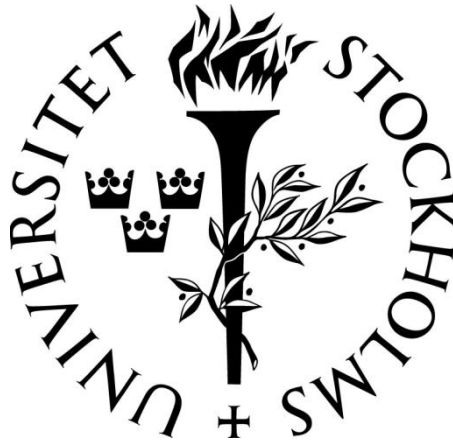


SIXTEENTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
3 to 9 APRIL 2009

MEMORANDUM FOR CLAIMANT



STOCKHOLMS UNIVERSITET

ON BEHALF OF:

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

CLAIMANT

AGAINST:

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

RESPONDENT

STEPHANIE CABRAL · JESSICA EDVALL · KSENIYA KORYUKALOVA
LAURE MEYER · SOFIA PALMQVIST · JONATHAN ROBILOTTO

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\$	United States Dollar
AAA	American Arbitration Association
Arb.	Arbitration
Art.	Article
ASA	Swiss Arbitration Association
ATF	Arrêt du Tribunal Fédéral (Swiss Supreme Court)
CISG	United Nations Convention on the International Sale of Goods, Vienna, 11 April 1980
CISG-AC	CISG Advisory Council
Cl. Ex.	CLAIMANT's exhibit
Co.	Company
Conv. on Agency	Convention on Agency in the international Sales of Goods
CNY	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)
Ct.	Court
Doc	Document
ECU	Engine Control Unit
Ed.	Edition
Eds.	Editors
e.g.	exempli gratia (for example)
et al.	et alia (and the others)
Geo. Wash. Int'l L. Rev.	George Washington International Law Review
GmbH	Gesellschaft mit beschränkter Haftung (German Limited Liability Company)
i.e.	id est (that means)
ICC	International Chamber of Commerce and Industry
ICCA	International Council for Commercial Arbitration
Int'l	International
L.	Law
L.J.	Law Journal

Ltd.	Limited
No.	Number
NY	New York
OLG	Oberlandesgericht (German Regional Court of Appeal)
p.	page
para.	paragraph
PECL	Principles of European Contract Law
pp.	pages
Proc. Ord.	Procedural Order
Q.	Queensland
R.	Reporter
S.	Supreme
SCC	Stockholm Chamber of Commerce
SCC Rules	Arbitration rules of the SCC
SCH	Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien (Vienna), Austria
Sess.	Session
Stmt of Cl.	Statement of Claim
Supp.	Supplement
U.K.	United Kingdom
U.N.	United Nations
U.S.	United States
UAM	Universal Auto Manufacturers Distributors Oceania, Ltd.
UKHL	United Kingdom House of Lords
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	The UNIDROIT Principles of International Commercial Contracts, 2004
VJ	Vindobona Journal
v.	versus
Vol.	Volume
Y.B.	Yearbook
ZCC	Zurich Chamber of Commerce



STATEMENT OF FACTS

CLAIMANT: Mr. Joseph Tisk, who does business under the trade name of Reliable Auto Imports (“CLAIMANT”), is a sole-trader car dealer whose principal office is located in Mediterraneo. CLAIMANT purchases consignments of new and used cars from a variety of countries and imports them for sale in Mediterraneo.

RESPONDENT UAM: Universal Auto Manufacturers Distributors Oceania, Ltd. (“RESPONDENT UAM”) was formerly an authorized importer of automobiles manufactured by Universal Auto Manufacturers. It is organized under the laws of Oceania.

RESPONDENT Universal: Universal Auto Manufacturers, S.A. (“RESPONDENT Universal”) is a major manufacturer of automotive products. It is organized under the laws of Equatoriana.

JANUARY 2008

- **18 - 23 January:** CLAIMANT and RESPONDENT UAM enter into a contract for the purchase and sale of 100 RESPONDENT Universal-manufactured “Tera” cars (“the Contract”). CLAIMANT makes a 50% down payment on the Contract on 23 January, amounting to \$380,000. The Contract calls for the cars to be shipped as space is available.

FEBRUARY 2008

- **18 - 21 February:** CLAIMANT experiences significant problems with the engines of all 25 Tera cars shipped in the first consignment. He contacts a mechanic to remedy the problem, but the mechanic is unable to identify the source of the defect.
- **22 February:** CLAIMANT contacts Mr. High, Sales Manager at RESPONDENT UAM, and informs him that the 25 Tera cars are malfunctioning and nearly undriveable. Mr. High subsequently informs both Mr. Harold Steiner (Regional Manager for RESPONDENT Universal) and Universal technical personnel of his conversation with CLAIMANT.
- **27 February:** CLAIMANT receives a response from Mr. Frank Jones, Chief Engineering Officer of RESPONDENT Universal, who details what he refers to as a “complicated” procedure that may be necessary to fix the Tera cars.
- **28 February:** Mr. Steiner contacts CLAIMANT and informs him that RESPONDENT Universal is prepared to send its technical personnel to fix the unidentified problem with the Tera cars. CLAIMANT replies, asking Mr. Steiner “how long it will take for the cars to be fixed.” In response, Mr. Steiner states that “it is not possible to answer that question with any

precision” and then, in a later phone conversation, Mr. Steiner expresses to CLAIMANT his feeling that the cars can probably be fixed in one week, but he refuses to guarantee such a result, since it is not yet known for certain if the 25 Tera cars can even be fixed at all.

- **29 February:** CLAIMANT accepts a previously rejected offer of 20 Indo cars made by Patria Importers on 12 February. He then informs both RESPONDENT UAM and RESPONDENT Universal (collectively, “RESPONDENTS”) that, in light of the uncertainty surrounding the malfunctioning Tera cars, he must terminate the entire Tera car sales Contract and request the return of his \$380,000 down payment.

APRIL 2008

- **11 April:** Ms. Judith Powers, Insolvency Representative for RESPONDENT UAM, informs CLAIMANT that, under Oceania law, “the opening of insolvency proceedings [commenced on 9 April in Oceania] automatically voids any choice of forum clause, including any arbitration agreement” in all of RESPONDENT UAM’s contracts.
- **14 - 21 April:** An article noting that RESPONDENT UAM’s insolvency leaves RESPONDENT Universal “without a distributor in Oceania” appears in the Business News of Equatoriana. In an interview with the same publication, Mr. Steiner of RESPONDENT Universal laments the “great loss” of its authorized distributor, RESPONDENT UAM, after a fifteen-year relationship spent “developing the market for Universal products” in Oceania.

MAY 2008

- **17 May:** The 25 defective Tera cars are shipped from Mediterraneo to RESPONDENT Universal in Equatoriana.

JUNE 2008

- **19 June:** RESPONDENT Universal contacts CLAIMANT to inform him that the problem with the 25 malfunctioning cars was “quickly fixed” even though “the procedure for assessing the [problem] was somewhat complicated”
- **20 June:** CLAIMANT replies to RESPONDENT Universal, and notes that it is unfortunate that RESPONDENT Universal was unable to guarantee repair of the cars at the time the problem arose.

AUGUST 2008

- **15 August:** CLAIMANT submits a Request for Arbitration and Statement of Claim to the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”).

ARGUMENT

I. INTRODUCTION

1. The Arbitral Tribunal has jurisdiction over this dispute on the basis of the valid and enforceable arbitration agreement contained in the Contract [*Cl. Ex. 1*]. RESPONDENTS, however, object to the Tribunal's jurisdiction in part on the basis of the alleged effect of Oceania insolvency law on these proceedings. RESPONDENTS allege that this insolvency law operates to make void the arbitration agreement that serves as the basis for the Tribunal's jurisdiction [*Answer, p. 32, para. 5; Powers' Letter, p. 30*]. Therefore, CLAIMANT will address this threshold matter first **(II)**. CLAIMANT will then establish that RESPONDENT Universal is bound by the arbitration agreement, and is liable for the breach of the Contract, even though it is a non-signatory to the Contract **(III)**. These questions will be addressed concurrently, as the legal theories that serve to bind RESPONDENT Universal to the arbitration agreement also serve as the basis for liability in light of RESPONDENTS' breach of the Contract. Lastly, CLAIMANT will demonstrate that RESPONDENTS' contract breach was fundamental, and that he properly avoided the Contract, in accordance with the relevant articles of the United Nations Convention on Contracts for the International Sale of Goods (1980) ("CISG") **(IV)**.

II. THE INSOLVENCY LAW OF OCEANIA DOES NOT AFFECT THE ARBITRAL TRIBUNAL'S JURISDICTION

2. The Tribunal is empowered to determine matters related to its own jurisdiction - in accordance with Danubian Arbitration Law (the *lex arbitri* governing these proceedings) - even where the very existence of a valid arbitration agreement is disputed **(A)**. In this case, there is no contractual basis for the application of Oceania insolvency law to this question of the Tribunal's jurisdiction **(B)**. Furthermore, this dispute remains arbitrable despite the commencement of insolvency proceedings in Oceania **(C)**.

A. The Tribunal's Authority to Determine its Own Jurisdiction is Unaffected by the Insolvency Law of Oceania

3. Danubian Arbitration Law (which is identical to the UNCITRAL Model Law with the 2006 amendments [*Stmt. of Cl., para. 26*]) expressly empowers this Tribunal to determine issues related to its jurisdiction. It states that “[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement” [*Danubian Arb. Law, Art. 16(1)*]. This provision of Danubian Arbitration Law is a codification of the well-established doctrine known as “competence-competence” [*See Holtzmann & Neubaus, p. 479*]. Under this doctrine, even in instances where the main contract is alleged to have “ceased to exist,” “the arbitral tribunal still has the [jurisdictional] platform on which [the arbitration] may stand” [*Redfern & Hunter, p. 252; See also, Premium Nafta (U.K.); Heuman, pp. 347-49*]. Because Danubian law embraces this doctrine, the allegation that Oceania insolvency law may void the arbitration agreement is not alone a sufficient basis to dismiss a claim on jurisdictional grounds. Instead, Article 16(1) of Danubian Arbitration Law empowers this Tribunal to rule on its own jurisdiction, as well as rule on the merits if it finds the jurisdictional challenge unsubstantiated [*See Redfern & Hunter, pp. 199-200*].

B. There is No Basis for the Application of Oceania Insolvency Law

4. The notion that Oceania insolvency law affects these proceedings is unsupported by both the language of the Contract and a choice of law analysis. RESPONDENTS’ argument that the arbitration agreement no longer exists is predicated solely on the application of Oceania law [*See Answer, para. 5; Powers’ Letter, p. 30*]. They ask this Tribunal to apply the law which is most beneficial to their position, despite the fact that both RESPONDENTS had the opportunity to include a choice of law clause in the Contract but chose not to do so **(1)**. As there is no law governing the contract, the most appropriate law to apply here to the questions of jurisdiction and the validity of the arbitration agreement is Danubian Arbitration Law. Applying this law yields the conclusion that there is, in fact, a valid and enforceable arbitration agreement still very much in existence **(2)**.

1. **RESPONDENT UAM Drafted the Contract But Chose to Forego the Opportunity to Include a Choice of Law Clause**

5. There is no contractual basis that supports the application of Oceania insolvency law to this dispute. The Contract was on a form provided by RESPONDENT UAM [*Proc. Ord. 2, para. 16*]. It does not contain any choice of law clause, much less one that stipulates the application of Oceania law to either the arbitration agreement or its container contract [*Cl. Ex. 1*]. In utilizing its own form contract, RESPONDENT UAM undeniably had the opportunity to include a choice of law clause, and chose not to do so. Likewise, RESPONDENT Universal reviewed the form contract used by its distributor, RESPONDENT UAM, and similarly chose to forego the opportunity to amend it to include a choice of law clause [*Proc. Ord. 2, para. 16*]. It should also be noted that the arbitral clause in the Contract is identical to the SCC Model Arbitration Clause readily available on the SCC website. While RESPONDENTS chose to utilize this language verbatim, they ignored the decidedly unambiguous model governing law clause also available from the SCC website (“**Model Governing Law Clause:** This contract shall be governed by the law of ----- (insert jurisdiction)”).
6. Thus, RESPONDENT UAM inserted the SCC Model Arbitration Clause, without the accompanying choice of law clause, into the Contract, and that clause was effectively approved by RESPONDENT Universal. Now both RESPONDENTS seek to avoid the contractual obligation to arbitrate by invoking RESPONDENT UAM’s domestic law, which was not referred to in the Contract. In effect, RESPONDENTS ask this Tribunal to simply apply the law that leads to their most beneficial result, namely the dismissal of these proceedings on jurisdictional grounds [*See Answer, p. 32, para. 5; Powers’ Letter, p. 30*].

2. **Danubian Arbitration Law Should be Applied to Determine the Validity of the Arbitration Agreement**

7. This Tribunal should apply the law of the seat to the question of the validity of the arbitration agreement. When an arbitral tribunal is faced with the task of determining the most appropriate law to apply to questions regarding the arbitration agreement itself, the most reasonable choice is “between the law of the seat of arbitration and the law which governs the contract as a whole” [*Redfern & Hunter, p. 126; See also, Born, p. 391*]. In this case, rather than the haphazard application of insolvency law that is foreign to two of three parties in the dispute, as well as the seat of

arbitration, Danubian Arbitration Law is the most appropriate law to apply to this jurisdictional question.

8. The notion that the law of the seat should be applied to such matters “is well established in both the theory and practice of international arbitration” [*Redfern & Hunter*, p. 83]. In a recent arbitration seated in Finland, which is a Model Law country like Danubia, the tribunal considered the question of which law is applicable to the determination of its jurisdiction when an insolvent respondent invokes non-arbitrability under its own national legislation and found that the law of the seat of arbitration applies [*SCC O53/2005 (2007)*]. Proceeding under the SCC Rules, the tribunal rejected the respondent’s argument that the law of respondent’s country should be taken into consideration [*SCC O53/2005 (2007)*]. The tribunal reasoned that because the parties had not indicated, at the time the arbitration agreement was concluded, any intent with regard to applicable law, the law of the seat was the most appropriate law to apply [*SCC O53/2005 (2007)*]. Furthermore, the New York Convention provides that “[r]ecognition and enforcement of [an] award may be refused . . . [if the arbitration] agreement is not valid under the law to which the parties have subjected it or, *failing any indication thereon*, under the law of the country where the award was made” (*emphasis added*) [*CNY Art. V(1)(a)*]. Thus, the New York Convention itself expressly contemplates situations like the one before the Tribunal, where the parties have failed to indicate which law should be applied to the arbitration agreement, and hinges enforceability on the arbitration agreement being valid under the law of the seat of arbitration [*van den Berg*, pp. 294-95].
9. The key consideration of party intent also supports the application of Danubian Arbitration Law to this dispute. In the absence of any applicable law expressly designated by the parties, it is a “fundamental principle of arbitration” that the agreement should be interpreted to reflect the parties’ original intention [*Leahy & Bianchi*, p. 54; *See also, MacGuinness*, p. 67]. A recent House of Lords decision noted that the validity of any arbitration agreement largely depends “upon the intention of the parties as expressed in their agreement” [*Premium Nafta (U.K.)*]. The French Supreme Court has similarly stated that the validity of an arbitration agreement should be determined by looking at the common intentions of the parties, without looking at any underlying domestic law [*Kboms El Mergeb v. Société Dalico (France)*]. Here, both CLAIMANT and RESPONDENT UAM expressed an unambiguous intent to arbitrate in Danubia, and pursuant to the SCC Rules [*Cl. Ex. 1*]. Because of the provision naming Danubia as the seat of arbitration, it is reasonable to infer that the parties intended to apply Danubian Arbitration Law to procedural matters such as the question of jurisdiction [*Petrochilos*, pp. 204-07]. Conversely, it would be

unreasonable to infer from an agreement that makes no reference to Oceania law the notion that the parties intended to apply Oceania law to such questions. Under Danubian Arbitration Law, RESPONDENT UAM's insolvency by itself simply does not warrant dismissal of these proceedings on jurisdictional grounds. Danubia does not have any law or policy that mirrors Oceania insolvency law [*Proc. Ord. 2, para. 4*]. Likewise, Danubia has not adopted the UNCITRAL Model Law on Cross-Border Insolvency [*Proc. Ord. 2, para. 2*]. Thus, there is no indication that Danubia has any interest in Oceania insolvency proceedings.

10. In addition, the arbitration agreement in question is decidedly valid under Article 7 of Danubian Arbitration Law, which requires only “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not” [*Danubian Arb. Law, Art. 7; See also, Proc. Ord. 2, para. 3*]. Furthermore, the arbitral clause contains all the essential elements of a valid arbitration agreement: it details the scope of the agreement; provides the language of the arbitration; states the number of arbitrators; names the seat of arbitration; and provides the name of the arbitration institution [*Compare, Redfern & Hunter, pp. 156-60 to Cl. Ex. 1*]. In sum, in the absence of an express choice of law clause naming the law that governs the Contract, the Tribunal should apply the law of the seat of arbitration to the question of the validity, or existence, of the arbitration agreement. Doing so inevitably leads to the conclusion that the arbitration agreement contained in the Contract between CLAIMANT and RESPONDENT UAM is valid and should be enforced.

C. The Dispute Between the Parties is Arbitrable Despite the Commencement of Insolvency Proceedings in Oceania

11. The commencement of insolvency proceedings in Oceania has no effect on the arbitrability of this dispute, or the jurisdiction of this Tribunal. There is, of course, an inherent conflict between the centralized nature of any insolvency proceeding and the principle of party autonomy that exists at the heart of any arbitral proceeding [*Kröll, p. 357*]. One U.S. judge summed up this conflict by noting that “bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution” [*In re U.S. Lines (U.S.)*]. Here, however, there is no conflict between the arbitral proceedings in Danubia and the insolvency proceedings in Oceania that would warrant dismissal of this case on jurisdictional grounds **(1)**. Likewise, any award rendered by this Tribunal will not adversely affect those same insolvency proceedings **(2)**.

1. The Dispute Between the Parties Remains Arbitrable Because it Does Not Directly Implicate the Insolvency Proceedings in Oceania

12. The dispute before the Tribunal remains arbitrable because it does not involve a core bankruptcy matter (such as the appointment of an insolvency trustee), but rather a fairly typical breach of contract dispute. Arbitral tribunals, who owe no allegiance to any one country's judicial system, generally should not consider themselves bound by any party's national insolvency law [*Kröll*, p. 362]. Writing on an SCC arbitration proceeding that involved an insolvent respondent, one commentator stated, “[o]nly those disputes . . . that arise not from the contract but have their roots [directly] in the bankruptcy proceedings” should be excluded from arbitration proceedings [*Jarvin*, p. 149, *commenting on SCC 104/1997 (Sweden)*]. Even national courts generally do not apply foreign law to render a dispute non-arbitrable unless applicable conflict of laws rules dictate doing so [*Kröll*, p. 362]. A recent Swedish court, for example, addressing arbitrability in general stated that it is a “main rule [in arbitration] that foreign law is not applied to the arbitrability of the dispute” [*Diamond Mine Case (Sweden)*]. Under German law, “the insolvency of one party does not in general affect the arbitrability of a dispute” [*Lew et al.*, p. 207]. Likewise for both France and Italy, in which the bankruptcy courts are given exclusive jurisdiction only over those matters pertaining to “pure” or “core” bankruptcy matters [*Lew et al.*, p. 207]. Furthermore, in the U.S., “two recent decisions from courts in New York and Philadelphia have held that even ‘core’ bankruptcy [can], in certain circumstances, be referred to arbitration pursuant to the terms of an existing arbitration agreement” [*Clement*; *See also In re Mintye (U.S.)*; *MBNA Am. Bank v. Hill (U.S.)*].
13. Despite the lack of conflict between this contractual dispute and insolvency proceedings in Oceania, RESPONDENTS nonetheless urge application of Oceania insolvency law simply because one of the parties to this dispute has commenced insolvency proceedings in Oceania [*See Answer*, p. 32, *para. 5*; *Powers’ Letter*, p. 30]. This Tribunal should reject RESPONDENTS’ objections, however, because “arbitral tribunals should take a firm approach to the limitations imposed by insolvency law and only yield to those which are necessary to serve the two principles of transnational public policy,” namely equal treatment of creditors and due process [*Kröll*, p. 376]. In this case, a finding that the Tribunal has jurisdiction will not offend either of these principles.

2. An Arbitral Award Rendered in Danubia Will Not Frustrate Insolvency Proceedings in Oceania

14. An award rendered by this Tribunal would not have a negative effect on RESPONDENT UAM's insolvency proceedings in Oceania. In fact, arbitral tribunals often disregard restrictions imposed by a foreign insolvency law in part because of the lack of effect that arbitral proceedings have on parallel insolvency proceedings [*Kröll*, p. 374]. One ICC tribunal, for example, found that “the present status” of the insolvent respondent “is of little importance and in fact has no effect on the validity of the proceedings pending before the arbitral tribunal” [*ICC 2139 (1974)*]. Similarly, an ICC tribunal seated in Syria found Syrian law applied to the question of jurisdiction; insolvency proceedings opened in France involving the French respondent had no bearing on the arbitral proceedings [*ICC 6057 (1991)*]. A third ICC tribunal, even while noting the possibility that the claimant might face challenges enforcing an award against the insolvent respondent, nonetheless also found that it had jurisdiction over the insolvent respondent, and that the arbitral proceedings should thus continue [*ICC 7337 (2005)*]. Therefore, neither the insolvency proceedings in Oceania nor potential challenges CLAIMANT might face in enforcing an award are a sufficient basis for dismissal of these proceedings on jurisdictional grounds.
15. Furthermore, the various national insolvency laws are generally intended “to ensure an equal treatment of creditors in the same class” [*Kröll*, p. 359]. This principle of equal treatment of creditors typically arises only in the context of the distribution of assets [*Kröll*, p. 376]. This was the reasoning of an ICC tribunal in a similar multi-party arbitration, in which a French company sought repayment of a loan it had given to one Italian company, which was subsequently guaranteed by a second Italian company [*ICC 4415 (1984)*]. When the guarantor of the loan commenced insolvency proceedings, it argued that it could no longer be party to the arbitral proceedings, just as RESPONDENTS have done here, on the basis of an Italian court decision that said the company's insolvency operated to render void any arbitration agreement [*ICC 4415 (1984)*]. The ICC tribunal disagreed, and found that arbitral proceedings against both Italian companies should continue, as it was an international arbitration and therefore Italian domestic law was not applicable to the question of jurisdiction [*ICC 4415 (1984)*]. The tribunal reasoned further that other creditors' rights were not affected to a degree that would warrant interrupting the arbitral proceedings [*ICC 4415 (1984)*]. Likewise here, in addition to the similarly international nature of these proceedings, the mere existence of an arbitral award would not adversely affect the rights of other creditors. Furthermore, RESPONDENT UAM was given the opportunity to defend both its interests and

those of other UAM creditors in this case and expressly declined [*Powers' Letter*, p. 30]. Consequently, an award that respects the principle of due process may still be rendered, in accordance with Article 30 of the SCC Rules, as well as Article 25(b) of Danubian Arbitration Law.

16. **CONCLUSION:** There is no concern that an award rendered on the merits would violate any notions of due process, equality, or adversely affect RESPONDENT UAM's insolvency proceedings in Oceania in any way that would otherwise warrant dismissal on jurisdictional grounds. Likewise, there is neither a contractual nor a legal basis to apply Oceania insolvency law in this case. Therefore, this Tribunal should apply Danubian Arbitration Law and find that the arbitration agreement is valid and enforceable.

III. RESPONDENT UNIVERSAL IS BOUND BY THE ARBITRATION AGREEMENT AND LIABLE FOR THE BREACH OF CONTRACT

17. The valid and enforceable arbitration agreement provides this Tribunal with jurisdiction over both RESPONDENTS. RESPONDENT Universal, however, has erroneously suggested that it cannot be bound because it is a non-signatory to the arbitration agreement and, similarly, that it cannot be held liable for the breach of the Contract [*Proc. Ord. 1, para. 3*]. Although consent to arbitrate is undeniably a fundamental basis of all arbitration proceedings, a non-signatory may nonetheless be compelled to arbitrate a dispute and consequently can be held liable [*Redfern & Hunter, pp. 148-51*]. Here, RESPONDENT Universal can be bound to the arbitration agreement, and held liable, by virtue of either of two internationally-accepted legal theories, recognized by courts and arbitral tribunals alike [*See Born, p. 602; See also, Lew et al., paras. 16-58*].
18. In the matter before the Tribunal, RESPONDENT Universal is bound to the arbitration agreement and liable for the breach of the Contract because RESPONDENT UAM acted as RESPONDENT Universal's agent when it entered into the Tera cars sales transaction **(A)**. Alternatively, courts and tribunals in civil law jurisdictions (like RESPONDENT Universal's home country of Equatoriana [*Proc. Ord. 2, para. 8*]) in particular have bound non-signatories to contracts by operation of the so-called "Group of Companies Doctrine" in which the benefits and obligations of an arbitral agreement are extended to other members of the same group of companies to which the signatory belongs [*Redfern & Hunter, pp. 148-50*] **(B)**. Lastly, even if the Tribunal were to find that RESPONDENT Universal was not bound by the Contract initially, it became bound to both the arbitration agreement and the Contract by way of its conduct **(C)**.

A. RESPONDENT Universal is Obligated to Arbitrate this Dispute and Liable for the Breach of Contract Because RESPONDENT UAM Effectively Acted as RESPONDENT Universal's Agent

19. RESPONDENT Universal is bound to the Contract and the arbitration agreement contained within by agency principles. “All developed legal systems recognize the power . . . of one individual or legal entity to enter into binding legal acts on behalf of another” [*Born, p. 215*]. When analyzing a relationship of this nature, the conduct of a company which did not sign the contract “but nevertheless behaved in a manner to (possibly) inspire the understanding of the [other] contracting party” that it was “involved in the contract and its implementation” is a key consideration [*Blessing, p. 176*]. RESPONDENT Universal’s behavior prior to and during the performance of the Contract inspired the reasonable understanding of CLAIMANT that both RESPONDENTS were involved in the implementation of the Contract. Consequently, RESPONDENT Universal is bound to the arbitration agreement and liable for the subsequent contract breach under a theory of apparent agency.
20. RESPONDENT Universal is obligated to arbitrate this dispute as RESPONDENT UAM acted as its agent when it entered into the Tera car sales Contract **(1)**. On the question of liability, this Tribunal should apply the Convention on Agency in the International Sales of Goods (“Convention on Agency”). Applying the Convention on Agency to the facts here leads to RESPONDENT Universal’s being liable for breach of the Contract **(2)**.

1. RESPONDENT Universal is Bound to the Arbitration Agreement Entered Into By its Agent, RESPONDENT UAM

21. It is well-established and internationally-recognized that a non-signatory can be bound to an arbitration agreement through the agency principles [*Redfern & Hunter, pp. 151-52*]. On the facts of this case RESPONDENT Universal is obligated to arbitrate because RESPONDENT UAM acted with apparent authority. This notion of apparent authority is expressed in Article 14 of the Convention on Agency, which states, “where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal . . . the principal may not invoke against the third party the lack of authority of the agent” [*Conv. on Agency, Art. 14(2)*]. Article 3:201 of the Principles of European Contract Law (“PECL”) contains similar language and states that apparent authority can be “implied [by] the circumstances” and inferred from “statements or conduct [which] induce the third party reasonably and in good faith to

believe that the apparent agent has been granted authority” by the principal [*Art. 3:201(1), (2) of PECL*]. Likewise, the commentary to Article 2.2.5(2) of the UNIDROIT Principles states that the circumstances of the case must be examined to determine if the third party’s belief was reasonable [*Commentary of Art. 2.2.5 of UNIDROIT Principles*]. Apparent authority is thus often found on the basis of a party’s reasonable understanding [*Hanotiau, p. 13-14*]. Therefore, even if RESPONDENT UAM lacked express authorization to act on behalf of RESPONDENT Universal, the latter is bound by the arbitration agreement at issue here as it was reasonable for CLAIMANT to believe, in good faith, that RESPONDENT UAM had such authorization. [*See e.g., ICC 5730 (1988)*].

22. First, RESPONDENTS’ name similarity should be noted as evidence of the reasonableness of CLAIMANT’s understanding. CLAIMANT contracted to purchase “100 new 2008 model Tera cars” manufactured by Universal Auto Manufacturers (RESPONDENT Universal herein) and sold by Universal Auto Manufacturers Distributors (RESPONDENT UAM herein) [*Cl. Ex. 1; Proc. Ord. 2, para. 11*]. Second, CLAIMANT’s reasonable understanding of RESPONDENTS’ principal-agent relationship is evidenced by its initial communication requesting assistance with the defective Tera cars from *either* RESPONDENT UAM *or* RESPONDENT Universal (*emphasis added*) [*Cl. Ex. 2*]. Third, when informed of the problems with the Universal-manufactured Tera cars, RESPONDENT UAM’s first instinct was apparently to inform its principal, RESPONDENT Universal [*Stmt. of Cl., paras. 12-13*]. Adding further support to the reasonableness of CLAIMANT’s understanding, CLAIMANT did indeed receive a response to his inquiry from representatives of RESPONDENT Universal; its Chief Engineering Officer [*Cl. Ex. 3*] and Regional Manager [*Cl. Ex. 4*]. Lastly, RESPONDENT Universal proposed to fix the cars with its own service personnel and in fact handled the entire matter without UAM involvement [*Stmt. of Cl., paras. 12-17; Cl. Ex. 3-6*]. Were RESPONDENT UAM truly the lone seller and not RESPONDENT Universal’s agent, it would have been solely responsible for such repairs. On these facts, CLAIMANT was thereby led to reasonably believe that RESPONDENT UAM acted on behalf of RESPONDENT Universal and consequently RESPONDENT Universal is obligated to arbitrate this dispute.

2. RESPONDENT Universal is Liable for the Breach of the Contract Entered Into By its Agent, RESPONDENT UAM.

23. RESPONDENT UAM’s apparent authority here not only binds RESPONDENT Universal to the arbitration agreement but also serves to hold RESPONDENT Universal liable for the breach of the Contract. There is no question that apparent agency is a valid and internationally-accepted legal

basis for liability. For example, an arbitral tribunal in Zurich, proceeding under the Rules of the Zurich Chamber of Commerce (“ZCC”), unanimously found that a contract signed by a provincial organization of a State could be attributed to the supervising national organization of that State under a theory of apparent agency [*ZCC Award 188/1991 (1993)*]. The reviewing court upheld the award rendered by the tribunal, emphasizing the connections and uniform purpose of the two entities [*ZCC Award 188/1991 (1993)*, upheld by *Swiss Federal Supreme Court*; See also *Zuberbühler*, p. 19]. Similarly, an ICC Tribunal seated in Switzerland relied on the notion of apparent authority in a contractual dispute to find that the claimant was entitled to use the defendant-manufacturer’s brand name because of the signature of an individual who had “apparent authority on which claimant was entitled to rely” [*ICC 8445 (1996)*].

24. Although lacking a choice of law clause, the arbitration agreement contained in the Contract does make clear that both CLAIMANT and RESPONDENT UAM possessed an unambiguous intent to arbitrate “[a]ny dispute, controversy or claim arising out of or in connection with this contract . . . in accordance with the [SCC Rules]” [*Cl. Ex. 1*]. Under Article 22 of the SCC Rules, where there is no applicable law chosen by the parties, an arbitral tribunal “shall apply the law or rules of law which it considers to be most appropriate” [*SCC Rules Art. 22(1)*]. Article 28(2) of Danubian Arbitration Law similarly empowers the Tribunal [*Danubian Arb. Law, Article 28(2)*]. The Convention on Agency is the most appropriate law to apply when examining RESPONDENTS’ principal-agent relationship as all concerned States (Equatoriana, Mediterraneo, and Oceania) are parties to the Convention on Agency [*Proc. Order 2, para. 7*]. The Convention applies “irrespective of whether the agent acts in his own name,” as RESPONDENT UAM did here, “or in that of the principal” [*Conv. on Agency, Art. 1(4)*]. Under the Convention, the agent’s authority may be express or implied, it “need not be given in or evidenced by writing,” and it “may be proved by any means” [*Conv. On Agency, Art. 9, 10*].
25. Article 1 stipulates that the Convention applies where the agent “has authority or purports to have authority on behalf of another person, the principal, to conclude a contract of sale of goods with a third party” [*Conv. On Agency, Art. 1(1)*]. This language includes situations in which acts undertaken by the agent are based on either express authority or “apparent authority conferred by [a] principal” [*Revue de Droit Uniforme, 1984, I, Explanatory report, para. 21*]. Thus, the Convention also applies to situations in which the agent acts with apparent authority, as is the case here. Where the third party has reasons to believe a principal-agent relationship exists, the principal will be considered a party to the agreement entered into by its agent [*Revue de Droit Uniforme, 1984, I, Explanatory report, para.*

- 58]. In this case, as CLAIMANT was given reasons to believe that RESPONDENTS enjoyed a principal-agent relationship, RESPONDENT Universal should be considered a party to the Contract.
26. The CISG, which has been adopted by Equatoriana, Mediterraneo, Oceania, and Danubia, is the primary substantive law applicable to this dispute as the Contract contains no choice of law clause and all three parties involved in the Contract have their places of business in different contracting states [*CISG Art. 1(1); Stmt. of Cl., paras. 1, 4, 5, 25*]. The CISG, however, “does not address the complex issues that underlie questions of agency and authority” [*Bonell & Liguori, p. 388*] and thus liability must be supported on other grounds, most often national law like the Convention on Agency is here [*See Honnold, p. 67; Proc. Ord. 2, para. 7*]. In the *Vodka Case*, for example, in which the CISG was applicable, joint and several liability was nonetheless found on the basis of German commercial law [*Vodka Case (Germany)*]. Here, RESPONDENT Universal is liable for RESPONDENT UAM’s contract breach, in accordance with the theory of apparent agency inherent in the Convention on Agency. Under Article 12 of the Convention on Agency, “[w]here an agent acts on behalf of a principal within the scope of his authority . . . the acts of the agent shall directly bind the principal and the third party to each other” [*Conv. on Agency, Art. 12*]. Furthermore, “where the agent fails to fulfill . . . his obligations to the third party, the third party may exercise against the principal the rights which the third party has against the agent” [*Conv. on Agency, Art. 13(2)(b)*].
27. As discussed in detail below in Section **IV**, RESPONDENTS failed to fulfill their obligations to CLAIMANT when they committed a fundamental breach of the Contract. Given the factual analysis above in Section **III(A)(2)**, it follows that RESPONDENT Universal is liable for the breach of contract by its apparent agent, RESPONDENT UAM. Although RESPONDENT Universal tried to foist liability solely onto its agent, after the contract had been breached [*Cl. Ex. 4*], throughout CLAIMANT’s entire ordeal he communicated almost exclusively with representatives from RESPONDENT Universal rather than his express contractual counterpart, RESPONDENT UAM [*Stmt of Cl., paras. 13-17; Cl. Ex. 3-6*]. RESPONDENTS thus gave CLAIMANT the reasonable impression that RESPONDENT Universal, alongside its agent RESPONDENT UAM, was a party to the Contract. Therefore, on the facts of this case, and in accordance with the relevant provisions of the Convention on Agency, RESPONDENT Universal is liable for the breach of the Contract entered into by its apparent agent, RESPONDENT UAM.

B. RESPONDENT Universal is Bound to the Arbitration Agreement and Liable for the Breach of the Contract Because RESPONDENTS Constituted One Economic Reality in their Dealings with CLAIMANT

28. Even if the Tribunal found that RESPONDENTS did not have a principal-agent relationship, RESPONDENT Universal is nonetheless bound to the Contract and the arbitration agreement under the facts of this case. Binding a non-signatory to an arbitration agreement is particularly justified when the non-signatory becomes involved in the performance of the contract, as RESPONDENT Universal did here, indicating that it “tacitly agreed to be bound” by the arbitration agreement [*Fouchard et al.*, pp. 283-84]. This notion is inherent in the Group of Companies Doctrine, which allows a non-signatory to a contract to either be bound by, or take advantage of, the arbitration clause contained in the contract [*Lamm & Aqua*, p. 724]. Applying the doctrine here appropriately binds RESPONDENT Universal to the arbitration agreement and the Contract given the facts of this case.
29. The leading authority on this doctrine is the *Dow Chemical* case. In *Dow Chemical*, a distinguished ICC arbitral tribunal chaired by Professor Sanders found that non-signatories to an arbitration agreement could nonetheless arbitrate under the agreement where all of the companies involved constituted one and the same economic reality [*Dow Chemical (ICC)*; See also, *Craig/Park/Paulson*, para. 5.09]. The *Dow Chemical* tribunal undertook primarily a fact-based analysis, examining the circumstances surrounding the contract negotiations, contract performance **(1)**, and contract termination **(2)** before finding that the non-signatories could indeed benefit from the arbitration agreement at issue [*Dow Chemical (ICC)*]. Since this decision, courts and arbitral tribunals have relied on this analysis and other factors, including intent to be bound as evidenced by conduct [*Camboulive et al.*, p. 2], the presence of a corporate relationship, and the overall role played by the non-signatory in the dispute [*Zuberbühler*, p. 24]. Given the prevalence of these factors in this case it follows that RESPONDENT Universal is liable for the breach of the Contract signed by its distributor, RESPONDENT UAM **(3)**.

1. RESPONDENT Universal is Bound to the Arbitration Agreement Because it Participated in the Performance of the Contract and was Aware of the Obligation to Arbitrate Contained Within the Contract

30. A factual analysis of RESPONDENT Universal’s actions prior to and during the performance of the Contract reveals that it and RESPONDENT UAM were so closely related as to bind

RESPONDENT Universal to the arbitration agreement. This analysis is not a matter of mere corporate structure, but rather an examination of the non-signatory's participation in the performance of the contract and its conduct toward the other party [*ICC 10758 (2001)*]. The *Dow Chemical* tribunal, for example, determined that a non-signatory could be party to an arbitration agreement on the basis of the relationship between the members of the group of companies involved; the apparent understanding of all parties in the case; and the respective role each party played during the execution of the contract [*Dow Chemical (ICC)*].

31. In this case, it should first be noted that RESPONDENT UAM was actually created by RESPONDENT Universal, as a joint venture with another company [*Proc. Ord. 2, para. 12*]. RESPONDENT Universal enjoyed representation on RESPONDENT UAM's Governing Board, which had the authority to establish overall company policy for RESPONDENT UAM and oversaw UAM management [*Proc. Ord. 2, para. 12*]. Second, RESPONDENT UAM was RESPONDENT Universal's sole distributor in Oceania [*Cl. Ex. 15*]. Third, RESPONDENT Universal reviewed the form contract containing the arbitration agreement at issue here and used by RESPONDENT UAM [*Proc. Ord. 2, para. 16*]. Thus, RESPONDENT Universal was aware of the contractual obligation to arbitrate. These factors alone indicate that RESPONDENTS, despite their formal legal separation, are in reality one and the same economic entity. Furthermore, and as discussed above, Danubian Arbitration Law requires only "an agreement by the parties to submit to arbitration" [*Danubian Arb. Law, Art. 7; See also, Proc. Ord. 2, para. 3*]. It does not require that the arbitration agreement be in writing. This is particularly important because the need for a signature is correspondingly relaxed, thereby strengthening the argument that the arbitration agreement should be extended to a non-signatory [*Jarvin (1994), p. 203*]. Lastly, it should also be noted that RESPONDENT Universal is no stranger to arbitration agreements in general, choosing to utilize arbitration as its preferred method of dispute resolution in all of its distributor agreements [*Proc. Ord. 2, para. 14*].
32. That RESPONDENTS are one and the same economic reality becomes even more apparent when their relationship is viewed in action, during the performance of the Contract. In establishing who should be bound by the arbitration agreement in *Dow Chemical*, the tribunal considered whom the parties "understood themselves to be contracting with" [*Dow Chemical (ICC)*]. Thus the argument for extending arbitration agreements to non-signatories becomes even stronger in cases "where circumstances might lead third parties to confuse the different companies of the group" [*Fouchard et al., p. 284*]. In terms of this "apparent understanding" relied upon by the *Dow Chemical* tribunal, it

must be stressed again that the initials “UAM” in RESPONDENT UAM’s trade name stand for “Universal Auto Manufacturers” [*Proc. Ord. 2, para. 11*]. Thus, CLAIMANT contracted with Universal Auto Manufacturers Distributors to purchase cars manufactured by Universal Auto Manufacturers [*Cl. Ex. 1*]. It is no surprise then, that when the initial shipment of cars proved to be defective, CLAIMANT notified RESPONDENT UAM of the issue and expressed hope for assistance from “[RESPONDENT UAM’s] service personnel *and/or* [RESPONDENT] Universal” (*emphasis added*) [*Cl. Ex. 2*].

2. RESPONDENT Universal is Bound to the Arbitration Agreement Because it Played a Pivotal Role in the Parties’ Contractual Relationship

33. In addition to the events surrounding contract performance, the *Dow Chemical* tribunal also considered the events leading up to the dispute, when it noted that the non-signatory “played an essential role in the termination of the . . . contract” [*Dow Chemical (ICC)*]. Here, RESPONDENT Universal embroiled itself further into the Contract by playing a decisive role in the events that led to CLAIMANT’s avoidance of the Contract. In fact, it was RESPONDENT Universal’s inability to guarantee repair of its defective products that led in part to the termination of the Contract and subsequently to the dispute before this Tribunal [*Cl. Ex. 10-11; See detailed discussed below under Section (IV)*].
34. Lastly, the *Dow Chemical* tribunal relied on the fact that the non-signatory “parent company was the pivot of the contractual relationship” established between members of its group and the other party to the contract [*Dow Chemical (ICC)*]. Here, during the performance of the Contract, RESPONDENT Universal expressed a desire to have a “long and mutually profitable relationship with” CLAIMANT [*Cl. Ex. 4*]. Later, and after RESPONDENT UAM had commenced insolvency proceedings, RESPONDENT Universal reiterated this desire in a letter to CLAIMANT, stating that it “look[ed] forward to a future order from” CLAIMANT, by way of its new distributor in the region, Patria Importers [*Cl. Ex. 12*]. It is clear that RESPONDENT Universal was the pivot of the contractual relationship between CLAIMANT and RESPONDENTS, and sought to continue the customer relationship with CLAIMANT established by RESPONDENT UAM. Therefore, much as the *Dow Chemical* tribunal’s analysis led it to conclude that a Dow Chemical company could arbitrate even as a non-signatory because it had played an “equally preponderant role” in the formation and execution of the contract at issue, RESPONDENT Universal should be

bound to the arbitration agreement here because of the extensive role it played in the formation and execution of the Tera car sales Contract.

3. As One Economic Reality, RESPONDENTS Should Be Held Jointly Liable For the Breach of the Contract

35. This “one economic reality” theory is also applicable to the issue of contractual liability. In ICC Case 5103, for example, the tribunal based third party liability on the facts present in the case, and reasoned that “[t]he security of international commercial relations requires that account must be taken of these economic realities and that all the companies of the corporate group must be held jointly and severally liable [where] they have directly or indirectly benefited” from the contract [*ICC 5103 (1988)*; *See also, Fouchard et al., pp. 283-84*]. In a more recent case, the arbitral tribunal relied in part on the Group of Companies doctrine to find that a State entity, which was one of the respondents in the case, could be held liable for the acts of a second respondent in the case, who represented a sub-division (i.e. the Ministry of Agriculture) of that State entity [*ICC 9762 (2001)*]. Furthermore, scholars writing on the Group of Companies Doctrine have noted that, “related companies which share a common interest with regard to a specific contract are presumed to have a common will” by virtue of which the contract is extended to the non-signatory company [*Derains & Goodman-Everard*].
36. It is unnecessary here to repeat in detail the facts discussed above that demonstrate RESPONDENTS constitute one economic reality. It follows that when parties are as economically integrated as RESPONDENTS were in their dealings with CLAIMANT, the non-signatory party which is bound to the arbitration agreement is also liable for the breach of the contract. A breaching party cannot escape liability simply by disclaiming it after the breach has occurred [*Cl. Ex. 4*]. Instead, in the matter before the Tribunal, RESPONDENTS shared a common interest in the Tera car sales Contract, as evidenced by RESPONDENT Universal’s extensive involvement in the Contract’s performance, and thus RESPONDENT Universal should be bound by the arbitration clause and held liable for the breach of the Contract.

C. Even if RESPONDENT Universal Was Not Bound by the Contract at the Outset, it Became Bound by Virtue of its Conduct and Should Be Obligated to Arbitrate and Held Liable For the Breach of the Contract

37. Lastly, even if the Tribunal finds that RESPONDENT Universal is not bound to the Contract either as RESPONDENT UAM's principal or under the Group of Companies Doctrine, RESPONDENT Universal nonetheless became bound and liable by virtue of its conduct during the performance of the Contract. First, RESPONDENT Universal should be estopped from denying it is a party to the arbitration agreement, as it received a direct benefit from the Contract **(1)**. Second, given RESPONDENT Universal's conduct and the facts of this case the Tribunal should find that RESPONDENT Universal assumed the contractual obligations of the Tera car sales Contract, and therefore should be held liable for the breach of that Contract **(2)**.

1. RESPONDENT Universal Should Be Estopped From Denying That it is a Party to the Contract Because it Received a Direct Benefit from the Contract and was Aware of the Arbitration Agreement Within the Contract

38. Estoppel principles may be applied when an agreement "confers a direct benefit" upon a third party, who is thereby "estopped from contesting the binding effect of an arbitration clause within that agreement, provided it had sufficient notice of the arbitration clause and failed to object to it" [*Redfern & Hunter, p. 150; See also, Born, p. 616*]. In an international setting, the principle of estoppel "represents a special application of the general principle of good faith" [*SCH-4318 (Austria); See also, SCH-4366 (Austria) concluding that the general notion of estoppel is implicit in the CISG*]. The Swiss Supreme Court recently confirmed an award rendered against a sole shareholder for damages due by a company and reasoned that despite not being a signatory to the contract at issue, the shareholder had played an important role in the execution of the contract, he was aware of the terms of the agreement, and consequently it would be contrary to the principle of good faith not to consider him a party to the agreement [*ATF 129 III 727 (Switzerland)*].

39. Estoppel prevents a party who receives the benefit of a contract from denying the contract's burdens, namely the obligation to arbitrate [*International Paper Co. (U.S.); See also American Bureau of Shipping v. Tencara Shipyard (U.S.)*]. As one U.S. federal court judge stated succinctly, "a non-signatory [should be prevented] from embracing a contract, and then turning its back on the portions of the contract, such as [the] arbitration clause, that it finds distasteful" [*E.I. DuPont (U.S.)*]. Active participation by the non-signatory in defense of its own economic interests should

also be considered when examining whether it “should become bound under (or might avail itself of the benefits of) the arbitration clause” [*Blessing, p. 176*].

40. The direct benefit received by RESPONDENT Universal here is readily apparent: without contracts like the Tera car sales Contract, RESPONDENT Universal is not able to sell the cars it manufactures in Equatoriana. After CLAIMANT reported the defective condition of the Tera cars, RESPONDENT Universal made its direct interest in the Contract apparent when it stated that “Universal does not wish you to have any doubts about either the quality of the Tera brand of our cars or of the intention of Universal to stand behind its product” [*Cl. Ex. 4*]. In other words, RESPONDENT Universal actively sought to ensure the success of the Contract, knowing that if the Contract failed it would likely lose the financial benefits it had already received [*Proc. Ord. 2, para. 15*]. RESPONDENT Universal now seeks to avoid the contractual burden of arbitration contained within the Contract, even though it received a benefit from the Contract.
41. RESPONDENT Universal also had sufficient notice of the arbitration clause and failed to object to it. In ICC Case 5730 the tribunal highlighted the fact that the non-signatory (whom it found should be bound by the arbitration agreement at issue) was aware of the existence of the arbitration agreement and likely would have accepted it [*ICC 5730 (1988)*]. Here, RESPONDENT Universal was not only aware of the arbitration agreement contained in the Contract [*Proc. Ord. 2, para. 16*], it also includes an arbitral clause in its own distributor contracts, demonstrating a willingness to resolve disputes through arbitration [*Proc. Ord. 2, para. 14*]. Accordingly, RESPONDENT Universal should be obligated to arbitrate this dispute.

2. RESPONDENT Universal Assumed the Obligations Under the Contract and Accordingly is Liable For the Contract Breach

42. A party may, by way of its conduct, assume the contractual obligations of another. Should the Tribunal find that RESPONDENT Universal was not initially liable for the performance of the Contract, then, by virtue of its extensive involvement in the performance of the Contract, RESPONDENT Universal effectively assumed RESPONDENT UAM’s contractual obligations. It is therefore reasonable that both RESPONDENTS be held liable for the failure to comply with the terms of the Contract, as illustrated by a recent arbitration case in Sweden. A tribunal proceeding under the SCC Rules found that a non-signatory party, by virtue of its conduct, could be bound to a contract, including its arbitral clause, and be held liable for breach of that contract [*SCC 108/1997 (2000)*]. After an American company had entered into a contract with a Russian

company, Y, which was a subsidiary of Russian company Z, a dispute arose and the American company sought to hold both Y and its parent company Z liable for the alleged contract breach [SCC 108/1997 (2000)]. The tribunal found that Z, by becoming involved with the implementation of the contract, had indicated that it was prepared to assume the rights and obligations of the contractual relationship with the American company [SCC 108/1997 (2000)]. Therefore, the tribunal ruled that both subsidiary Y and parent company Z were liable (jointly and individually) for the contract breach [SCC 108/1997 (2000)]. By way of the same theory of assumption, the tribunal also held the non-signatory parent company Z bound to the arbitration agreement, reasoning that the arbitration agreement was an integral part of the substantive rights and obligations assumed by Y [SCC 108/1997 (2000)].

43. In this case, RESPONDENT Universal in essence inserted itself into the performance phase of the Contract, in order to protect its own reputation and ensure that CLAIMANT and RESPONDENT Universal would enjoy a “long and mutually profitable relationship” [Cl. Ex. 4]. Any argument that RESPONDENT Universal cannot be held liable merely because it was not a party to the Contract ignores the reality of RESPONDENT Universal’s extensive involvement in the implementation of the Contract.
44. **CONCLUSION:** Under the facts of this case, RESPONDENT Universal is bound to the arbitration agreement and liable for RESPONDENT UAM’s breach of the Contract, as UAM acted as Universal’s agent in the Tera car sales Contract with CLAIMANT. Alternatively, because RESPONDENTS are one and the same economic reality, despite their formal legal separation, RESPONDENT Universal is bound by the Contract and the arbitration agreement by application of the Group of Companies Doctrine. If, however, the Tribunal finds RESPONDENT Universal was not liable when the Contract was entered into, it later assumed the Contract’s obligations by virtue of its conduct during the performance phase of the Contract.

IV. CLAIMANT PROPERLY AVOIDED THE CONTRACT DUE TO RESPONDENTS' FUNDAMENTAL BREACH

45. RESPONDENTS breached the Contract when RESPONDENT UAM delivered 25 cars with defects related to the engine control units (“ECUs”) **(A)**. This was a fundamental breach in respect to both the initial shipment and the entire contract, thereby allowing CLAIMANT to declare the Contract avoided in accordance with CISG Article 49 **(B)**. In addition, RESPONDENT Universal’s offer to examine the defective cars did not preclude CLAIMANT from avoiding the Contract **(C)**. However, even if this Tribunal finds that the delivery of 25 defective cars was not a fundamental breach of the Contract, CLAIMANT still properly avoided the Contract as he reasonably believed a fundamental breach would occur **(D)**. Finally, in the event this Tribunal finds the contract at issue is an installment sales contract, CLAIMANT still properly avoided the entire contract **(E)**.

A. RESPONDENT UAM Breached the Contract When it Delivered 25 Defective Cars

46. Neither RESPONDENT UAM nor RESPONDENT Universal appears to dispute that the delivery of 25 defective Tera cars constituted a breach of contract [*Proc. Ord. 1, para. 3(4)*]. In fact, RESPONDENT Universal, in its Answer to CLAIMANT’s Statement of Claim, seemingly conceded that there may have been a breach of the Contract when the defective cars were delivered to CLAIMANT in Mediterraneo [*Proc. Ord. 1, para. 3(4)*]. This stance is understandable, given that the 25 defective cars were close to undriveable and represented the entirety of the first shipment of Tera cars. Denying outright that there had been a breach of contract would be a nearly untenable position, in light of CISG Article 35, which requires the contractual goods to be “fit for the purposes for which goods of the same description would ordinarily be used” [*CISG Art. 35(2)(a)*]. Here, where all 25 Tera cars delivered in the first shipment came with engines that “misfired so badly [the cars] were close to undriveable,” [*Cl. Ex. 2*] it is clear that the goods – newly manufactured automobiles – were not fit for any conceivable ordinary use.

B. The Breach of the Contract was Fundamental and Entitled CLAIMANT to Properly Avoid the Contract Under CISG Article 49

47. RESPONDENTS also fundamentally breached the Contract when they delivered the 25 defective Tera cars. As a result, CLAIMANT was entitled to avoid the Contract, and did so properly, under Article 49 of the CISG [See *Bernstein & Lookofsky*, p. 123]. Under Article 49 of the CISG, “[t]he buyer may declare the contract avoided if the failure by the seller to perform any of his obligations under the contract or [the CISG] amounts to a fundamental breach of contract” [CISG Art. 49(1)(a)]. This notion of fundamental breach has two distinct aspects, delineated in Article 25: first, a breach of contract will be “fundamental if it results in such detriment to the other party as [to] substantially . . . deprive him of what he is entitled to expect under the contract” [CISG Art. 25; See also, *Huber*, p. 213]. In this case, the delivery of 25 nearly undriveable cars, coupled with RESPONDENTS’ inability to indicate when, if ever, the defective cars would be repaired, substantially deprived CLAIMANT of what he was entitled to expect under the terms of the Contract **(1)**.
48. Second, a breach will be fundamental “unless the party in breach did not foresee [the result] and a reasonable person of the same kind in the same circumstances would [also] not have foreseen such a result” [CISG Art. 25]. As RESPONDENTS were aware of the nature of CLAIMANT’s business and the restrictive lending practices in Mediterraneo, the result here was foreseeable **(2)**. Thus, because RESPONDENTS’ breach was fundamental in accordance with CISG Article 25, CLAIMANT properly declared the Contract avoided under Article 49.
49. Third, this Tribunal should disregard any argument that the breach was not fundamental based on either the percentage of the contracted for goods actually affected or on the repairs that took place months after these events. CLAIMANT freely acknowledges that the first consignment represented 25% of the purchased goods and that RESPONDENT Universal was eventually able to repair the defective Tera cars. However, neither of these facts are compelling or, in the instance of the repairs, even relevant to the question of whether a fundamental breach occurred **(3)**.

1. Claimant Suffered a Substantial Deprivation of What He Was Entitled to Expect Under the Contract

50. An examination of the facts demonstrates that CLAIMANT suffered a substantial deprivation of his contractual expectations. When analyzing whether a substantial deprivation has occurred in accordance with CISG Article 25, an arbitral tribunal should consider “the [unique] circumstances of each case” [*Koch (1999)*, p. 213]. Since the parties’ contractual expectations are largely subjective in nature, an individual claimant’s needs and circumstances are particularly relevant when determining this issue [*Ramberg*, p. 121]. The circumstances here strongly suggest an affirmative answer to the question of whether CLAIMANT suffered a substantial deprivation of his contractual expectations, for several reasons. First, none of the 25 cars shipped in the first consignment could serve the purpose for which they were bought **(i)**. Second, CLAIMANT’s business likely would not have survived further delays of what he reasonably expected under the Contract; namely fully functioning Tera cars **(ii)**.

i. CLAIMANT was Substantially Deprived of His Contractual Expectations Because All 25 Tera Cars Were Defective and Unfit for Resale

51. In the matter before the Tribunal, the defects in the Tera cars negatively affected both their function and their ultimate contractual purpose. In order for a non-conformity to amount to a fundamental breach, the non-conformity must affect the essential features of the contractual goods. When the contract does not expressly establish the essential features, an arbitral tribunal analyzing whether a fundamental breach occurred should consider the “purpose [for which] the goods [were] bought” [*CISG-AC Opinion No. 5, para. 4.3*]. When a buyer, like CLAIMANT, “is in the resale business, the issue of potential resalability becomes [particularly] relevant” to the question of whether a fundamental breach has occurred [*CISG-AC Opinion No. 5, para. 4.3*]. In addition, for buyers in the retail industry it is, of course, “generally unreasonable for [them] to sell defective goods to [their] customers [*Koch (1999)*, p. 221].

52. As CLAIMANT is a car dealer, resalability and receipt of non-defective cars were two essential expectations inherent in the Contract. RESPONDENTS failed to meet these expectations. At the time of the contract breach, RESPONDENTS speculated that the cars might have a problem related to their ECUs [*Cl. Ex. 3*]. ECUs are complicated sensory devices that perform the “demanding job” [*Capelhart*, p. 500] of “monitor[ing] and compensat[ing] for a large number of variables” [*Held*, p. 9]. Given the consumer-oriented nature of the auto sales industry, it is

unreasonable to believe that CLAIMANT could have sold to the public cars containing defects related to such a critical device. At a minimum, CLAIMANT was entitled to expect Tera cars that were not defective and that were fit for resale. Thus, he suffered a substantial deprivation of what he was entitled to expect under the Contract when 100% of the cars delivered in the first consignment proved to be “close to undrivable” [*Cl. Ex. 2*].

ii. CLAIMANT Faced an Unreasonable Risk of Economic Harm as a Result of RESPONDENTS’ Breach of the Contract

53. Not only was CLAIMANT substantially deprived of what he reasonably expected under the Contract, he also faced a risk of insolvency as a result of the uncertainty surrounding the potential repair of the defective cars. When analyzing whether a party has been substantially deprived of its contractual expectations, the economic consequences resulting from the breach are a key concern [*Babiak, pp. 120-21*]. More specifically, the “actual loss of the aggrieved party” [*Zeller, p. 227*], the amount lost in relation to the contract’s overall value, and “the extent to which the breach interferes with other activities of the injured party” are all key considerations [*CISG Commentary, p. 101; Koch, (1999) p. 214*]. In the *T-Shirt Case*, for example, the arbitral tribunal examined a contractual dispute resulting from a shipment of t-shirts that shrank disproportionately [*T-Shirt Case (Germany)*]. The tribunal found that there had been a fundamental breach, because the defect in the t-shirts would have exposed the buyer to economic hardship in the form of returns and a barrage of complaints from customers [*T-Shirt Case (Germany)*].
54. In the dispute before the Tribunal, CLAIMANT faced economic hardship far greater than mere returns or customer complaints; CLAIMANT in fact faced the risk of potential insolvency as a result of RESPONDENTS’ breach [*Stmt. of Cl. para. 18*]. Given the defective condition of the 25 Tera cars, CLAIMANT could not expect any income from the cars until they were repaired [*Stmt. of Cl. para. 18*]. Therefore, CLAIMANT was forced to choose between relying on RESPONDENTS’ vague offer to repair (discussed in detail below in Section **(C)**) or finding an alternative source of goods. Given the tremendous economic risk CLAIMANT faced if he chose the former, he was perfectly entitled to avoid the Contract and find a new automobile supplier.

2. The Consequences of the Contract Breach Were Foreseeable Because RESPONDENTS Were Aware of the Nature of Lending Practices in Mediterraneo and Their Affect on CLAIMANT's Business

55. Secondly, the breach here was fundamental because the consequences of RESPONDENTS' breach were entirely foreseeable. The second aspect of fundamental breach under Article 25 of the CISG is the foreseeability of the consequences of the breach [*Huber, p. 216*]. The legislative history of the CISG indicates that the burden of proving the lack of foreseeability of loss is on the breaching party [*Report of UNCITRAL 10th Session, p. 5*]. Thus, in essence, the foreseeability of the breach's consequences is relevant only as defense available to the breaching party [*Schlechtriem & Schwenzger, p. 284; Graffi, p. 339*]. Foreseeability here should thus be analyzed from RESPONDENTS' perspective, as they are the breaching party in this case.
56. The consequences need not necessarily be foreseeable at the moment the contract was concluded, as developments arising subsequent to the conclusion of the contract but before the breach may be considered when analyzing this issue of foreseeability [*Honnold, pp. 183-84*]. As this Tribunal has noted, RESPONDENTS were aware of the nature of CLAIMANT's business from prior dealings, as well as the unusual lending practices of banks (which do not furnish working capital to businesses) in Mediterraneo [*Proc. Ord. 2, para. 17*]. Therefore, it was indeed foreseeable that the delivery of 25 defective cars – representing the entirety of the initial shipment – would risk CLAIMANT's economic stability and force his decision to avoid the entire contract. Given the restrictive national banking practices in Mediterraneo, it is foreseeable that any company of CLAIMANT's size would be put at risk in the event an entire shipment of goods – intended for resale – was delivered in an effectively useless state, in need of potentially extensive repair. Thus, because RESPONDENTS' breach here satisfies both aspects of the Article 25 definition of “fundamental,” CLAIMANT properly avoided the Contract under Article 49 [*CISG Art. 25, 49(1)(a)*].

3. The Amount of Defective Goods Supports a Fundamental Breach and RESPONDENTS' Subsequent Repairs are Not Relevant to the Question of Whether a Fundamental Breach Occurred

57. RESPONDENTS may argue that no fundamental breach occurred because the initial shipment represented only one quarter of all the goods purchased. However, when a defect or non-conformity impedes the function of the goods, even a defect affecting only a portion of the goods

may amount to a fundamental breach. In such cases, special attention should be paid to the “nature of the goods” and “the extent of the deviation from the agreed [upon] quality” [*Koch (1999)*, pp. 221-22]. As an illustration, the Cour d’Appel de Paris found a fundamental breach of contract in a recent case involving the purchase and sale of pressure cookers, where less than a third of the goods sold suffered from a defect that made them dangerous [*Case 2002/18702 (France)*]. Similarly, in the *Cheese Case* of 1979, the German Supreme Court found a fundamental breach despite only 3% of the delivered cheese in the transaction in question actually being defective [*Cheese Case (Germany)*]. Thus, a non-conformity can rise to the level of fundamental breach, even where only a relatively small percentage of the overall contract is affected. Here, while the initial shipment represented 25% of the overall contract, that 25% was entirely defective, despite being newly-manufactured model 2008 cars. Thus, 100% of the goods received were undriveable [*Stmt. of Cl., paras. 9- 11*]. Given the severity of the defect and corresponding risk to CLAIMANT’s business, this shipment represented a fundamental breach of the entire contract.

58. This Tribunal should be similarly skeptical of any argument that there was no fundamental breach on the basis that the Tera cars allegedly proved relatively easy to fix in June of 2008, months after these events occurred [*Cl. Ex. 12*]. Such an argument is akin to arguing that it is commercially viable for businesses to remain uncertain as to their legal rights and obligations potentially for months after the moment a contract breach occurs. In a business context, this is a highly undesirable scenario. Thus, whether a substantial deprivation has occurred should not be measured on the basis of hindsight, especially when it arises some four months after the breach occurred, as is the case here [*Cl. Ex. 12*]. Instead, a finding that the defect amounts to a fundamental breach should be based on the circumstances present at the moment the breach occurred, and in particular on the position into which the seller’s breach placed the buyer [*Huber, pp. 214-15*].
59. Here, at the time the breach was discovered, CLAIMANT could not repair the cars himself, nor did RESPONDENTS have any local facilities in Mediterraneo which could undertake repairs [*Stmt. of Cl., para. 11*]. Furthermore, RESPONDENT Universal was unable to even guarantee the possibility of repair, much less the time in which repairs would take place [*Cl. Ex. 6; Stmt. of Cl., para. 17; See further discussion Section (C)*]. This uncertainty, in turn, forced CLAIMANT to choose between avoiding the Contract and finding other cars to sell, or face potential insolvency [*Stmt. of Cl., paras. 18, 20*]. Thus, any argument that attempts to measure the fundamental nature of the breach on the basis of information learned four months after the breach occurred is misleading and should be disregarded by the Tribunal.

C. RESPONDENT Universal's Offer to Remedy RESPONDENTS Failure to Perform Was Invalid and Did Not Change the Fundamental Nature of the Breach

60. Ideally, RESPONDENTS here would have manufactured and delivered non-defective automobiles, in accordance with the Contract. Failing that, this dispute could have been avoided if RESPONDENTS had been able to assure CLAIMANT at the time the breach occurred that they would be able to fix the cars, and that they could do so in a certain period of time, thereby enabling CLAIMANT to make any corresponding business decision based on definitive information. Article 49 of the CISG, in a reference to Article 48, addresses this scenario, in which a breaching seller may potentially remedy his “failure to perform his obligations” [*CISG Art. 48, See also, CISG Art. 49(2)(b)(iii)*]. Although RESPONDENTS here were eventually successful in repairing the defective cars months after these events occurred, they did not make a valid “offer to remedy” their contractual breach when it was discovered, in accordance with Article 48, because RESPONDENT Universal unreasonably exposed CLAIMANT to the risk of economic harm **(1)**. In addition, the offer to remedy was invalid because RESPONDENT Universal failed to indicate the specific period of time in which it would perform **(2)**. Even if RESPONDENT Universal’s vague offer to remedy could be considered an effective offer under Article 48, the breach of contract remains fundamental and CLAIMANT properly rejected the offer to remedy and avoided the Contract **(3)**.

1. The Offer to Remedy Was Invalid Because CLAIMANT Faced Unreasonable Economic Risk

61. Article 48 affords the seller that has failed to fulfill its contractual obligations with the potential opportunity to “remedy at his own expense” provided it can do so “without unreasonable delay and without causing the buyer unreasonable inconvenience” [*CISG Art. 48(1)*]. In this case, waiting on the hypothetical repairs offered by RESPONDENT Universal would have unreasonably exposed CLAIMANT to potentially disastrous financial harm [*Stmt. of Cl., para. 18*]. Just as the economic situation of the parties should be considered when determining whether a breach was fundamental, similar factors bear on the question of whether an offer to remedy was valid in light of Article 48’s “reasonable” standard. For example, a German court found a delay unreasonable where waiting for repairs likely would have resulted in economic hardship to the buyer, even though the seller was unaware of the urgency of the situation [*Pharmaceutical case (Germany)*]. In essence, unacceptable disturbance to the buyer’s business should be considered unreasonable [*Huber, p. 204*].

62. In this case, by delivering a shipment of entirely defective goods, RESPONDENTS placed CLAIMANT in a precarious state, one that included a risk of insolvency [*Stmt. of Cl., para. 18*]. Thus, RESPONDENTS' offer to remedy can only be found reasonable, in accordance with the standard delineated in Article 48, if it is concurrently found reasonable that CLAIMANT should have risked insolvency in response to RESPONDENTS' less-than-reassuring assertion that 'it cannot be known for certain if the problem can be fixed at all' [*CISG Art. 48(1); Stmt. of Cl., para. 17*].

2. The Offer to Remedy Was Invalid Because RESPONDENTS Failed to Indicate a Specified Period of Time in Which They Would Perform

63. Inherent in this opportunity to remedy is an assumption that the breaching party will perform within an "indicated" and "specified period of time" [*CISG Art. 48(2), (3)*]. Thus, an offer to remedy any failure to perform contractual obligations must contain an "indication of the date by which [the breaching party] intends to fulfill his obligations" to be found valid [*Schlechtriem & Schwenzger, pp. 76-77*]. In other words, the offer to remedy is invalid unless it "sufficiently specif[ies] the time and the manner of the cure" [*Case No. 16 U 77/01 (Germany)*].

64. The offer to remedy made by RESPONDENT Universal on 28 February 2008, fails to meet this requirement, because RESPONDENTS did not specify the time of the cure. It should be noted that it was actually CLAIMANT who asked for a time period in which he could expect repairs to occur [*Cl. Ex. 5*]. In response, RESPONDENT Universal stated that "[i]t is not possible to answer" and it could only indicate "that it will not be very long" [*Cl. Ex. 6*]. When given additional opportunity by CLAIMANT to indicate a specified period of time, RESPONDENT Universal continued to be vague, stating that it would be impossible to guarantee a timeline and in fact it could not be known for certain if the problem could be fixed at all [*Stmt. of Cl., para. 17*]. These equivocal assertions cannot constitute a valid offer to remedy under Article 48 because they gave CLAIMANT no indication of when RESPONDENTS' breach would be remedied or even that it could be remedied at all.

3. Even if RESPONDENTS' Offer to Remedy Was Valid, the Breach Remains Fundamental and CLAIMANT Properly Avoided the Contract.

65. Even if this Tribunal were to find RESPONDENTS made a valid offer to remedy under Article 48 that does not preclude a finding that the breach was fundamental. Several noteworthy scholars

have stated that the right to avoid a contract because of a fundamental breach takes priority over any theoretical right to cure, and thus the determination of whether a breach is fundamental should not take into account any offer to remedy [See e.g., *Schlechtriem & Schwenzler*, pp. 6-28; *Kee*, p. 190; *Graffi*, p. 343]. The reasoning behind this position primarily stems from the plain meaning of Article 48, which notes that the breaching seller's ability to remedy its own failure is "[s]ubject to Article 49" which, as discussed above, is the buyer's right to avoid [CISG Art. 49(1); *Koch (1999)*, p. 221]. This language should be interpreted as a limitation on Article 48; otherwise any offer to remedy a contractual breach would "retrospectively frustrate[e] the buyer's existing right of avoidance" [*Koch (2007)*, p. 132]. Thus, even if RESPONDENT Universal's speculation regarding potential repairs somehow constituted a valid offer to remedy, the contractual breach nonetheless remains fundamental.

66. Lastly, even if RESPONDENTS' vague declarations regarding the potential repairs amounted to a valid and specific offer to remedy, and even if exposing CLAIMANT to potential insolvency satisfied the reasonableness standard articulated in Article 48, CLAIMANT still properly avoided the Contract because he rejected the theoretical offer to remedy the very next day [*Cl. Ex. 10, 11; Stmt of Cl., para. 21*]. RESPONDENTS' offer to remedy came on 28 February 2008 [*Cl. Ex. 6*]. CLAIMANT rejected that offer one day later on February 29 [*Cl. Ex. 10, 11*]. The seller's right to cure is dependent on the consent of the buyer [*ICC 7531 (1994)*]. Under Article 48, the buyer may "make known" that he will not accept the breaching seller's offer to remedy, provided he does so "within a reasonable time" [See *Schlechtriem & Schwenzler*, p. 563], thereby eliminating the seller's ability to remedy under Article 48 [CISG Art. 48(2); See also, *CISG Art. 49(2)(b)(iii)*; *Huber*, p. 221]. This same "reasonable time" requirement is found in Article 49 of the CISG. A German appellate court, examining this language, found that avoidance coming one day after communications with the seller was indeed "within a reasonable time" [*Shoes Case (Germany)*]. Thus CLAIMANT here properly avoided the Contract in accordance with Articles 48 and 49 of the CISG.

D. CLAIMANT Properly Avoided the Contract Prior to the Date for Performance Because He Reasonably Believed RESPONDENTS Would Commit a Fundamental Breach in the Future

67. Lastly, under Article 72 of the CISG, a “party may declare the contract avoided” if “prior to the date for performance . . . it is clear that one of the parties will commit a fundamental breach of contract” [*CISG Art. 72(1)*]. The date for performance is when the final obligation becomes due [*See Key Press Case (Germany)*]. For example, in the *Key Press Case*, the seller made final delivery in October but title of the goods did not transfer until the last installment payment was made in November. The German Supreme Court noted that the date for performance was thus in November, when both delivery and payment was complete. Here, because both future deliveries and payment were outstanding when CLAIMANT declared the Contract avoided, the timing criteria of Article 72 is satisfied.
68. The primary purpose of Article 72 is to protect the interests of a party that reasonably believes a fundamental breach of contract will occur [*Azereedo*]. A party with such a belief can thus immediately declare the contract avoided rather than wait until the fundamental breach occurs [*Lookofsky, p. 113*]. Often, as was the case here, it can be “undesirable [for the non-breaching party] that the contract should have to remain in force” when there has been an indication that a fundamental breach will occur [*Bennett (72) in Bianca-Bonell, p. 527*]. It might, for example, be necessary to “prevent or reduce a loss” [*Schlectriem & Schwenzger, p. 283*] by avoiding the existing contract “so that another contract can be expeditiously entered into” and thus avoiding the contract is the non-breaching party’s only satisfactory recourse [*Liu (2005), p. 2*].
69. Such is the case in the matter before the Tribunal, where CLAIMANT was forced to weigh potential insolvency against replacement goods [*Stmt. of Cl., para. 18, 19*]. As discussed above, the entirety of the first consignment of cars was delivered in a nearly “undriveable” state [*Cl. Ex. 2*]. Neither CLAIMANT’s mechanic nor RESPONDENT Universal’s engineers knew the source of the cars’ malfunction [*Stmt. of Cl., para. 11; Cl. Ex. 3*]. RESPONDENT Universal’s Chief Engineer, in fact, stated that “problems may have developed” with the entire “first production run using” the ECUs in the defective Tera cars, suggesting that perhaps the problem could be more widespread [*Cl. Ex. 3*]. Yet at no time did RESPONDENTS assure CLAIMANT that these problems would be avoided in future consignments. These facts evidence the reasonableness of CLAIMANT’s position; that RESPONDENTS would commit a fundamental breach of the Tera car sales Contract.

70. Article 72 further states that a party intending to avoid a contract must be provided with “adequate assurance[s]” that such an action is unwarranted because the other party intends to perform [*CISG Art. 72(2)*]. On its face, the function of Article 72 is readily apparent: a party need not sit waiting, and merely hope that the other party will perform, if he has reason to believe otherwise. Failure to provide adequate assurances of performance helps to elucidate for the non-breaching party the likelihood that the other party will commit a fundamental breach in the future [*CISG Commentary, para. 2*]. Likewise, the failure to provide adequate assurances demonstrates the reasonableness of the non-breaching party’s belief that a fundamental breach of contract will occur [*Bridge, p. 418*]. The adequacy of assurance to which the innocent party is entitled under this article depends upon the “circumstances which gave rise to the threat of non-performance” [*Bennett (72) in Bianca-Bonell, pp. 522-23*]. An adequate assurance of performance is both affirmative and definite. The party required to give adequate assurance under Article 72 must make “more than a mere statement of intention and ability to perform” [*Bennett in Bianca-Bonell, p. 522*]. Likewise, silence or ambiguous answers will not suffice [*Case No. 17 U 146/93 (Germany); Downs Investments (Australia)*].
71. Here, RESPONDENTS not only provided ambiguous answers but also explicitly refused to assure CLAIMANT of their performance. As discussed above in detail, CLAIMANT made both the defect and his precarious financial situation known to RESPONDENTS [*See e.g., Cl. Ex. 2*]. In response, RESPONDENTS provided no assurances of performance and instead offered only vague speculation about the potential for repairing the Tera cars [*See e.g., Stmt. of Cl., para. 17*]. Accordingly, CLAIMANT respectfully urges the Tribunal to find that RESPONDENTS’ inability to confirm that they would perform their obligations under the Contract entitled CLAIMANT to declare the Contract avoided in accordance with Article 72 of the CISG.

E. Even If the Tera Cars Sales Contract is Viewed as an Installment Contract, CLAIMANT Still Properly Avoided the Contract

72. The above discussion reflects CLAIMANT’s view that the Contract at issue here was not an installment contract because an installment contract is one which, by definition, requires separate deliveries of the goods. Mere payment by installments will not create an installment contract [*Schlechtriem & Schwenzger, p. 733*]. Here, the Contract did not require separate deliveries of the goods; instead it merely allowed for the possibility of “partial shipment” [*Cl. Ex. 1*]. Partial shipment, or partial delivery, is separate and distinct from the concept of installment contracts [*Huber, p. 349*]. When, as here, the contract does not require separate deliveries, and instead

expressly contemplates only that the Tera cars will be shipped from Oceania to Mediterraneo “as space is available,” the buyer’s right to declare the contract avoided is controlled only by CISG Article 49. Should the Tribunal find that the Contract at issue is an installment contract, however, CLAIMANT was still entitled to declare the entire contract avoided in accordance with CISG Article 73. Under Article 73(2), a party can declare a “contract avoided for the future” in the event that one party fails to “perform any of his obligations in respect of an installment,” provided that in so doing the breaching party “gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future installments” [*CISG Art. 73(2)*].

73. The above analysis demonstrates that the breach committed by RESPONDENTS was fundamental. Therefore, if this contract were to be viewed as an installment contract, CLAIMANT properly avoided with respect to the first shipment of defective Tera cars [*See CISG Art. 73(1)*]. The fundamental breach represented by those defective Tera cars also gave CLAIMANT “good grounds” to avoid the remaining installments, in accordance with Article 73(2) of the CISG. The “good grounds” standard articulated in Article 73(2) means that even a mere breach, not necessarily fundamental in nature, with respect to any installment may give good grounds to conclude that a fundamental breach will occur with respect to future installments [*Liu, para. 2.2; Bennett (73) in Bianca-Bonell, p. 533*]. As acknowledged by numerous courts, when the initial breach actually is fundamental in nature, it is even more likely that the initial (fundamental) breach will provide the “good grounds” required to conclude that a fundamental breach of the entire contract will occur in the future [*See e.g., “Bonaventure” v. Pan African Export (France); Spanish Paprika Case (Germany); Handelsgericht Zurich (1995)*]. Notably, in the *P. v. P.* case, an arbitral tribunal held that, in order to prevent the buyer from meeting the CISG’s “good grounds” standard, the seller would have to have taken steps to negate the high probability that a past breach would be repeated in future installments [*The Barley Case (Austria)*]. Thus, the breaching party has the burden of ensuring the innocent party that the fundamental breach will not occur in future deliveries.

74. In the matter before the Tribunal, RESPONDENTS gave no indication that preventative measures would be taken to avert future breaches of the Contract. As discussed above, RESPONDENTS could not even guarantee that the initial breach could be fixed at all, much less avoided in the future [*Stmt. of Cl., para. 17*]. Therefore, given that the problem with the Tera cars’ engines affected every newly-manufactured car in the initial shipment, it would have been reasonable for CLAIMANT to envision future performance being equally deficient [*Cl. Ex. 2; Stmt. of Cl., para. 11*]. CLAIMANT was unable to fix the problem and RESPONDENTS were unwilling to guarantee repairs [*Stmt. of*

Cl., paras. 11, 17]. Accordingly, CLAIMANT had good grounds to believe that the fundamental breach of the first installment would also occur in respect to future installments and therefore properly exercised his right to declare the entire contract avoided under Article 73.

75. **CONCLUSION:** RESPONDENTS fundamentally breached the Contract when they delivered an entirely defective consignment of newly-manufactured Tera cars. This dispute could potentially have been avoided had RESPONDENTS provided CLAIMANT with information more definitive than a vague and inadequate offer to attempt speculative repairs. Unfortunately, CLAIMANT was forced to make an immediate business decision based on the information then available as he faced serious economic risk, including the risk of potential insolvency. As the cars were undriveable and consequently unfit for resale, CLAIMANT was entitled to immediately declare the Contract avoided. Accordingly, CLAIMANT urges the Tribunal to find RESPONDENTS jointly and individually liable for the fundamental breach of the Contract.

V. REQUEST FOR RELIEF

Counsel for CLAIMANT respectfully requests that the Tribunal find that:

- (1) the insolvency law of Oceania has no bearing on these proceedings and thus the Tribunal has jurisdiction to consider the parties' dispute;
- (2) RESPONDENT Universal is bound by the arbitration agreement contained in the Contract between CLAIMANT and RESPONDENT UAM;
- (3) RESPONDENT Universal is liable for the breach of contract; and
- (4) RESPONDENTS committed a fundamental breach of the Contract that authorized CLAIMANT to properly avoid the Contract

Respectfully Submitted,

(signed)

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