, 1992, pp. 153-163

(cited: *ICC Case No. 6162*, in para. 33)

ICC Case No. 7331 (1994)

Seller (Yugoslavia) v Buyer (Italy)

JDI 1995, pp. 1001-1009

(cited: *ICC Case No. 7331*, in: para 2)

ICC Case No. 8786 (1997),

Claimant (Turkey) v Defendant (Germany)

ICC International Court of Arbitration Bulletin, Vol.11/No. 2, pp. 70-76

(cited: *ICC Case No. 8786*, in para. 91)

ICC Case No. 8910 (1998)

Company (France) v Company (United Arab Emirates)

JDI 2000, pp. 1085-1096

(cited: *ICC Case No. 8910*, in para. 3)



**Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft**

Buyer (Germany) v. Seller (Austria)

15 June 1994,

CISG- online No. 93

(cited: *Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, 15 June 1994*, in para. 2)

**Schiedsgericht der Hamburger freundschaftlichen Arbitrage,**

Buyer (Germany) v. Seller (Czech Republic),

29 December 1998,

Neue Juristische Wochenschrift-Rechtsprechungs-Report Zivilrecht (NJW-RR) (1999), pp. 780-782

(cited: *Schiedsgericht der Hamburger freundschaftlichen Arbitrage, 29 December 1998*, in para. 128)

**Schiedsgericht der Börse für Landwirtschaftliche Produkte Wien,**

Buyer (Poland) v. Seller (Austria),

10 December 1997,

CISG-online No. 351,

Österreichische Zeitschrift für Rechtsvergleichung (östZRVgl) (1998), pp. 211-220

(cited: *Schiedsgericht der Börse für Landwirtschaftliche Produkte Wien, 10 December 1997*, in paras. 130; 132)

**Zurich Chamber of Commerce,**

China National Machinery & Equipment Import & Export Corporation v. Loebersdorfer Maschinenfabrik AG (Austria)

11 February 1993,

Case No. 188 (1991)

Quoted according to: Marc Blessing, “State Arbitrations: Predictably Unpredictable Solutions?”

(cited: *Zurich Chamber of Commerce, 11 February 1993*, in paras. 6; 8)

**STATEMENT OF FACTS**

- 18 January 2008** Mr. Joseph Tisk (hereinafter referred to as “CLAIMANT”), doing business as Reliable Auto Imports, decides to purchase 100 of Universal Auto Manufacturers’, S.A. (hereinafter referred to as “UNIVERSAL”) Tera cars. It approaches UAM Distributors Oceania Ltd (hereinafter referred to as “UAM”), UNIVERSAL’s distributor for Oceania and Mediterraneo and concludes a contract about the sale of 100 Tera cars with UAM.
- 6 February 2008** The first consignment of 25 cars is shipped from UAM, Oceania, to CLAIMANT, Mediterraneo.
- 12 February 2008** CLAIMANT is approached by Patria Importers, Ltd (hereinafter referred to as “Patria”) with an offer of 20 new Indo cars.
- 18 February 2008** The Tera cars arrive in Mediterraneo and are made available to CLAIMANT the same day. When they are driven to CLAIMANT’s showroom and the storage area it is noted that due to severe misfiring the cars are almost undriveable.
- 19 February 2008** CLAIMANT rejects Patria’s offer concerning the Indo cars.
- 21 February 2008** A mechanic inspects 10 of the defective Tera cars on behalf of CLAIMANT, but cannot determine what is wrong with them, though he suggests that an Engine Control Unit (ECU) problem is the likely cause.
- 22 February 2008** CLAIMANT calls UAM in order to report the situation and sends him a coextensive email.
- 27 February 2008** UAM informs CLAIMANT that its service personnel cannot identify the defect of the cars, although an ECU issue is considered to be most likely.
- 28 February 2008** UNIVERSAL informs CLAIMANT that it will undertake to repair the defective cars. Repairing the cars would require specially trained personnel and special equipment which is promised to be shipped by air to Mediterraneo within three days.
- CLAIMANT inquires for the duration of the repairing process.



UNIVERSAL responds that this cannot be determined as long as its personnel had not fixed several cars. If the ECUs had to be replaced or if there was a more fundamental problem, it would be a long-winded reparation. Therefore, it would be impossible to guarantee that the cars will be repaired at a fixed date.

**29 February 2008** CLAIMANT accepts Patria's offer for the Indo cars. On the same day CLAIMANT sends a message to UAM stating that it is cancelling the contract and later informs UNIVERSAL thereof. CLAIMANT also demands the return of its down payment of USD 380,000 from UAM.

**09 April 2008** The district court in Port City, Oceania, commences insolvency proceedings regarding UAM.

**17 May 2008** UNIVERSAL decides not to send the service personnel and equipment to CLAIMANT. The defective cars are shipped from Mediterraneo to UNIVERSAL in Equatoriana.

**19 June 2008** UNIVERSAL reports that all 25 Tera cars had been repaired within 5 working days.

**20 June 2008** CLAIMANT reiterates its request for the return of USD 380,000.

**15 August 2008** CLAIMANT submits a request for arbitration to the SCC Arbitration Institute.



## STATEMENT OF PURPOSE

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

- UNIVERSAL is bound by the arbitration agreement between UAM and CLAIMANT (**FIRST ISSUE**)
- The jurisdiction of the Arbitral Tribunal is not affected by the insolvency law of Oceania (**SECOND ISSUE**)
- UNIVERSAL is liable for the breach of contract by UAM (**THIRD ISSUE**)
- There was a fundamental breach of contract authorising CLAIMANT to avoid the contract (**FOURTH ISSUE**)



## ISSUE 1: UNIVERSAL IS BOUND BY THE ARBITRATION AGREEMENT BETWEEN UAM AND CLAIMANT

- 1 The sales contract concluded by CLAIMANT and UAM on 18 January 2008 contained an arbitration agreement [*Claimant's Exhibit No. 1, para. 13, p. 11*]. This agreement was not signed by UNIVERSAL. UNIVERSAL is nevertheless bound by the agreement due to general principles of international arbitration.
- 2 Neither the UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as "UNCITRAL ML") adopted by Danubia, applicable as the *lex loci arbitri*, nor the parties' chosen Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter referred to as "SCC Rules") deal with the question of binding a non-signatory to an arbitration agreement. In such cases a tribunal is free to apply general principles of international commercial arbitration [*ICC Case No. 7331; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, 15 June 1994*].
- 3 It is widely recognised in international arbitration practise that an arbitration clause can be extended to non-signatories [*ICC Case Nos. 2375; 1434; 8910; FOUCHARD/GAILLARD/GOLDMAN, para. 498; POUURET/BESSON, para. 250; SANDROCK, p. 464; SACHS, p. 64*]. A party can be bound by an arbitration agreement despite the fact that it did not consent to the arbitration agreement neither expressly nor tacitly [*SUNKIST SOFT DRINKS v. SUNKIST GROWERS, U.S. Ct. App. 11<sup>th</sup> Circ.; REDFERN/HUNTER, para. 3-30; DERAIS/SCHWARTZ, p. 89; SANDROCK, ibid.*]. This is the case where a non-signatory induced the expectation that it would be bound and not holding the non-signatory to the arbitration agreement would therefore frustrate the other party's reasonable expectation [*Schweizerisches Bundesgericht, 16 October 2003; ICC Case No. 9058; MOSES, p. 38; BLESSING, p. 177; STUCKI, para. 5*]. This principle has often been applied by arbitral tribunals and national courts:
- 4 One of the most prominent decisions in this regard was rendered in *Dow Chemical v. Isover Gobain* applying the so called "group of companies" doctrine [*ICC Case No. 4131*]. The arbitral tribunal held that non-signatories are bound to an arbitration agreement if "by virtue of their role in the conclusion, performance, or termination of the contracts [they] appear[ed] to have been veritable parties to these contracts" [*ICC Case No. 4131, cf. also: ICC Case No. 5730*]. In a later decision the Cour d'Appel Paris went one step further: In the interest of good administration of justice [*HANOTIAU, para. 79*] the existence of a "group of companies" is not necessary to bind a non-signatory [*Cour d'Appel Paris, 7 December 1994*].



- 5 When the Swiss Federal Supreme Court held a non-signatory bound by an arbitration agreement, it based its reasoning on the reasonable expectation of the other party. In this case the signatory and the non-signatory party appeared mutually connected with a uniform purpose and mere geographically separation of tasks. The court held that a party is not only bound if it expressed its consent to the arbitration agreement, but also if its conduct led the other party to expect that it will be bound by the arbitration agreement [*Schweizerisches Bundesgericht, 1 September 1993*].
- 6 In such situations it is justified to extend the arbitration agreement to the non-signatory since the failure to bind it would be contrary to the other party's reasonable expectation [*Zurich Chamber of Commerce, 11 February 1993; BLESSING, p. 177; HABEGGER, para. 8*]. This flows from the general principle of international trade law that a party shall be hold to the expectations it has caused [*GAILLARD, p. 241*].
- 7 Applying said principle, UNIVERSAL is bound by the arbitration agreement since a reasonable person could expect UNIVERSAL to be bound by the arbitration agreement (A). CLAIMANT expected UNIVERSAL to be bound (B) and UNIVERSAL is responsible for this expectation (C).

**A. A REASONABLE PERSON COULD EXPECT UNIVERSAL TO BE BOUND BY THE ARBITRATION AGREEMENT**

- 8 A reasonable person in the position of CLAIMANT could expect UNIVERSAL to be bound by the arbitration agreement. Whether the expectation that a non-signatory will be bound by an arbitration agreement is reasonable has to be determined with regard to all aspects of the contractual relationship [*BLESSING, p. 177*]. It is reasonable for a party to expect a non-signatory to be bound by an arbitration agreement, if the non-signatory and the signatory party appear to be one economic and legal entity [*ICC Case No. 4131; Zurich Chamber of Commerce, 11 February 1993*].
- 9 Several aspects of UNIVERSAL's conduct (I) and business organisation (II) led to the perception that UAM and UNIVERSAL constitute one economic and legal entity.

**I. UNIVERSAL'S CONDUCT CONTRIBUTED TO THE PERCEPTION THAT RESPONDENTS CONSTITUTE ONE LEGAL AND ECONOMIC ENTITY**

- 10 UNIVERSAL's conduct contributed to the perception that UAM and UNIVERSAL (hereinafter referred to as "RESPONDENTS") form one entity in the eyes of third parties.



- 11 UNIVERSAL adopted a superior role in the performance of the contract. It was UNIVERSAL, not UAM, which repaired the cars [*Claimant's Exhibit No. 4, paras. 2 and 3, p. 15*]. Hence, UNIVERSAL undertook UAM's obligation to cure the lack of conformity. Furthermore, the correspondence between CLAIMANT and UAM concerning the problems of the Tera cars consisted of only two phone calls [*Statement of Claim, paras. 13 and 14, p. 5*], whereas UNIVERSAL communicated with CLAIMANT continually by mail and phone [*Claimant's Exhibits Nos. 3, 4, 6, pp. 13, 15, 17; Statement of Claim, para. 17, p. 6*]. Hence, CLAIMANT was under the impression that UNIVERSAL was as much involved in the contract as UAM. UNIVERSAL encouraged this impression by stating that it wished to have a "long and mutually profitable relationship" with CLAIMANT [*Claimant's Exhibit No. 4, para. 5, p. 15*]. A reasonable person had to assume that UNIVERSAL referred to the contractual relationship concerning the Tera cars. Therefore, UNIVERSAL took a leading role in the contract.
- 12 Thus, UNIVERSAL's conduct contributed to the perception that RESPONDENTS constitute one legal and economic entity.

## **II. THE BUSINESS ORGANISATION OF UNIVERSAL AND UAM CONTRIBUTED TO THE PERCEPTION THAT RESPONDENTS CONSTITUTED ONE LEGAL AND ECONOMIC ENTITY**

- 13 The business organisation of UAM and UNIVERSAL, which provided for strong links between each of them, contributed to the impression that they formed one entity.
- 14 First, UNIVERSAL and UAM share the same name. The use of identical logos by two parties amplifies the assumption that they constitute one legal entity [*Schweizerisches Bundesgericht, 1 September 1993*]. UAM is merely an abbreviation for UNIVERSAL Auto Manufacturers [*Procedural Order No. 2, para. 11, p. 42*]. Moreover, this abbreviation is used in UNIVERSAL's e-mail address "info@uam.eq" as well as in the one of UAM, "sales@uamdo.oc" [*Statement of Claim, paras. 4 and 5, p. 4 (emph. add.)*].
- 15 Second, UAM appeared to be the sales department of UNIVERSAL in Oceania and Mediterraneo. UNIVERSAL did not have any other representation in these countries [*Statement of Claim, para. 7, p. 5*]. UNIVERSAL and UAM had "worked closely together for the past fifteen years developing the market for UNIVERSAL products" in Mediterraneo [*Claimant's Exhibit No. 16, para. 3, p. 27*]. In these fifteen years, UAM never sold any products other than those of UNIVERSAL [*Procedural Order No. 2, para. 32, p. 46*]. Hence, UAM has always represented UNIVERSAL and its products in Oceania and Mediterraneo and therefore appeared to be UNIVERSAL's sales department.



- 16 Third, UAM appeared to depend on UNIVERSAL. The sales contracts which UAM concluded with retailers encompassed the obligation of repairing the delivered products in case they were defective. However, in the case at bar UAM was unable to repair the Tera cars and therefore to fulfil all contractual obligations on its own. The regional manager of UNIVERSAL, stated that repairing the cars required “special equipment and specially trained personnel that UAM does not have” [*Claimant’s Exhibit No. 4, para. 2, p. 15*]. Therefore, a reasonable person had to assume that UNIVERSAL would generally support UAM in a situation concerning defective products. UNIVERSAL’s former conduct contributed to this assumption as it had already performed necessary repairs in a previous case, in which UAM was not able to do so [*Procedural Order No. 2, para. 15, p. 43*]. Hence, UAM appeared to depend on UNIVERSAL.
- 17 Since UNIVERSAL held a 10 percent stake in UAM, UNIVERSAL might argue that UAM and itself did not appear as one legal entity. UNIVERSAL’s number of shares, however, did not represent its factual influence on UAM. Due to the fact that UAM could not sell products other than UNIVERSAL’s without its approval, it controlled UAM’s range of goods [*Procedural Order No. 2, para. 32, p. 46*]. Additionally, UAM was unable to expand its operations without UNIVERSAL’s help [*Procedural Order No. 2, para. 32, p. 46*]. In public it was even believed that not UAM’s attempt to expand, but UNIVERSAL itself caused UAM’s insolvency [*Claimant’s Exhibit No. 16, para. 4, p. 27*]. Thus, UNIVERSAL’s legal influence on UAM is irrelevant for the justification of CLAIMANT’s expectation. This expectation arose from UNIVERSAL’s appearance in public and its implication in the specific contract. Hence, RESPONDENTS may not argue that UNIVERSAL and UAM did not appear as one legal entity.
- 18 To summarise, UNIVERSAL’s conduct and business organisation led to the reasonable perception that UNIVERSAL and UAM constitute one legal and economic entity. Thus, it was reasonable to expect UNIVERSAL to be bound by the arbitration agreement.

## **B. CLAIMANT EXPECTED UNIVERSAL TO BE BOUND**

- 19 CLAIMANT expected UNIVERSAL to be bound by the arbitration agreement.
- 20 First, it expressed this expectation by stating that it would be immaterial to it whether UNIVERSAL or UAM would repair the Tera cars [*Claimant’s Exhibit No. 2, para. 3, p. 12*]. Furthermore, CLAIMANT informed both UNIVERSAL and UAM of the avoidance of the contract [*Claimant’s Exhibit No. 10, para. 3, p. 21; Claimant’s Exhibit No. 11, paras. 1 and 4, p. 22*]. These facts show that CLAIMANT did not differentiate between UNIVERSAL and UAM with



regard to the performance of the contract.

- 21 Second, CLAIMANT displayed its expectation of UNIVERSAL being bound when it permitted UNIVERSAL to become engaged in the performance of the contract. Since CLAIMANT and UAM concluded a sales contract containing an arbitration clause, CLAIMANT wanted to solve all disputes arising out of this contract by international arbitration [*Claimant's Exhibit No. 1, para. 13, p. 11; Procedural Order No. 2, para. 16, p. 43*]. It would have been unreasonable for CLAIMANT to allow UNIVERSAL to repair the cars when it was not also bound by the arbitration agreement. If UNIVERSAL's interference had led to a violation of CLAIMANT's goods, it would have been difficult for the latter to claim damages as UNIVERSAL has its seat in a different country.
- 22 Thus, CLAIMANT's conduct shows that it expected UNIVERSAL to be bound by the arbitration agreement.

### C. UNIVERSAL IS RESPONSIBLE FOR CLAIMANT'S EXPECTATION

- 23 UNIVERSAL is responsible for CLAIMANT's expectation. A non-signatory party is responsible for a third party's expectation of it to be bound by the arbitration agreement if the non-signatory party has caused this expectation and if it was aware of the existence the arbitration agreement [*Schweizerisches Bundesgericht, 1 September 1993; Cour d'Appel Paris, 30 November 1988*]. UNIVERSAL was aware of the existence and scope of the arbitration agreement contained in the sales contract between UNIVERSAL and UAM. UNIVERSAL reviewed the form contracts UAM used for the sale of UNIVERSAL's products [*Procedural Order No. 2, para. 16, p. 43*]. Furthermore, CLAIMANT's expectation was caused by UNIVERSAL's conduct and intervention in the contractual performance for the following reasons:
- 24 First, UNIVERSAL is responsible for the business organisation of UAM and itself and therefore for CLAIMANT's expectation arising out of this business organisation. UNIVERSAL sells its products through subsidiaries, main importers and franchise dealers in order to distribute responsibilities and to limit its liability. However, UNIVERSAL did not stick to this legal separation in practise. To the contrary, UNIVERSAL deliberately created the impression that itself and UAM formed one and the same entity and therefore may not rely on its separate legal structure. UNIVERSAL was involved in the operations of UAM and tried to control its corporate affairs [*Claimant's Exhibit No. 16, para. 5, p. 27; Procedural Order No. 2, para. 32, p. 46*]. UAM was founded as a joint-venture of UNIVERSAL and Oceania Partners



[*Statement of Claim, para. 30, p. 8*]. It has to be assumed that it was UNIVERSAL that determined UAM's name in order to emphasise their close connection. If a child bears your name, people expect you to be the parent.

- 25 Moreover, UNIVERSAL insisted that UAM would not sell any other products but UNIVERSAL's [*Procedural Order No. 2, para. 32, p. 46*]. Ensuring that UAM was directly associated with UNIVERSAL's products and reputation was also in UNIVERSAL's interest as the reputation of a car manufacturer is a crucial factor for determining a customer's purchase decision. Hence, UNIVERSAL is responsible for its business organisation and the expectations arising out of this.
- 26 Second, UNIVERSAL deliberately intervened in the contractual performance and is therefore responsible for CLAIMANT's expectation caused by this interference. UNIVERSAL offered to repair the cars and contacted CLAIMANT directly and not via UAM [*Claimant's Exhibit No. 4, para. 3, p. 15*]. Moreover, CLAIMANT could not perceive this involvement as a mere act of courtesy as UNIVERSAL stated that it wanted to "stand behind its products" and wished to have a "long and mutually profitable relationship" with CLAIMANT [*Claimant's Exhibit No. 4, para. 3, p. 15*]. All of these acts contributed to CLAIMANT's expectation. Hence, it was UNIVERSAL's deliberate conduct and intervention in the contractual performance which caused CLAIMANT's expectation.
- 27 Third, UNIVERSAL itself informed CLAIMANT that UAM did not have the means required to repair the cars [*Claimant's Exhibit No. 4, para. 2, p. 15*]. This evoked the impression that UAM had to rely on UNIVERSAL's support in general. In fact, Universal did cure the defect of cars delivered by UAM in a previous case [*Procedural Order No. 2, para. 32, p. 46*].
- 28 To conclude, UNIVERSAL is responsible for the fact that CLAIMANT reasonably expected it to be bound by the arbitration agreement.

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### CONCLUSION TO ISSUE 1

- 29 UNIVERSAL is also bound by the arbitration agreement contained in the sales contract. This is due to the fact that CLAIMANT reasonably expected UNIVERSAL to be bound by the arbitration agreement and that UNIVERSAL induced this expectation.



## **ISSUE 2: THE INSOLVENCY LAW OF OCEANIA DOES NOT AFFECT THE JURISDICTION OF THE ARBITRAL TRIBUNAL**

30 On 9 April 2008, the District Court of Port City, Oceania, commenced insolvency proceedings against UAM. Oceanian insolvency law stipulates to invalidate any arbitration agreement which the insolvent had consented to in the past [*Claimant's Exhibit No. 14, para. 4, p. 25*]. Nevertheless, the insolvency law of Oceania does not affect the Arbitral Tribunal's jurisdiction over UAM and UNIVERSAL (A). Even if the Tribunal were to find that its jurisdiction is affected by Oceanian insolvency law, it still has jurisdiction with regard to UNIVERSAL (B).

### **A. THE INSOLVENCY LAW OF OCEANIA DOES NOT AFFECT THE ARBITRAL TRIBUNAL'S JURISDICTION OVER THE DISPUTE AGAINST UAM AND UNIVERSAL**

31 Despite UAM's insolvency the Arbitral Tribunal has jurisdiction over the dispute between CLAIMANT and RESPONDENTS since its jurisdiction is solely determined by Danubian law (I). The jurisdiction of the Arbitral Tribunal is not further affected by eventual non-enforceability of the award in Oceania (II).

#### **I. THE JURISDICTION IS SOLELY DETERMINED BY DANUBIAN LAW**

- 32 Danubian law determines the arbitrability of the dispute and under Danubian law arbitration is not hindered by UAM's insolvency [*Statement of Claim, para. 29, p. 8*].
- 33 Whether a subject matter can be arbitrated is determined by the law of the seat of arbitration [*ICC Case No. 6162; VAN DEN BERG, p. 152; LEW/MISTELIS/KRÖLL, para. 9-31; POUURET/BESSON, para. 332; ARFAZADEH, p. 75*]. Several reasons necessitate this finding.
- 34 First, it complies with the parties' intentions to apply the law of the seat of arbitration to determine the arbitrability of the dispute. In the absence of a choice-of-law clause, however, "we must presume, as it is the nature of arbitration agreements to provide for given procedures in a given place, that the parties intend that the law of the place where the arbitration proceedings are held will apply" [*Tokyo High Court, 30 May 1994; cf. also: UNION OF INDIA V. MCDONNELL DOUGLAS COR., Q.B.D.*].
- 35 The parties did not agree upon a choice-of-law clause [*Statement of Claim, para. 25, p. 8*]. However, they did agree on Vindobona, Danubia as the seat of arbitration [*Claimant's Exhibit No. 1, para. 13, p. 11*]. Therefore, the parties implicitly chose the law of Danubia to govern



the arbitration as *lex loci arbitri*.

- 36 Second, Art. 1(5) UNCITRAL ML stipulates that the law of the seat of arbitration may inhibit the arbitrability of certain disputes. Laws of other countries, i.e. the country of origin of either party, are not considered to be relevant [ARFAZADEH, p. 75]. This indicates that the law of the seat of arbitration determines the arbitrability of a dispute.
- 37 Third, if the arbitration proceedings and the arbitral award rendered do not comply with the law of the seat of arbitration, the award can be set aside according to Art. 34(2)(a)(i) or (b)(i) UNCITRAL ML. By virtue of this provision, an award can be set aside if the arbitration agreement is void or if the dispute is not arbitrable under the law of the seat of arbitration. Applying the law of the seat of arbitration ensures the validity of the award [LEW/MISTELIS/KRÖLL, para. 9-31; MOSES, p. 68].
- 38 Accordingly, the question whether or not UAM's insolvency has any influence on the proceedings at hand is governed by Danubian law. As UAM's insolvency does not hinder arbitration under Danubian law, the Arbitral Tribunal has jurisdiction over the dispute.

## **II. THE JURISDICTION OF THE ARBITRAL TRIBUNAL IS NOT FURTHER AFFECTED BY NON-ENFORCEABILITY OF THE AWARD IN OCEANIA**

- 39 The stipulated voidance of the arbitration agreement due to Oceanian law only affects the enforceability of the award in Oceania. However, the Arbitral Tribunal does not need to consider enforceability in Oceania when determining its jurisdiction. The enforceability of an award is not decisive for determining the jurisdiction of the Arbitral Tribunal (a). Even if the Tribunal were to find that the enforceability of an award is relevant, its jurisdiction would be ensured as an award would be enforceable in Equatoriana and presumably in Polaria (b).

### **a. The enforceability of an award is not decisive for determining the Arbitral Tribunal's jurisdiction**

- 40 At the stage of determining the jurisdiction of the Tribunal the enforceability of an award is not decisive. Considering the enforceability would contradict the purpose of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "New York Convention") (aa). Furthermore, most awards are effective without legal enforcement (bb). Finally, RESPONDENTS may not argue that Art. 47 SCC Rules requires the Arbitral Tribunal to decline its jurisdiction (cc).



**aa. Considering enforceability at the stage of jurisdiction would contradict the purpose of the New York Convention**

- 41 Declining the Arbitral Tribunal's jurisdiction on the ground that an award will not be enforceable would contradict the purpose of the New York Convention.
- 42 The purpose of the New York Convention is to facilitate the circulation and enforcement of foreign arbitral awards [*MEADOWS INDEMNITY CO. LTD V. BACCALA INS CO. ET ALIA, US Dist. Ct. (E.D.N.Y.); KAUFMANN-KOHLER/RIGOZZI, para. 884*]. Therefore, the New York Convention distinguishes between the question of an arbitral tribunal's jurisdiction and the enforcement of an award. Art. V(2)(a) New York Convention expressly gives the national law of the enforcing state the leeway to prohibit the enforcement of an arbitral award. Art. II New York Convention, which concerns an arbitral tribunal's jurisdiction, does not mention the law of the enforcing state. Hence, it follows from said articles that the law of the enforcing state can only exclude the enforcement of an award and not an arbitral tribunal's jurisdiction [*MEADOWS INDEMNITY CO. LTD V. BACCALA INS CO. ET ALIA, US Dist. Ct. (E.D.N.Y.); Cour d'Appel Bruxelles, 4 October 1985*].
- 43 If the national law of an enforcing state could preclude an arbitral tribunal's jurisdiction Art. V(2)(a) would be redundant. No arbitral tribunal would arrive at an award to which the Convention's criteria of enforceability had to be applied since it would have declined its jurisdiction already. Hence, the laws of enforcing states cannot preclude an arbitral tribunal's jurisdiction. A universally challenge-proof award is neither an aim of international arbitration, nor should it be the quest of the arbitrator [*MANTILLA-SERRANO, p. 73*].
- 44 According to Art. V(2)(a) New York Convention the law of Oceania is relevant at the stage of enforcement of an award. When determining the Arbitral Tribunal's jurisdiction, however, the enforceability of an award in Oceania is of no significance.
- 45 To conclude, it would contradict the New York Convention if non-enforceability in Oceania could inhibit the Arbitral Tribunal's jurisdiction.

**bb. Most awards are effective without legal enforcement**

- 46 Non-enforceability does not rule out effectiveness of an award. An award issued by the Arbitral Tribunal would be effective even if it was not legally enforced in Oceania. In the majority of cases, an award is paid without being legally enforced – either spontaneously or under the pressure of moral or professional sanctions [*RHÔNE MÉDITERRANÉE V. ACHILLE*



*LAURO ET ALIA, U.S. Dist. Ct. (District of St. Thomas and St. John); Cour d'Appel Bruxelles, 4 October 1985; SCHLOSSER, para. 755; MOSES, p. 69*]. It is possible that an award issued by the Arbitral Tribunal will be paid despite its lack of enforceability in Oceania. Thus, although an award might not be legally enforceable in Oceania, it will still be effective.

**cc. RESPONDENTS may not argue that Art. 47 SCC Rules requires the Arbitral Tribunal to decline its jurisdiction**

- 47 RESPONDENTS may not argue that Art. 47 SCC Rules obliges the Arbitral Tribunal to decline its jurisdiction on the ground of a lack of enforceability in Oceania. Art. 47 SCC Rules sets up the general rule that an arbitral tribunal “shall make every reasonable effort to ensure that an award will be legally enforceable”. It serves as a guideline in the case of a lacuna in the rules, but does not oblige an arbitral tribunal to ensure enforceability by all means [*DERAINS/SCHWARTZ, pp. 385-386 commenting on Art. 35 ICC Rules, which corresponds with Art. 47 SCC Rules*].
- 48 Art. 47 SCC Rules is not applicable in the case at bar since there is no lacuna in the rules. The jurisdiction of the Arbitral Tribunal is determined by Danubian law [*see supra paras. 32-38*] which is conclusive.
- 49 Moreover, the refusal of jurisdiction by the Arbitral Tribunal would not constitute a reasonable effort to ensure enforceability of the award in terms of Art. 47 SCC Rules. Art. 47 SCC Rules only refers to efforts which grant the effectiveness of the outcome of arbitral proceedings, but not to those which lead to its termination. The enforcement of an award cannot be ensured by refusing to render it.
- 50 Hence, it would be inconsistent with the purpose of Art. 47 SCC Rules, if the Arbitral Tribunal declined its jurisdiction.
- 51 To conclude, considering the enforceability of an award at the stage of determining the Arbitral Tribunal’s jurisdiction would not comply with Art. V(2)(a) New York Convention. Art. 47 SCC Rules does not oblige the Arbitral Tribunal to render a universally challenge-proof award.
- 52 Thus, non-enforceability of an award is not decisive for determining whether or not the Arbitral Tribunal has jurisdiction.

**b. An award will be enforceable in Equatoriana and presumably in Polaria**

- 53 Even if the Tribunal were to consider enforceability at this stage of the proceedings, its jurisdiction would be ensured. Oceanian courts might prohibit the enforcement of the award in Oceania according to Art. V(2)(a) New York Convention. However, an award will be enforceable in other countries, i.e. Equatoriana and presumably in Polaria.
- 54 An award can be enforced in any Contracting State to the New York Convention in which the debtor has assets [*BORN*, p. 707; *MOSES*, p. 69; *LEHMANN*, p. 131]. As long as it is enforceable in other jurisdictions, non-enforceability in one particular country cannot preclude an arbitral tribunal's jurisdiction [*MEADOWS INDEMNITY CO. LTD. V. BACCALA INS CO. ET ALIA*, *US Dist. Ct. (E.D.N.Y.)*].
- 55 Since UNIVERSAL is incorporated in Equatoriana, which is a Contracting State to the New York Convention [*Statement of Claim*, para. 5, p. 4; para. 26, p. 8], an award against it will be enforceable in Equatoriana.
- 56 Furthermore, an award against UAM can presumably be enforced in Polaria. UAM has a claim for money paid into the court of Polaria [*Procedural Order No. 2*, para. 34, p. 47]. Since Polaria is also a Contracting State to the New York Convention [*Procedural Order No. 3*, p. 47] an award possibly can be enforced in Polaria.
- 57 The request of UAM's insolvency representative, Ms. Powers, to the court in Polaria to order the payment of the claim to the estate of UAM [*Procedural Order No. 2*, para. 34, p. 47] does not suffice to prohibit the jurisdiction of the Arbitral Tribunal.
- 58 First, the enforcement of the award is still possible as it is uncertain whether the court in Polaria will hold Ms. Powers' request justified. Such a case has never occurred in Polarian courts before and it not governed by Polarian statutory law [*Procedural Order No. 2*, para. 34, p. 47]. Therefore, it is uncertain how the court will decide. However, the possibility to enforce in Polaria must be sufficient to consider the award as enforceable in Polaria as the Arbitral Tribunal's jurisdiction must not depend on a pending case before a foreign court.
- 59 Second, it is at CLAIMANT's own risk how the court in Polaria decides. In general, it is the harm of the claiming party if an award cannot be enforced; it must be within this party's discretion to bear the risk of an unenforceable award by initiating arbitration proceedings [*Schweizerisches Bundesgericht*, 23 June 1992; *MOSES*, p. 69, *ARFAZADEH*, p. 75]. Hence, the jurisdiction of the Arbitral Tribunal cannot be declined on the ground that the enforceability in Polaria is uncertain. For these reasons, Ms. Powers' request does not suffice



to prohibit the Tribunal's jurisdiction.

- 60 Thus, even if the Tribunal were to consider enforceability at this stage, its jurisdiction would be ensured as an award will be enforceable in Polaria and Equatoriana.
- 61 To conclude, the jurisdiction of the Arbitral Tribunal is not prohibited by non-enforceability in Oceania. Oceanian insolvency law does not affect the Arbitral Tribunal's jurisdiction.

#### **B. IN ANY CASE, THE ARBITRAL TRIBUNAL HAS JURISDICTION REGARDING UNIVERSAL**

- 62 Even if the Arbitral Tribunal found that it had no jurisdiction over UAM, it would have jurisdiction over UNIVERSAL. UNIVERSAL asserts that it cannot be bound by the arbitration agreement since according to Oceanian law the arbitration clause is void [*Answer of Universal, para. 5, p. 32*]. First, Oceanian insolvency law does not apply to UNIVERSAL (I). Second, contrary to Respondent's assertion, the arbitration agreement with UNIVERSAL is not void (II).

#### **I. OCEANIAN INSOLVENCY LAW DOES NOT APPLY TO UNIVERSAL**

- 63 Oceanian insolvency law does not apply to UNIVERSAL and, therefore, cannot exclude the Tribunal's jurisdiction. The insolvency provisions of Oceania apply only to insolvents which are incorporated in Oceania [*Claimant's Exhibit No. 14, para. 4, p. 25*]. The purpose of insolvency provisions is to guarantee an equal treatment of all creditors and an equitable, orderly and systematic dispersion of the insolvent's assets by centralising all claims [*LEW/MISTELIS/KRÖLL, para. 9-56; LEHMANN, p. 130*]. The Regional Court of Port City, Oceania, has exclusive jurisdiction with regard to any claims against UAM [*Claimant's Exhibit No. 14, para. 3, p. 25*]. This jurisdiction, however, does not extend to UNIVERSAL. As UNIVERSAL is neither incorporated in Oceania nor insolvent it does not fall within the scope of the insolvency law of Oceania.

#### **II. THE ARBITRATION AGREEMENT WITH UNIVERSAL IS NOT VOID**

- 64 Although UNIVERSAL argues that an arbitration agreement does not exist [*Answer of Universal, para. 5, p. 32*], the agreement is still in force. The provisions of Oceanian insolvency law concern the objective arbitrability of the dispute and thereby take effect regarding UAM. They do not touch on the validity of the arbitration agreement itself.
- 65 The validity of an arbitration agreement is based on the parties' consent to arbitrate



[*FOUCHARD/GAILLARD/GOLDMAN*, para. 532; *MOSES*, p. 65; *ARFAZADEH*, p. 80]. The objective arbitrability of a dispute is affected if provisions of national law deny arbitration concerning particular subject matters due to public policy considerations [*REDFERN/HUNTER*, para. 3-12; *LEW/MISTELIS/KRÖLL*, para. 9-2; *KAUFMANN-KOHLER/RIGOZZI*, paras. 190 and 191; *LAZIC*, p. 52]. Objective arbitrability may, hence, prevent a dispute from being arbitrated, whereas an invalid agreement is ineffective as a whole.

- 66 In *ICC Case No. 6149* the validity of the arbitration agreement between the seller (Korea) and the buyer (Jordan) was challenged by the Jordanian defendant on grounds of a provision of Jordanian law by which the agreement was “null and void”. In response to the defendant’s argument the Tribunal held that the “obvious purpose” of the invoked provision was to deny arbitrability and not to void the arbitration agreement as a whole.
- 67 The Tribunal’s holding also applies to the case at hand. If a party is insolvent, limitations of arbitration are based on public policy considerations and therefore are matters of objective arbitrability [*LEW/MISTELIS/KRÖLL*, para. 9-56; *FOUCHARD/GAILLARD/GOLDMAN*, para. 1617; *REDFERN/HUNTER*, paras. 3-13 and 3-14]. Oceanian insolvency law, as cited by RESPONDENTS, stipulates that the arbitration agreement is “void” [*Claimant’s Exhibit No. 14*, para. 4, p. 25]. However, corresponding to the holding in *ICC Case No. 6149*, the purpose of the provision invoked by UNIVERSAL is to prevent a situation whereby national courts are deprived of their jurisdiction as far as matters of public importance, i.e. insolvency, are concerned. The desired effect of the law is therefore to deny arbitrability on the ground of Oceania’s public policy considerations, but not to invalidate the arbitration agreement as a whole: Oceanian insolvency law freezes the arbitration agreement regarding UAM, it does not melt it. UNIVERSAL is not barred from arbitration since the arbitration agreement with UNIVERSAL is not void.
- 68 Even if the Tribunal found that UAM’s insolvency affects its jurisdiction, this would have no impact on its jurisdiction over UNIVERSAL.

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## CONCLUSION TO ISSUE 2

- 69 The Arbitral Tribunal’s jurisdiction is not affected by the insolvency law of Oceania because Danubian law governs the dispute exclusively and non-enforceability in Oceania cannot prohibit the Arbitral Tribunal’s jurisdiction. In any case, the insolvency law of Oceania has no impact on the Tribunal’s jurisdiction regarding UNIVERSAL.

**ISSUE 3: UNIVERSAL IS LIABLE FOR THE BREACH OF CONTRACT**

70 UAM delivered cars which were not in conformity with the contract and therefore breached the contract under Art. 35(1) of the Convention on Contracts about the International Sale of Goods (hereinafter referred to as “CISG”). The CISG applies according to its Art. 1(1)(a) as all three parties have their places of business in different Contracting States. UNIVERSAL is liable for the breach of contract committed by UAM as it gave a representation of quality to CLAIMANT (A). Even if the Tribunal were to deny liability based on a representation of quality, UNIVERSAL must be held liable due to a modification of contract (B).

**A. UNIVERSAL IS LIABLE FOR THE BREACH OF CONTRACT AS IT GAVE A REPRESENTATION OF QUALITY**

71 UNIVERSAL is liable because a reasonable person would have understood its conduct as a representation of quality. Under the CISG a manufacturer is directly liable to a subpurchaser when he gives an independent representation of quality which creates a direct contractual link between them [*HONNOLD, Art. 4, para. 6; FLECHTNER, para. 63*]. Such representation of quality does not need to be written or explicit [*HONNOLD, Art. 4, para. 63; FLECHTNER, ibid.*], but any declaration substantially advertising the quality of its own products is sufficient. The liability based on the representation of quality is effective when the subpurchaser completes a transaction with the distributor.

72 Independent of the sales contract between the subpurchaser and the distributor a direct contractual relationship with the manufacturer is possible under the CISG. The wording of Art. 4 CISG, defining the scope of the Convention as covering only the obligations of the seller and the buyer, is too narrow [*SCHLECHTRIEM, para. 41, p. 40; FERRARI/FLECHTNER/ BRAND/FERRARI, p. 97; FLECHTNER, para. 63; MÜKO-BGB/WESTERMANN, Art. 4, para. 1*]. Therefore, Art. 4 CISG does not hinder direct liability of the manufacturer [*CARRETTE, p. 596; HEUZÉ, p. 523; RAYNARD, p. 1023*].

73 Accordingly, courts found that a contractual relationship between the subpurchaser and the manufacturer was established when the manufacturer substantially participated in the contract [*ASANTE TECHNOLOGIES v. PMC-SIERRA, Fed. Dist. Ct. California; Cour d'Appel Grenoble, 15 May 1996*]. In these cases, manufacturers delivered deficient technical products. Although they had not directly concluded a contract with the subpurchaser, the courts found them to be liable because of their substantial participation in the sales contract.



- 74 Such interpretation of Art. 4 CISG is also appropriate as it reduces transaction costs and the manufacturer of the product is in a better position to prevent or cure defects of his own goods. He has the technical knowledge and the equipment. It is also the manufacturer who produced the defective goods. Thus, establishing a direct liability in fact leads to the correct economic result, i.e. liability rests with the party who is responsible for the defect.
- 75 This interpretation is all the more justified in cases where the representation of quality was the decisive factor for the conclusion of the contract [*HONNOLD, Art. 4, para. 63*], while the distributor was of minor importance. UNIVERSAL's advertising made CLAIMANT buy the Tera cars. Consequently, CLAIMANT wanted to buy UNIVERSAL products because it was convinced of their quality.
- 76 A reasonable person must have interpreted UNIVERSAL's conduct as a representation of quality under Art. 8(2) CISG.
- 77 First, such representation of quality can be drawn from the way UNIVERSAL promoted its Tera cars. It advertised them by referring to "very favorable reviews" and stated that therefore the problems with the Tera cars were surprising [*Claimant's Exhibit No. 3, para. 1, p. 13*]. Furthermore, it assured CLAIMANT that the Tera cars were reliable [*Claimant's Exhibit No. 4, para. 3, p. 15*].
- 78 Second, UNIVERSAL encouraged CLAIMANT to continue to buy its products [*Claimant's Exhibit No. 12, para. 5, p. 23*]. A representation is given when a manufacturer directly contacts the buyer and persuades him to purchase his products from one of his distributors [*HONNOLD, Art. 4, para. 63*]. In spite of the dispute with CLAIMANT concerning the defective Tera cars, UNIVERSAL encouraged CLAIMANT to purchase its products from its new distributor Patria Importers [*Claimant's Exhibit No. 12, para. 5, p. 23*]. The fact that it gave a representation in such a difficult situation leads to the conclusion that UNIVERSAL is generally willing to encourage buyers to directly purchase its products. Therefore, it substantially participates in sales contracts by advertising appeals.
- 79 Third, UNIVERSAL had an essential interest in giving such a representation. The Tera car was a new prototype developed by UNIVERSAL [*Statement of Claim, para. 9, p. 5*] and was yet to be established on the market. Any problems with the new cars could influence the reputation of the Tera brand and therefore affect the sales trend in a negative manner. Hence, UNIVERSAL needed to avoid unfavourable press concerning the Tera cars as its reputation is essential for its market position.



80 The direct contractual relationship between CLAIMANT and UNIVERSAL was established when CLAIMANT completed the transaction with UAM. Hence, UNIVERSAL could not exclude its liability afterwards.

81 To conclude, a reasonable person in the position of CLAIMANT had to understand UNIVERSAL's conduct and statements as a representation of quality.

#### **B. UNIVERSAL MUST BE HELD LIABLE BECAUSE IT ENTERED THE CONTRACTUAL RELATIONSHIP**

82 Even if the Tribunal were to deny UNIVERSAL's liability based on a representation of quality, UNIVERSAL is still liable for the breach by UAM. UNIVERSAL, UAM and CLAIMANT agreed to modify the sales contract pursuant to Art. 29(1) CISG. UNIVERSAL impliedly offered to enter the contractual relationship (I). UAM and CLAIMANT accepted this offer (II).

83 A contract may be modified by the mere agreement of the parties under Art. 29(1) CISG. Modifications do not require an explicit agreement but can be made implicitly [*OGH*, 29 June 1999; *BRUNNER*, Art. 29, para. 1; *ACHILLES*, Art. 29, para. 1; *HERBER/CZERWENKA*, Art. 29, para. 4]. The principle of party autonomy (Art. 6 CISG) allows a third party to enter the contractual relationship [*SCHMIDT-KESSEL*, p. 61].

#### **I. UNIVERSAL IMPLIEDLY OFFERED TO BECOME A PARTY TO THE CONTRACT**

84 A reasonable person in the position of CLAIMANT had to assume that UNIVERSAL offered to enter the contractual relationship between UAM and CLAIMANT.

85 First, UNIVERSAL offered to undertake all necessary repairs for the defective Tera cars [*Claimant's Exhibit No. 4, para. 3, p. 15*]. It is the seller's duty to cure the defective goods, Art. 46(3) CISG. Hence, UAM had to repair the Tera cars. However, at hand technical advice was offered by UNIVERSAL and not by UAM [*Claimant's Exhibit No. 3, paras. 2-11, p. 13*]. It was UNIVERSAL which offered to repair the cars and finally repaired them [*Claimant's Exhibits Nos. 4 and 12, paras. 3 and 3, pp. 15 and 23*]. UAM on the contrary did not propose any possibility of supplementary performance. Therefore, UNIVERSAL fulfilled the seller's contractual obligations. A reasonable person would have concluded that UNIVERSAL offered to become a party to the sales contract.

86 Second, UNIVERSAL directly communicated with CLAIMANT, whereas UAM was not involved in the negotiations concerning the repair of the cars [*Claimant's Exhibits Nos. 3-6, pp. 13-17*].



Intensive correspondence between parties can be a substantial proof of a contractual relationship [*COMPROMEX, 29 April 1996*]. UNIVERSAL and CLAIMANT communicated intensively by telephone and letter [*Claimant's Exhibits Nos. 3-6, pp. 13-17; Statements of Claim, para. 13, pp. 5-6*]. UNIVERSAL and CLAIMANT continued this mutual communication even after CLAIMANT had avoided the contract [*Claimant's Exhibits Nos. 11-13, pp. 22-24*]. Hence, a reasonable person would have concluded that UNIVERSAL offered to enter the contractual relationship.

- 87 Third, the defective cars were shipped directly to UNIVERSAL and not to UAM. According to Art. 81(2) CISG each party has to return acquired objects to its contractual partner when a contract is avoided [*Int. Ct. Russian CCI, 15 April 1994; KRITZER, Art. 81, para. 8; KAROLLUS, p. 86; WITZ/SALGER/SALGER, Art. 81, para. 4*]. In the case at hand the Tera cars were returned to UNIVERSAL. Since UNIVERSAL accepted the returned Tera cars and repaired them [*Claimant's Exhibit No. 12, paras. 1 and 2, p. 23*], a reasonable person would have assumed UNIVERSAL to be a party to the contract.
- 88 Fourth, UNIVERSAL deliberately proposed to get involved although it must have been aware that as a consequence it might be liable for any failure during the repair of the cars. UNIVERSAL knew that UAM neither had the equipment nor the personnel to repair the cars [*Claimant's Exhibit No. 4, para. 2, p. 15*]. It was also aware of the fact that banks in Mediterraneo did not provide working capital to businesses [*Procedural Order No. 2, para 17, p. 43*]. Therefore, it knew that CLAIMANT had no choice but to avoid the contract if the cars were not repaired. UNIVERSAL was in the best position to determine the risks of the subsequent performance because it had the knowledge and personnel to repair the cars. Nevertheless, it acted and offered to cure as it wanted to antagonise any doubts about the quality of its products and its reliability [*Claimant's Exhibit No. 4, para. 3, p. 15*]. Hence, UNIVERSAL did not get involved out of courtesy, but intended to establish a contractual relationship with CLAIMANT.
- 89 Fifth, UNIVERSAL had an essential interest in offering to become a contracting party. It strived to preserve the excellent reputation of its products, particularly the new Tera car brand. Any bad reviews on the product endangered the Tera cars' commercial success. Therefore, UNIVERSAL wanted to do "everything possible" to repair the cars [*Claimant's Exhibit No. 6, para. 1, p. 17*]. It also stated that it stood "behind its products" [*Claimant's Exhibit No. 4, para. 3, p. 15*].



- 90 Furthermore, UNIVERSAL is liable to UAM in either way as it had delivered defective cars to UAM [*Procedural Order No. 2, para. 15, p. 43*]. Therefore, interacting directly with CLAIMANT was economically easier and more effective for UNIVERSAL.
- 91 UNIVERSAL's liability is not altered by the fact that it offered to repair the cars "without admission of liability" [*Claimant's Exhibit No. 4, para. 3, p. 15*]. A party's expressed reservation is void when it contradicts its simultaneous statements and conduct (*protestatio facto contraria non valet*) [*ICC CASE No. 8786; SCHLECHTRIEM/JUNGE (3<sup>rd</sup> Ed.), Art. 8, para. 6*]. UNIVERSAL was interested in determining the Tera cars' problem [*Procedural Order No. 2, para. 21, p. 44*]. It negotiated the terms of repairing and was substantially involved in the contractual correspondence. Finally, it was aware of the risk of getting involved, but stated that it was not liable. UNIVERSAL's statements and conduct contradict the exclusion of liability which is, therefore, ineffective. UNIVERSAL cannot take the benefits of directly settling the dispute with CLAIMANT and deny the detriments at the same time.
- 92 To conclude, a reasonable person in the position of CLAIMANT would have come to the understanding that UNIVERSAL wanted to become a party to the contract.

## II. UAM AND CLAIMANT AGREED TO MODIFY THE SALES CONTRACT

- 93 UAM and CLAIMANT agreed to modify the sales contract pursuant to Art. 29(1) CISG. The mutual consent may be proved by any means, including the behaviour of the parties [*Hof van Beroep Gent, 15 May 2002; HUBER/MULLIS, p. 102; STAUDINGER/MAGNUS, Art. 29, para. 9*].
- 94 UAM and CLAIMANT benefited from the fact that UNIVERSAL took over the correspondence with CLAIMANT and offered technical support [*Claimant's Exhibit No. 4, paras. 2 and 3, p. 15*]. As both parties agreed on UNIVERSAL repairing the cars they also agreed that UNIVERSAL was to become a party to the contract.
- 95 Therefore, UNIVERSAL, UAM and CLAIMANT all agreed to modify the sales contract. To conclude, UNIVERSAL is liable for the breach of contract as a party to the sales contract.

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## CONCLUSION TO ISSUE 3

- 96 UNIVERSAL is liable for the breach of contract as it gave a representation of quality. If such liability is denied, UNIVERSAL is liable as it entered the contractual relationship between UAM and CLAIMANT by a modification of contract.



**ISSUE 4: THERE WAS A FUNDAMENTAL BREACH OF THE SALES CONTRACT AUTHORISING CLAIMANT TO AVOID THE CONTRACT**

97 The Tera cars that were shipped to CLAIMANT were undisputedly defective [*Answer of Universal, para. 6, p. 33*]. The delivery of defective cars constituted a fundamental breach of contract committed by RESPONDENTS (A), which gave CLAIMANT the right to avoid the contract (B).

**A. THE DELIVERY OF DEFECTIVE CARS CONSTITUTED A FUNDAMENTAL BREACH OF CONTRACT COMMITTED BY RESPONDENTS**

98 The delivery of undriveable cars amounted to a fundamental breach of contract committed by RESPONDENTS. Pursuant to Art. 25 CISG a breach of contract is fundamental if it results in such detriment to the other party as to substantially deprive it of what it is entitled to expect under the contract. The buyer's detriment must have been reasonably foreseeable. CLAIMANT suffered a detriment by receiving defective cars (I). The detriment substantially deprived it of what it was entitled to expect under the contract (II). This substantial detriment was reasonably foreseeable for RESPONDENTS (III).

**I. CLAIMANT SUFFERED A DETRIMENT BY RECEIVING DEFECTIVE CARS**

99 Not having cars of merchantable quality caused a detriment to CLAIMANT. The requirements for a detriment are not only met if there is a measurable damage, but also if the seller's behaviour results in an unfavourable situation for the buyer [*SCHLECHTRIEM/SCHROETER, Art. 25, para. 9; MÜKO-HGB/BENICKE, Art. 25, para. 5; BRUNNER, Art. 25, para. 7*]. As CLAIMANT operates as a sole trader car dealer, it entered the contract with UAM with the intention to resell the purchased cars [*Claimant's Exhibit No. 1, para. 1, p. 11*]. This intention has been incorporated into the contract. As the cars misfired severely and were almost undriveable [*Claimant's Exhibit No. 2, para. 2, p. 12*], CLAIMANT could not resell the cars. The intention wherefore it entered the contract was frustrated. Hence, CLAIMANT suffered a detriment by receiving defective cars.

**II. THE DETRIMENT SUBSTANTIALLY DEPRIVED CLAIMANT OF WHAT IT WAS ENTITLED TO EXPECT UNDER THE CONTRACT**

100 Receiving unmerchantable cars substantially deprived CLAIMANT of what it was entitled to expect under the contract. The function of Art. 25 CISG is to allow a contract to be cancelled



[*HONNOLD, Art. 25, paras. 181.2 and 186; SCHLECHTRIEM/SCHROETER, Art. 25, para. 4; GALSTON/SMIT, § 9, p. 12; ENDERLEIN/MASKOW/STROHBACH, Art. 25, para. 2.2; BRUNNER, Art. 25, para. 1*]. This purpose has to be considered when determining whether a party is substantially deprived of what it was entitled to expect under the contract [*SCHLECHTRIEM/SCHROETER, Art. 25, para. 22*]. Hence, a party suffers a substantial detriment if it cannot be reasonably expected to hold on to the contract. This is the case when neither keeping the goods and claiming damages nor requesting subsequent performance would be a reasonable alternative for the buyer [*BRUNNER, Art. 25, para. 14; PILTZ, para. 194, pp. 304-305; HEILMANN, p. 466*]. In such cases the buyer's legitimate interest justifies an immediate avoidance of the contract [*HUBER/MULLIS, p. 217; MÜKO-HGB/HUBER, Art. 49, para. 21*]. Whether or not it was unreasonable for the buyer to hold on to the contract has not to be measured according to the objective extent of the damage. Rather the importance of each obligation and the buyer's interest in it has to be taken into account [*HONNOLD, Art. 25, para. 183; SCHLECHTRIEM/SCHROETER, Art. 25, para. 9; MÜKO-HGB/BENICKE, Art. 25, para. 5*].

**101** RESPONDENTS argue that the actual repairs of the cars took 5 days only and therefore were not unbearable for CLAIMANT. However, whether or not it is unbearable to await subsequent performance has to be determined when the breach occurs. This is the point in time when the buyer has to declare avoidance, Art. 49(2)(b)(i) CISG. Thus, the buyer must be able to determine at this point in time whether or not he is entitled to declare avoidance. Hence, it is irrelevant how long it took RESPONDENTS to fix the cars.

**102** CLAIMANT could neither have been reasonably expected to keep the cars and claim damages (a), nor to await subsequent performance (b).

**a. CLAIMANT could not reasonably be expected to keep the cars and claim damages**

**103** It was unreasonable for CLAIMANT to hold on to the contract and claim damages. Keeping the goods is unreasonable for the buyer if reselling the goods is either impossible or unreasonable for him [*OLG München, 29 November 2005*]. The standards applicable to the reasonableness need not to be high [*BRUNNER, Art. 25, para. 16*]. CLAIMANT had ordered new Tera model cars; in return, however, it received cars not running smoothly with such serious misfiring that they were practically undriveable. The delivered goods were worthless and could not be resold. Therefore, CLAIMANT could not reasonably be expected to keep the cars and claim damages.

**b. CLAIMANT could not reasonably be expected to await subsequent performance**

- 104 Faced with the consequences of the breach of contract, it was unreasonable for CLAIMANT to await subsequent performance. If subsequent performance cannot be completed within a time that is favourable for the buyer it is unreasonable [*STAUDINGER/MAGNUS, Art. 25, para. 12*]. In such a situation the subsequent performance itself constitutes a fundamental breach of contract since the goods cannot be resold, used or processed, until the seller has cured the defect [*OLG Stuttgart, 12 March 2001; STAUDINGER/MAGNUS, Art. 25, para. 12; ACHILLES, Art. 25, para. 4; BRUNNER, Art. 25, paras. 14-16*].
- 105 It could not be estimated how long it would take to repair the cars (**aa**) and awaiting subsequent performance was not favourable for CLAIMANT because it faced the risk of insolvency (**bb**). Moreover, CLAIMANT did not have to bear the risk of not having merchantable cars within the near future (**cc**) and did not need to await subsequent performance after giving RESPONDENTS the opportunity to cure the defect (**dd**).

**aa. It could not be estimated how long it would take to repair the cars**

- 106 Both UNIVERSAL and UAM did not want to give any specific information as to how long it would take to fix the cars [*Claimant's Exhibit No. 6, para. 2, p. 17*]. Thus, it was uncertain when CLAIMANT would have merchantable cars.
- 107 First, RESPONDENTS were reluctant to ensure that the Tera cars could be repaired at all [*Statement of Claim, para. 17, p. 6*].
- 108 Second, if it was possible to fix the defects, RESPONDENTS conceded that doing so would be complicated. As an ECU problem seemed likely [*Claimant's Exhibit No. 3, para. 2, p. 13*] it could not be determined how long the repairs would take [*Claimant's Exhibit No. 6, para. 2, p. 17*].
- 109 Third, repairing the cars seemed all the more complex since only UNIVERSAL had qualified personnel at its disposal [*Claimant's Exhibit No. 4, para. 2, p. 15*]. Moreover, none of the mechanics in Mediterraneo was familiar with the new Tera cars' structure [*Claimant's Exhibit No. 2, para. 2, p. 12*]. In order to repair the cars in Mediterraneo, UNIVERSAL's personnel needed to fly from Equatoriana to CLAIMANT. However, an airport strike was possible in Mediterraneo [*Claimant's Exhibit No. 10, para. 1, p. 21*]. Therefore, it was uncertain whether UNIVERSAL's team would arrive quickly.
- 110 Hence, it could not be estimated how long it would take to repair the cars.

**bb. CLAIMANT faced the risk of insolvency**

- 111 As long as CLAIMANT did not get its working capital of USD 380,000 back which it had spent for the Tera cars, it faced the risk of insolvency [*Statement of Claim, para. 18, p. 7*]. CLAIMANT spent its entire working capital on the down payment. However, all it received in return was a consignment of defective cars [*Statement of Claim, para. 11, p. 5*]. As it had no cars ready for sale, CLAIMANT did not gain any income to compensate the down payment. CLAIMANT could not hope for any support by the banks in Mediterraneo because they do not finance working capital [*Claimant's Exhibit No. 13, para. 3, p. 24*].
- 112 For above reasons, CLAIMANT did not have any radius of operation. Its showroom was empty [*Claimant's Exhibit No. 2, para. 4, p. 12*]. In fact, CLAIMANT continually had to pay inventory costs for the defective cars while its business was put into cold storage. Hence, CLAIMANT faced the risk of insolvency.

**cc. CLAIMANT did not have to bear the risk of not having merchantable cars within the near future**

- 113 RESPONDENTS may not argue that, by agreeing to the partial shipment clause, CLAIMANT had to bear the consequences of delayed performance. Delayed delivery would have had the same consequences as late repair. Generally, the seller bears the risk of late performance [*COMPROMEX, 29 April 1996; SCHLECHTRIEM/SCHROETER, Art. 25, para. 16; LOOKOFSKY, para. 5.6, p. 105*]. The partial shipment clause in the contract allowed shipment in instalments "as space was available". Therefore, RESPONDENTS did not have to deliver immediately. If no space had been available the cars would not have arrived within the near future. In this case, CLAIMANT, not having cars ready for sale, would have been faced with financial problems. These problems are comparable to its precarious situation caused by the uncertainty whether and when RESPONDENTS would repair the cars.
- 114 However, CLAIMANT neither had to bear the risk of receiving cars late nor the comparable risk of having the cars repaired within the near future. RESPONDENTS must not assume that they had the right to deliver the cars whenever they wanted to. They had to consider the economic situation of their contractual partner, a sole trader car dealer. The sales contract contained a CIF clause. This incoterm indicates that the observance of the stipulated time of delivery is an essential contractual obligation [*SCHLECHTRIEM/SCHROETER, Art. 25, para. 20*]. Hence, RESPONDENTS had to ship the cars within an appropriate time. Moreover, by accepting the partial shipment clause, the risk of late performance does not pass over to CLAIMANT as the



sole purpose of the clause was to save on shipment costs [*Statement of Claim, para. 9, p. 5*].

- 115 The buyer, already charged with the delivery of defective goods, does not have to dwell on its uncertain situation [*BIANCA/BONELL/WILL, Art. 48, para. 2.1.1.1*]. Thus, CLAIMANT did not have to bear the risk of not having merchantable cars within the near future.

**dd. CLAIMANT did not need to await subsequent performance after giving Respondents the opportunity to cure the defect**

- 116 Although CLAIMANT had accepted the offer of subsequent performance by UNIVERSAL its right to declare the contract avoided was not precluded. If a party agrees to subsequent performance, it is not bound by this declaration and still has a right to avoid unless it has placed a deadline for the subsequent performance even if the seller has already delivered substitute goods [*OGH, 5 July 2001; SCHLECHTRIEM/MÜLLER-CHEN, Art. 45, para. 14; SCHMIDT-AHRENDTS, p. 28*]. In this case, pursuant to Art. 49(2)(a)(ii) CISG, it cannot maintain its right to avoid the contract until the deadline has expired because the seller reasonably trusts in his possibility to cure within the given time. CLAIMANT did not place such deadline. Moreover, UNIVERSAL was not in need for protection as it had not commenced to prepare the sending of its personnel. Therefore CLAIMANT was still entitled to declare the contract avoided.
- 117 Furthermore, CLAIMANT did not abuse the right because it was extrinsically forced to avoid the contract. Its intention was to uphold the contract. This derives from the fact that it declined Patria's offer [*Claimant's Exhibit No. 8, para. 3, p. 19*], although the Indo cars had proven to be a success in Mediterraneo and could have been delivered within five days [*Statement of Claim, para. 19, p. 7*]. CLAIMANT was pushed to avoid the contract since it could no longer dwell on its insecure financial situation. This does not constitute an abuse of right. Thus, CLAIMANT did not need to await subsequent performance after giving RESPONDENTS the opportunity to cure the defect.
- 118 As a result, CLAIMANT suffered a detriment that substantially deprived it of what it was entitled to expect under the contract.

**III. THE SUBSTANTIAL DETRIMENT WAS FORESEEABLE FOR RESPONDENTS**

- 119 RESPONDENTS could have foreseen that the delivery of defective cars would amount to a substantial detriment to CLAIMANT. Art. 25 CISG provides that, unless the party in breach did



not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result, the breach is fundamental.

- 120 The foreseeability is legally presumed. RESPONDENTS cannot exonerate because they were aware of CLAIMANT being a sole trader car dealer who wished to resell the purchased cars [*Claimant's Exhibit No. 1, para. 1, p. 11*]. UAM also knew about the size of CLAIMANT's business [*Procedural Order No. 2, para. 17, p. 43*]. It was clear that CLAIMANT had very little storage capacity which was occupied by the defective cars which could not be used.
- 121 RESPONDENTS may not argue that they could not foresee the threatening insolvency of CLAIMANT because the latter had accepted the partial shipment clause. The terms of payment gave an insight into CLAIMANT's financial situation. The parties stipulated that the remaining half of the purchase price was due after all Tera cars had arrived in Mediterraneo [*Claimant's Exhibit No. 1, para. 2, p. 11*]. This agreement was concluded since CLAIMANT could not finance the contract at once. RESPONDENTS had to draw the conclusion that their contractual partner needed the profit from reselling the first instalments to pay for the other ones. This is a common business practice: businessmen invest their capital instead of saving. A good salesman is always in debt. Sole trader car dealers in particular do not have a large working capital at their disposal.
- 122 Furthermore, RESPONDENTS were aware that the only purpose of the partial shipment clause was to reduce transportation costs [*Statement of Claim, para. 9, p. 5*]. Moreover, RESPONDENTS knew that Mediterranean banks were reluctant to provide companies with credits and risk capital [*Procedural Order No. 2, para. 17, p. 43*]. For the above reasons, RESPONDENTS had an insight into CLAIMANT's precarious financial situation. Therefore, the substantial detriment was foreseeable for RESPONDENTS.
- 123 As a result, the delivery of defective cars constituted a fundamental breach of contract by UAM and UNIVERSAL.

#### **B. CLAIMANT HAD THE RIGHT TO AVOID THE WHOLE CONTRACT**

- 124 The delivery of 25 defective cars constituted a fundamental breach of contract pursuant to Art. 25 CISG. For this reason, CLAIMANT was entitled to avoid the contract with regard to the first instalment according to Art. 73(1) CISG.
- 125 CLAIMANT was also entitled to avoid the contract with regard to the future deliveries of 75 cars according to Art. 73(2) CISG (I). Even if the Tribunal should find that there were no



good grounds to expect that the future deliveries would be defective, CLAIMANT could avoid the contract in its entirety pursuant to Art. 49(1)(a) CISG (II).

**I. CLAIMANT WAS ENTITLED TO AVOID THE CONTRACT WITH REGARD TO THE FUTURE DELIVERIES OF 75 CARS ACCORDING TO ART. 73(2) CISG**

126 The fact that every car delivered was defective gave CLAIMANT the right to avoid the contract with regard to the future deliveries according to Art. 73(2) CISG. This provision entitles the buyer to avoid an instalment contract for the future if the breach of contract with respect to one of the instalments gives him good grounds to expect that there will be a fundamental breach regarding future instalments.

127 CLAIMANT and UAM concluded an instalment contract (a) and CLAIMANT had good grounds to expect that there would also be a fundamental breach regarding the future deliveries (b).

**a. CLAIMANT and UAM concluded an instalment contract**

128 CLAIMANT and UAM agreed upon an instalment contract as they had arranged for the 100 cars to be delivered in separate consignments to Mediterraneo. An instalment contract requires at least two separate deliveries which are dividable and independent looking at the contract in its entirety [*Schiedsgericht der Hamburger freundschaftlichen Arbitrage*, 29 December 1998; *HGer Zurich*, 30 November 1998; *SCHLECHTRIEM/HORNUNG/FONTOULAKIS*, Art. 73, para. 8; *BRUNNER*, Art. 73, para. 2; *HONSELL/SCHNYDER/STRAUB*, Art. 73, para. 10]. The predefinition of an exact date for the deliveries is not required [*SCHLECHTRIEM/HORNUNG/FONTOULAKIS*, Art. 73, para. 9; *MÜKO-HGB/MANKOWSKI*, Art. 73, para. 3; *HEILMANN*, p. 536]. These requirements are already fulfilled if a contract allows the delivery of goods belonging together in separate lots [*BRUNNER*, Art. 73, para. 2; *MÜKO-HGB/HUBER*, Art. 73, para. 3].

129 CLAIMANT and UAM incorporated a clause in their contract which permitted partial shipment as space was available [*Claimant's Exhibit No. 1*, para. 3, p. 11]. On 18 February 2008, CLAIMANT received 25 out of 100 purchased Tera cars [*Statement of Claim*, para. 10, p. 5]. Consequently, there was at least one more consignment with the remaining 75 cars planned. CLAIMANT and UAM thus concluded an instalment contract.



**b. CLAIMANT had good grounds to expect that there would also be a fundamental breach regarding the future deliveries**

- 130 CLAIMANT had good grounds to expect that there would also be a fundamental breach of contract with regard to future instalments. Comparing the wording of Art. 73 CISG (“good grounds”) to Art. 72 CISG (“it is clear”), it becomes evident that a less strict standard has to be applied to the probability in the sense of Art. 73 CISG [*Schiedsgericht der Börse für landwirtschaftliche Produkte Wien, 10 December 1997; AUDIT, para. 169; HEILMANN, p. 539*]. No evidence is required that the future consignments will be defective, whereas plausible reasons for expecting a future fundamental breach of contract are sufficient [*Schiedsgericht der Börse für landwirtschaftliche Produkte Wien, 10 December 1997; HEILMANN, ibid.*].
- 131 First, all of the cars delivered in the first instalment had the same defects and were essentially undriveable [*Statement of Claim, para. 11, p. 5*]. It was likely that the cars which had yet to be shipped would have the same problems as the previous ones. When CLAIMANT declared the contract avoided, UNIVERSAL had not yet determined the source of the defects. It suggested that an ECU problem seemed likely [*Claimant’s Exhibit No. 3, para. 2, p. 13*]. Given that all of the ECUs were produced by Bering Engine Controls [*Claimant’s Exhibit No. 3, para. 2, p. 13*], it appeared that not only had something gone wrong during the production process but also that the automobile component had been misconstructured. It was probable that all of the new model Tera cars had been assembled in this way. After all, they were produced in one production run out of which the first instalment must have been selected randomly.
- 132 Second, the seller has the obligation to reduce the buyer’s worries, e.g. by indicating that prospective goods will be manufactured in a different factory. This is the only possibility to assure the buyer that the next delivery will be without any defect [*Schiedsgericht der Börse für Landwirtschaftliche Produkte, 10 December 1997*]. RESPONDENTS had neither inspected the other instalments nor had they assured that future deliveries were assembled differently.
- 133 Third, the defective Tera cars delivered to UAM could not be repaired before they arrived in Mediterraneo. 120 Tera cars from the first production run had been stocked at UAM and were designated for CLAIMANT [*Procedural Order No. 2, para. 26, p. 45*]. As it lacked both special equipment and the required expertise to repair the defects it was to be feared that CLAIMANT would receive defective cars again.
- 134 Thus, CLAIMANT had good grounds to expect that there would also be a fundamental breach regarding the future deliveries. It was entitled to avoid the contract with regard to the future



deliveries of 75 cars according to Art. 73(2) CISG.

## **II. ALTERNATIVELY, CLAIMANT COULD AVOID THE CONTRACT IN ITS ENTIRETY PURSUANT TO ART. 49(1)(a) CISG**

- 135 The fact that 25 out of 100 cars were defective had such an impact on the contract that, alternatively, CLAIMANT was entitled to avoid it in its entirety pursuant to Art. 49(1)(a) CISG. According to this provision a party may declare the entire contract avoided if the other party has committed a fundamental breach with regard to the entire contract.
- 136 CLAIMANT's financial situation would not have ameliorated if the future shipments had contained functional cars. The risk of insolvency was already too high to bear after the first instalment of malfunctioning cars had arrived. It took three and a half weeks for the defective cars to arrive [*Statement of Claim, para. 10, p. 5*]. CLAIMANT could not wait as long again for the remaining 75 cars because, by then, it had paid USD 380,000 but did not gain any income. Still, it was charged with running storage costs [*Statement of Claim, para. 18, p. 7*]. Thus, regardless of the question whether the remaining cars would be defective or not, the non-conformity of the first 25 cars constituted a fundamental breach of the entire contract. Alternatively, CLAIMANT could avoid the contract in its entirety pursuant to Art. 49(1)(a) CISG.

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### **CONCLUSION TO ISSUE 4**

- 137 There was a fundamental breach of contract by RESPONDENTS that entitled CLAIMANT to declare the entire contract avoided. The delivery of undriveable cars caused CLAIMANT a detriment that substantially deprived it of what it was entitled to expect under the contract. RESPONDENTS could also foresee CLAIMANT's substantial detriment. Thus, CLAIMANT had the right to avoid the contract in its entirety either pursuant to Art. 73(1), (2) CISG or pursuant to Art. 49(1)(a) CISG, irrespective of its agreement to subsequent performance. Thus, there was a fundamental breach of the sales contract authorising CLAIMANT to avoid the whole contract.



## REQUEST FOR RELIEF

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

- UNIVERSAL is bound by the arbitration agreement between UAM and CLAIMANT (**FIRST ISSUE**)
- The jurisdiction of the Arbitral Tribunal is not affected by the insolvency law of Oceania (**SECOND ISSUE**)
- UNIVERSAL is liable for the breach of contract by UAM (**THIRD ISSUE**)
- There was a fundamental breach of contract authorising CLAIMANT to avoid the contract (**FOURTH ISSUE**)

## CERTIFICATE

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

Freiburg im Breisgau,

4 December 2008

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