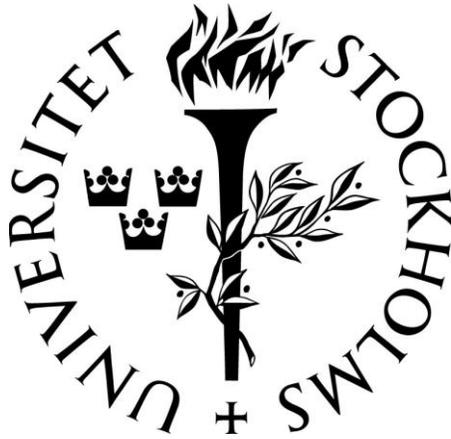


SIXTEENTH ANNUAL  
WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT  
3 to 9 APRIL 2009

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MEMORANDUM FOR RESPONDENT



STOCKHOLMS UNIVERSITET

**ON BEHALF OF:**

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

**RESPONDENT**

**AGAINST:**

Reliable Auto Imports  
114 Outer Ring Road  
Fortune City, Mediterraneo

**CLAIMANT**

---

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

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## INDEX OF ABBREVIATIONS

\$	United States Dollar
Arb.	Arbitration
Art.	Article
ATF	Arrêt du Tribunal Fédéral (Swiss Supreme Court)
CIETAC	China International Economic & Trade Arbitration Commission
CISG	United Nations Convention on the International Sale of Goods, Vienna, 11 April 1980
CISG-AC	CISG Advisory Council
Cl. Brief	CLAIMANT's Brief to the Tribunal
Cl. Ex.	CLAIMANT's Exhibit
Conv. on Agency	Convention on Agency in the international Sales of Goods (Geneva, 17 February 1983)
ECU	Engine Control Unit
e.g.	exempli gratia (for example)
et al.	et alia (and the others)
et seq	et sequens (and the following)
i.e.	id est (that means)
ICC	International Chamber of Commerce and Industry
Inc.	Incorporated
Ltd.	Limited
ML	Model Law
No.	Number
p.	page
para.	paragraph
pp.	pages
Proc. Ord.	Procedural Order
SCC	Stockholm Chamber of Commerce
SCC Rules	Arbitration rules of the SCC
Sch	Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien (Vienna), Austria



Stmnt of Cl.	Statement of Claim
U.K.	United Kingdom
U.S.	United States
UAM	Universal Auto Manufacturers Distributors Oceania, Ltd.
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	The UNIDROIT Principles of International Commercial Contracts, 2004
v.	versus



## 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 manufacturer of automotive products. It is organized under the laws of Equatoriana.

### JANUARY 2008

- **18 - 23 January:** CLAIMANT and RESPONDENT UAM entered into a contract for the purchase and sale of 100 newly-manufactured “Tera” cars (“the Contract”), which had recently received enthusiastic reviews in the trade press. The contract price was \$7,600 per car. On 23 January, CLAIMANT made a \$380,000 deposit on the Contract, representing 50% of the overall contract price. The Contract called for the cars to be shipped “as space is available.”

### FEBRUARY 2008

- **18 - 21 February:** CLAIMANT alleges that after receiving the 25 cars shipped in the first installment, he experienced problems with the engines of the cars. A mechanic hired by CLAIMANT was unable to identify the source of the cars’ engine difficulties.
- **22 February:** CLAIMANT then contacted his contractual partner and spoke to Mr. High, Sales Manager at RESPONDENT UAM. CLAIMANT informed Mr. High of the difficulties with the 25 Tera cars. Mr. High assured CLAIMANT that he would speak to his own service personnel, and possibly RESPONDENT Universal as well.
- **27 February:** Mr. High responded to CLAIMANT, and stated that while his own service personnel were unsure as to what the exact problem was, it was likely either an issue with the cars’ engine control units (“ECUs”) or a fuel pressure issue. CLAIMANT also spoke to Mr. Frank Jones, Chief Engineering Officer of RESPONDENT Universal, who reaffirmed the notion that the cars likely had a problem with their ECUs.



- **28 February:** Mr. Steiner, Regional Manager at RESPONDENT Universal, also contacted CLAIMANT and informed him that while RESPONDENT “UAM is, of course, responsible . . . for the condition of the Tera cars it . . . sold to [CLAIMANT],” nonetheless RESPONDENT Universal was willing to send its technical personnel to fix the unidentified problem with the Tera cars, in an effort to “stand behind its product.” CLAIMANT asked how long the repairs would take. In response, Mr. Steiner noted that he could not be certain but he was sure it would not be very long. In a later phone conversation, Mr. Steiner expressed to CLAIMANT his feeling that the cars would probably be fixed in one week, although he could not guarantee such a result.
- **29 February:** On the heels of accepting another offer to purchase cars made by Patria Importers, a competitor of RESPONDENT UAM, CLAIMANT informed both RESPONDENT UAM and RESPONDENT Universal that he was terminating the (entire) Contract with RESPONDENT UAM. In a letter to RESPONDENT Universal, CLAIMANT stated there was “no reason” to send any personnel or equipment to Mediterraneo.

#### APRIL 2008

- **11 April:** Ms. Judith Powers, Insolvency Representative for RESPONDENT UAM, which declared bankruptcy on 9 April, informed CLAIMANT that, under Oceania law, “the opening of insolvency proceedings [commenced in Oceania] automatically void[ed] any choice of forum clause, including any arbitration agreement” in all of RESPONDENT UAM’s contracts.

#### MAY 2008

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

#### JUNE 2008

- **19 June:** RESPONDENT Universal contacted CLAIMANT and informed him that the problems with the 25 Tera cars were “quickly fixed.”

#### AUGUST 2008

- **15 August:** In spite of the information provided to CLAIMANT by Ms. Judith Powers in April, CLAIMANT submitted a Request for Arbitration and Statement of Claim to the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”).

## ARGUMENT

### I. RESPONDENT UNIVERSAL IS NOT BOUND BY THE ARBITRATION AGREEMENT BECAUSE IT HAS NOT CONSENTED TO BEING A PARTY TO THESE PROCEEDINGS

1. RESPONDENT Universal respectfully requests that this honorable Tribunal declare that it has no jurisdiction over RESPONDENT Universal, as it was never a party to the Contract or the arbitration agreement in question, and thereby dismiss all claims against RESPONDENT Universal. It is a core principle of commercial arbitration that consent to arbitrate, given by the parties, is a foundational basis of all arbitration proceedings [*Redfern & Hunter, pp. 148-51*]. Here, RESPONDENT Universal has given no such consent, was not a party to the arbitration agreement, and participates in these proceedings only because of the presence of Article 30 of the Arbitration Rules of the SCC (“SCC Rules”), which empowers this Tribunal to render an award against a party despite its non-participation in the proceedings [*See SCC Rules, Art. 30(2)*]

2. Despite CLAIMANT’s assertions to the contrary, RESPONDENT Universal has not given any form of consent, tacit or otherwise, to arbitrate a dispute arising out of a contract to which it was never a party **(A)**. In addition, 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*], should not be applied here because RESPONDENT UAM and RESPONDENT Universal are separate and autonomous entities **(B)**. Lastly, there are no circumstances in this case that justify application of the principles of equity and good administration of justice **(C)**.

#### A. RESPONDENT Universal Has Never Consented to Being a Party to These Arbitral Proceedings and its Offer to Provide Assistance to CLAIMANT is Not Sufficient Grounds to Bind RESPONDENT Universal to the Arbitration Agreement

3. The Arbitral Tribunal has no jurisdiction over RESPONDENT Universal because no arbitration agreement exists between CLAIMANT and RESPONDENT Universal. The facts of this case do not justify compelling RESPONDENT Universal to arbitrate a dispute arising out of a contract to which it was not a party. It is a fundamental principle that arbitration is a consensual arrangement, and not one in which the parties can be forced to participate against their will [*Redfern & Hunter, pp. 148-51*]. The burden of proving that the non-signatory consented to being bound to

the arbitration agreement “lies with the party claiming that the agreement is binding on [the] third party” [*Pondret & Besson*, p. 229]. This burden is higher when a party seeks to bind a non-signatory in the absence of consent than when a non-signatory willingly seeks to take advantage of an arbitration agreement [*Craig/Park/Paulsson*, p. 177]

4. RESPONDENT Universal did not give “tacit consent” to being a party to the arbitration agreement in question [*Cl. Brief*, para. 35-38]. To be successful, the party seeking to bind a non-signatory to the arbitration agreement must show that the non-signatory engaged in conduct from which it can reasonably be inferred that it intended to accept the obligation to arbitrate [*Pondret & Besson*, p. 265]. This intention can be deduced from the particular circumstances in each case [*Fouchard et al.*, p. 504]. Such circumstances are not present here, however, because RESPONDENT Universal did not participate in the negotiation of the Contract between CLAIMANT and RESPONDENT UAM, nor was it responsible for the performance of said contract (1). Likewise, RESPONDENT Universal’s subsequent conduct – its offer to help CLAIMANT – cannot be construed as consent to arbitrate a dispute in which it is not otherwise involved (2). Lastly, under the facts of the case, RESPONDENT Universal cannot reasonably be considered a third-party beneficiary of the Contract between CLAIMANT and RESPONDENT UAM (3).

**1. RESPONDENT Universal Did Not Participate in the Negotiation of the Contract, Nor its Performance.**

5. Contrary to CLAIMANT’s erroneous assertions, RESPONDENT Universal participated neither in the negotiation of the Contract, nor in its performance. RESPONDENT Universal’s role in the events preceding the signing of the Contract is known only to be its separate, likely long-standing agreement with RESPONDENT UAM [*Proc. Ord. 2*, para. 13; see also, *Cl. Ex. 16*]. RESPONDENT Universal does not deny that it has a corporate relationship with RESPONDENT UAM; that of manufacturer-distributor. In general, however, a corporate relationship alone is not sufficient to bind a non-signatory to an arbitration agreement [*See Hanotiau (2006)*, pp. 341 - 44; *See e.g., Thompson-CSF (U.S.)*]. In fact, in the absence of proof to the contrary, it should be presumed that a non-signatory to an arbitration agreement naturally did not intend to become a party to that agreement [*Pondret & Besson*, p. 229].

6. CLAIMANT asserts that negotiation is “an indicator of consent” and because “RESPONDENT [Universal] was substantially involved in the negotiation” of the Contract, it

“should be considered bound by the arbitration agreement” [*Cl. Brief, para. 36*]. This argument is unsupported by any facts and directly contradicts CLAIMANT’s own Statement of Claim, in which it conceded that it had “negotiated a contract with [RESPONDENT] UAM” and RESPONDENT UAM alone [*Stmt. of Claim, para. 9*]. Furthermore, not only is there no evidence that RESPONDENT Universal participated in the negotiation of the contract at issue, but this Tribunal has previously stated that RESPONDENT “Universal did not deal directly with any retailer of its motor products in the area serviced by [RESPONDENT] UAM” [*Proc. Ord. 2, para. 16*].

7. CLAIMANT’s support for its allegation that RESPONDENT Universal “clearly participated in the transaction as though it were also a party to the agreement” [*Cl. Brief, para. 37*] is equally suspect. This supposedly “clear participation” stems from the fact that RESPONDENT Universal “regularly reviewed the terms of the form contract” used by RESPONDENT UAM [*Cl. Brief, para. 37*]. RESPONDENT Universal concedes that it “reviewed the form contracts used by its authorized distributors,” although it is unclear where CLAIMANT’s characterization of this activity as “regular” comes from [*Proc. Ord. 2, para. 16*]. Form contracts generally tend to be static documents that do not change with any degree of frequency, and the fact remains that RESPONDENT Universal – as a matter of policy – did not participate in the contracts entered into by the distributors to whom it sells its automobiles [*Proc. Ord. 2, para. 16*].

**2. RESPONDENT Universal’s Offer to Assist CLAIMANT is Not a Reasonable Basis to Force RESPONDENT Universal to Arbitrate a Dispute Arising Out of a Contract it Never Signed.**

8. While RESPONDENT Universal did not participate in the transaction between CLAIMANT and RESPONDENT UAM, it did offer to provide assistance to RESPONDENT UAM and CLAIMANT when the engine difficulties arose [*Cl. Ex. 4*], but that offer was refused by CLAIMANT the very next day [*Cl. Ex. 11*]. In making the offer to assist, RESPONDENT Universal made clear that it did so “without admission of liability” and only to “stand behind its product” [*Cl. Ex. 4*]. CLAIMANT’s argument necessarily implies that RESPONDENT Universal should effectively be punished for actions that amount to exemplary customer service.
9. In ICC case 6769, for example, X and Y entered into a purchase agreement, with the goods to be manufactured in part by Z [*ICC 6769 (1991)*]. When a dispute arose, X brought a claim against the manufacturer Z under the contract concluded with Y. The tribunal ruled that even though Z had provided a written statement of the technical aspects of the equipment it

manufactured to assist X, there was no basis for the tribunal to find jurisdiction over Z as it was a non-signatory to the arbitration agreement. Similarly, RESPONDENT Universal here made only an offer to provide assistance to CLAIMANT, and that offer was refused almost immediately [*Cl. Ex. 11*]. The notion that those events are adequate support for the idea that RESPONDENT Universal gave consent to participate in these proceedings is unreasonable. The offer to provide assistance cannot reasonably be interpreted as “tacit consent” to arbitrate a dispute that subsequently arose between CLAIMANT and RESPONDENT UAM [*See e.g., Gvozdenovic (U.S.)*].

### 3. RESPONDENT Universal Was Not a Third-Party Beneficiary of the Contract.

10. RESPONDENT Universal, although admittedly the manufacturer of the Tera cars at issue here, was not a third-party beneficiary of the Contract. In order to bind a non-signatory under this theory, the party seeking to bind the non-signatory must show that the parties to the contract intended to confer a benefit on the third-party non-signatory; a mere incidental benefit in favor of the non-signatory is not a legally sufficient reason to compel arbitration [*See e.g., Cargill (U.S.); see also, Hanotiau, p. 261*]. To determine whether a non-signatory was intended to be a third-party beneficiary, the Tribunal should look at the language of the contract [*See e.g., ICC 9839 (1999)*]. Here, the Contract makes no mention of RESPONDENT Universal [*Cl. Ex. 1*]. As stated above, RESPONDENT UAM and RESPONDENT Universal actually had a separate agreement; separate from the Contract [*Proc. Ord. 2, para. 13*]. There is no indication that CLAIMANT and RESPONDENT UAM intended to benefit RESPONDENT Universal when they entered into the Contract.

11. Rather than provide legal or factual support, CLAIMANT here relies on “a hypothetical situation” [*Cl. Brief, para. 43*]. In its hypothetical, “there is a distributor agreement between A and B and that of a sale between B and C” and CLAIMANT asserts that A can be compelled to arbitrate if it is “proved to be the intended beneficiary” [*Cl. Brief, para. 43*]. While conceding the obvious similarity between CLAIMANT’s hypothetical and the facts of this case, unlike “A,” RESPONDENT Universal was not an intended beneficiary of the Contract here and there is no factual support for such a claim. CLAIMANT does provide some case support in addition to its hypothetical, but contorts the holding of one case to suit its own purposes. “In *Sunkist*,” CLAIMANT states, “the court extended the arbitration agreement to the non-signatory in light of its close connections with the signatory” [*Cl. Brief, para. 42*]. “*Sunkist*” is a U.S. case in which the

court allowed the non-signatory party *to take advantage of* an arbitration clause, not because of any “close connections,” but because the signatory’s claims against the non-signatory – brought in the court – necessarily relied upon a license agreement which contained an arbitration clause [*Sunkist (U.S.)*]. Thus, at the non-signatory party’s request, the court ordered the parties to arbitration [*Sunkist (U.S.)*]. Aside from the legal theory of third-party beneficiary not being discussed in the case, as well as the key differentiating factor that the subsidiary was wholly-owned by the parent (in contrast to RESPONDENT Universal’s mere 10% ownership here [*Proc. Ord. 2, para. 12*]), *Sunkist* would be more appropriately applied had CLAIMANT filed suit against RESPONDENT Universal in a national court, and RESPONDENT Universal then sought to go to arbitration.

12. Throughout its argument under this theory CLAIMANT appears to use the concept of ‘incidental beneficiary’ and disguise it with a cloak of ‘third party beneficiary’ [*Cl. Brief, para. 42-44; see also, Hanotiau, p. 261*]. While CLAIMANT concedes that RESPONDENT Universal “is not a direct beneficiary of the contract between [CLAIMANT] and RESPONDENT [UAM],” nevertheless, “the result of RESPONDENT [UAM]’s flourishing trade would in fact make RESPONDENT [Universal] a beneficiary” and “[t]herefore RESPONDENT [Universal] had an interest in the contracts RESPONDENT [UAM] entered into” [*Cl. Brief, para. 44*]. Ignoring CLAIMANT’s somewhat insensitive use of the phrase “flourishing trade” on the heels of RESPONDENT UAM’s recent bankruptcy [*Powers’ Letter, p. 30*], CLAIMANT leaps from this observation to the argument that RESPONDENT Universal should be “estopped from challenging the jurisdiction of the Tribunal” [*Cl. Brief, Heading of para. 42-44*], apparently because it benefits when cars that it manufactures enjoy brisk sales.

13. Certainly RESPONDENT Universal benefits from sales made by its distributors to auto dealers like CLAIMANT. Likewise, RESPONDENT Universal also benefits, in much the same way, when dealers like CLAIMANT sell its products to the general public. Such activity, however, fits better under the heading of “capitalism at work” than it does under any potential theory of legal liability, or reason why an entity should be forced to arbitrate in the absence of consent. Any benefit that RESPONDENT Universal received from RESPONDENT UAM’s success (prior to the latter declaring bankruptcy of course) is irrelevant to the issue of whether RESPONDENT Universal was an intended third-party beneficiary at the inception of the Contract. In the words of one commentator, “[h]owever far one is ready to stretch the concept of consent . . . one should not forget that consent is the fundamental pillar of international arbitration” [*Hanotiau, p. 52*].

**B. RESPONDENT Universal and RESPONDENT UAM Are Two Separate Entities That Do Not Constitute One Economic Reality**

14. As argued at length above, RESPONDENT UAM and RESPONDENT Universal are two separate entities and thus RESPONDENT Universal cannot be obligated to arbitrate in the absence of consent, simply because the two entities engaged in business transactions together. The mere fact that companies engage in related business ventures does not create a presumption that one of them can be bound to the other's agreements [*Jarrosson*, p. 219]. Certainly if CLAIMANT had wanted to include RESPONDENT Universal in the Contract, and therefore the arbitration agreement, it could have so requested before it signed the Contract [*See e.g., ICC 4402 (1983)*]. Here, however, CLAIMANT attempts to tie RESPONDENTS together after the fact by applying the so-called "Group of Companies doctrine."
15. CLAIMANT notes that the leading authority on this doctrine is the *Dow Chemical* case [*Cl. Brief*, para. 46], although it fails to note that *Dow Chemical* is generally not widely followed [*Poudret & Besson*, p. 215]. As one commentator noted, "[t]he doctrine [although] accepted under French law, is rejected, more or less explicitly in most legal systems, and has [even] been described as infamous" [*Youssef*, p. 110]. Regardless, in *Dow Chemical*, an ICC tribunal found that non-signatories to an arbitration agreement could nonetheless arbitrate under the agreement because all of the companies involved constituted one and the same economic reality [*Dow Chemical (ICC)*; *see also, Craig/Park/Paulsson*, para. 5.09]. CLAIMANT states at the outset of its argument that this doctrine "is well accepted in French courts and most other jurisdictions" but concedes that "Swiss courts tend to disregard it completely" [*Cl. Brief*, para. 45; *See e.g., Alpha (Switzerland)*]. CLAIMANT could also have added the U.K. and the U.S., among others, to its list of countries that tend to disregard this doctrine [*See e.g., Peterson Farms (U.K.)*; *see also, Thompson-CSF (U.S.)*].
16. Nonetheless, even if the doctrine is applied here, the facts simply do not support a finding that RESPONDENT UAM and RESPONDENT Universal are "one and the same economic reality" [*Dow Chemical (ICC)*]. The *Dow Chemical* tribunal undertook primarily a fact-based analysis, examining the circumstances surrounding the contract negotiations, contract performance, and contract termination before finding that the non-signatories could indeed benefit from the arbitration agreement at issue [*Dow Chemical (ICC)*; *see also, Lamm & Aqua*, p. 724]. As discussed above, RESPONDENT Universal took no part in the negotiations of the Contract, it was not responsible for performance of the Contract, and its entire role in these events is limited to an offer of assistance that was ultimately – and improperly – refused by CLAIMANT [*Cl. Ex. 11*].

C. Application of the Theories of “Equity and Good Administration of Justice,” as Urged By CLAIMANT, is Unjustified in This Case as There Has Been No Denial of Justice or Other Unfair Prejudice to CLAIMANT’s Rights

17. CLAIMANT also argues that RESPONDENT Universal “should be a party to the arbitration proceedings” “[o]n grounds of equity and good administration of justice” [*Cl. Brief, paras. 52-54*]. CLAIMANT’s argument here relies entirely on what it refers to as “the *Westland* case,” an ICC case from 1986 [*Cl. Brief, para. 52; see also ICC 3879 (1986)*]. CLAIMANT fails to mention however, that the country of Egypt, which was a respondent in the *Westland* case, and a non-signatory to the arbitration agreement in question, challenged the award rendered against it, and the award was overturned [*Westland Helicopters (1988)*]. The Swiss Federal Supreme Court held that the arbitrators’ application of equity in the case was inappropriate, as there was no denial of justice, and thus the tribunal did not properly have jurisdiction over the non-signatory party. The court reasoned that because the claimant, Westland Helicopters, was free to initiate court proceedings against Egypt in an Egyptian court, binding the non-signatory under a theory of equity was unjustified.

18. Application of this theory is equally unwarranted here, as CLAIMANT faces no denial of justice – it could easily pursue its rights in either a court in Equatoriana, or more logically pursue its case against RESPONDENT UAM in the insolvency court of Oceania, on the basis of the Contract between RESPONDENT UAM and CLAIMANT.

19. **CONCLUSION:** RESPONDENT Universal and RESPONDENT UAM are two separate and distinct entities and consequently binding RESPONDENT Universal to an arbitration agreement it did not enter into is unjustifiable. Likewise, the facts of this case demonstrate that RESPONDENT Universal has not given its consent to participate in these proceedings. Consequently, the claims against RESPONDENT Universal should be dismissed.

**II. THE INSOLVENCY LAW OF OCEANIA RENDERED VOID THE ARBITRATION CLAUSE AND CONSEQUENTLY THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE PARTIES**

20. Under Oceania law, the commencement of insolvency proceedings by RESPONDENT UAM on 9 April 2008, automatically voided the arbitration agreement contained within the Contract [*Powers’ Letter, p. 30*]. CLAIMANT asserts that the SCC Rules and Danubian Arbitration Law (“DAL”) support the notion that this Tribunal is able to determine which law is most

appropriately applied to the substance of the dispute and consequently it is similarly empowered to determine what law should be applied to the arbitration agreement [*Cl. Brief, para. 3; see also SCC Rules Art. 22(1); DAL Art. 28(2)*]. However, while the SCC Board has previously determined that the Tribunal does not manifestly lack jurisdiction [*See Proc. Ord. 1, para. 5; see also SCC Rules Art. 10(1)*], in this case the Oceania insolvency law is applicable and rendered the arbitration agreement void [*Proc. Ord. 2, para. 5*], consequently the Tribunal has no foundation for its jurisdiction **(A)**. In addition, RESPONDENT Universal respectfully urges the Tribunal to dismiss the case, in accordance with the public policy interests expressed by Mediterraneo and Equatoriana **(B)**.

**A. The Insolvency Law of Oceania is Applicable to the Matter Before the Tribunal and Renders Void the Foundation for these Proceedings**

21. Contrary to CLAIMANT's assertions, Oceania law is most appropriately applicable to this dispute, as Oceania is the country most closely connected to the Contract. Certainly DAL empowers the Tribunal to "rule on its own jurisdiction" [*DAL Art. 16(1)*]. Here, however, the task is complicated by the fact that the Contract does not designate any applicable law. Therefore, RESPONDENT Universal urges the Tribunal to first determine the substantive law applicable to the Contract, and then apply that law to the arbitration agreement itself **(1)**. To determine the substantive law applicable to the Contract, the Tribunal should apply general principles of conflicts of law rules, which lead to Oceania law, as Oceania is the State most closely connected to the Contract **(2)**. Consequently the arbitration agreement is void, and the claim against RESPONDENT Universal should be dismissed **(3)**.

**1. The Substantive Law Applicable to the Contract Should Also be Applied to the Arbitration Agreement.**

22. The Tribunal is urged to determine the law most appropriately applied to the substantive matters of the dispute, and then apply that law to the arbitration agreement contained within the Contract. In general, "[t]here is a very strong presumption in favor of the law governing the substantive agreement which contains the arbitration clause also governing the arbitration agreement" itself [*Lem, p. 142*]. In the absence of any choice of law clause in the Contract, however, this Tribunal "is faced with the problem" of choosing which law to apply to the question of the arbitration agreement's validity [*Redfern & Hunter, p. 121*]. "The real choice – in the absence of any express or implied choice by the parties – appears to be between the law of the seat of the

arbitration, and the law which governs the contract as a whole” [*Redfern & Hunter*, p. 126; see also, *Born*, p. 391]. In this case, RESPONDENT Universal urges the Tribunal to apply the law which governs the Contract as a whole.

23. Because the arbitration clause is only one of many clauses appearing in the Contract, the most reasonable choice would be for the Tribunal to apply the same law consistently throughout these proceedings. That is particularly true here, as CLAIMANT at the outset of these proceedings has urged the Tribunal to first determine whether the arbitration agreement can be extended to a non-signatory [*Cl. Brief*, paras. 30-55]. This determination, while seemingly procedural in nature, necessarily forces the Tribunal to examine the substantive issues of the case. Thus, although a jurisdictional question, it represents a mixed question of law and fact. The Tribunal must consider such substantive matters as the legal nature of the relationship between the parties and the events surrounding this dispute in order to determine whether it has jurisdiction over RESPONDENT Universal. In considering such substantive matters, it would be reasonable for the Tribunal to apply the law that governs the substantive issues in the case. Therefore, “the starting point” should be “to determine the proper law of the contract in which the arbitration agreement is [found]” and then that same law should also govern the arbitration agreement, “since it is part of the substance of the underlying contract” [*Mustill/Boyd*, p. 63].

24. This approach of “applying the substantive law governing the underlying contract to the arbitration agreement” has been used in a number of recent cases [*Born (2008)*, p. 476]. In a recent German case, a court of appeals determined the law applicable to the disputed legal relationship at issue and then applied that law to the arbitration agreement as well [*Case No. 11 Sch 06/01 (2003)*]. A recent British court undertook a similar approach in the absence of an express choice of law clause, and applied the same law to both the parties’ contract and its arbitral clause [*Born (2008)*; see also *Halpern (2006)*]. Applying the substantive law that governs the entire contract to the arbitration agreement is also more reasonable here than applying Danubian law to the arbitration agreement, merely because it is the seat of the arbitration. The seat “may be chosen because of its geographical convenience to the parties; or because it is a suitably neutral venue; or because of the high reputation of the arbitration services there; or for some other, equally valid reason” [*Redfern & Hunter*, pp. 120-21; see also *SCC 117/1999 (2001)*], none of which have anything to do with arbitration agreement itself. Thus, applying the substantive law which governs the Contract as a whole – namely, Oceania law, as demonstrated below – to the arbitration agreement is the most reasonable approach for the Tribunal in the absence of any choice of law made by the parties.

**2. Oceania Law is the Substantive Law Applicable in This Dispute as the Law of the Place Most Closely Connected to the Contract.**

25. In the absence of any express choice of law made by the parties, the Tribunal should apply general principles of conflict law to determine which law is most appropriately applicable to the Contract as a whole, and consequently to the arbitration agreement itself. Both CLAIMANT and RESPONDENT Universal agree that this method of determining the applicable substantive law enjoys wide acceptance in international arbitration [*See Cl. Brief, para. 4; see also, Craig/Park/Paulsson, p. 323; Lew/Mistelis/Kröll, p. 428*]. It relies on an analysis of similar case law, international conventions, national conflicts rules (or national systems of private international law) and provides that, in the absence of an express choice of law by the parties, the law most appropriate to apply is that of the country with the closest connection to the contract [*See e.g., ICC 4237 (1984)*]. This approach is considered by most scholars to be the “modern” conflict rule and, notably, is present in the Rome Convention on the Law Applicable to Contractual Obligations of 19 June 1980 (“Rome Convention”) [*Redfern & Hunter, p. 122*]. Most legal systems, in fact, when faced with such questions, apply the law of the country which has the closest connection to the contract or transaction in question [*Blessing, p. 413; see also, Lando, p. 113; See e.g., ICC 4237 (1984)*].

26. CLAIMANT concedes that the country which has the closest or most significant connection with the contract is generally considered the one in which the party who is to effect the characteristic performance resides; or, put simply, the seller’s country [*See Cl. Brief, para. 5*]. This is so because in international sales of goods the “characteristic performance” of the contract is generally the selling of the goods in question, which is, obviously, accomplished by the seller [*Blessing, p. 414; see also, Lando, p. 113*]. Here, the seller of the goods in question – the 2008 model Tera cars – was RESPONDENT UAM, which “resides” or has its principal place of business in Oceania [*Stmt. of Cl., para. 3; Cl. Ex. 1*]. Thus, Oceania law – including the Oceania Law on Insolvency – should be applied, thereby rendering void the arbitration agreement on which these proceedings are predicated [*Proc. Ord. 2, para. 5; Powers’ Letter, p. 30*].

27. CLAIMANT cites the Hague Convention in support of its argument that Mediterraneo law should be applied, as an “exception to th[e] presumption” that the seller’s law is applicable in the absence of any choice of law clause to the contrary [*Cl. Brief, para. 5*]. First, while the language of the Hague Convention may be compelling, as theoretically representative of international consensus, it is certainly not automatically applicable in this case, as neither Mediterraneo nor Oceania (nor Equatoriana for that matter) is known to be a signatory to this Convention.

CLAIMANT makes no mention of why the Hague Convention should be applied by the Tribunal. Second, even if the Tribunal were to apply the Hague Convention here, the specific exception relied upon by CLAIMANT is inapplicable, given the language of the Contract. The section cited by CLAIMANT stipulates that the law of the buyer's country should be applied only if "the contract provides expressly that the seller must perform his obligation to deliver the goods in [the buyer's country]" [*Hague Convention, Art. 8(2)(b)*]. Here CLAIMANT has placed itself in an untenable position. It argues that "[t]he instant case falls under such an exception [because] the Tera cars were to be delivered to Mr. Tisk in Mediterraneo" [*Cl. Brief, para. 5*]. This argument is erroneous, and ignores the language of the Contract.

28. The Contract between RESPONDENT UAM and CLAIMANT calls for the cars to be shipped "CIF Incoterms 2000 Fortune City, Mediterraneo" [*Cl. Ex. 1*]. "Cost, Insurance and Freight" or "CIF" is a shipment term under which the seller's obligation to deliver the goods is fulfilled "when the goods pass the ship's rail *in the port of shipment*" (*emphasis added*) [*Incoterms 2000 Commentaries*] – in this case, Oceania [*Cl. Ex. 1; Stmt. of Cl., para. 9*]. The designation of "Fortune City, Mediterraneo" in the shipping term contained in the Contract [*Cl. Ex. 1*] is not a destination or arrival term; instead it merely denotes the place to where the buyer – CLAIMANT – likely agreed to pay for shipping [*See Incoterms 2000 Commentaries*]. Perhaps this exception might have applied if the shipping terms in the Contract utilized a so-called "D-term" (i.e. DAF, DES, DDU, DEQ, DDP) under which the seller is responsible for actually getting the goods to the destination, and thus delivery does not occur in the legal sense until the buyer actually receives the goods [*See Incoterms 2000 Commentaries*]. In sum, RESPONDENT UAM was responsible only for putting the cars on a ship or carrier in Oceania destined for Mediterraneo; it was not responsible for ensuring that the cars arrived in Mediterraneo. Had the shipment of cars been lost at sea, for example, the financial loss would have been on CLAIMANT as buyer, because under the CIF term "the seller fulfills the contract in the country of shipment" [*See Incoterms 2000 Commentaries*]. Therefore, even if the Hague Convention were applied, the exception contained in Article 8(2)(b) is nonetheless inapplicable given the terms of the Contract, and the place most closely connected with the Contract remains RESPONDENT UAM's home country of Oceania.

29. CLAIMANT's additional reasons for applying Mediterraneo law, rather than Oceania law, are equally insufficient. It argues that Mediterraneo law should be applied because Mediterraneo is "more closely connected [to the Contract] . . . than Oceania" [*Cl. Brief, para. 6*]. In support, CLAIMANT notes that the "parties to the [C]ontract are all incorporated in different states" and

lists Mediterraneo, Oceania, and RESPONDENT Universal's home country of Equatoriana [*Cl. Brief, para. 6; see also, Cl. Ex. 1*]. In addition to again citing the legally erroneous notion that "delivery was to take place in Mediterraneo," CLAIMANT cites in theoretical support of its argument the fact that it "is not clear where the [C]ontract was negotiated and where it was finally formed" [*Cl. Brief, para. 6*]. This is insufficient to overcome the above-detailed and widely accepted presumption that the seller's law should be applied – here the law of RESPONDENT UAM's Oceania – in the absence of any choice of law clause to the contrary.

30. CLAIMANT argues in the alternative for the Tribunal to apply DAL when determining the validity of the arbitration agreement [*Cl. Brief, para. 8*]. CLAIMANT relies in part on "the principle *qui indicem forum elegit jus* (a choice of forum is a choice of law)" and cites noted scholars Redfern and Hunter for this argument [*Cl. Brief, para. 8*]. Indeed, Redfern and Hunter do discuss this principle of law, and describe it as a general assumption, potentially utilized where the parties have not included a choice of law clause in their contract [*Redfern & Hunter, pp. 120-21*]. In the very next paragraph, however, they expound on this notion and state that "[t]he assumption makes sense when the reference is to a [national] court of law . . . [t]he assumption is less compelling, however, when the dispute resolution clause provides for arbitration in a particular country, rather than litigation in the courts of that country" [*Redfern & Hunter, pp. 120-21*]. In addition, as discussed above, a place of arbitration may be chosen for any one of a number of reasons, entirely unconnected to the law of the seat. Such reasons do not justify its application to the arbitration agreement. Furthermore, in contrast to Oceania's status as the place of the seller in this case, Danubia appears in the Contract merely as the location for any potential dispute resolution proceeding [*Cl. Ex. 1*]. Rather than applying Danubian law, Oceania law – being the law of the seller, and thus the law that should govern the Contract as a whole – is the most appropriate law to apply to the arbitration agreement. Doing so yields the conclusion that the arbitration agreement is void and thus the claims against RESPONDENT Universal should be dismissed.

### **3. The Tribunal Lacks Jurisdiction Over the Parties Because the Oceania Insolvency Law Operates to Render Void the Arbitration Agreement.**

31. As Oceania law – including the "Law on Insolvency of Oceania" – should be applied to the Contract and the arbitration agreement contained therein, consequently there exists no basis for these proceedings, because the arbitration agreement is void [*See Powers' Letter, p. 30; see also, Cl. Ex. 1*]. Under this law, upon the initiation of insolvency proceedings in Oceania on 9 April 2008, by

RESPONDENT UAM, “all forum selection agreements, *including arbitration agreements*, in all contracts to which [RESPONDENT UAM] was a party, were automatically voided by virtue of the Law on Insolvency of Oceania” (*emphasis added*) [*Powers’ Letter*, p. 30]. More specifically, the insolvency law operates to render the arbitration agreement void *ab initio*, which is to say, it has the legal effect of never having existed at all [*See Proc. Ord. 2, para. 5; see also, Black’s Law*, p. 6]. Even assuming that the Tribunal determined that the arbitration agreement could possibly be extended to bind RESPONDENT Universal, even though it has given no consent to arbitrate this dispute, because of the Oceania insolvency law there is effectively no arbitration agreement to extend. Therefore, as the arbitration agreement legally never existed under applicable Oceania law, there is no basis for these proceedings, and the Tribunal has no jurisdiction over the parties.

32. It could be argued however [*See Vis Rule 33*] – although CLAIMANT did not – that the principle of separability serves as a sort of lifeline for the arbitration agreement in this case. This principle, or doctrine, of “separability” provides that an arbitration clause is separate and distinct from its container contract and can be enforced even where the validity of the contract is in dispute, because the validity of the arbitration clause does not depend upon the validity of the contract as a whole [*Redfern & Hunter*, p. 251 *et seq.*] As the arbitration agreement is treated as a separate and distinct agreement, it is voidable “only on grounds which relate directly to the arbitration agreement” [*Premium Nafta (U.K.)*]. For that reason, the argument fails. The issue here – Oceania’s insolvency law – relates directly to the arbitration agreement in question, as the language of the Oceania law provided above makes clear. Since the law operates to render void the arbitral clause itself, although potentially leaving intact its container contract, there is no longer any basis for these proceedings [*See Powers’ Letter*, p. 30]. CLAIMANT may be able to pursue its claims in a national court, on the basis of the Contract alone, but that is a question for an appropriate court, and not for this Tribunal.

**B. The Expressed Public Policy Concerns of Mediterraneo and Equatoriana Encourage the Dismissal of These Proceedings**

33. The Oceania insolvency law appears intended to provide the insolvency court of Oceania with exclusive jurisdiction over all disputes related to insolvent Oceania companies like RESPONDENT UAM [*See Lazic*, p. 14; *see also, Mantilla-Serrano*, p. 68]. Such mandatory provisions are generally intended “to ensure a collective procedure guaranteeing equal treatment of all creditors and are therefore often considered to be part of . . . international public policy” [*Kröll*, p. 363].

34. In this case, the Tribunal’s task of deciding whether the Oceania Law on Insolvency is applicable is complicated by the fact that while “bankruptcy policy exerts an inexorable pull towards centralization . . . arbitration policy advocates a decentralized approach towards dispute resolution” [*In re U.S. Lines (U.S.)*]. However, it should be noted that both RESPONDENT Universal’s home country of Equatoria and CLAIMANT’s home country of Mediterraneo have adopted the UNCITRAL Model Law on Cross-Border Insolvency [*Proc. Ord. 2, para. 2*]. Although Danubia has not adopted this model law as part of its domestic legislation [*Proc. Ord. 2, para. 2*], the State of Danubia has no interest in these proceedings; it is the seat, and nothing more [*See Cl. Ex. 1*]. In contrast, Mediterraneo and Equatoria are the home countries of CLAIMANT and RESPONDENT Universal, respectively. The goods in question were manufactured in Equatoria. They were shipped to, and intended for sale in, Mediterraneo [*Cl. Ex. 1*]. The interest of those states in these proceedings is thus readily apparent.

35. By adopting this model law, both countries have expressed their interest in its stated goals, namely “promot[ing] the objectives of . . . [c]ooperation” between States; “[g]reater legal certainty for trade and investment; [f]air and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor [and]; [p]rotection and maximization of the value of the debtor’s assets” [*UNCITRAL ML on Cross-Border Insolvency*]. Even if this Tribunal were to apply Mediterraneo law to the issue of the arbitration agreement’s validity, as CLAIMANT urges [*Cl. Brief, paras. 6-7*], all that is known of relevant Mediterraneo law is that it has adopted the UNCITRAL Model Law on Cross-Border Insolvency [*Proc. Ord. 2, para. 2*] and consequently expressed its interest in the above described goals of the law. At a minimum, if potential creditors of RESPONDENT UAM were all able to seek legal redress of their claims outside of the insolvency proceedings underway in Oceania, certainly the stated aims of “cooperation,” “legal certainty,” and fairness and efficiency would be irreparably impeded. Thus, because of the public policy interests expressed by the home countries of the parties involved in this proceeding, this claim should be dismissed, and CLAIMANT should be encouraged to seek relief in Oceania instead, in accordance with the expressed public policy interests of its own home jurisdiction.

36. **CONCLUSION:** In the absence of any law governing the Contract, the Tribunal should apply general principles of conflict law to determine the law that governs the contract, and apply that law to the arbitration agreement itself. This approach leads to the application of Oceania law, as Oceania is the place most closely connected to the Contract. Under Oceania law, the arbitration

clause has been rendered void *ab initio* by operation of the Law on Insolvency of Oceania. Consequently, the Tribunal has no jurisdiction over the parties or this dispute and accordingly all claims against RESPONDENT Universal must be dismissed.

### III. RESPONDENT UNIVERSAL CANNOT BE HELD LIABLE FOR RESPONDENT UAM'S BREACH OF CONTRACT

37. Even if the Tribunal determines that RESPONDENT Universal is bound by the arbitration agreement and thus obligated to arbitrate this dispute, that does not necessitate a finding by the Tribunal that RESPONDENT Universal is liable for RESPONDENT UAM's alleged breach of the Contract itself. A determination that a party should be obligated to arbitrate, even where it is not a party to the arbitration agreement, does not mean that the party is also automatically deemed liable [*Born (2008), p. 1,141*].

38. Undeniably, agency principles – the idea that one “legal entity [can] enter into binding legal acts on behalf of another” – are generally recognized by “[a]ll developed legal systems” [*Born, p. 215*]. As noted by CLAIMANT, however, since the legal concept of agency falls outside of the scope of the CISG, Article 7(2) provides that in such cases the rules of international private law should be applied to determine which law is most applicable [*Cl. Brief, para. 83; see also CISG, Art. 7(2)*]. In this case, and as discussed above, Oceania law should be applied by the Tribunal when considering the substantive issues of the case. Oceania agency law can be found in the Convention on Agency (“COA”), as Oceania is a signatory to the Convention (as are Mediterraneo and Equatoriana) [*Proc. Ord. 2, para. 7*]. Here, however, the facts are insufficient to support a finding that RESPONDENT Universal and RESPONDENT UAM enjoyed a principal-agent relationship **(A)**. Likewise, and contrary to CLAIMANT's assertions, piercing the corporate veil is unjustified under the facts of this case **(B)**.

#### A. RESPONDENT Universal Cannot Be Held Liable Because No Agency Relationship Existed Between RESPONDENT Universal and RESPONDENT UAM

39. RESPONDENT Universal and RESPONDENT UAM operated as two completely autonomous, separate companies, and thus CLAIMANT's argument that liability should be predicated here on some alleged principal-agency relationship is unsupported by the facts. In general, an agency relationship is a consensual relationship between two legal entities, in which one party – the principal – has the right to control the activities of the other party – the agent – and the

agent has the power to enter into transactions on behalf of the principal [*See, e.g., Ervin v. Nokia (U.S.); see also, COA, Art. 1*]. The facts here demonstrate that RESPONDENT Universal lacked the requisite control over RESPONDENT UAM needed to support a finding that the two companies enjoyed an agency relationship **(1)**. Likewise, none of the evidence supports the notion that RESPONDENT Universal consented to being represented by RESPONDENT UAM in its dealings with CLAIMANT **(2)**, nor did it give the appearance that such consent had been given **(3)**.

**1. RESPONDENT Universal Did Not Have Control Over RESPONDENT UAM Sufficient to Support a Finding of Liability Based on Agency Principles.**

40. The facts of this case provide insufficient support for the notion that RESPONDENT UAM acted as RESPONDENT Universal’s agent in its dealings with CLAIMANT. CLAIMANT concedes that a principal-agent relationship can only be found if it is able to “prov[e] [that RESPONDENT Universal had] control . . . over RESPONDENT [UAM]” [*Cl. Brief, para. 85*]. In this endeavor, CLAIMANT has failed.

41. In the matter before the Tribunal, the evidence demonstrates that RESPONDENT UAM acted as a separate entity, beyond the control of RESPONDENT Universal. Although it was the creation of joint investments made by RESPONDENT Universal and Oceania Partners, it maintained control over its own day-to-day operations and no one from RESPONDENT Universal participated in the management of RESPONDENT UAM [*Proc. Ord., para. 12*]. RESPONDENT Universal’s initial investment, in fact, represented a mere 10% ownership stake in the company, a fact conceded by CLAIMANT [*Cl. Brief, para. 53; see also, Proc. Ord. 2, para. 12*]. It had only one member on RESPONDENT UAM’s five-person Board, and consequently could not block any decisions agreed to by the majority of the Board [*Proc. Ord., para. 12*]. In stark contrast, Oceania Partners owned 90% of RESPONDENT UAM and held 80% of the seats on its Board [*Proc. Ord., para. 12*]. RESPONDENT Universal’s relatively minor interest in RESPONDENT UAM hardly qualifies it as the “controlling factor” behind the company [*See Cl. Brief, para. 53*]. Furthermore, RESPONDENT Universal did not dictate to RESPONDENT UAM or any of its distribution partners how the products it manufactured should be sold, or to whom [*Proc. Ord. 2, para. 16*]. In addition, 75 of the 100 cars at issue in this case remain in the possession of RESPONDENT UAM to this day, as assets of the bankruptcy estate [*Proc. Ord. 2, paras. 21, 26*]. It seems likely that if RESPONDENT Universal truly was RESPONDENT UAM’s principal, and had the kind of

control over RESPONDENT UAM that CLAIMANT suggests, it would have taken back those 75 cars from its alleged agent, so they could be re-sold to other distributors.

42. In the “*Diesel Generator case*,” for example, a CIETAC tribunal considered a factually-similar scenario, in which the claimant-buyer contracted to purchase a diesel generator from the seller-first respondent, who was a distributor of the manufacturer-second respondent [*Diesel Generator (China, 2006)*]. The tribunal found that the two respondents had a sales relationship, because the distributor purchased diesel generators from the manufacturer outright, and re-sold them to its own customers, and such a relationship was not sufficient to support a finding that an agency relationship existed. The conduct presented by the claimant as evidence of an agency relationship – primarily communications between the two respondents – was deemed irrelevant to the issue of agency, because all such evidence presented by the claimant occurred after the contract of sale had been concluded.

43. CLAIMANT mischaracterizes some of the facts in its attempt to demonstrate that RESPONDENT Universal had some modicum of control over RESPONDENT UAM. Most notably, CLAIMANT states that “*individual transactions* were . . . scrutinized by RESPONDENT [Universal] before they were finalized” (*emphasis added*) [*Cl. Brief, para. 87*]. Later, it re-states and relies on this point again, arguing that “RESPONDENT [Universal] could review the contracts signed by RESPONDENT [UAM]” [*Cl. Brief, para. 94*]. This is an apparent misreading of one section of a procedural order issued previously by this Tribunal. In reality, RESPONDENT Universal only “review[s] the form contracts used by its authorized distributors . . . but . . . d[oes] not mandate any of their terms or their wording” [*Proc. Ord. 2, para. 16*]. Based on that description, as provided by the Tribunal, it cannot accurately be said that RESPONDENT Universal scrutinized, approved, or otherwise controlled any of the individual transactions RESPONDENT UAM ever entered into.

## **2. RESPONDENT Universal Did Not Consent to Be Represented by RESPONDENT UAM in its Dealings with CLAIMANT.**

44. Similarly, there is no indication that RESPONDENT Universal consented to be represented by RESPONDENT UAM in its transaction with CLAIMANT. In general, a principal demonstrates that another party is authorized to act as its agent by some manifestation of intent that it gave consent to be represented by the third party agent [*See e.g., Giordano (U.S.)*]. This manifestation of intent usually takes some “verbal, contractual, or written” form [*Giordano (U.S.)*].

Article 9 of the Convention on Agency states that “[t]he authorization of the agent by the principal may be express or implied” [*COA, Art. 9(1); see also, UNIDROIT Principles, Art. 2.2.2(1)*]. Thus the principal must take some affirmative action – be it overt or implicit – to demonstrate its consent to the relationship; a party cannot simply conclude a contract and state that it acts on behalf of another, without the other party consenting in some way to being represented [*See e.g., Karavos (U.S.)*].

45. CLAIMANT has not demonstrated that RESPONDENT Universal gave any form of consent to be represented by RESPONDENT UAM. In addition, although not argued in CLAIMANT’s written submission to the Tribunal, nor did RESPONDENT Universal even give the appearance such consent had been given. In fact, the very opposite is true. When RESPONDENT Universal made an offer to CLAIMANT to assist with the cars’ engine trouble, Mr. Steiner stated in no uncertain terms, “UAM is, of course responsible to you for the condition of the Tera cars it has sold to you . . . [but because] 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 . . . we [will] . . . undertake the repairs without admission of liability” [*Cl. Ex. 4*].

46. Furthermore, the Contract was signed exclusively by RESPONDENT UAM; RESPONDENT Universal is not mentioned as UAM’s principal or otherwise [*Cl. Ex. 1*]. As described above, the cars sold by RESPONDENT UAM to CLAIMANT were owned by RESPONDENT UAM outright; they had sole possession and ownership of the Tera cars at issue in this case [*Proc. Ord. 2, para. 20*]. Lastly, and as a result of their separate contractual relationship, RESPONDENT Universal was, in fact, “liable to UAM under the CISG for any defects in regard to the [Tera] cars sold by it to UAM” [*Proc. Ord. 2, para. 15*]. RESPONDENT Universal has previously settled that issue in amicable fashion with representatives of RESPONDENT UAM’s bankruptcy estate [*Proc. Ord. 2, para. 21*]. CLAIMANT’s argument, then, requires it to demonstrate that RESPONDENT Universal, as alleged principal, is liable to its own alleged agent, RESPONDENT UAM. Certainly there is nothing in Oceania law – the Convention on Agency – that supports the notion that a principal can be held liable by its own agent. Given these facts, CLAIMANT cannot show that a principal-agent relationship existed, because the record before the Tribunal conclusively demonstrates that RESPONDENT UAM acted solely on its own behalf. RESPONDENT Universal’s very presence in this proceeding is almost entirely dependent on its offer to provide assistance and stand behind its product.

**3. RESPONDENT Universal Did Not Give the Appearance that  
RESPONDENT UAM Had Authority to Act on its Behalf.**

47. Finally, although not addressed by CLAIMANT, in theory it could be argued [*See Vis Rule 33*] that RESPONDENT Universal gave CLAIMANT the impression that RESPONDENT UAM was its agent in the transaction at issue. Article 14 of the Convention on Agency states that “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” [*COA, Art. 14(2)*]. Thus, where the conduct of a non-signatory party “inspire[s] the understanding of the [third] party” that the wrong-doing contracting party is its agent in the relevant transaction, the non-signatory party can possibly be held liable [*Blessing (1999), p. 176; see e.g., Transamerica Leasing (U.S.), Polish Steamship (U.K.)*]. This notion of “apparent agency” often arises in arbitral cases where the relationship between a non-signatory and a contracting party is not explicitly defined [*Zuberbühler*].

48. The argument fails here, however, as RESPONDENT Universal and RESPONDENT UAM have their own contract, separate from the Contract entered into by CLAIMANT and RESPONDENT UAM, and thus their relationship and status as entirely separate entities is explicitly defined [*See Proc. Ord. 2, para. 13*]. In a 1996 case from Switzerland (which notably is a signatory to the Convention on Agency), the Swiss Federal Tribunal considered an alleged principal-agent relationship where the plaintiff was attempting to extend an arbitration agreement entered into by a subsidiary to its (non-signatory) parent company [*Poudret & Besson, p. 223; see also, ATF 120 II 155*]. The parent company had actually “played an active role in the conclusion and the performance of the contract” at issue, but nonetheless the Swiss court denied the request to extend the arbitration agreement to the non-signatory under an agency theory because the plaintiff knew “at the time of the conclusion of the contract” that it was “dealing with the subsidiary and not the parent company” and the “subsequent engagement” by the parent did not alter this fact [*Poudret & Besson, p. 223*]. Here, in addition to not being involved with the negotiation or performance of the Contract, as discussed above, RESPONDENT Universal also made clear that RESPONDENT UAM was solely “responsible to [CLAIMANT]” for any defects in the Tera cars “it has sold to [CLAIMANT]” when it made its offer to assist CLAIMANT [*Cl. Ex. 4*]. It would be unreasonable for CLAIMANT to draw from this statement the idea that RESPONDENT UAM was somehow representing RESPONDENT Universal. In addition, much of the factual support CLAIMANT relies upon, such as RESPONDENT Universal’s admitted ability to review generic, blank form

contracts used by its distributors [*Proc. Ord. 2, para. 16*], is information provided during the course of these proceedings, and thus is irrelevant to the issue of CLAIMANT's understanding when it entered into the Contract.

49. Lastly, this point is rendered largely moot here by CLAIMANT's own written submission to the Tribunal. CLAIMANT refers to RESPONDENT Universal's alleged "control" over RESPONDENT UAM as "latent," meaning hidden, covert, or otherwise concealed [*See Cl. Brief, para. 101*], thereby effectively conceding that it did not know of RESPONDENT Universal's alleged control at the time the transaction was entered into, and thus eviscerating any potential argument based on the notion of apparent agency.

**B. "Piercing the Corporate Veil" of RESPONDENT Universal is Unwarranted In Light of the Lack of Evidence of Improper Conduct**

50. Similarly, there is no evidence of improper conduct in this case that would warrant piercing the corporate veil of RESPONDENT Universal. In general, where there is evidence of fraud, deceit, or otherwise improper conduct, an arbitral tribunal is able to "pierce" through existing corporate protections and hold liable a corporate parent company for the actions of a subsidiary entity [*See Born, p. 669; see also, Siegel v. Warner Bros. (U.S.), Cohen, para. 83*]. Improper conduct is a key element of this idea and constitutes a heavy burden on the party urging a court or tribunal to cast aside the other party's corporate protections [*See e.g., Carte Blanche (U.S.)*]. Mere control by the parent is not sufficient; the party bringing the claim must show some impermissible abuse of the legal separation between the two entities that resulted in a wrong done to the plaintiff or claimant [*See, e.g., TNS Holdings (U.S.)*]. In *Adams v. Cape Industries*, for example, a British case cited by CLAIMANT, the court stated that piercing the corporate veil would be warranted only if the plaintiff could show that the defendant engaged in improper conduct, such as using another company to "evade mandatory legal provisions" or improperly affect "existing third-party rights" [*See Hanotian, p. 69; see also, Adams v. Cape (U.K.)*]. The reasoning behind the imposition of this heavy burden is because of the strong presumption present in many legal systems in favor of the legal independence of a corporate entity [*Lévy / Stucki, p. 716*].
51. CLAIMANT urges the Tribunal to "pierce the corporate veil" of RESPONDENT Universal apparently by utilizing the above-discussed principles of agency [*See Cl. Brief, paras. 86-96*]. In support of this argument, CLAIMANT provides the Tribunal with an overview of agency law in the U.K., the U.S., France, and Germany [*Cl. Brief, paras. 86-97*], of which only France is a signatory

to the Convention on Agency like Oceania, Mediterraneo, and Equatoriana [*See Proc. Ord. 2, para. 7; see also, COA, Status - Signatures/Ratifications*]. Nonetheless, CLAIMANT concludes the following: Under “U.K. Law” there is an “impropriety requirement” that must be demonstrated before “lifting the veil” is possible, and such requirement “is satisfied in the instant case . . . because [CLAIMANT] was supplied with defective cars” [*Cl. Brief, para. 88*]. One shudders to think of the legal morass that would result from such a rule, in which corporate protections could be callously cast aside whenever a manufactured product proved to have some minor defect.

52. Similarly, CLAIMANT asserts that, under U.S. law, “[t]he separate personality of the corporation will be disregarded . . . whenever the separateness of the corporate form is employed to commit an injustice or gain an unfair advantage” [*Cl. Brief, para. 90*]. According to CLAIMANT, it must show “some sort of moral culpability” on the part of the principal [*Cl. Brief, paras. 90-91*]. CLAIMANT then proffers the erroneous notion that “the improper conduct in the instant case was the fact that RESPONDENT [Universal] had sold RESPONDENT [UAM] defective cars fully knowing that the finances of RESPONDENT [UAM] were shaky and that it was approaching insolvency” [*Cl. Brief, para. 92*]. The facts, however, do not support this arbitrary accusation, as demonstrated below.

53. The Contract between CLAIMANT and RESPONDENT Universal was signed in January of 2008 [*Cl. Ex. 1*]. It can reasonably be inferred from this fact that RESPONDENT Universal sold the Tera cars in question to RESPONDENT UAM sometime prior; otherwise CLAIMANT would have contracted to purchase goods that its seller neither possessed nor owned. As to RESPONDENT Universal’s knowledge of RESPONDENT UAM’s financial difficulties, this Tribunal has previously determined that it was not until “February 2008 [that] Universal began to doubt whether UAM would be able to continue in business for much longer” [*Proc. Ord. 2, para. 33*]. Therefore, even if RESPONDENT Universal sold the cars to RESPONDENT UAM at this point (“fully knowing” of RESPONDENT UAM’s financial difficulties, as CLAIMANT asserts), it would have done so knowing that RESPONDENT UAM intended to immediately re-sell the cars, presumably at a higher price, per the Contract with CLAIMANT, signed in the month prior. It is difficult to imagine how this kind of transaction would do anything but help RESPONDENT UAM’s financial position, especially given that CLAIMANT paid half of the total contract price in advance, prior to any cars being shipped [*Cl. Ex. 1*]. Regardless, CLAIMANT then partially rebuts its own argument in the next sentence, when it concedes that RESPONDENT Universal “did not know about the defect in the vehicles” [*Cl. Brief, para. 92*]. Based on this line of argument, then, it is

unclear exactly where RESPONDENT Universal's "moral culpability" [*Cl. Brief, para. 92*] stems from, as it apparently – according to CLAIMANT – is guilty only of selling what it thought to be fully functioning, quality automobiles to its distributor and contractual partner, as it had done for over a decade [*See Cl. Ex. 16*].

54. CLAIMANT concludes its argument pertaining to why the Tribunal should pierce RESPONDENT Universal's corporate veil, thereby holding it liable for RESPONDENT UAM's alleged breach of the Contract, with a description of French and German law [*Cl. Brief, paras. 93-97*]. Similar to their British and American counterparts, if CLAIMANT's argument is understood, French law allegedly requires an "element of fraud" or "deceit" to pierce the corporate principal's veil, whereas German law allegedly requires only a showing of "tight control" [*Cl. Brief, paras. 94, 96*]. Here CLAIMANT introduces a new but equally fictitious fact in support of its argument. CLAIMANT urges this Tribunal to predicate liability on the "fact" that RESPONDENT Universal "interfered with the conduct of RESPONDENT [UAM] by scuttling all the expansion plans, both of which were essential for the well-being of RESPONDENT [UAM]" [*Cl. Brief, para. 97*]. More than merely an apparent mischaracterization of the facts, this argument stands in direct opposition to what has been previously noted by the Tribunal. The expansion plans referred to by CLAIMANT were: 1.) Oceania Partners' plan "to expand the operations of UAM" and 2.) UAM's proposal "to sell cars manufactured by producers other than Universal" [*Proc. Ord. 2, para. 32*]. RESPONDENT Universal, while it indeed did resist those proposals and refused to contribute financing, as it found the plans ill-advised under the market conditions present at the time, hardly "scuttled" them, since "Oceania Partners prevailed and significant sums were expended by UAM in preparation for the expansion" [*Proc. Ord. 2, para. 32*].

55. CLAIMANT's argument thus relies upon inaccurate facts, and is somewhat ironic, given that the ill-fated expansion itself proved to be RESPONDENT UAM's undoing, as "cash flow[s] from existing operations w[ere] not sufficient to fund the [expansion] . . . [and] [a]s a result, UAM reached the point that it could no longer meet its obligations and the insolvency proceedings were the result" [*Proc. Ord. 2, para. 32*]. Regardless, CLAIMANT fails to make any reasonable link between these events, involving an apparent business disagreement between Oceania Partners and RESPONDENT Universal, and the matter before the Tribunal, which involves an entirely separate contract for the purchase and sale of automobiles. It is also unclear what, if anything, the proposed expansion plans have to do with the Contract between CLAIMANT and RESPONDENT UAM, as well as CLAIMANT's decision to improperly terminate that contract (which occurred prior to

RESPONDENT UAM's insolvency and thus the failed expansion plans could not possibly have had anything to do with CLAIMANT's decision, or any of the events that gave rise to this dispute).

56. **CONCLUSION:** RESPONDENT Universal takes no position as to the accuracy of the assertions made by CLAIMANT in its around-the-world tour of agency law. RESPONDENT Universal does submit, however, that CLAIMANT has failed to demonstrate that a principal-agent relationship existed between RESPONDENT Universal and RESPONDENT UAM. In addition, CLAIMANT's arbitrary accusations of fraud, misconduct, and deceit are unsupported by the facts, or supported by inaccurate or misconstrued facts, and thus piercing the corporate veil is completely unjustified under either Oceania law, or the laws of any country discussed by CLAIMANT. Therefore, as RESPONDENT UAM did not act as RESPONDENT Universal's agent in its dealings with CLAIMANT, and in fact entered into the Contract on its own behalf and for its own financial gain, RESPONDENT Universal cannot be held liable for RESPONDENT UAM's alleged breach of the Contract.

#### IV. CLAIMANT WAS NOT ENTITLED TO DECLARE THE CONTRACT AVOIDED

57. Even if the Tribunal determines that RESPONDENT Universal possibly could be held liable for RESPONDENT UAM's alleged contract breach, in this case CLAIMANT was not entitled to avoid the Contract because no fundamental breach had been committed and thus there are no grounds on which to predicate liability. As discussed above, in the absence of a choice of law clause, Oceania law is the substantive law applicable to the Contract, as the law of the place most closely connected to the Contract. Because Oceania is a party to the CISG, the CISG is the substantive law applicable to the question of "whether there was a fundamental breach of the sales contract authorizing [CLAIMANT] to avoid the Contract [*Proc. Ord. 1, para. 13; see also, Stmt. of Cl., para. 25, CISG, Art. 1(1)(b)*]. CLAIMANT and RESPONDENT Universal agree on this point - that the CISG should be applied [*See Cl. Brief, para. 56; see also, Stmt. of Cl., para. 25, CISG, Art 1(1)(a)*].

58. The CISG operates on the principle that contract preservation is preferred over contract avoidance [*Ferrari, p. 501*]. Therefore, it is intended to preserve contracts and prevent the "particularly severe" remedy of contract avoidance whenever possible [*Lookofsky, pp. 30, 122; see also, Schlechtriem (2006), p. 95*]. The events of this dispute did not justify CLAIMANT's resorting to the severe remedy of contract avoidance, because the Contract was not fundamentally breached. The CISG rules relating to installment contracts should be applied by the Tribunal when

considering this issue, because the contract between RESPONDENT UAM and CLAIMANT was an installment sales contract. Neither of the two requirements found in the CISG pertaining to rightful avoidance of installment contracts are satisfied in this dispute and thus CLAIMANT was not entitled to avoid the Contract **(A)**. In addition, CLAIMANT improperly declared the Contract avoided prior to expiration of the additional time it fixed for RESPONDENTS to perform **(B)**. If this Tribunal were to find the contract at issue was not an installment contract, CLAIMANT was nonetheless still not entitled to declare the Contract avoided **(C)**.

**A. CLAIMANT Was Not Entitled to Avoid the Contract Because the Alleged Breach Was Not Fundamental and CLAIMANT Did Not Have Good Grounds to Conclude That a Fundamental Breach Would Occur in the Future**

59. At the conclusion of the Contract by RESPONDENT UAM and CLAIMANT, it was understood that the goods would be shipped in installments and the parties' initial performance demonstrates this fact **(1)**. CISG Article 73 governs the termination of installment contracts. It provides two distinct requirements that must be met to properly declare an installment contract entirely avoided. First, a party may "declare the contract avoided [only] with respect to that installment" if the installment is fundamentally breached [*CISG Art. 73(1)*]. In this case, because the first installment was not fundamentally breached CLAIMANT was not entitled to declare the first installment avoided **(2)**. In addition, to avoid the entire contract, the party must establish that there were "good grounds" to believe a fundamental breach would occur "with respect to future installments" [*CISG Art. 73(2)*]. There are no such good grounds present under the facts of this case that would have entitled CLAIMANT to avoid the remainder of the entire contract **(3)**.

**1. The Tera Cars Sales Contract Was An Installment Sales Contract**

60. The Contract between RESPONDENT UAM and CLAIMANT was an installment contract. An installment contract is one which "requires or authorizes the delivery of goods in separate lots" [*Sec. Comm. on CISG Art. 64 (now Art. 73)*]. The dates of those deliveries may be flexible and the "contract may allow that deliveries be asked for when needed" [*Azeredo, para. 1; see also, Chengwei (2003), para. 10.1; Kazimierska, p. 99*]. In essence, an installment contract is one which allows for separate deliveries and the parties act accordingly.

61. Here, the terms of the Contract authorized the delivery of the cars in separate lots, providing "[p]artial shipment allowed" [*Cl. Ex. 1*]. At the conclusion of the Contract, the parties understood

that RESPONDENT UAM would not be shipping all 100 cars in a single delivery, as demonstrated by CLAIMANT's statement that, "[t]he cars were to be transported in a number of separate consignments . . ." [*Stmt. of Cl., para. 9*]. Indeed, the first shipment by RESPONDENT UAM contained only 25 of the 100 Tera cars CLAIMANT contracted to purchase [*Stmt. of Cl., para. 10*]. Accordingly RESPONDENT UAM intended to make at least one more installment to satisfy its contractual obligation. Furthermore, CLAIMANT does not dispute that the CISG rules applicable to installment contracts control in this case [*See Cl. Brief, para. 80*]. Therefore, the Tribunal should evaluate the parties' rights and obligations under the Contract in accordance with the rules applicable to installment contracts.

## **2. The First Installment Was Not Fundamentally Breached.**

62. CLAIMANT was not entitled to take advantage of the severe remedy of contract avoidance because there was no fundamental breach with respect to the first installment. CISG Article 25 defines a breach as fundamental when it "results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result" [*CISG Art. 25*]. Even assuming that the non-conformity present in the 25 Tera cars shipped in the first installment constituted a breach, regardless only a fundamental breach justifies avoiding a contract or installment under the CISG [*Lorenze; see also, CISG, Art. 73(1)*]. In this case, the breach was not fundamental because CLAIMANT was not substantially deprived of his contractual expectations (i) and RESPONDENTS neither foresaw nor could reasonably have foreseen the resulting consequences (ii).

### **i. The Breach Did Not Substantially Deprive CLAIMANT of Its Expectation Under the Contract.**

63. CLAIMANT cannot meet his burden to demonstrate that the alleged breach substantially deprived him of what he was entitled to expect under the Contract [*See CISG, Art. 25*]. When determining whether a breach substantially deprived a party of its expectations, the essential question to be answered is whether the deviation from what the party was expecting under the contract and what they actually received was "sufficiently serious" considering all relevant circumstances [*Honnold (1998), p. 185; see also, Bianca/Bonell, p. 211*]. The non-conformity at issue in this case was not "sufficiently serious" for several reasons, discussed below.

64. First, RESPONDENT Universal offered to repair the 25 Tera cars shipped in the first installment, and would have made the cars ready for resale without unreasonable delay or inconvenience, thereby precluding a finding of a fundamental breach under the CISG. CISG Article 48 provides the seller with a right to cure in the event he fails to perform his obligations under the contract “if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience . . .” [*CISG Art. 48(1)*]. While the non-breaching party retains the right to avoid in cases where there has been a fundamental breach, even serious defects should not be regarded as fundamental when a seller invokes its right to cure under Article 48 [*Lookofsky, p. 121*]. Several courts have adopted this approach. A German court, for example, held that a defect could not amount to a fundamental breach because of “the willingness of the party in breach to provide substitute goods without causing unreasonable inconvenience to the other party” [*Acrylic Blankets Case (1997)*]. The court reasoned that “even a serious lack of quality [could] not . . . constitute a fundamental breach as the seller had offered to furnish additional blankets” [*Acrylic Blankets Case (1997)*; see also, *Inflatable Triumphal Arch Case (2002)*].
65. Once the offer to cure has been made the buyer must accept it unless he can prove that there are delays and inconveniences associated with the proposed cure that are unreasonable [*Schlechtriem & Schwenzler, p. 565, 567*; see e.g., *Case No. 6252 (Switzerland)*; see also *CISG Art. 48(1)*]. Here, RESPONDENT Universal did indeed offer to promptly repair the defective Tera cars [*Cl. Ex. 4*]. It offered to send technical personnel that would arrive in Mediterraneo within three days; hardly an unreasonable delay [*Cl. Ex. 4*]. Likewise, the offer to cure did not expose CLAIMANT to any unreasonable inconvenience because it did not require any effort on CLAIMANT’s part at all. RESPONDENT Universal not only offered to supply the personnel and equipment, but also offered to perform the repairs in Mediterraneo [*Cl. Ex. 4*].
66. Second, any delay CLAIMANT would have suffered had it not avoided the Contract would have only been temporary and would not have interfered with any essential term of the Contract. CLAIMANT asserts that its “conduct” made “clear” that “timely delivery of the goods was an essential part of the [C]ontract” [*Cl. Brief, para. 68*]. Further, “time was clearly of the essence . . . and [this] was communicated to the RESPONDENT” [*Cl. Brief, para. 71*]. CLAIMANT fails to support this argument, however, with any evidence of statements or conduct made prior to the conclusion of the Contract that would have indicated that time was an essential feature of the Contract [*See Cl. Brief, paras. 68-71*]. The seriousness of the breach should be measured against interests “actually laid down and circumscribed by the contract” [*Schlechtriem & Schwenzler, p. 283*].

Contrary to CLAIMANT's assertions, the Contract does not contain any clause of this nature [*See Cl. Ex. 1*]. In fact, the very opposite is true. The Contract allowed for shipment from Oceania to Mediterraneo "as space is available" indicating that time was very clearly *not* of the essence [*See Cl. Ex. 1*]. CLAIMANT's argument here is tantamount to the notion that discussions occurring subsequent to a breach can retroactively increase the parties' rights and obligations under their original contract. If time of delivery was as important as CLAIMANT now asserts, it should have made that known before the conclusion of the Contract.

67. Third, as all of the defective cars were ultimately fully repaired and available for resale within five working days [*Proc. Ord. 2, para. 22*], CLAIMANT would have received fully conforming cars had it not avoided the Contract. According to the CISG Advisory Opinion regarding fundamental breach, "where the non-conformity of the goods can be remedied by the seller . . . repairing the goods . . . there is not yet a fundamental breach" [*CISG-AC 5*]. The Commercial Court of Zurich followed this approach in the *Saltwater Isolation Tank Case*, when it stated that the delivery of a leaking tank could not be fundamental "because [the defect] could have been easily corrected . . ." [*Saltwater Isolation Tank Case (1995)*].

68. Fourth, at the time CLAIMANT avoided the Contract, it had not suffered any economic harm that would justify resorting to the highly undesirable remedy of contract avoidance. The economic consequences of a breach may be relevant when determining the extent of the detriment [*Sec. Com. On CISG Art. 23 (now CISG Art. 25)*]. Relevant factors include the "monetary value of the contract [and] the monetary harm caused by the breach" [*Sec. Com. On CISG Art. 23 (now CISG Art. 25)*] as well as the "actual loss of the aggrieved party" [*Zeller, p. 227*]. In this case, CLAIMANT fails to present any substantial, quantifiable loss arising from the breach.

69. CLAIMANT argues that "the monetary damage caused . . . by the breach in contract was tremendous" in part because it "had paid 50% of the price of the cars up front" [*Cl. Brief, para. 62*]. This argument is misguided. CISG Article 25 in part defines the notion of "fundamental" breach in terms of what the non-breaching party "is entitled to expect under the contract" [*CISG Art. 25*]. The "50% of the price" CLAIMANT refers to is not what it was entitled to expect under the Contract (and thus could potentially be substantially deprived of), but rather represents his own contractual obligation. At the moment the breach occurred, not only was CLAIMANT not "substantially deprived" of his 50% down payment, but he actually remained contractually obligated to pay the remaining 50% of the contract price.

70. CLAIMANT also argues that the non-conformity in the Tera cars caused it to suffer a “severe liquidity crisis” in which it was on “the verge of having to declare insolvency” [*Cl. Brief, para. 62*]. CLAIMANT’s argument here is premised entirely and improperly on its own unique economic circumstances. RESPONDENTS were not informed of any particular need for attention to be paid to CLAIMANT’s economic vulnerability. Furthermore, RESPONDENTS’ obligation under the Contract was to deliver Tera cars, not to ensure CLAIMANT against the vagaries of changing financial circumstances. A guarantee of continuing economic stability, therefore, was not something CLAIMANT was entitled to expect under the Contract [*See Cl. Ex. 1*]. In addition, CLAIMANT states that it “turned down another offer for the sale and purchase of cars from Patria Importers” as it “could not afford to store those cars as well as the Tera cars” [*Cl. Brief, para. 62*]. This apparent fabrication, however, is contrary to a letter CLAIMANT has previously provided the Tribunal, in which it rejected this offer because of concerns that “further sales of the [Patria cars] would be slow” although CLAIMANT noted it might place an order when it “see[s] the market improving [*Cl. Ex. 8*]. Lastly, CLAIMANT laments “the expensive storage space” which it allegedly “could not afford” [*Cl. Brief, para. 79*]. Even if that were true, a mere \$2,000 spent on storage can hardly support the unilateral termination of a contract worth \$380,000 [*See Stmt. of CL, para. 36*].

71. Finally, even if the non-conformity in the 25 cars somehow constituted a fundamental breach, under Article 73 CLAIMANT was entitled only to avoid that first installment [*CISG, Art. 73(1)*]. RESPONDENT UAM remained obligated to deliver 100 working automobiles and CLAIMANT remained obligated to pay for all subsequent installment(s), including the 50 cars he had not paid for. He therefore suffered no economic harm. In sum, for all of the above reasons it is apparent that the breach did not substantially deprive CLAIMANT of his contractual expectations and thus cannot be considered a fundamental breach [*See CISG, Art. 25*]. Had CLAIMANT not improperly terminated the Contract, it would have suffered, at most, a temporary delay of goods sold under a contract whose very language made clear that time and speed of delivery was not an essential feature. Therefore, CLAIMANT was not entitled to avoid even the first installment of cars, much less the entire contract [*See CISG, Art. 73(1)*].

**ii. No Substantial Deprivation Was Foreseeable.**

72. Even if the Tribunal disagrees with the above analysis, the alleged substantial deprivation here was not foreseeable by RESPONDENTS. Under Article 25, a breach that results in a detriment so as to substantially deprive a party of its contractual expectations nonetheless cannot be

considered a fundamental breach if “the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result” [*CISG, Art. 25*]. This notion of “unforeseeability” of the breach’s consequences thus acts as an affirmative defense for the breaching party, and precludes a finding that a fundamental breach has occurred [*Babiak, p. 117*]. Foreseeability is to be measured at the moment the contract was concluded [*Schlechtriem & Schwenzler, p. 290*]. In this case, at the moment the Contract was concluded, the only foreseeable consequence of the breach here would be a brief, temporary delay before CLAIMANT received conforming cars, but that consequence, as discussed above, is not sufficiently serious to constitute a substantial deprivation.

73. CLAIMANT, however, argues that what was foreseeable here was all of the above-discussed not-quite-substantial deprivations, and its alleged potential insolvency [*Cl. Brief, paras. 64-65*]. As CLAIMANT obviously did not become insolvent, presumably its argument here is that the risk it faced – being on “the verge of insolvency” – was a detrimental result of the breach that substantially deprived CLAIMANT of what it was entitled to expect under the Contract [*See Cl. Brief, para. 62; see also, CISG, Art. 25*]. Under the facts, however, this alleged risk was not a foreseeable consequence of RESPONDENT UAM’s delivery of cars with minor defects. RESPONDENT Universal “did not know [of] the details of [CLAIMANT]’s financial position [*Proc. Ord. 2, para. 17*]. Instead, RESPONDENT Universal possessed only general knowledge about the lending practices of Mediterraneo banks [*Proc. Ord. 2, para. 17*]. Even if mere economic risk could be considered a detriment that led to a substantial deprivation of contractual expectations, such risk was not foreseeable here, because the argument is predicted entirely on CLAIMANT’s own unique economic circumstances, which were not known to RESPONDENTS. Armed with only general knowledge at the conclusion of the Contract, RESPONDENTS had no reason to foresee that a short delay might expose CLAIMANT to potential insolvency. Therefore, as there was no fundamental breach as defined by CISG Article 25, CLAIMANT was not entitled to avoid the first installment, nor the Contract itself.

### **3. CLAIMANT Did Not Have Good Grounds to Believe a Fundamental Breach Would Occur in the Future.**

74. If, however, the Tribunal finds that the breach of the first installment was fundamental in nature, nonetheless CLAIMANT could not reasonably have believed RESPONDENTS would commit a fundamental breach in the future because RESPONDENT Universal demonstrated its

commitment to the quality of its products and its interest in continued business relations [*See Cl. Ex. 4*]. CISG Article 73(1) allows a party to declare only past installments avoided. A party may declare future installments avoided, thereby canceling the entire contract, only if the breaching party's "failure to perform any of his obligations in respect of any installment 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)*]. These "good grounds" must derive "from a [prior] failure to perform obligations" but even that alone is insufficient [*Bennett (73) in Bianca/Bonell, p. 536*]. Therefore, CLAIMANT's assumption that it was entitled to declare the Contract avoided simply because "there was [a] fundamental breach of the contract by the seller with respect to the first installment" [*Cl. Brief, para. 80*] is mistaken.

75. When, as here, the breaching party could not have anticipated the defects but strives to rectify the problem, there are not good grounds for the non-breaching party to reasonably believe that the breach will manifest itself again in the future. A belief that a past breach will occur again in the future generally is justified only where the past breach arises from some improper conduct. Such conduct includes the failure to deliver past due installments of the contractual goods [*See e.g., The Sunflower Oil Case*], refusing "to maintain the trade relationship and to proceed with further deliveries" [*BRI Production Bonaventure v. Pan African Export*], or "a series of breaches" [*Bennett (73) in Bianca/Bonell, pp. 534-535*] such as repeated late deliveries [*See e.g., Rolled Steel Case*]. In this case, neither RESPONDENT could have anticipated the manufacturing issue that led to the non-conformity, as it was an anomaly that has not arisen in regard to any other Tera cars (the only defective cars were all manufactured on the same day [*Proc. Ord. 2, para. 29*]). Immediately upon learning of the defect, RESPONDENT Universal offered to undertake repairs, so as to relieve "any doubts about either the quality of the Tera brand . . . or of the intention of Universal to stand behind its product" [*Cl. Ex. 4*]. Given this demonstrated commitment to customer service and the quality of its product, it was unreasonable for CLAIMANT to believe that RESPONDENTS would allow a similar breach to occur in the future. Therefore, as CLAIMANT lacked the requisite "good grounds," even if the Tribunal were to find that CLAIMANT could avoid the first installment, it was not entitled to avoid the entire contract and consequently it is not entitled to relief in this case [*See CISG, Art. 73(2)*].

**B. CLAIMANT Declared the Contract Avoided Before the Time Fixed for Performance Had Expired**

76. CISG Article 47 provides that “[t]he buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations” [*CISG, Art. 47(1)*]. The effect of fixing an additional time period is that “[the buyer] binds himself for the period fixed” [*Will in Bianca/Bonell, p. 346*]. In its written submission, CLAIMANT characterizes the communications between itself and RESPONDENTS as “notice” by CLAIMANT that it “was willing to wait [10 days] for the seller to cure the defect in the cars” in accordance with CISG Article 47 [*Cl. Brief, para. 71*]. In effect, CLAIMANT asserts that it granted RESPONDENT Universal an additional 10-day period to fix the defects, thus its declaration that the Contract was avoided after only one day was not effective [*See Cl. Brief, para. 70 - 71*]. RESPONDENT Universal recognizes that CISG Article 47 is generally applicable only to cases of non-delivery [*Sec. Comm. on CISG Art. 45 (now CISG Art. 49)*], however RESPONDENT Universal will not dispute CLAIMANT’s interpretation here.

77. Having established an additional period of time, “[u]nless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract” [*CISG Art. 47(2)*], including a “claim [of] avoidance;” *see also, The UNCITRAL Digest of CISG Art. 47 Case Law, para. 8; See also, The Cheese Case; German case no. 1 U 143/95 and 410 O 21/95*. That notice must be an express declaration “that it is not able or willing to perform” [*The UNCITRAL Digest of CISG Art. 47 Case Law, para. 8*]. CLAIMANT equates the lack of a guarantee of performance here with an explicit refusal to perform [*Cl. Brief, para. 71*]. A refusal, however, “conclusively suggest[s] that the (non-performing party) had seriously and finally refused to fulfill the remaining obligations under the contract” [*Chengwei (March 2005), para. 5.3., citing the Shoes case (Germany, 1997)*]. A mere declaration “that it is uncertain whether [the non-performing party] will be able to perform” does not produce the effects of an express and valid notice of refusal to perform under Article 47(2) of the CISG” [*Chengwei (March 2005), para. 5.3.*]. According to CLAIMANT, however, it was entitled to declare the contract avoided prior to the expiration of the fixed period of time because “the seller did not agree to provide . . . a guarantee [of performance]” [*Cl. Brief, para. 71*]. CLAIMANT has not argued that RESPONDENTS seriously and finally refused to repair the cars. In reality, RESPONDENT Universal repeatedly assured CLAIMANT it would perform and it should have been given the opportunity to do so. Failing to establish that RESPONDENT Universal refused to perform, CLAIMANT’s avoidance of the Contract was correspondingly improper because it was done within the time period in which

CLAIMANT had agreed to wait for performance by RESPONDENT Universal [*Cl. Brief, para. 70-71*].

**C. Even if the Contract Was Not an Installment Contract, CLAIMANT Was Still Not Entitled to Declare the Contract Avoided**

78. Even if this Tribunal were to find that the Contract was a single delivery contract, rather than an installment contract, CLAIMANT still was not entitled to avoid the Contract because the breach was not fundamental. With single delivery contracts, a declaration that the contract is avoided must be supported by a fundamental breach [*See CISG, Art. 49*]. It is unnecessary here to repeat in detail the facts discussed above that demonstrate there was no fundamental breach of the Contract. In addition, however, CLAIMANT was not entitled to avoid the Contract because it had no reasonable basis to believe a fundamental breach would occur in the future.

79. It could not reasonably be inferred that RESPONDENTS were going to commit a fundamental breach in the future in light of RESPONDENT Universal's assurances that the repairs would be expeditiously completed. Under Article 72(1) of the CISG a party may avoid a contract only if "prior to the date for performance of the contract 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)*]. Here, because both future deliveries and payment were outstanding when CLAIMANT declared the Contract avoided, if the Tribunal finds that this is a single delivery contract, the timing criteria of Article 72 is satisfied. The "tendency to limit avoidance as a remedy of last resort" has led to the high standards of avoidance [*Schlechtriem (1986), p. 94*], namely the "it is clear standard" which has been interpreted to mean that "a very high degree of probability [that a future fundamental breach will occur] is required" [*Azaredo, para. 2.a. citing the Shoes case (Germany), 1992*].

80. That high degree of probability cannot exist when one party adequately assures the other it will perform. CISG Article 72 further provides, ". . . the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance" [*CISG Art. 72(2)*]. In short, by providing that adequate assurance, a party may prevent avoidance [*Schlechtriem (1986), p. 94*]. For assurances to be considered adequate, they must remove the threat of non-performance by giving "reasonable security to the promisee that . . . the promisor will perform" [*Chengwei (May 2005), para. 5.2.; see also, Bennett (71) in Bianca/Bonell, p. 522*].

81. In this case, RESPONDENTS gave adequate assurance of their performance. At the outset, RESPONDENT Universal definitively stated that its “technical personnel will arrive in three days” [*Cl. Ex. 4*]. Although RESPONDENTS obviously could not guarantee success or the timing for repairs prior to setting foot in Mediterraneo and examining even one car, CLAIMANT was assured that it would “not be very long before you have the Tera [cars] on your showroom floor” [*Cl. Ex. 6*]. Thus, CLAIMANT had no reasonable basis on which it could conclude that RESPONDENTS were going to commit a fundamental breach in the future because RESPONDENTS indicated they intended to repair the 25 Tera cars, and fulfill the remaining obligations under the Contract.

82. **CONCLUSION:** CLAIMANT was not entitled to declare the Contract avoided because there was no fundamental breach of the Contract. If CLAIMANT had not improperly avoided the Contract, it would have received exactly what it was entitled to expect under the Contract. The Tribunal should reject CLAIMANT’s arguments and find that RESPONDENTS did not substantially deprive CLAIMANT of its expectations under the Contract; any substantial deprivation stemming from CLAIMANT’s unique economic circumstances was entirely unforeseeable; and no fundamental breach could reasonably have been expected in light of RESPONDENTS’ good faith efforts to satisfy CLAIMANT.

## V. REQUEST FOR RELIEF

Counsel for RESPONDENT respectfully requests that the Tribunal find that:

- (1) the arbitration agreement cannot rightfully be extended to RESPONDENT Universal **(I)**;
- (2) even if the arbitration agreement could be extended, the insolvency law of Oceania applies and renders void the arbitration agreement **(II)**;
- (3) RESPONDENT Universal cannot be held liable for the contract breach committed by RESPONDENT UAM **(III)**; and
- (4) CLAIMANT was not entitled to avoid the Contract, because there was no fundamental breach, and thus CLAIMANT is not entitled to any remedy in these proceedings **(IV)**.



Respectfully Submitted,  
(signed)

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*Stephanie Cabral*

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*Jessica Edvall*

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*Kseniya Koryukalova*

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*Laure Meyer*

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*Sofia Palmqvist*

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*Jonathan Robilotto*