SIXTEENTH ANNUAL

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

3-9 APRIL 2009

VIENNA

MEMORANDUM FOR CLAIMANT

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TABLE OF ABBREVIATIONS

App.	Appellate Court
Arb.	Arbitration
Art. / Arts.	Article / Articles
Assn.	Association
Cir.	Circuit (U.S. Circuit Court of Appeals)
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980
Com.	Commercial
Corp.	Corporation
Ed. / eds	Editor / editors, or edition
e.g.	*Exemplum gratia* (for example)
Ex.	Exhibit
Fed. Cl.	U.S. Court of Federal Claims
FLR	Federal Law Reports
ICC	International Chamber of Commerce
i.e.	*id est* (that is)
Int'l l	International
K.B.	King's Bench
Ltd.	Limited Company
n.	Note / Footnote
No.	Number
Par.	Paragraph / paragraphs
PECL	Principles of European Contract Law
Proc.	Procedure or procedural
Q.B.	Queen's Bench
Reg. / Regs.	Regulation / regulations
Rev.	Review
Sec.	Secretariat
S.D.N.Y.	Southern District of New York
Tech.	Technology

U.K.	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
U.S.	United States of America, United States Reports (in citations)
USD	United States Dollar
v.	*versus* (against)
vol.	Volume
Y.B.	Yearbook
ZPO	German Act of Civil Procedure

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JUDICIAL DECISIONS

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STATEMENT OF FACTS

CLAIMANT, Joseph Tisk, trading as Reliable Auto Imports, is a sole trader car dealer, based in Mediterraneo. **FIRST RESPONDENT,** UAM Distributors Oceania Ltd, is a corporation organised in Oceania that is currently insolvent but which, prior to insolvency, was the authorized importer into Oceania of automotive products manufactured by Universal. **SECOND RESPONDENT,** Universal Auto Manufacturers, S.A., is a major manufacturer of automotive products organized in Equatoriana.

On **18 January 2008**, Claimant and First Respondent entered into a contract of sale for 100 Tera car vehicles, to be shipped to Mediterraneo in separate consignments and paid for in set instalments. The contract of sale included an arbitration clause providing of any disputes or claims arising out of or in connection with the contract. On **23 January 2008**, Claimant paid USD 380,000 as the first instalment under the contract. The first consignment of 25 Tera cars was shipped to Oceania on **6 February 2008**, arriving in Mediterraneo on **11 February 2008**, and clearing customs so as to be available for transport by First Respondent on **18 February 2008.** When the cars were driven to the showroom, they did not run smoothly and the engines misfired so severely that they were practically 'undriveable'. On **21 February 2008,** Claimant was informed by a hired mechanic that an Engine Control Unit (ECU) problem was likely. When Claimant related his difficulties to First Respondent's sales manager, Mr. High, expressing his need for the cars to be available for sale soon on **22 February 2008**, Mr. High informed him on **27 February 2008** that First Respondent's personnel could not identify the problem but an ECU issue was a strong possibility. Second Respondent's chief engineer, Mr. Jones, also telephoned Claimant that day to relate that First Respondent's service personnel could not identify the issue but t the most likely problem was fault with the ECU. However Mr. Jones could not tell Claimant, on request, how long repair or replacement of the ECU would take, indicating that potentially complex examination of the cars would be required.

On **28 February 2008,** Second's Respondent's general manager, Mr Steiner, indicated, that pursuant to discussions with First Respondent, Second Respondent would undertake the repair of the Tera cars and that Second Respondent's personnel could arrive within three days. He could not, however, confirm, when asked by Claimant, how long repair would take or whether repair or was possible. He also acknowledged potential delay in arrival of Second Respondent's personnel and equipment, were the threatened airport strike to take place in

Mediterraneo. On **29 February 2008,** Claimant notified First and Second Respondents of his cancellation of the contract of sale, requesting Mr. High to cancel shipment of the remaining cars, and Mr. Steiner to cancel sending service personnel and equipment to Mediterraneo. On **9 April 2008,** First Respondent entered into insolvency proceedings in Oceania.

The defective Tera cars were shipped from Mediterraneo to Second Respondent in Equatoriana on **7 May 2008**. On **19 June 2008**, Mr. Steiner sent a letter to Claimant stating that the 25 cars that were returned to Second Respondent had been repaired, to which Claimant replied on **20 June 2008**, stating that it was unfortunate that Mr. Steiner could not have provided such a guarantee when asked, and that the tone of the exchange had convinced him at the time that it was fruitless to count on repair of the Tera cars in time for him to continue his business. On **15 August 2008**, Claimant lodged a request for arbitration and statement of claim with the Arbitration Institute of the Stockholm Chamber of Commerce (hereafter *SCC*), pursuant to the terms of the arbitration agreement. Receipt of the request was confirmed by the SCC on **20 August 2008**. On **25 August 2008,** Judith Powers, the Insolvency Representative of the Oceanian insolvency proceedings, indicated that neither she nor First Respondent would participate in the appointment of an arbitrator or in arbitral proceedings. On **1 September 2008,** Second Respondent submitted its answer to Claimant's statement of claim to the SCC. The SCC Board determined on **20 September 2008** that it does not manifestly lack jurisdiction over the dispute and indicated its intent to proceed with the appointment of arbitrators.

SUMMARY OF ARGUMENT

I. THE TRIBUNAL SHOULD FIND SECOND RESPONDENT BOUND BY THE ARBTRATION AGREEMENT

Second Respondent disputes the jurisdiction of the tribunal as it contends that Tribunal it did not sign or otherwise become a party to the arbitration agreement. As a preliminary matter, the tribunal has the authority to determine its own jurisdiction in accordance with the principle of competence-competence. Claimant contends that Second Respondent is in fact bound by the arbitration agreement without signing the agreement. The Second Respondent's consent to be bound by the arbitration agreement is manifested on the basis that: (i) Second Respondent's conduct was an expression of implied consent to be bound, or (ii) Second Respondent is estopped for denying it is a party to the agreement as it is intimately intertwined with the contract and receives a direct benefit from the contract, or (iii) Second

Respondent is a member of a group of companies bound by the arbitration agreement, or (iv) First Respondent signed the agreement as agent for Second Respondent. Finally, where Second Respondent is bound by the arbitration agreement, the formal requirements of writing will not inhibit enforcement of an award.

II. THE JURISDICTION OF THE TRIBUNAL IS NOT AFFECTED BY THE INSOLVENCY LAW OF OCEANIA

The jurisdiction of the tribunal is not affected by Oceanian insolvency law. Irrespective of Oceanian insolvency law, the tribunal has competence to determine its own jurisdiction. Consequently, the terms of Oceanian law cannot automatically deprive the Tribunal of jurisdiction. Moreover, the tribunal's jurisdiction is not precluded by the terms of Oceanian law as that law has solely domestic effect and does not render the arbitration agreement void in Danubia. The award of the tribunal would also be enforceable, as the the dispute is arbitrable and the exercise of jurisdiction would not be contrary to public policy. Alternatively, should the award of the tribunal not be enforceable in Oceania, the existence of alternative enforcement jurisdictions warrants the exercise of jurisdiction.

III. THE TRIBUNAL SHOULD HOLD SECOND RESPONDENT LIABLE FOR BREACH OF THE CONTRACT OF SALE

Second Respondent is liable for breach of the contract of sale. The delivery of defective good plainly constituted a beach of the terms of contract. Second Respondent is liable for such breach either on the basis that it was an original party to the contract, or alternatively, that it assumed the obligations and liabilities under the contract by subsequent modification.

IV. CLAIMANT WAS ENTITLED TO AVOID THE CONTRACT OF SALE ON THE BASIS OF FUNDAMENTAL BREACH

The delivery of unfit Tera cars to Claimant constituted amounted to fundamental breach of the contract by First Respondent. Second Respondent's offer to cure does not preclude fundamental breach and in turn, does not mitigate Claimant's right to avoid the contract. As all other conditions upon avoidance are met, Claimant was both entitled to avoid the contract and validly did so by letters dated 29 February 2008 *[Cl. Ex. 10; Cl. Ex. 11].*

JURISDICTIONAL ARGUMENT

I. SECOND RESPONDENT IS BOUND BY THE ARBITRATION AGREEMENT

1. Second Respondent challenges jurisdiction of the tribunal on the grounds that it did not sign or otherwise become a party to the arbitration agreement. Claimant rejects this assertion for three reasons. The Tribunal may determine its own jurisdiction in accordance with competence-competence (A). Second Defendant is in fact bound by the arbitration agreement without signing the agreement, having clearly manifested its consent to be bound (B). Enforcement of an award of the tribunal will not be susceptible to a challenge on the basis of the written form of the arbitration agreement (C).

A. THE TRIBUNAL HAS AUTHORITY TO DETERMINE ITS OWN JURISDICTION

2. As an initial matter, Second Respondent does not dispute as the primary source of the tribunal's authority the existence of a prima facie valid arbitration agreement contained in the contract of sale [*Cl. Ex. 1*].

3. On 18 January, 2008 Claimant and First Respondent entered into a contract of sale containing an arbitration clause (hereafter *arbitration agreement*), by which Claimant contends Second Respondent is also bound *[see infra, Pt. I. B-C]*. The arbitration agreement, at paragraph 13 of the contract, states:

> "Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The arbitral tribunal will consist of three arbitrators. The seat of arbitration shall be Vindobona, Danubia. The language to be used in the arbitral proceedings will be English." *[Statement of Claim, ¶27]*

4. The arbitration agreement selects the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (hereafter *SCC Rules*) as the procedural rules of the arbitration and Danubia as the seat. Art. 10 of the SCC Rules enables the Board of the SCC Institute to dismiss a case in whole or in part if the SCC Institute manifestly lacks jurisdiction over the dispute, thereby recognising the competence of the Board to rule on the question of jurisdiction. However, the application of the provision, as reflected in the Board's prior rulings, is confined to assessment of prima facie jurisdiction – a preliminary analysis of whether lack of jurisdiction is clear on the face of the dispute (primarily by reference to the

terms of the arbitration agreement), without requiring further examination *[Magnusson/Larsson 49]*. As the Board has determined that no prima facie lack of jurisdiction is evidenced, the jurisdictional issues before the tribunal are substantive *[Stockholm Arbitration Institute, Letter to All Parties, 20 September 2008]*.

5. On issues of substantive jurisdiction, the SCC Rules are supplemented by the law of the seat, Danubian law *[Redfern/Hunter 79; Born 273; Fouchard 225]*. As the arbitration agreement does not stipulate a choice of law to govern the proceedings, the question of the tribunal's jurisdiction will be governed by the law of the seat, Danubia *[Fouchard 225; Redfern/Hunter 84; 2007 SCC Rules*]. This is affirmed by the 2007 amendments to the SCC Rules, which, rather than referring to the seat in passing under general procedural provisions in accordance with the 1999 SCC Rules, created a separate Article 20 designated 'seat of arbitration', in order to draw express attention to the 'technical-legal concept of the seat' *[Magnusson/Shaughnessy 50-51]*.

6. Danubian law incorporates the UNCITRAL Model Law on International Commercial Arbitration (with 2006 amendments) (hereafter *Model Law*), which Danubia has adopted *[Statement of Claim, ¶26]*. Art. 16(1) of the *Model Law* provides that a 'Tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.' This article codifies the internationally accepted doctrine of competence-competence *[Fouchard 397]*. The terms of Art. 16(1) vest in the tribunal the power to determine its own jurisdiction, which extends to determination of the scope of the arbitration agreement and the parties thereto *[Jarvin 98]*.

B. SECOND RESPONDENT IS BOUND BY THE ARBITRATION AGREEMENT WITHOUT SIGNING

7. Second Respondent contends that it 'did not sign or otherwise become a party to the…arbitration agreement' *[Letter from Joseph Langweiler, 1 September 2008]*.

8. Arbitration is contractual by nature. However, it does not follow that the obligation to arbitrate attaches only to a party which has personally signed the written arbitration agreement *[Thomson-CSF 766; Redfern/Hunter 3-30; Fouchard 280-281]*. Rather, consent is the essential foundation of arbitration *[Redfern/Hunter 3-30]*. The determination of who the parties to an arbitration agreement are is equivalent to a determination of which parties have consented to it. The consent may be express or implicit. In the latter case, the court or tribunal will have recourse to a close examination of the facts of the case *[Hanotiau (2) 256]*. As such, the fact that Second Respondent has not signed the written instrument does not

exclude the possibility that the arbitration agreement is binding upon Second Respondent. Claimant contends that Second Respondent has manifested its consent to be bound by the arbitration agreement as a result of four alternative grounds:

(a) Second Respondent's conduct was an expression of implied consent; or

(b) Second Respondent is estopped from denying it is a party to the arbitration agreement; or

(c) Second Respondent is a member of a group of companies and is bound by the arbitration agreement; or

(d) First Respondent concluded the arbitration agreement as agent for Second Respondent.

(i) Second Respondent's Conduct was an Expression of Implied Consent

9. Second Respondent intentionally participated in the performance of the contract by undertaking to repair the defective cars, and implicitly consented to the arbitration agreement in the contract of sale.

10. If a party has not signed an arbitration agreement courts and arbitral tribunals will take into consideration the conduct of the party in the negotiation and performance, and will infer consent to be bound where there was significant involvement by the party *[Hanotiau 271; Zuberbühler 21; X S.A.L]*.

11. The principle was illustrated in an analogous case before the Paris Court of Appeals. In V2000, the Court declined jurisdiction to hear a suit brought by the French purchaser of a car from an English company, where the purchaser was also suing the French distributor. There was an arbitration agreement in the purchase agreement between the English company and the purchaser, but the French distributor was not a signatory. However, both before and after signing the contract the purchaser had dealt with the French distributor as intermediary in the transaction. The Court held that the effects of the arbitration clause extend to parties directly involved in the performance of the contract, provided that the actions and surrounding circumstances raise the presumption that they were aware of the existence and scope of the arbitration clause. In making its assessment the tribunal should consider not just the arbitration agreement, but all economic and legal aspects of the dispute *[Fouchard 281]*.

12. Second Respondent was directly involved in the performance of the sale contract, not only as the original manufacturer of the cars, but also by agreeing to undertake the repairs of the cars *[Cl. Ex. 4]*. In fact, the obligation to make repairs would have been impossible without the 'special equipment and specially trained personnel' of Second Respondent *[Cl. Ex. 4]*. In this regard there was complete reliance upon Second Respondent by Claimant and First

Respondent alike. Furthermore, when considering all the economic and legal aspects of the dispute, it is significant that Second Respondent was a founding partner of First Respondent, which was established with the explicit purpose of providing a market for Second Respondent's products *[Proc. Order 2]*. Second Respondent was also fully aware of the existence and scope of the arbitration agreement, having reviewed the form of contract used by First Respondent *[Proc. Order 2]*.

13. Second Respondent was directly and substantially involved in the contract, and this involvement was undertaken in full knowledge of the arbitration agreement. This conduct demonstrates that Second Respondent consented to being bound by the arbitration agreement. This was acknowledged by Second Respondent which in the course of offering to make the repairs, stated that "We are pleased that you have chosen to sell the Tera automobile in Mediterraneo and look forward to a long and mutually profitable relationship with you." *[Cl. Ex. 4]*. Obviously, Second Respondent viewed itself as being engaged in a commercial relationship with Claimant framed by the contract of sale including the arbitration agreement, and expected that to continue. Thus, Second Respondent must be considered bound by the agreement to arbitrate.

14. This conclusion is supported by recognition that the international arbitration agreement has "a validity and an effectiveness of its own" to govern disputes in respect of the contract *[Korsnas Marma]*. The self-standing validity and effectiveness of the arbitration clause in an international contract requires that the obligation to arbitrate includes parties which are directly implicated in the performance of the contract and in the disputes, provided they are aware of the arbitration agreement, even though they were not signatories of the contract itself *[SMABTP]*. Were it otherwise, the ability of the tribunal to render an effective award would be illusory and the intent of the parties to submit the dispute to arbitration would be undermined.

15. The autonomous validity and effectiveness of the arbitration agreement supports the conclusion that Second Respondent consented to the agreement by its conduct. The opportunity of fulfilling the parties intent to arbitrate by rendering a meaningful award dictated that Second Respondent, as manufacturer, repairer, shareholder, and implicit contractor, be recognized as a party to the arbitration agreement of which it was fully aware.

(ii) Alternatively, Second Respondent is Estopped from Denying it is a Party to the Arbitration Agreement

16. Second Respondent is both inextricably intertwined with the contact of sale and has received a direct benefit under it, and it is therefore estopped from being denying it bound by the agreement to arbitrate.

17. The doctrine of estoppel serves to preclude a party from enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations. *[Intergen; Hanotiau 263]*. Estoppel will recognize a party which has not signed the contract as bound by an arbitration agreement where the party is inextricably intertwined with the contract, or alternatively where the party has received a direct benefit under the agreement *[Moses 35].*

a. Second Respondent is intimately intertwined with the contract

18. A party will be estopped from asserting that it is not bound by an arbitration agreement which it has not signed where the claims are 'intimately founded and intertwined with the underlying contract obligations' between the signatory parties *[Sunkist Soft Drinks 757]*. This analysis proceeds upon a two-prong test: first, examining the relationship between the claim and the contract containing the arbitration agreement, and second, the nexus between the parties *[Hosking 533]*.

19. McBro Planning concerned a hospital construction dispute. The hospital had two separate agreement with its electrical contractor, Triangle, and its construction manager, McBro. Both contracts contained identical arbitration provisions, however the Triangle agreement expressly denied any contractual relationship between Triangle and McBro. Despite the denial of any contractual agreement, the court compelled Triangle to arbitrate its claims with McBro. The court found that the dispute was inextricably linked with McBro's contract with the hospital and the parties were sufficiently connected, such that Triangle was estopped from denying arbitration *[McBro Planning 343].*

20. Second Respondent is inextricably linked to the contract of sale through both the initial manufacture and subsequent offer to repair the defective cars, which only Second Respondent is capable of performing *[Cl. Ex. 3]*. Furthermore, there is a clear nexus between Claimant and Second Respondent, which Second Respondent recognizes as a 'long and mutually profitable relationship' *[Cl. Ex. 4]*. As such, Second Respondent is estopped from denying to be bound by the arbitration agreement.

b. Second Respondent received direct benefit from the contract

21. A party is estopped from denying its obligation to arbitrate when it receives a direct benefit from a contract containing an arbitration clause *[Deloitte]*. In ABS, Tencara had contracted with a syndicate to build a yacht. The contract required the American Bureau of Shipping (ABS) to classify the yacht. Tencara entered into a contract containing an arbitration clause for the ABS to classify the yacht. The yacht sustained serious hull damage due to poor design and construction. Tencara sued the ABS in Italy and the yacht's owners sued the ABS in France. The ABS brought suit in New York to compel all parties to arbitrate their claims together. The owners claimed they were not a party to the contract between Tencara and the ABS and, therefore, were not a party to the arbitration agreement. The court held that the owners were obliged to arbitrate. Since the owners had received the benefit of the ABS's classification in the form of lower insurance rates and being able to sail in French waters, they were precluded from claiming the arbitration agreement did not apply to them *[ABS]*.
Second Respondent received significant direct benefits from the contract of sale, both as the manufacturer of the cars and as a shareholder of First Respondent. Second Respondent acknowledges expected benefits of contract of sale from 'long and mutually profitable relationship' with Claimant *[Cl. Ex. 4]*. Therefore, Second Respondent is estopped from denying it is bound by the arbitration agreement which forms part of the contract from which it directly benefits.

(iii) Alternatively, Second Respondent is a Member of a Group of Companies and is bound by the Arbitration Agreement on that Basis

22. First Respondent and Second Respondent are related members in a group of companies and their participation in relation to the contract of sale and arbitration agreement is effectively inseparable.
23. Despite the legal independence of its individual entities, a group of companies constitutes one and the same economic reality where the circumstances of a contract's conclusion, performance, and termination, and the degree of influence amongst members of the group warrants such an inference *[Dow Chemical]*. When the claims against the companies are based on the same facts and are inherently inseparable, a party which has not signed the arbitration agreement should be considered bound by the agreement, or else the arbitration proceedings would be rendered meaningless *[JJ Ryan 320-321]*.
24. Determination of whether an arbitration clause should be considered to bind other companies of the group or its shareholders is a matter which must be decided on a case-to-case basis, requiring close analysis of:

(a) the circumstances in which the agreement was made;

(b) the corporate and practical relationship existing on one side and known to those on the other side of the bargain;

(c) the actual or presumed intention of the parties as regards the rights of non-signatories to participate in the arbitration agreement; and

(d) the circumstances under which non-signatories subsequently became involved in the performance of the agreement and in the dispute arising from it *[ICC Case 9517]*.

25. Second Respondent is not only founding shareholder of First Respondent, but First Respondent is entirely dependant upon Second Respondent in its operations as distributer of its products [*Proc. Order 2, ¶12*]. The parties manifested their intent that Second Respondent be a party to the contract of sale and arbitration agreement by involving Second Respondent in the performance of the contract, and the issue of repairs to the defective cars, which form the basis of the dispute *[Cl. Ex. 3; Cl. Ex. 4]*. As such, Second Respondent must be recognised as a party to the arbitration agreement or else participation by Claimant and First Respondent in the arbitration would be rendered meaningless.

(iv) Alternatively, Second Respondent Authorised First Respondent to act as its agent in concluding the arbitration agreement

26. Second Respondent is bound by the arbitration agreement which was entered into by First Respondent as agent of Second Respondent. Traditional principles of agency law may bind a non-signatory to an arbitration agreement *[Thomson-CSF 777]*. Where it is established that First Respondent signed the agreement to arbitrate as agent for Second Respondent, the latter will be considered bound by the arbitration agreement, alone or together with First Respondent [*Hanotiau 258]*.

a. Agency Convention is the applicable law to agency relationship

27. Tribunals invited to determine whether a principal was bound by an arbitration agreement concluded by its agent distinguished between:

(i) the law governing the arbitration agreement (the law of the seat of the arbitration);

(ii) the laws which governed the agent's capacity to conclude an arbitration agreement on behalf of the principal (the law of the principal's registered office); and

(iii) the form in which such capacity should have been conferred on the agent (the law of the jurisdiction in which the agreement between the agent and the principal was concluded) *[ICC Case 5832]*.

28. As such, the law governing the agency relationship between First Respondent and Second Respondent is not the seat of the arbitration, Danubia, but rather laws of the place First Respondent and Second Respondent operate, Oceania and Equatoriana respectively. Both Oceania and Equatoriana are parties to the Convention on Agency *[Proc. Order 2]*. The Convention on Agency applies in the context of the international sale of goods *[Arts. 1, 2]*. As the arbitration agreement was contained within a contract for the international sale of goods, it is appropriate that the Convention on Agency be applied to the issue of First Respondent acting as agent for Second Respondent when concluding the arbitration agreement. A principal may authorise an agent to bind it on the basis of actual authority, apparent authority, or subsequent ratification *[Bonell 732-743]*.

b. Second Respondent authorised First Respondent to conclude the arbitration agreement as its agent

29. The granting of authority to the agent by the principle is not subject to any particular requirement of form and may be either express or implied *[Agency Convention Art. 9]*. Second Respondent may have expressly authorised First Respondent to act as its agent to enter into contracts of sale for its motor vehicles in the distribution agreement between Second Respondent and First Respondent *[Yelland 161]*. An authority to conclude arbitration agreements would be implied as part of that authority based on the parties' usual course of dealings, the standard contract of sale reviewed by Second Respondent contains a arbitration clause, and arbitration clauses fall within general trade usage *[Bonell (2) 163]*. Thus, where First Respondent held an express authority from Second Respondent it would include the authority to conclude arbitration agreements.

c. Second Respondent is bound by the arbitration agreement as a result of apparent authority for First Respondent to act as its agent

30. In the alternative, if there was no actual authority for First Respondent to act as agent, Second Respondent is bound as a result of apparent authority *[China National; Alamaria]*. A principle, whose conduct leads a third party reasonably to believe that the agent has authority to act on its behalf, is prevented from invoking against the third party the lack of authority and is therefore bound by the latter's act *[Agency Convention Art. 14]*. Whether the third party's belief was reasonable will depend on the circumstances of the case *[Bonell (2) 170]*. Apparent authority is an application of the general principle of good faith and the prohibition of inconsistent behaviour *[UNIDROIT Arts. 1.7, 1.8; Bonell (2) 171]*.

31. First Respondent was a partnership established by Second Respondent for the express purpose of marketing motor vehicles manufactured by Second Respondent in a region with

no existing distribution arrangements *[Proc. Order 2, ¶12]*. Second Respondent maintained an equity share in the First Respondent, appointed a member of First Respondents board *[Proc. Order 2, ¶12]*, and the two 'worked closely together' for fifteen years to develop a market for Second Respondent's products *[Cl. Ex. 16]*. Furthermore, the acronym "UAM" in First Respondent's business name directly references Second Respondent's business name, "Universal Auto Manufacturers" *[Proc. Order 2, ¶11]*. In these circumstances where Claimant has reasonably relied upon agency relationship between First Respondent and Second Respondent, and Second Respondent received material benefit therefrom, it would be contrary to the principles of good faith and the prohibition of inconsistent behaviour for Second Respondent to resist being bound by the arbitration agreement.

d. Second Respondent subsequently ratified First Respondent's conclusion of the arbitration agreement by its conduct

32. In the alternative, if First Respondent was not authorised to bind Second Respondent as principal on the basis of actual or apparent authority, Second Respondent subsequently authorised the arbitration agreement by ratification *[Cotunav]*. On ratification the agent's acts produce the same effects as if they had been carried out with authority from the outset *[Bonell (2) 180]*. Ratification is not subject to any requirements as to form, and may be express or inferred from the conduct of the principal *[Agency Convention Art. 15(8)]*.

33. Second Respondent ratified the arbitration agreement and bound itself as principal to the contract when it undertook to make repairs to the defective cars. Second Respondent undertook 'that everything possible will be done to speed the repair of the cars sent to you', which was an essential condition of the performance of the contract *[Cl. Ex. 6]*. Therefore, Second Respondent, 'by performing the contract in awareness of the situation, had in reality ratified it, including the arbitration clause' *[Cotunav]*.

e. First Respondent as agent will still be bound by the arbitration agreement

34. An agent that concludes an arbitration agreement on behalf of a principal may also be bound in addition to the principal. Where the parties to an arbitration agreement intend to arbitrate all the controversies which arise between them, the agreement should be applied to all claims against agents or entities related to the signatories *[Pritzker 1122]*. Where a party operates through its agents an arbitration agreement would be of little value if it did not extend to those agents. Claimants could avoid the practical consequence of the agreement to arbitrate by simply naming agents as defendants, and the intent of the parties to arbitrate would be effectively nullified *[Arnold 1281]*.

35. The arbitration agreement applies to 'any dispute, controversy or claim' related to the contract of sale *[Cl. Ex. 1]*. First Respondent as agent for Second Respondent was integral to the negotiation, conclusion and performance of the contract of sale and the actions of First Respondent are directly implicated in the claim against Second Respondent as principal. To it would exclude claims regarding First Respondent from the arbitration agreement would eviscerate the arbitration and deny the intention of the parties to submit these to arbitration. Therefore, First Respondent must also be bound to the arbitration agreement as agent.

C. REQUIREMENTS AS TO WRITTEN FORM DO NOT COMPROMISE ENFORCEABILITY OF THE ARBITRATION AGREEMENT

36. Having demonstrated that Second Respondent is a bound by the arbitration agreement, an award rendered by the tribunal will satisfy the writing requirements of the Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958 (hereafter *NY Convention*) and be enforceable outside Danubia.
37. Danubia has adopted Option II of Article 7 of the UNCITRAL Model Law *[Proc. Order 2, ¶3]*, removing all requirements of form conditioning the validity of an international arbitration agreement.
38. With respect to enforcement of an award outside of Danubia, Art. II(1) of the NY Convention requires an arbitration "agreement in writing" to be "signed by the parties" *[Art. II(2) NY Convention]*. The writing requirements will not present a bar to enforcement where the Second Respondent has not signed the agreement.

(i) Writing Requirement is Satisfied by Original Contract Signed by Claimant and First Respondent

39. When applying similar writing requirements under Swiss law to the question of whether an arbitration agreement signed by only two parties could bind another non-signatory, the Swiss Tribunal Fédéral found that the written form requirement only applies to the original arbitration clause itself by which the initial parties have expressed their common will to submit the dispute to arbitration. The question of the subjective scope of a formally valid arbitration agreement, including determination of the parties bound by it, is a matter of interpretation rather than form *[X S.A.L 736]*. As such, provided there is a formally valid arbitration agreement in a contract, the question of bind parties not explicitly mentioned therein does not engage the writing requirement.
40. In the present case, the arbitration agreement contained in the contract of sale signed by Claimant and First Respondent clearly meets the writing requirements and is formally valid

[Cl. Ex. 13]. The subsequent issue of whether Second Respondent is bound by that agreement is a matter to be addressed by interpreting the agreement. As such, the arbitration agreement would satisfy the writing requirement of the NY Convention for the purposes of enforcement of an award outside of Danubia.

(ii) Writing requirement is satisfied by the documentary evidence submitted by Claimant

41. In the alternative, the documentary evidence submitted by Claimant satisfies the writing requirement. The writing requirement ought be interpreted broadly, by recognising that Article II(2) of the NY Convention provides a non-exhaustive list of ways in which an arbitration agreement may be made 'in writing'*[UNCITRAL Recommendation]*. This reflects State Parties practice, whereby the writing requirements in most national laws and under the NY Convention have been liberally interpreted *[Lew/Mistelis/Kröll 132]*. Courts have recognised the diminishing importance of the signature requirement *[Compagnie de Navigation; Lew/Mistelis/Kröll 136, 138]*, and applied party intent over form *[Sphere Drake*; *Lew/Mistelis/Kröll 138]*, where such intent is derived from documents manifesting the intent of such third party to arbitrate *[Poudret et al. 221]*. As such, the documentary evidence provided by Claimant *[Cl. Exs. 1, 3, 4, 6, 13 and 16]*, applied above in manifesting the consent of Second Respondent, ought to be sufficient that the agreement be 'in writing'.

42. Consequently, Second Respondent is bound by the arbitration agreement.

II. THE INSOLVENCY LAW OF OCEANIA DOES NOT AFFECT THE JURISDICTION OF THE TRIBUNAL IN DANUBIA

43. Second Respondent further contends that Oceanian law renders the arbitration agreement non-existent, thereby affecting the tribunal's jurisdiction *[Answer of Second Respondent, 1 September 2008]*. Contrary to Second Respondent's contention, the jurisdiction of the tribunal is not affected by Oceanian insolvency law for three reasons. First, irrespective of Oceanian law, the tribunal has competence to determine its own jurisdiction pursuant to the principle 'competence-competence', as codified in the *Model Law* and adopted into Danubian law (A). Second, the tribunal's jurisdiction is not precluded by the terms of Oceanian law as that law has solely domestic effect and does not render the arbitration agreement void in Danubia (B). Third, the award of the tribunal is enforceable as the subject of insolvency is arbitrable and the exercise of jurisdiction would not be contrary to public

policy (C). Alternatively, should the award of the tribunal not be enforceable in Oceania, the existence of alternative enforcement jurisdictions warrants the exercise of jurisdiction (D).

A. THE TRIBUNAL HAS AUTHORITY TO DETERMINE THE VALIDITY OF THE ARBITRATION AGREEMENT

44. Notwithstanding Second Respondent's submission that Oceanian law renders the arbitration agreement void, Oceanian law cannot automatically deprive the tribunal of power to determine its jurisdiction due to the operation of the principle 'competence-competence'. This principle is reflected in both the procedural rules selected by Claimant and First Respondent to govern the procedure of the arbitration, the *SCC Rules,* and the law of the seat of arbitration (*lex arbitri*), Danubian law, vis-à-vis Art. 16 of the *Model Law [see infra Pt. I.A]*. The intent and effect of Art. 16(1) of the *Model Law* is to enable an arbitral tribunal to continue with proceedings where a challenge to the existence or validity of the arbitration agreement is made, thereby preventing parties from delaying or derailing arbitral proceedings merely by alleging invalidity or non-existence of the arbitration agreement *[Fouchard 400; Paulsson 115; Gonzales de Cossio 242]*. The operation of 'competence-competence' as codified in Art. 16(1) enables the tribunal, irrespective of Oceanian law, to determine whether it can exercise jurisdiction over the dispute, preventing automatic deprivation of jurisdiction by virtue of Oceanian law.

B. OCEANIAN LAW DOES NOT PRECLUDE THE TRIBUNAL'S JURISDICTION

45. Oceanian law does not divest the tribunal of jurisdiction as (i) the law governing the existence and validity of the arbitration agreement in Danubia is the law of the seat, Danubian law; (ii) Oceanian law cannot override Danubian law as it has solely domestic effect; and (iii) the arbitration agreement is enforceable under Danubian law.

(i) The Law Governing the Arbitration Agreement is the Law of Danubia, not Oceania

46. The law of the seat, Danubia, rather than Oceania, as well as governing the conduct of the arbitration *[see infra Pt. II. A]*, also governs the arbitration agreement. Both scholarly commentary and international arbitral conventions – specifically, the *NY Convention, Arts. V and VI* - affirm the operation of the law of the seat, Danubian law, as the law governing the arbitration agreement *[Redfern/Hunter 84; Law/Mistelis/Kroll 107; Samuel 262]*. This is so for two reasons.

47. First, in circumstances where the existence of the arbitration agreement is challenged, as it is here by Oceanian law *[Cl. Ex. 14],* the law of the seat has traditionally determined the standard against which existence is judged *[Redfern/Hunter 107; ICC Case 6162].* For example, in ICC Case 6162, the validity of an arbitration agreement providing for arbitration in Switzerland in accordance with Egyptian law was considered valid pursuant to Swiss law (the law of the seat), despite Egyptian law rendering it void. Similarly, the validity of the arbitration agreement between Claimant and Respondent/s should be determined by reference to Danubian law, despite Oceanian law rendering it void.

48. Second, should the law of the seat not automatically govern the arbitration agreement in this way, it will still govern the arbitration agreement under a conflict of laws approach. As Claimant and First Respondent have stipulated a choice of seat but not choice of law *[Statement of Claim, ¶25]*, Danubian law bears the closest connection to the arbitration agreement (as the place of initial application and enforcement of the arbitration agreement) *[Redfern/Hunter 107; NY Convention, Art. V(1)].* The NY Convention supports such a conclusion by making recognition and enforcement of arbitral awards in alternative jurisdictions contingent upon enforcement under the law of the seat *[Art. V NY Convention; Park 236].* The fact that Danubian law is not the law governing the main contract, in this instance the CISG *[see infra. Pt III. A],* does not limit the closeness of its connection to the arbitration agreement, due to the operation of the doctrine of separability. This doctrine, which is broadly recognised by most modern arbitration laws, holds that the arbitration agreement is autonomous from and maintains a separate existence to the main contract and can therefore be governed by different law *[Prima Paint; Sojuznefteexport; Lew/Mistelis/Kroll 101,106; Fouchard 198; Art. 16(1) Model Law].*

49. Oceanian law is neither the law of the seat nor the law bearing the closest connection to the dispute pursuant to a conflict of laws approach. Consequently, the law governing the arbitration agreement is that of Danubia, not Oceania.

(ii) Oceanian Law Has Solely Domestic Effect

50. Oceanian law is unable to override the law governing the arbitration, Danubian law, as the terms of Oceanian law have solely domestic effect. The limits of national law's ability to override the terms of the law governing an international arbitration are well recognised *[Lew/Mistelis/Kroll 112].* The presence of an international element shifts an arbitration agreement out of the ambit of national law and into that of international arbitral conventions *[Goshawk; Corcoran].* In Corcoran, the New York Supreme Court confirmed that any international element, even mere foreign nationality of a party, is sufficient. As the place of

arbitration, Danubia, is a third country foreign to both Claimant and Respondents, the requisite international element is evident. Consequently, while Oceanian law may operate to render the effect of the arbitration agreement void in Oceania, it has no bearing upon the validity of the agreement under *international* arbitral proceedings in Danubia.

51. The 2006 decision of the Georgian Northern District Court in Goshawk affirms that domestic law rendering an arbitration agreement void cannot override *international* arbitral instruments - whether the NY Convention (in national proceedings concerning referral to international arbitration) or the *law of the seat* (in international arbitral proceedings) – where an arbitration agreement has an international element. In Goshawk, the court found that Georgia's domestic McCarran Ferguson Act, which operated to render all arbitration agreements contained in insurance contracts void by mandating state regulation of the insurance industry, had solely domestic operation. It could not override the terms of the relevant international arbitral instrument, the NY Convention. Per Goshawk, while Oceanian domestic law renders the arbitration agreement void upon commencement of insolvency proceedings *[Cl. Ex. 14],* it is superseded by the terms of the instrument of *international* arbitration governing the agreement's validity, Danubian law *[as established infra Pt. II. B(i)]*. Whether the arbitration agreement is void or enforceable is therefore a question solely for Danubian law, irrespective of Oceanian law. Though in Goshawk the issue arose in the context of domestic (US) proceedings regarding referral to arbitration, rather than international arbitral proceedings, there is support for applying the same criteria at both levels for consistency *[Lew/Mistelis/Kroll 119; Kustvaart-Bevrachting]*.

(iii) The Arbitration Agreement is Enforceable under Danubian Law

52. The arbitration agreement is enforceable under Danubian law as it is (a) existent, and (b) valid under Danubian law.

a. The arbitration agreement is existent under Danubian law

53. Danubia, by adopting the Model Law and NY Convention, has incorporated the terms of those instruments into domestic law *[Statement of Claim, ¶26]*. The sole basis of Second Respondent's contention regarding the non-existence of the arbitration agreement lies in the terms of Oceanian law. According to the insolvency representative of the Port City regional court, Oceanian law renders all forum selection clauses, including arbitration agreements, void ab initio upon the commencement of insolvency proceedings *[Cl. Ex.14]*. No such rider provision exists in either the Model Law or NY Convention. Thus, prima facie, the arbitration agreement is existent under Danubian law.

b. The arbitration agreement is valid under Danubian law

54. The requirements for formal validity under Danubian Law are contained in the NY Convention, as adopted by Danubia *[Statement of Claim ¶26]*. Art. II(1) of the NY Convention requires an agreement to be in writing. Pursuant to Art. II(2) of the NY Convention, agreement in writing includes an arbitration clause contained in a contract signed by the parties. Art. 8(1) of the Model Law and Art. II(3) of the NY Convention provide that an arbitration agreement in writing is invalid only if it is "null and void, inoperative or incapable of being performed."

55. The arbitration agreement plainly fulfils the first condition, being included within a contract signed by the parties *[Statement of Claim, ¶ 27; Cl. Ex. 1]*. The arbitration agreement is also neither null and void, inoperative or incapable of being performed. The terms 'null and void' under the NY Convention refer to a neutral *international* standard, which does not take into account national idiosyncrasies, so as to further the harmonisation objective of the NY Convention *[Redfern/Hunter/Blackaby/Partasides 277; Lew/Mistelis/Kroll 342]*. Pursuant to this internationally accepted standard, the arbitration agreement is null and void if there is invalidity or defect at the *time of formation*, typically by virtue of the standard contractual defences of "fraud, duress, illegality, mistake, and lack of capacity" *[Born 160; Redfern/Hunter/Blackaby/Partasides 277; Khan]*. The terms of Oceanian law, despite rendering the arbitration agreement void ab initio, do not constitute initial defect or invalidity. As such, the arbitration agreement is neither null nor void under the terms of the NY Convention, as incorporated into Danubian law.

56. Moreover, there is no suggestion that the arbitration agreement is either inoperative or incapable of performance. Inoperability denotes the agreement losing its effect (typically by virtue of revocation of the agreement by the parties or by the operation of res judicata) *[Moses 32]*. This is not evidenced as the agreement remains in existence *[see infra Pt. II. B(iii)(a)]*. Incapability of performance, which refers to impracticability of establishing the arbitral tribunal due to practical impediments or textual uncertainty, is not at issue as the arbitral proceedings have been established *[Lew/Mistelis/Kroll 344]*.

C. THE AWARD RENDERED BY THE TRIBUNAL IS ENFORCEABLE

57. Assuming that Oceanian law does not render the arbitration agreement void in Danubia, the sole remaining impediment to jurisdiction is potential non-enforceability of the tribunal's award in Oceania. The grounds on which the recognition and enforcement of an award may be refused are narrow. These grounds are codified in Art. V of the NY Convention and Arts. 34 and 36 of the Model Law (which mirror the terms of the NY Convention). Where

enforcement is sought in Oceania, solely the last two grounds will be in contention. These are (i) the subject matter of the award is not arbitrable in the place of enforcement; and (ii) award is contrary to public policy in the place of enforcement. Neither is established as the dispute is both arbitrable and consistent with public policy.

(i) The Subject Matter of the Dispute is Arbitrable

58. The dispute is arbitrable as (a) the parties intended arbitration; (b) Oceanian law does not preclude arbitrability of insolvency disputes; and (c) should Oceanian law be considered a mandatory rule against arbitration of insolvency disputes, the balance of public policy favours arbitrability.

a. The parties intended the dispute to be arbitrated

59. International arbitration is predicated on consent and contractual agreement between the parties. It is based on the idea of party autonomy – the contractual ability of parties to opt out of normal national jurisdiction *[Redfern/Hunter/Blackaby/Partasides 4; Lew/Mistelis/Kroll 187]*. In the words of *Fouchard [31],* 'it is the parties' common intention which confers powers upon the arbitrators'. In keeping with the doctrine that the parties' intent prevails, the tribunal should exercise jurisdiction on the basis that Claimant and First Respondent (and Second Respondent by extension) intended the dispute to be arbitrated. This intent is reflected in the terms of the arbitration agreement itself "any dispute…shall be settled by arbitration…", by which Claimant contends Second Respondent is also bound *[Statement of Claim, ¶27; Cl. Ex. 1]*. Such intent is imputed to Second Respondent by extension of the arbitration agreement *[see infra Pt. I]*. Moreover, as the arbitration agreement was entered into less than three months prior to First Respondent formally entering into insolvency proceedings on April 9, it is likely that First Respondent was aware of its impending insolvency and intended the dispute to be arbitrated irrespective *[Statement of Claim, ¶28; Cl. Ex. 14]*.

b. The intent of the parties to arbitrate is not displaced by Oceanian law

60. While there is some scholarly support for the imposition of certain limits on the will of the parties *[Fouchard 464]* – the parties' intent is not displaced by Oceanian law as first, arbitral practice confirms that only the mandatory rules of the *seat* will displace the will of the parties to arbitrate; and secondly, the dispute is objectively arbitrable under Oceanian law.

61. Arbitral practice confirms that irrespective of the terms of national insolvency law, where the law is not that of the seat, it will not displace the presumption of arbitrability based on party intent *[ICC Case 6057; ICC Case 5996; Serrano 58; Lew 374]*. In both ICC Case 6057 and 5996, the arbitrator proceeded to arbitrate and render an award despite restrictions in the

insolvency law of the domicile of a party. In consistency with arbitral practice, the tribunal in Danubia is entitled to proceed to arbitrate on the basis of party intent, regardless of the terms of Oceanian law.

62. Moreover, even if Oceanian law is capable of displacing the parties' intent to arbitrate, the dispute is objectively arbitrable under its terms. Objective arbitrability refers to national laws which preclude arbitration of disputes concerning a particular *subject [Lew/Mistelis/Kroll 187; Fouchard 312; Art. 34(2) Model Law; Art. V(2)(a) NY Convention]*. The terms of Oceanian law, however, merely render an arbitration agreement void upon the commencement of insolvency proceedings *[Cl. Ex. 14; Statement of Claim, ¶28]*. Thus, it is the commencement of domestic proceedings (parallel proceedings), rather than the particular subject of insolvency, which impedes arbitration under Oceanian law. The dispute is therefore objectively arbitrable under the terms of Oceanian law.

c. In the event that Oceanian law constitutes a mandatory rule, the balance of public policy favours arbitrability

63. Should Oceanian law be construed as a mandatory national rule precluding arbitration of disputes involving insolvent Oceanian parties, arbitrability becomes a question of balancing competing public policy considerations - the international public policy encouraging arbitration of commercial disputes as against the policy of reserving matters of public interest for domestic courts *[Lew/Mistelis/Kroll 198; Fouchard 331; Redfern/Hunter 137; Barraclough/Waincymer 217]*. In the context of insolvency, the public policy contest is between national policy interest in centralising all claims against the debtor's estate so as to ensure consistency and equality of creditor treatment, as against the international policy concern with fostering arbitration of commercial disputes and recognising party autonomy *[Lazic 5]*. Of these competing forces, the balance lies in favour of arbitrability, for two reasons.

64. First, in an insolvency context, both US and European (particularly French, German and Swiss) jurisprudence confirms that solely 'pure' or 'core' bankruptcy matters are not arbitrable *[Lew 367]*. Despite some jurisdictional variation, 'pure' or 'core' typically refers to conduct such as the institution of insolvency proceedings or appointment of trustees which is capable of substantially affecting the public interest *[Lazic 5; Lew 367]*. A contractual claim by an individual creditor such as the Claimant will therefore not constitute a 'pure' or 'core' bankruptcy matter and is consequently arbitrable.

65. Second, arbitral practice and commentary confirms the pre-eminence attributed to international over domestic public policy on issues of mandatory rules generally *[Fouchard*

336-337; Redfern/Hunter 147; Mitsubishi]. In Mitsubishi, the New York Supreme Court affirmed the pre-eminence of international public policy, holding anti-trust disputes arbitrable in the international context, despite mandatory rules of domestic law precluding arbitration. In jurisdictions such as France this pre-eminence operates as a presumption in favour of arbitrability, rebutted solely by clear statutory statements of non-arbitrability *[Fouchard 336-337]*. In an insolvency context, this pre-eminence is reflected in numerous jurisdictions. For example, Section 1030(1) of Germany's ZPO statute renders arbitrable all disputes raising an 'economic interest', under which head contractual claims against an insolvent party clearly fall. Conversely, under both French and Dutch law, insolvency disputes are presumed arbitrable where they involve an arbitration agreement entered into prior to insolvency *[Lazic 5-8]*.

(ii) The Exercise of Jurisdiction is Not Contrary to Public Policy

66. The second potential ground of non-enforceability, public policy, overlaps with the public policy considerations pertaining to arbitrability. In the context of Art. V of the NY Convention, public policy refers to a narrow international standard otherwise classed 'ordre public' *[Lew/Mistelis/Kroll 720]*. While the 'international' element is not explicitly referred to in the Model Law or NY Convention, it is extensively recognised in French jurisprudence and is supported by both case law and commentary *[Mitsubishi; Ganz; Thieffry 35; Fouchard 335; Redfern/Hunter 445; Lew/Mistelis/Kroll 721]*. In Ganz, for example, the Cour de cassation explicitly grounded the arbitrator's role in the application of *international* public policy.

67. For arbitration of the dispute between Claimant and Respondents to be contrary to public policy, it must offend basic public (international) notions of morality *[Lew/Mistelis/Kroll 721]*. This includes both procedural and substantive morality – the first pertaining to issues of fraud, impartiality and natural justice in the conduct of arbitral proceedings and the latter referring to fundamental principles of law and foreign relations *[Law Association Committee on International Commercial Arbitration, cited in Lew/Mistelis/Kroll 721]*. The arbitration of the dispute between Claimant and Respondents does not reach this standard. Procedural immorality is not at issue and substantive immorality is not established as the arbitral proceedings both foster international policy and do not prejudice the insolvency proceedings in Oceania. The exercise of jurisdiction fosters international policy by encouraging arbitration of commercial disputes. Moreover, as the tribunal will merely render an award which will subsequently be brought before the Port City regional court for recognition and

enforcement, the proceedings foster, rather than prejudice, recognition of the jurisdiction of the Oceanian court.

68. In addition, it would be contrary to international public policy to abdicate jurisdiction on the basis of Oceanian law where a valid claim lies against a foreign respondent not subject to that law. Oceanian law bears no connection to Second Respondent and is unable to render the arbitration agreement void against Second Respondent (as it has solely domestic effect) *[see infra Pt. II. B(ii)]*. To abdicate jurisdiction on the basis of a mandatory rule of Oceanian law would therefore unjustifiably prejudice, rather than contravene, international public policy favouring arbitration of international commercial disputes.

D. IN ANY EVENT, AWARD ENFORCEABILITY IN OCEANIA IS NOT A PRE-REQUISITE FOR THE EXERCISE OF JURISDICTION

69. Even if Oceanian law precludes enforceability of the tribunal's award in Oceania, such enforceability is not a pre-requisite for the tribunal's exercise of jurisdiction. While the duty of the arbitral tribunal to render an enforceable award is often emphasised as a general rule *[Horvath 135; ICC Rules, Art. 35],* non-recognition or enforcement in a single contracting state, Oceania, does not preclude the exercise of jurisdiction where other enforcement jurisdictions are available *[ICC Cases 1350; 2139; 4415; 6057; Serrano 58; Lew 374]*.

70. Typically the existence of assets within a country is sufficient to establish jurisdiction for enforcement actions *[Lew/Mistelis/Kroll 703].* Consequently, Claimant will have a claim for enforcement in at least three jurisdictions – Oceania, Polaria and Equatoriana, all of which are parties to the NY Convention and subject to its terms *[Statement of Claim ¶26, Proc. Order 3].*

71. The NY Convention mandates the recognition and enforcement of all foreign arbitral awards by State parties. Underlying the NY Convention and its interpretation is a strong policy imperative in favour of fostering international commercial arbitration *[Goshawk; Mitsubishi; Lew/Mistelis/Kroll 692; Lazic 5].* First Respondent is known to have assets (a claim for debts owed to it) in Polaria which are yet to be distributed. Second Respondent, in light of its organisation in Equatoriana, is likely to have assets in that jurisdiction *[Statement of Claim, ¶5; Proc. Order 2, ¶34]*. The existence of two alternative enforcement jurisdictions, in conjunction with the policy of the NY Convention to foster enforcement and recognition of arbitral awards, mitigates any effect of potential non-enforceability in Oceania upon jurisdiction.

72. Moreover, in light of First Respondent's decision not to actively participate in proceedings, the dominant enforcement jurisdiction will be Second Respondent's domicile, Equatoriana, rather than Oceania. Despite Equatoriana's implementation of the UNCITRAL Model Law on Cross Border Insolvency 1997 (hereafter *Insolvency Convention*), the terms of that Convention do not preclude recognition of foreign individual proceedings concerning an insolvent party's assets where main insolvency proceedings are on foot *[Chap. 3, Insolvency Convention]*. The tribunal's award is therefore enforceable in Equatoriana, the dominant enforcement jurisdiction, further affirming the tribunal's jurisdiction.

CONCLUSION ON JURISDICTION

73. The Tribunal has competence to determine its jurisdiction. In determining its jurisdiction, the Tribunal should exercise jurisdiction over the dispute as (I) Second Respondent is bound by the terms of the arbitration agreement signed by Claimant and First Respondent; and (II) the insolvency law of Oceania both cannot and should not affect the jurisdiction of the Tribunal in *international* arbitral proceedings.

ARGUMENT ON THE MERITS

III. SECOND RESPONDENT IS LIABLE FOR FIRST RESPONDENT'S BREACH OF CONTRACT

74. In relation to the first of the substantive issues in dispute, Second Respondent contends that it is not liable for any breach of the contract of sale *[Answer of Second Respondent, 1 September 2008]*. This contention is erroneous. Preliminarily, the delivery of defective good plainly constituted a beach of the terms of contract (A). Second Respondent is liable for such breach because either (i) Second Respondent was a party to the contract; or alternatively, (ii) Second Respondent assumed the obligations and liabilities arising under the contract by subsequent modification (B).

A. FIRST RESPONDENT BREACHED THE TERMS OF THE CONTRACT

75. As a preliminary matter, Claimant and First Respondent concluded a valid contract of sale, which First Respondent subsequently breached.

76. It is not in contention that Claimant and First Respondent concluded a valid contract of sale on 18 January 2008 *[Cl. Ex. 1; Proced. Order 1]*. That contract of sale is governed by the United Nations Convention on Contracts for the International Sale of Goods 1980 (hereafter *CISG*). The CISG applies "to contracts of sale of goods between parties whose places of business are in different States" *[CISG Art. 1(1)(a)]*. While the contract of sale does not explicitly stipulate choice of law, Equatoriana, Oceania and Mediterraneo, the places of business of Claimant and both Respondents, are all parties to the CISG *[Statement of Claim, ¶25]*. Each place of business is a different State. It is therefore indisputable that the CISG applies to the merits of the dispute.

77. Art. 35 of the CISG confers an obligation upon the seller, First Respondent, to deliver goods which are of the quantity, quality, and description required by the contract. Article 35(2)(a) of the CISG states that the goods will not conform with the contract unless they are fit for the purposes for which goods of the same description would ordinarily be used.

First Respondent delivered to Claimant Tera cars containing defective misfiring engines which did not run smoothly. When driven from port to Claimant's place of business, the Tera cars 'misfired so badly that they were close to undriveable' *[Cl. Ex 2]*. First Respondent provided goods unfit for the purposes contemplated under the contract, thereby breaching the terms of the contract, pursuant to Art. 35 of the CISG.

B. SECOND RESPONDENT IS LIABLE FOR BREACH OF CONTRACT BY FIRST RESPONDENT

78. Second Respondent should be held liable for breach of contract by First Respondent for two alternative reasons. First, Second Respondent was a party to the original contract of sale (i). Second, in the alternative, Second Respondent became a party to the contract of sale by modification of the contract of sale (ii).

(i) Second Respondent was an Original Party to the Contract

79. Second Respondent was a party to the contract of sale, and as such is liable for the breach of the contract resulting from the delivery of defective Tera cars. Second Respondent may be considered a party under the contract on three alternative grounds:

a. First Respondent entered into the contract of sale as agent for Second Respondent;
b. Second Respondent participated substantially in the contract of sale; or
c. Second Respondent as party to the arbitration agreement must be party to the contract of sale on the basis of public policy.

a. First Respondent entered contract as agent for Second Respondent

80. The CISG does not apply to the issue of agency and authority, which are to be addressed in accordance with domestic law *[Honnold 68*, Schweizerische Zeitschrift*]*. As demonstrated above, First Respondent as agent was authorised to bind Second Respondent as principle on the basis of either actual authority, apparent authority, or subsequent ratification *[see infra Pt. I. B(iv)]*.

81. Where this agency relationship is established, references in the Convention to the acts of a party include persons for whose acts the party is responsible *[Honnold 68]*. Therefore, Second Respondent, as principal, is responsible under the Convention for the acts of First Respondent, and is liable for the breach of the contract.

b. Alternatively, Second Respondent participated substantially in the contract and is the "seller", within the meaning of Article 4 of the CISG

82. Art. 4 of the CISG limits the coverage of the CISG to 'the formation of the contract of sale and the rights and obligations of the *seller and the buyer* arising from such a contract'. While Second Respondent is the manufacturer, rather than the named seller of the goods supplied under the contract, Claimant contends that in all the circumstances Second Respondent was in fact the seller.

83. The 'buyer-seller language' of the Convention is not an impassable barrier to the application of the CISG to a remote supplier *[Honnold 63; Flechtner 7]*. The Convention is capable of being invoked against the remote supplier or manufacturer of goods where the supplier has participated substantially with the dealer in the contract of sale *[Flechtner 7; Honnold 63]*. In particular, the manufacturer may be considered to have participated in the contract, although not formally, where warranties and representations are addressed to the buyer. In such a case, the manufacturer stands in the shoes of the seller. In Asante Technologies, the CISG was applied to determine a US buyer's rights against a Canadian manufacturer of computer chips. The buyer had purchased through a US distributor, not directly from the Canadian manufacturer, however the chips had allegedly failed to conform to representations made by the manufacturer to the buyer.

84. While Second Respondent did not formally participate in the contract of sale with Claimant, Second Respondent participated through the operation of implied of warranties and representations in favour of Claimant. These representations are manifested in Second Respondent's statement that it 'does not wish [Claimant] to have any doubts about either the quality of the Tera brand of our cars or of the intention of [Second Respondent] to stand behind its product.' *[Cl. Ex. 4]*. Furthermore, its offer of repair and technical assistance satisfies the requirement of substantial participation in sale, in light of the operation of the

contract by instalment *[Cl. Ex 1; Cl. Ex. 4; Statement of Claim, ¶9]*. Indeed, Second Respondent had taken responsibility for fixing defective Tera cars in a similar situation in the past *[Proc. Order 2, ¶15]*. Thus, Second Respondent participated in the contract of sale by representing that it would 'stand behind its product' and as such is the seller within the scope of Art. 4 of the CISG.

c. To bind Second Respondent by the arbitration agreement but not the contract would be contrary to public policy

85. Claimant contends that Second Respondent is bound by the arbitration agreement as a result of three alternative grounds – first, Second Respondent's conduct was an expression of implied consent; second, Second Respondent is estopped from denying it is a party to the arbitration agreement; or third, Second Respondent is a member of a group of companies and is bound by the arbitration agreement *[see infra Pt. I.B]*.

86. Where Second Respondent is bound by the arbitration agreement contained in the contract of sale, as contended by Claimant, Second Respondent must be bound by the contract of sale. An alternative outcome would lead to the absurd result that Second Respondent would be bound to arbitrate disputes, and yet not be bound by the underlying contractual instrument from which such disputes would arise. This would render the arbitration agreement a nullity, by preventing any disputes that could be the subject of arbitration from arising.

87. Such an approach runs contrary to international public policy. Art. V of the New York Convention, to which Equatoriana, Oceania and Mediterraneo are parties *[Statement of Claim, ¶26]*, affirms the significance of compliance with public policy – predominantly interpreted as international public policy – in ensuring enforcement of arbitral awards *[see infra Pt. II. C(ii)]*. Underlying the New York Convention is international public policy promoting arbitration of international commercial disputes *[Lazic 5; Redfern/Hunter 445]*. To hold Second Respondent bound by the arbitration agreement but not the contract from which disputes subject to arbitration arise would unjustifiably constrain international arbitration, thereby violating international public policy.

88. This claim does not contradict the doctrine of separability of the arbitration agreement *[see infra Pt.II. B(i)],* as the doctrine stands solely for the propositions that invalidity of the main contract will not of itself invalidate the arbitration agreement, and the arbitration agreement *may* be governed by a separate law from that of the main contract *[Samuel(2) 14; Fouchard 210-212]*. Where invalidity of the main contract or governing law is not at issue, the doctrine

of separability does not operate to prohibit Second Respondent from being bound by the main contract on the basis of being bound by the arbitration agreement contained therein.

(ii) Second Respondent subsequently became a Party to the Contract by Modification of the Contract of Sale

89. Were Second Respondent not found to be a party at the formation of the contract of sale, Claimant contends in the alternative that the conduct of First Respondent and Second Respondent constituted a subsequent modification of the contract of sale.

90. Second Respondent, has, by its conduct, modified the terms of the contract of sale and become a party to it pursuant to Art. 29 of the CISG. Art. 29(1) of the CISG provides that "a contract may be modified …by the mere agreement of the parties". Unless a requirement that any such modification be in writing is stipulated, either within the contract *[Art. 29(2) CISG]* or under the law of a relevant State party to the Convention *[Art. 96 CISG],* the modification can take the form of conduct. No limitation is placed upon the form of modification by Art. 29, where preceding writing requirements do not operate *[Honnold 230; Schlechtriem 329].*This is affirmed by Article 3.2 of the UNIDROIT Principles, which provides that a contract is modified by mere agreement 'without any further requirements'. These principles assist interpretation of CISG consistently with its international character, as mandated under Art. 7(1) of the CISG. Both Art. 29 of the CISG and Art. 3.2 of the UNIDROIT Principles reinforce the premise that any agreed modification will be valid, irrespective of form or formality, including writing *[UNIDROIT Principles; Eiselen 2].*

91. Second Respondent, by agreeing to undertake the repair of the Tera cars sold to Claimant as well as subsequently having their personnel inspect the vehicles *[Cl. Ex. 4; Cl. Ex 12]*, undertook contractual obligations of repair owed by the seller. The obligation of repair is a subset of the duty of the seller to ensure conformity of the goods with the contract, under the terms of Art. 35 of the CISG *[see infra Pt. III. A]*. Therefore, Second Respondent's conduct constituted a subsequent modification, by which it bound itself as a party to the contract. Agreement to the modification is implicit within the offer by Second Respondent to provide its services in substitution of the First Respondent (which had no capacity to undertake repair) and in the acceptance of this offer by Claimant *[Cl. Ex. 4; Cl. Ex. 5]*. Writing is not required, as there is no suggestion that either the contract or the law of the relevant State parties to the CISG - Equatoriana, Oceania, Danubia, Mediterraneo - mandates it. Thus, by conduct, Second Respondent modified the contract of sale, binding itself as a party, pursuant to Art. 29 of the CISG.

IV. CLAIMANT WAS AUTHORISED TO AVOID THE CONTRACT ON THE BASIS OF FUNDAMENTAL BREACH

92. Having established Second Respondent's liability for breach of the contract of sale, Claimant contends that the delivery of unfit Tera cars amounted to a fundamental breach of the contract by First Respondent (A). Further, Second Respondent's offer to cure does not preclude fundamental breach (B). Therefore, Claimant is entitled to avoid the contract and did so validly by letters dated 29 February 2008 (C).

A. THE DELIVERY OF UNFIT TERA CARS AMOUNTED TO A FUNDAMENTAL BREACH OF CONTRACT

93. The delivery of unfit Tera cars amounted to fundamental breach on the basis that (i) First Respondent *breached* the contract of sale by failing to deliver cars which were of merchantable quality as required by Art. 35(2)(a) of the CISG; and (ii) that breach was fundamental for the purposes of Art. 25 of the CISG.

(i) Delivery of Unfit Tera Cars amounted to a breach of contract

94. Though not expressly stated within the terms of Art. 25 of the CISG, breach of contractual obligation is a precondition to a finding of fundamental breach *[Koch 185]*. By delivering goods, which were not in conformity with the contract, namely defective Tera cars, First Respondent breached its obligation under Art. 35(2)(a) of the CISG. Non-conformity under this section means that the goods are not fit for the purpose for which they are ordinarily used *[ICC Case 7531]*. The cars were close to 'undriveable' due to the failure of the Engine Control Unit to work properly *[Cl. Ex. 2]* and not fit for resale *[Cl. Ex. 2]*. Therefore, the cars were unfit for the purpose for which they would ordinarily be used. Claimant gave notice to First Respondent regarding the nature of the non-conformity, namely the defective engines of the Tera cars, one day after becoming aware of the breach *[Cl. Ex. 2]* as required by Art. 39(1) of the CISG *[see also infra Pt. III. A]*.

(ii) Delivery of unfit Tera cars amounted to a fundamental breach

95. The delivery of unfit Tera cars amounted to a fundamental breach since the breach (a) resulted in such detriment as to substantially deprive Claimant of what he was entitled to expect under the contract of sale, and (b) First Respondent could foresee and a reasonable person would have foreseen the consequences of breach *[Art 25(1) CISG]*.

a. Claimant suffered detriment substantially depriving him of his expectations under the contract

96. First Respondent's breach of contract caused detriment to Claimant that was of such degree that it substantially deprived Claimant of what he was entitled to expect under the contract *[Art. 25 CISG]*.
97. The term 'detriment' must be interpreted broadly, covering any harmful consequence *[Bianca/ Bonnell 211]*. It is not to be defined by reference to the damage suffered, but by reference to the importance of the interests created by the contract *[Schlechtriem 175]*.
98. Whether the aggrieved party failed to receive the essence of what could have been expected according to the contract is determinative for fundamental breach *[Graffi 339-340]*.
99. Claimant had been deprived of his expectation interests under the contract. Claimant's expectation interest derives from both express and implied contractual terms, and established practices and usages within the car trading industry *[Lorenz; Enderlein/Maskow 113]*.
100. The contract provides for the purchase of "100 new 2008 model Tera cars" *[Cl. Ex.1]*. The fact that the cars are new is important in the context of determining what expectation Claimant could have under the contract. The sale of new cars - as opposed to used cars – allows the expectation on the part of the buyer that the cars are mechanically sound when delivered. This is even more essential in the case of a sole trader relying on the quick resale of cars, such as the Claimant.
101. Claimant had an expectation that the Tera cars would be fit for their purpose, and if the cars were defective, that they would be repaired and made available quickly *[Cl. Ex 2]*. These expectations derive from Arts. 35 and 48(1) of the CISG, operating as implied terms of the contract. Moreover, Claimant, as a sole trader car-dealer would have intended that the Tera cars be in full working order so as to maximise profitability *[Statement of Claim, ¶3]*.
102. In determining the intent of a party, Art. 8(3) allows reference to "all relevant circumstances of the case including the negotiations of the parties … and any subsequent conduct. " Claimant's expectations are reflected in the correspondence between Claimant and Respondents regarding Claimant's awareness of the non-conformity and the need for quick repair so that the cars would be available for resale *[Cl. Ex. 2]*.
103. In the letter dated 22 February 2008, Claimant stated that he had 'almost no other stock to place on the showroom floor' and stressed that the Tera cars needed to be 'available for sale very soon' *[Cl. Ex. 2]*.
104. The Tera cars were misfiring so badly that they were 'close to undriveable' *[Cl. Ex 2]*. Thus Claimant was deprived of his expectation that the cars be fit for their purpose. This frustrated the underlying purpose of the contract, which was the purchase of vehicles for resale which is an essential characteristic of fundamental breach *[Oberlandesgericht; Enderlein/Maskow*

113]. Moreover, when Claimant sought assurance from Second Respondent's representative, Harold Steiner, regarding the length of time required to fix the Tera cars, no guarantee could be provided by Steiner that the cars could be repaired promptly or at all *[Cl. Exs. 5; 6; 10].*

105. The lack of assurance or guarantee regarding repair deprived Claimant of his expectation that the goods would be repaired and available quickly. Consequently, Claimant faced the likelihood of loss of resale possibility, loss of potential customers, and in turn loss of expected profits – reflecting substantial deprivation of Claimant's legitimate expectations under the contract *[Bianca/Bonell 212].*

106. Furthermore, whether there are serious consequences to the economic goals of the aggrieved party further informs the question of deprivation *[FCF S.A].* As a result of the defects in the Tera cars, Claimant was hindered in pursuing his commercial activities, as he could not continue his car trading business without products ready for sale *[Cl. Ex. 10].* Moreover, income from resale of the Tera cars was needed to sustain Claimant's business. Without such income Claimant faced the risk of insolvency *[Cl. Ex. 10].*

107. Therefore, Claimant suffered such detriment as a result of the non-conformity of the Tera cars, as to be substantially deprived of his expectation interest under the contract.

b. The consequences of breach were foreseeable

108. First Respondent did foresee and a reasonable person would have foreseen the deprivation to Claimant flowing from breach *[Art. 25 CISG]*. First Respondent and a reasonable person of the 'same kind' and 'in the same circumstances' would have foreseen that delivery of defective cars, thus cars unfit for their ordinary purpose, would deprive Claimant of his expectation of resale and profits. These severe consequences were foreseeable to both the First Respondent and a reasonable person in the shoes of the First Respondent *[Art. 25 CISG]*.

109. In relation to actual foreseeability, whether Respondent foresaw Claimant's substantial deprivation must be assessed 'in the light of the facts and matters of which he then knew' *[Bianca/Bonell 217].* This includes all the relevant circumstances of the case, as well as negotiations and correspondence between the parties *[Koch 229].* First Respondent knew from the nature of the contract of sale formed with Claimant, a sole trader car dealer, that non-conformity would preclude resale and result in loss of profits. The Respondent would therefore have been aware of the subsequent possibility of Claimant's insolvency, in light of the Claimant's letter dated 22 February 2008 stating that it was imperative that the cars be available for sale quickly as he had almost no other stock to place on the showroom floor *[Cl.*

Ex. 2]. The correspondence put First Respondent on notice of the Claimant's potential risk of insolvency.

110. As First Respondent operated in the car industry and doing business with Claimant in Mediterraneo, it can be inferred that First Respondent would have known that the banking facilities in Mediterraneo do not finance working capital and, in turn, that most of Claimant's working capital was tied up in the Tera cars *[Cl. Ex. 13; Proc. Order 3].*

111. Knowledge acquired by First Respondent after conclusion of the contract is relevant for determining subjective foreseeability. This is reflected in the legislative history of Art. 25 *[Ghestin 22; Erdem 184]*. While Art. 25 of the CISG does not specify at what point of time foreseeability should be measured, the article's legislative history demonstrates that the relevant time was omitted in order to permit decision on a case by case basis, considering subsequent knowledge of the parties [*First Committee Report, A/Conf.97/11, 99].*

112. The fact that other provisions of the CISG, such as Arts. 74(2), 31(b), 35(2)(b), 42(2)(a), 73(3) and 79(1), explicitly state the relevant point in time, while Art. 25 omits to do so, suggests the inclusion of subsequent knowledge under Art. 25 *[Botzenhardt 249]*. Thus Claimant's letter dated 22 February 2008 *[Cl. Ex. 2]* is relevant in discerning foreseeability.

113. In addition, as First Respondent attempted to rectify the breach, by organising repair through Second Respondent *[Cl. Ex. 4]*, there is a presumption that First Respondent foresaw the far-reaching consequences of the breach for Claimant *[Enderlein/Maskow 115].* Accordingly, First Respondent (and a reasonable person) would have foreseen the risk faced by Claimant as result of breach, namely that unless Claimant derived income from resale of the Tera cars, he faced the likelihood of becoming insolvent.

114. In relation to subjective foreseeability, a reasonable merchant 'of the same kind' in 'the same circumstances' as the First Respondent is presumed to have knowledge of the whole spectrum of facts and events at the relevant time *[Lorenz].*

115. First Respondent is a merchant which, as an authorised distributor, is at least knowledgeable and potentially a qualified expert in the car trading industry. A reasonable person like First Respondent refers to a reasonable merchant that is not intellectually or professionally substandard compare to the relevant industry standard *[Bianca/Bonnell 217]*. Such a merchant would have foreseen that delivery of defective cars would preclude resale and result in loss of profits.

116. Moreover, the reasonable merchant operating in the industry would generally be assumed to know about the specialities of their goods, including their usage *[Graffi 340*]. They could therefore have foreseen the consequences of non-conformity of the goods, regarding fitness

for use and merchantability. The reasonable merchant in the industry would also know that most of Claimant's working capital was tied up in the Tera cars, as the banking facilities in Mediterraneo do not finance working capital *[Cl. Ex. 13].* Thus, the consequences of non-conformity in terms of Claimant's loss of expected sales and profits and the subsequent risk of insolvency were foreseeable to a reasonable merchant.

B. SECOND RESPONDENT'S OFFER TO CURE DOES NOT PRECLUDE FUNDAMENTAL BREACH

117. Offer to cure does not preclude fundamental breach for two reasons. First, the wording and legislative intent of the CISG militate against taking into account an offer to cure when determining fundamental breach (i). Second, even if an offer to cure was to be taken into account, the right to cure only exists if cure is possible without unreasonable delay or inconvenience (ii). Moreover, good faith does not require the Claimant to accept the offer to cure (iii).

(i) The wording and intent of Art. 48 of the CISG militates against relevance of an offer to cure to fundamental breach

118. Taking into account offer to cure and curability of defect in determining fundamental breach contradicts the opening words of Art. 48(1) of the CISG. According to Art. 48, the seller's right to cure is 'subject to Art. 49' of the CISG, namely the buyer's right to avoid the contract. Therefore, Claimant's right to avoid the contract prevails over Second Respondent's right to cure and the question of whether the breach was fundamental for the purpose of avoidance cannot be answered in the light of an offer to cure *[Koch 323].*

(ii) In any event, the right to cure is subject to reasonableness

119. A right to cure after delivery under Art. 48(1) is subject to such cure not causing unreasonable delay or inconvenience *[Schlechtriem 565]*. What is reasonable in the circumstances must be decided on a case-by-case basis *[Bianca/Bonell, Art. 48, note 2.1.1.1.2*].
120. Further, irrespective of Second Respondent's intention in offering to cure, Claimant should not be bound by such an offer where the possibility of cure is uncertain *[Koch 267]*.
121. Claimant was told that the procedure to diagnose and fix the problem could be potentially complicated, suggesting the possibility of substantial delay *[Cl. Ex 3]*. When Claimant sought assurance regarding the time it would take for the cars to be fixed from Second Respondent, Second Respondent could not guarantee when the cars would be repaired or

whether they could be repaired at all *[Cl. Ex. 6; Cl. Ex. 10]*. The possibility of a strike at the Mediterraneo airport further contributed to the risk of delay of cure *[Cl. Ex. 10]*.

122. Seven days had passed from the date Claimant informed First Respondent of breach in which Second Respondent's representative, Mr Steiner, could make no guarantee as to the possibility of cure, prior to Claimant seeking to avoid the contract *[Cl. Ex. 2; Cl. Ex.10; Cl. Ex. 11]*.

123. It is unreasonable to expect Claimant to wait for an indefinite period in a situation of uncertainty regarding whether or when cure would take place *[Cl. Ex. 11]*, particularly where his financial livelihood was threatened. The fact that repair had occurred on 19 June 2008 *[Cl. Ex. 12]* is either irrelevant or goes to show that Claimant could not have waited the three months that it ultimately took for Second Respondent to cure the defect.

124. Furthermore, as the Tera cars were occupying expensive storage space and neither Respondent made any assurances as to reimbursement, the offer to cure created inconvenience and uncertainty of reimbursement by Second Respondent, again limiting the right to cure under the terms of Art. 48(1) of the CISG. Waiting for repairs (without knowing whether the repairs would even be forthcoming) was not a viable option for Claimant *[Cl. Ex. 13]*.

125. The offer to cure was therefore unreasonable and Claimant was entitled to reject it in the circumstances.

(iii) Good Faith does not require Claimant to accept offer to cure

126. The principle of good faith, as stipulated in Art. 7 of the CISG, does not limit Claimant's right to avoid the contract *[Koch 339],* as the principle applies solely to the interpretation of the CISG and it is in doubt whether such a principle applies to the performance of contractual obligations by parties *[Farnsworth 54]*.

127. Were good faith to apply to the contractual relationship between Claimant and Respondent/s so as to oblige Claimant to accept and cooperate with Second Respondent's offer to cure (over his right of avoidance), this would disregard the clear statutory intent of Art. 48(1) of the CISG and create uncertainty.

128. Alternatively, on the premise that good faith applies to the contractual relations of the parties, it would be contrary to good faith to oblige Claimant to accept an offer to cure on the uncertain grounds which surrounded the offer by Second Respondent to fix the cars. Claimant reasonably could not rely on Second Respondent's ability to cure the defect within a reasonable time *[see infra. Pt. IV.C(b)]* .

C. CLAIMANT IS ENTITLED TO AND DID VALIDLY AVOID THE CONTRACT

129. Art. 49(1)(a) of the CISG enables a buyer to declare a contract avoided where failure by the seller to perform their obligations under the contract or Convention amounts to a fundamental breach of contract under Art. 25 of the CISG. First Respondent committed a fundamental breach of contract *[see infra Pt. IV. B]*. Claimant was therefore entitled to avoid the contract and did so by letter dated 29 February *[Cl. Ex. 10]*.

130. Claimant fulfilled all other conditions upon avoidance under the CISG. First, Art. 26 of the CISG stipulates that 'notice' of avoidance is to be made to the other party in order to avoidance to be effective. However, notice need not satisfy any formal requirements and can be conveyed by letter *[Schlechtriem 61]*. Claimant notified both Respondents of his desire to cancel the contract and seek reimbursement of purchase price by way of letters dated 29 February 2008 *[Cl. Ex. 10; Cl. Ex. 11],* thereby fulfilling the requirements of Art. 26 of the CISG.

131. Second, Claimant fulfilled the requirement under Art. 49(2)(b)(i) of the CISG that declaration of avoidance be made within a reasonable time after Claimant knew or ought to have known of the breach. Claimant declared the contract avoided 7 days subsequently to becoming aware of the breach of contract on 22 February 2008 *[Cl. Ex. 2; see infra Pt. IV. B; Pt. III. A regarding breach]*.

132. Third, pursuant to Art. 73(2) of the CISG, Claimant is entitled to avoid future instalments of an instalment contract, where Claimant has grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, provided this is done within a reasonable time.

133. The entirety of the first instalment, all 25 Tera cars, were ultimately defective *[Cl. Ex. 12]*. Claimant's mechanic confirmed that almost half of the first instalment, 10 Tera cars, were defective upon receipt *[Cl. Ex. 2]*. Claimant thus had valid grounds to believe that the entirety of the received instalment and subsequent instalments would be defective, thereby fulfilling the requirements under Art. 73 of the CISG. As all other requirements for avoidance are fulfilled, Claimant validly avoided the contract on the basis of fundamental breach.

CONCLUSION ON THE MERITS

134. Pursuant to the terms of the CISG, First Respondent breached the contract of sale. Second Respondent is liable for such breach. Claimant was entitled to avoidance of the contract, on

the basis that the breach was fundamental. Any offer to cure did not preclude the fundamental breach or mitigate Claimant's right of avoidance. Consequently, Claimant validly avoided the contract of sale.

PRAYER FOR RELIEF

Claimant respectfully requests the Tribunal to find that:

1. Second Respondent is bound by the arbitration agreement contained in the contract of sale;

2. The insolvency law of Oceania, by which the arbitration clause becomes void in Oceania upon the commencement of insolvency proceedings, does not affect the jurisdiction of the tribunal proceedings in Danubia and the Tribunal should exercise jurisdiction over the dispute;

3. Second Respondent is liable for any breach of the contract of sale committed by the First Respondent; and

4. First Respondent's breach was a fundamental breach, authorising Claimant to avoid the contract of sale.

Sydney, 4 December 2008
Counsels
(signed)

_____	_____	_____
Irina Kolodizner	Thomas Beamish	Cassandra Campbell