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WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

02 TO 09 APRIL 2009

MEMORANDUM FOR RESPONDENT

LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN

ON BEHALF OF:	**AGAINST:**
Universal Auto Manufacturers, S.A.	Reliable Auto Imports
47 Industrial Road	114 Outerringroad
Oceanside	Fortune City
Equatoriana	Mediterraneo
RESPONDENT	**CLAIMANT**

COUNSELS:

Sebastian Kestler · Maximilian Pechtl · Leonie Pich ·

Dominik Steghöfer · Konstantin Svigac · Franziska Weinmann · Ulrich Andreas Zanconato

TABLE OF CONTENTS

INDEX OF AUTHORITIES ..... **IV**
INDEX OF CASES ..... **XVI**
INDEX OF ARBITRAL AWARDS ..... **XXIII**
INDEX OF LEGAL SOURCES ..... **XXVI**
LIST OF ABBREVIATIONS ..... **XXVII**
STATEMENT OF FACTS **1**
ARGUMENT **2**
I. THE ARBITRATION AGREEMENT IS NOT BINDING ON RESPONDENT **2**
A. Respondent did not Consent to Arbitrate With Claimant **2**
B. Respondent is not Bound to Arbitrate Under the Principles of Agency **3**
1. UAM did not act as an agent for Respondent 3
2. Claimant cannot rely on apparent authority 4
C. The Arbitration Agreement Should not be Extended Under the "Group of Companies" Doctrine **5**
1. The "group of companies" doctrine is not a valid legal principle 5
2. The application of the "group of companies" doctrine is inappropriate in the present case 7
(a) Respondents were separate, distinct and independently functioning companies . 7
(b) Respondent was not sufficiently involved in the Sales Contract to warrant the application of the "group of companies" doctrine 9
(c) None of the parties intended to include Respondent in the scope of the Arbitration Agreement 10
D. The Arbitration Agreement Cannot be Extended Under a "Related Contracts" Doctrine **10**
1. The Sales Contract and the Repair Agreement between UAM and Respondent are no closely related contracts 11
2. Arbitration Agreements cannot be extended to third parties under a "related contracts" doctrine 11
II. THE ARBITRATION AGREEMENT IS VOID **12**
A. The Arbitration Agreement is Governed by Oceanian law and Therefore Void **13**
B. The OIL Provision Should be Applied as a Loi de Police **14**
1. The OIL Provision protects a strong and legitimate state interest 14

2. The facts of the case justify the application of the OIL Provision 15
(a) The purpose of the OIL Provision calls for its application as a loi de police 15
(b) Disregarding the OIL Provision endangers enforceability of the Award 16
C. UAM Lacked the Capacity to Enter Into an Arbitration Agreement 18
D. International Cross-Border Insolvency Statutes and Principles of Comity Support a Restraint of the Tribunal's Jurisdiction 18

III. RESPONDENT IS NOT LIABLE FOR THE BREACH OF CONTRACT BY UAM 20
A. Respondent is not Party to the Sales Contract 20
B. Respondent did not Assume any Liability Under the Sales Contract 21
C. Respondent is not Liable Under a "Group of Contracts" Theory 21
D. The "Group of Companies" Doctrine or "Piercing the Corporate Veil" Considerations do not Justify an Extension of Liability 22

IV. CLAIMANT WAS NOT AUTHORIZED TO AVOID THE SALES CONTRACT 25
A. The Breach of the Sales Contract Committed by UAM Does not Amount to be Fundamental in Terms of Art. 25 CISG 25
1. Claimant was not substantially deprived of what it was entitled to expect under the Sales Contract 25
(a) Claimant still could have resold the Tera cars 26
(b) The breach of contract did not cause Claimant's precarious situation 27
(c) Respondent's offer to cure counteracts the breach from being fundamental 27
2. The alleged substantial detriment was unforeseeable 30
B. Claimant Lost any Right to Avoid the Sales Contract According to Art. 39 (1) CISG 31
C. Claimant was Estopped From Cancelling the Sales Contract Under the Principle of *Venire Contra Factum Proprium* 33
D. Claimant was not Authorized to Cancel the Sales Contract With Respect to the Future Instalments, Art. 73 (2) CISG 34

REQUEST FOR RELIEF 35

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In §§ 56, 57, 66

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In § 78
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In § 103

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In § 51

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In § 32

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- Central List of Lex Mercatoria Principles (available at: http://www.tldb.net) (TLDB-Principle)
- Codice Civile, Italy, 1942 (codice civile)
- Companies Act England, 2006
- Convention on Agency in the International Sale of Goods, Geneva, 1983 (Convention on Agency)
- Convention on the Law Applicable to Contractual Obligations, Rome, June 19, 1980 (Rome Convention)
- Corporations Act Australia, 2001
- European Community Regulation 1346/2000 (EC Insolvency Regulation)
- European Convention on Human Rights, Strasbourg, 1966 (ECHR)
- European Convention on International Commercial Arbitration, 1961 (Geneva Convention)
- German Constitution, Germany, 2006(German Constitution)
- Oceanian Insolvency Law (OIL)
- Restatement of the Law – Agency, US, 2006 (Restatement (Third) of Agency)
- UNCITRAL Legislative Guide on Insolvency Law, 2004 (Legislative Guide)
- UNCITRAL Model Law on Cross-Border Insolvency, 1997 (MLCBI)
- UNCITRAL Model Law on International Commercial Arbitration, 2006 (ML)
- United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG)
- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 (NYC)

LIST OF ABBREVIATIONS

%	per cent
&	and
§(§)	section(s)
Arb.	arbitration
Art(s).	article(s)
cf.	confer
Cir.	circuit
CISG	United Nations Convention on the International Sale of Goods, Vienna, 11 April 1980
Cl.	Claimant
Clex.	Claimant's Exhibit
Co.	company
Comm.	commentary
Corp.	corporation
e.g.	exempli gratia (for instance)
EC	European Community
ECJ	European Court of Justice
ECU	Engine Control Unit

ed.	edition
emph. add.	emphasis added
et al.	et alii (and others)
et seq.	et sequentes (and following)
ex p.	ex parte
i.e.	id est (that means)
ICC	International Chamber of Commerce and Industry
Inc.	incorporated
Int.	international
Ltd.	limited
Memo.	Memorandum
ML	UNCITRAL Model Law on International Commercial Arbitration, 21 June 1985
MLCBI	Model Law on Cross Border Insolvency
Mr.	Mister
Ms.	Miss
No(s).	number(s)
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958
p (p).	page(s)

Proc.	procedural
Pte.	Public trading enterprise
PWC	Price Waterhouse Coopers
S. p. A.	Società per azioni (Italian public listed company)
S.A.	Société Anonyme (French public listed company)/ Sociedad Anónima (Spanish public listed company)
SCC	Stockholm Chamber of Commerce
sec.	section
St. of Cl.	Statement of Claim
U.S.	United States
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
US	United States
USD	United States Dollar(s)
v.	versus
Vol.	volume
YCA	Yearbook of Commercial Arbitration

STATEMENT OF FACTS

- **18 January 2008**: Mr. Joseph Tisk (hereinafter Claimant), a car dealer doing business in Mediterraneo under the trade name of Reliable Auto Imports, negotiated a contract with UAM Distributors Oceania Ltd. to purchase 100 new Tera cars manufactured by Universal Auto Manufacturers S.A., a corporation organized in Equatoriana (hereinafter Respondent) for the total amount of USD 760.000. This contract contained an arbitration clause.
- **23 January 2008**: Claimant paid 50% of the contact price (USD 380.000) as a deposit.
- **6 - 11 February 2008**: The first consignment of 25 cars was shipped to Mediterraneo.
- **18 February 2008**: When the Tera cars were driven from the port to the showroom and to the storage area, it was noted that the engines of the cars did not run smoothly.
- **12 February 2008**: Patria Importers Ltd. contacted Claimant offering 20 new Indo cars
- **19 February 2008**: Claimant rejected the offer of Patria Importers Ltd.
- **22 February 2008**: Claimant notified UAM of the defects after the mechanic Claimant hired was unable to determine their source.
- **27 February 2008**: UAM informed Claimant that it could not determine the defects either. Thereupon, Respondent immediately contacted Claimant, giving possible technical explanations for the problem.
- **28 February 2008**: Respondent offered Claimant to repair the defective cars. After Claimant inquired how long it would take to fix the cars, Respondent assured him that he would have cars ready for sale within one week.
- **29 February 2008**: Claimant suddenly avoided the contract and demanded return of his down payment of USD 380.000. He notified Respondent to cancel any plans to repair the cars. Claimant accepted the offer for the 20 Indo cars by Patria Importers.
- **9 April 2008**: UAM entered insolvency proceedings.
- **11 April 2008**: Mrs. Powers, the appointed representative in UAM's insolvency, informed Claimant that under the law of Oceania, the arbitration clause was automatically voided upon commencement of insolvency proceedings.
- **9 June 2008**: Respondent informed Claimant that all of the 25 cars that had been returned to Respondent's premises were repaired and could also have been repaired while they were in Mediterraneo.

ARGUMENT

I. THE ARBITRATION AGREEMENT IS NOT BINDING ON RESPONDENT

1 Respondent maintains that the agreement to arbitrate (hereinafter Arbitration Agreement), included in the contract for the sale of 100 Tera cars between Claimant and UAM (hereinafter Sales Contract) is, contrary to Claimant's contention *(Cl. Memo. §§ 27 - 62),* not binding on Respondent. First and foremost, Respondent has never expressed any intent to arbitrate with Claimant **(A)**. Moreover, UAM has at no point acted as Respondent's agent, neither with actual nor with apparent authority **(B)**. Furthermore, Respondent is not bound by the Arbitration Agreement under the "group of companies" doctrine **(C)**. Finally, the agreement between UAM and Respondent to repair the Tera cars and the Sales Contract do not constitute a "group of contracts" that would allow an extension of the Arbitration Agreement to Respondent **(D)**.

A. Respondent did not Consent to Arbitrate With Claimant

2 Undisputed by Claimant, Respondent has never consented to arbitrate, nor communicated any intent to do so *vis-a-vis* Claimant. The parties' intent and consent to arbitrate, however, is the essential basis of international commercial arbitration, which depends on the party agreement for its very existence *(AT&T Techs. v. Communications Workers (US); MOSES p. 2; REDFERN/HUNTER 3-01).* In the words of the court in *Thomson-CSF v. AAA (US)*: "Arbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so".

3 The Sales Contract containing the arbitration clause was concluded only between Claimant and UAM, whereas Respondent was neither mentioned therein, nor did it sign the contract document *(Clex. No. 1).* Accordingly, Respondent was not a party to the Sales Contract. Furthermore, Respondent's conduct after the conclusion of the Sales Contract leaves no room for the interpretation that it consented to arbitrate with Claimant. Throughout the correspondence between the latter and Respondent, both parties did not refer to the Arbitration Agreement *(Clex. Nos. 3, 4, 5, 6, 11, 12).* Since Respondent was not party to the Arbitration Agreement and did not consent to submit itself to arbitration afterwards, the Tribunal has no jurisdiction over the dispute between Claimant and Respondent.

B. Respondent is not Bound to Arbitrate Under the Principles of Agency

4 Contrary to Claimant's allegations *(Cl. Memo. §§ 28 - 35)*, Respondent was not UAM's principal and is therefore not bound by the Sales Contract and thereby the Arbitration Agreement through actual authority **(1)**. Moreover, any allegation that Respondent is bound by the Arbitration Agreement through apparent authority would fail as Respondent did not create the appearance of having vested UAM with authority to act on its behalf, and Claimant did not rely on such an appearance **(2)**.

1. UAM did not act as an agent for Respondent

5 Respondent agrees with Claimant that the Convention on Agency in the International Sale of Goods (hereinafter Convention on Agency) is applicable to questions of agency in the present case (*Cl. Memo. § 34)*. However, Claimant's allegation that UAM acted as an agent *(Cl. Memo. § 28)* lacks any foundation. According to Art. 12 Convention on Agency, a party (the principal) is only contractually bound to a third party by the acts of another person (the agent) if the latter acts on behalf of the principal, within the scope of his authority and the third party knew or ought to have known that the agent was acting as an agent.

6 The burden of proof to establish agency lies with the party alleging the existence of the same *(Bundesgerichtshof February 28, 1985 (Germany); Incorporated Town of Locust Grove v. Faull (US))*. In this regard, Claimant fails to provide any evidence that would support its allegation that UAM acted on behalf of Respondent when it concluded the Sales Contract *(Clex. No. 1)*. UAM signed in its own name without any indication that it intended to act on behalf of Respondent or anyone else but itself *(Clex. No. 1)*.

7 Moreover, Respondent has at no point, neither explicitly nor implicitly, granted UAM the authority to act on its behalf. With respect to Claimant's contention that the Distributor Agreement between Respondent and UAM represents the latter's authorization *(Cl. Memo. § 34)*, the Tribunal should follow Claimant's own proposition: "Agreements […] should be interpreted in line with their content and not their title" *(Cl. Memo. § 30)*. Under the Distributor Agreement, UAM was to buy its merchandise from Respondent to resell it in its own name and on its own behalf *(Proc. Order No. 2 §§ 13, 20)*. The sales conditions provided that UAM had to pay the whole price for the purchased cars at the latest on delivery *(Proc. Order No. 2 § 20)*. Thereby, UAM was to sell the cars, which were in its sole ownership, on to its own customers, meaning that UAM worked for its own account and at its own risk and accordingly was not authorized to act on behalf of Respondent by the Distributor Agreement. In light of these facts, Respondent requests the Tribunal to hold that there was no

principal-agent-relationship through which Respondent could have been bound by the Sales Contract and hence by the Arbitration Agreement.

2. Claimant cannot rely on apparent authority

8 Claimant might further contend that Respondent vested UAM with apparent authority and is therefore bound by the Arbitration Agreement. According to Art. 14 (2) of the Convention on Agency as well as under general principles of agency *(Rama Ltd. v. Proved Tin (England); Restatement (Third) of Agency § 2.03)*, there are two preconditions to establish apparent authority. First, the conduct of the alleged principal must have given rise to the impression that it has authorized another party to act on its behalf. Second, the third party must have reasonably relied on such an impression. Respondent's conduct did not provide any indication that UAM acted as Respondent's agent which Claimant or a reasonable third person could have relied on.

9 The relevant time for reliance on such impression is the moment the Sales Contract and thereby the Arbitration Agreement was concluded. Respondent, however, did not present itself as UAM's principal at any time during or before the conclusion of the Sales Contract. Any such statement or conduct creating the appearance of authority would have had to be made clearly and unequivocally *(FRIDMAN p. 101)*. While it is true that Respondent and UAM were in a business relationship for several years *(Clex No. 16)* and shared part of their names *(St. of Cl. § 5; Proc. Order No. 2 § 11)*, this does not lead a reasonable person to deduce the existence of a principal-agent relationship. A similarity in names between a manufacturer and its distributors is reasonable, as customers should be able to easily identify the brand of cars a distributor sells. In particular, a businessman like Claimant should have been familiar with the necessity of such brand identification. Concluding a principal-agent relationship from such a resemblance would irrationally interpret a mere marketing decision between cooperating companies as a complex and economically risky internal relationship. Accordingly, a reasonable person in Claimant's position could not rely on Respondent being UAM's principal.

10 Moreover, when concluding the Sales Contract, Claimant did, in fact, not rely on such a wrongful impression. Claimant's subsequent behavior evinces that it only considered UAM to be its contract partner. Once Claimant became aware of the defects of the cars, it did not contact Respondent, whom it now purports to have regarded as its actual contractual partner, but only UAM *(Clex. No. 2)*. Also, Claimant terminated the Sales Contract by sending an e-mail to UAM demanding reimbursement from the latter *(Clex. No. 10)*, whereas Claimant merely informed Respondent about the contract cancellation because it did not need the latter's service personnel any more *(Clex. No. 11)*.

11 Thus, Claimant's conduct demonstrates that it did not rely on an impression that UAM was acting as Respondent's agent, as required by Art. 14 (2) Convention on Agency or under general principles of apparent authority.

12 In summary, UAM was neither authorized to act on Respondent's behalf, nor did Respondent ever present itself in a way suggesting that it had vested UAM with such authorization, nor did Claimant rely on any such representation it might have perceived. Therefore, Respondent is not bound by the Arbitration Agreement through agency or apparent authority.

C. The Arbitration Agreement Should not be Extended Under the "Group of Companies" Doctrine

13 Respondent acknowledges that, in certain constellations, some courts and tribunals have extended arbitration agreements to non-signatories, based on what has been termed "the group of companies" doctrine *(Cl. Memo. §§ 37 - 39)*. This doctrine was established by the tribunal in *Dow Chemical v. Isover St. Gobain (ICC),* which allowed *Dow Chemical's* wholly owned subsidiaries to arbitrate claims arising out of a contract containing an arbitration clause entered into by the parent.

14 It is Respondent's submission that, contrary to Claimant's allegations *(Cl. Memo. §§ 37 - 39),* the doctrine lacks a solid foundation in both legal scholarship and case law, while unduly straining the requirement of consensus on which arbitration is based **(1)**. Moreover, even if the Tribunal should regard the doctrine as a valid legal principle, the facts of the present case do not warrant its application as the doctrine's preconditions are not met **(2)**.

1. The "group of companies" doctrine is not a valid legal principle

15 With all due respect to the tribunals on whose judgments the notion of the "group of companies" doctrine has been developed, Respondent submits that its application as a doctrine or general legal principle is inappropriate. First and foremost, note should be taken that arbitration, as a means of private dispute resolution, is dependent on party autonomy *(see supra §§ 2, 3)*. This autonomy does not merely extend to the right to conclude an arbitration agreement, it also extends, as negative party autonomy, to the right not to arbitrate. Compelling a non-signatory to arbitrate without clear evidence of his consent therefore constitutes a serious intrusion into party autonomy. This is aggravated by the fact that arbitration, through the preclusion of court actions and full judicial review *(GROSSMAN § 189; SCHWAB/WALTER § 37)*, deprives a party of its right to be heard in court as guaranteed by most if not all legal systems *(cf. Regina v. Lord Chancellor, ex p Witham (England); Art. VI (1) ECHR; Art. 101 German Constitution)*.

16 For these reasons, the "group of companies" doctrine has, from its inception, found very limited support in both arbitral and judiciary case law and has never been generally accepted *(MÜLLER/KEILMANN p. 118; REDFERN/HUNTER 3-32)*. English courts have made clear that the doctrine "forms no part of English law" *(Peterson Farms (England))* and the existence of a group of companies is insufficient to extend arbitration agreements to non-signatories as well under American principles of law *(Sarhank Group v. Oracle (US))*. Instead, a non-signatory party may be bound to an arbitration agreement only by ordinary principles of contract and agency *(McAllister Brothers Inc. v. A&S Transportation Co. (US); Thomson-CSF v. AAA (US))*. Likewise, the doctrine has no standing in the German legal system *(LACHMANN § 510; MÜLLER/KEILMANN p. 121)* and even faced criticism in France *(RUBELLIN-DEVICHI p. 515)*, the country where the doctrine first emerged. Since the "group of companies" doctrine is non-existent in most legislations, the Tribunal in *Dow Chemical* did not base its decision on a national law, but relied on the *lex mercatoria* as the law applicable to the arbitration agreement. *Lex mercatoria*, however, as the law of the international business community has been defined as the set of rules "unanimously adopted by all countries engaged upon international commerce" *(MUSTILL p. 92)*. As the cold reception of the "group of companies" in the legal community of the abovementioned major international trading powers demonstrates, the doctrine has no place in such a consensus of international commerce.

17 Moreover, as Claimant itself argues, the law applicable to the Arbitration Agreement in this case is not an ill-defined concept such as the *lex mercatoria*, but a codified and established national law *(Cl. Memo. § 7)*. Since the parties differ only on the question which national law exactly should be applied *(see infra § 44)*, Respondent and Claimant apparently agree that vague notions such as international trade usages should not be employed as the applicable law. Neither the Arbitration Agreement nor the Sales Contract provides a choice of law provision that would evince the parties' intent to have the Arbitration Agreement governed by trade usages *(Clex. No. 1)*. General considerations also speak against de-nationalization of the arbitral process. Application of the a-national *lex mercatoria* would ignore the fact that arbitration always depends on its recognition in national laws *(GOODE p. 37)*. In addition, trade usages are by their nature too unspecific and unpredictable to serve as a basis for the imposition of the duty to arbitrate on a non-signatory party *(Model Law Preparatory Materials as cited in HOLTZMANN/NEUHAUS p. 300; REDFERN/HUNTER 3-33)*.

18 Furthermore, the *Dow Chemical* tribunal's reliance on arbitral awards as the basis of its decision does not convince. Sole reliance on arbitral case law poses great risks for the fairness and transparency of international commerce as arbitral awards are rarely published in their entirety

(DEVOLVÉ/ROUCHE/POINTON § 20; FENN/DAVIES/O'SHEA p. 814), seldom and only to a limited degree subject to court control *(cf. PWC Statistics p. 9; GROSSMAN § 189; REDFERN/HUNTER 9-44)* and often tailored to the specific facts of a certain case which may not be published due to reasons of confidentiality. The actors of transnational commerce, however, have an especially strong interest in transparency and predictability as to who is and who is not bound by a given arbitration agreement *(ZUBERBÜHLER p. 33)*. If an issue of such importance were to be decided under the "group of companies" doctrine lacking clear pre-conditions and reliable case law, transparency would irreparably be undermined: "Commerce, if it is about anything, is about certainty; […] if it is impossible to provide the businessman with any clear answer to a question, because the law is unclear, then it is a law that will fall into disrepute" *(TWEEDDALE/TWEEDDALE 6.38)*. Thus, the "group of companies" doctrine is not apt for application in international commercial arbitration.

2. The application of the "group of companies" doctrine is inappropriate in the present case

19 Even if the Tribunal deems the "group of companies" doctrine to deserve consideration, the facts of the case do not allow for its application. The preconditions employed by the tribunal in *Dow Chemical* as the basis of its decision to include non-signatories in the scope of an arbitration agreement were that Dow Chemical and its subsidiaries over which Dow Chemical had absolute control, constituted "one and the same economic reality" and that all non-signatories were directly involved in the "conclusion, performance and termination of the contract". In addition, the tribunal emphasized that the extension of the arbitration agreement was in line with the "mutual intent of the parties", a prerequisite that "remains key" in all group of companies cases *(ZUBERBÜHLER p. 25)*.

20 In the case at hand, UAM and Respondent do not constitute "one and the same economic reality" **(a)**. Further, Respondent was not involved in the conclusion, performance and termination of the Sales Contract **(b)**. Finally, the specific facts of this case do not allow the conclusion on which the tribunal in *Dow Chemical* could rest its award, namely that the extension of the Arbitration Agreement would reflect the mutual intent of the parties **(c)**.

(a) Respondents were separate, distinct and independently functioning companies

21 Claimant's allegation that Respondent and UAM formed a "single economic reality" and therewith a "group of companies" *(Cl. Memo. §§ 41 - 44)* cannot be upheld as UAM had both an independent legal and economic existence from Respondent.

22 None of Claimant's arguments attempting to establish the existence of economic identity of UAM and Respondent convinces. While Respondent owned 10% of UAM's shares, this - as Claimant itself concedes - does not represent "a determining share of ownership" *(Cl. Memo. § 41)*. Moreover, the mere fact that Claimant had one single member in UAM's governing board does not transform its 10% into a golden share: The majority shareholder, Oceania Partners, held the remaining 90% and an overwhelming majority of 80% in the board of directors *(Proc. Order No. 2 § 12)*. While Respondent might have been able to communicate its position, there was no possibility to veto any decisions made by Oceania Partners *(Proc. Order No. 2 § 12)*. In addition, the "day to day" management of the company lay solely in the hands of Oceanian citizens, who were unconnected to Respondent *(Proc. Order No. 2 § 12)*.

23 Furthermore, there is no basis for Claimant's assertion that Respondent "reviewed the formation of the contracts used between UAM and UAM's customers" *(Cl. Memo. § 41)* and "had reviewed and had not objected to the form contract used between [the parties]" *(Cl. Memo. § 44),* apparently aimed at establishing that Respondent somehow "controlled" UAM. Respondent only reviewed the form contracts generally used by UAM *(Proc. Order No. 2 § 16)* and had no influence on the individual agreements UAM made, possibly deviating from these forms. The only purpose of this review was to ensure UAM did not violate Respondent's general company policies *(Proc. Order No. 2 § 16)* and Respondent did not mandate any of the individual contract terms *(Proc. Order No. 2 § 16)*. Thus, the review did not exceed the due diligence of a responsible corporation that wishes to make sure its business partners adhere to the same minimum standards in their corporate policy.

24 The allegation that both companies presented a single economic unity is further rebutted by taking account of the internal relationship between UAM and Respondent. The Distributor Agreement on which their business connection rested contained a clause providing for arbitration at the Equatoriana International Arbitration Center *(Proc. Order No. 2 § 14)*. The inclusion of a clause to settle disputes before a neutral tribunal simply makes no sense between two corporations that are, allegedly, basically one and the same company. What conflicts could arise between two entities under identical management?

25 Claimant further bases its argument on the assertion that Respondent and UAM cooperated for the past fifteen years *(Cl. Memo. § 43)*. While the existence of such cooperation is undisputed, it has very little evidentiary value. A long-lasting business relationship between otherwise entirely independent companies is neither unusual nor does it indicate, especially in the absence of significant common ownership, that both companies form an "economic reality".

26 In conclusion, the basic precondition of the "group of companies" doctrine, namely that both companies form a single economic reality, has not been established – and indeed cannot be established from the facts. Accordingly, the "group of companies" doctrine is inapplicable to the present case.

(b) Respondent was not sufficiently involved in the Sales Contract to warrant the application of the "group of companies" doctrine

27 Respondent was further not involved in the conclusion, performance and termination of the Sales Contract to a sufficient degree, if any, that would justify an extension of the Arbitration Agreement under the "group of companies" doctrine. This lack of connection between Respondent and the Sales Contract stands in contrast to the doctrine's landmark case *Dow Chemical*. Therein, Dow's subsidiaries had concluded the contracts in dispute (which were only later assigned to the parent company), they were expressly authorized to fulfill the parent company's obligations and played "an essential role" in the termination of the contracts.

28 First, Respondent played no role in the conclusion of the contract. As distinguished from the contracts in *Dow Chemical* explicitly referring to Dow's subsidiaries, Respondent was not mentioned in the Sales Contract *(Clex. No. 1)*. Respondent also did not mandate any contract terms *(Proc. Order No. 2 § 16),* nor did it take part in the contract negotiations, or even contacted Claimant until after UAM had made the first delivery.

29 Second, UAM alone was expected to carry out the main performance, namely to deliver the cars under the Sales Contract. Likewise, the company responsible to Claimant for the car's repairs after delivery was UAM, not Respondent. It was not until UAM turned out to be incapable of performing the repairs that it had to commission Respondent to fulfill its contractual obligations *(Clex. No. 4)*, whose involvement is thereby merely incidental. Since Respondent had no obligation towards Claimant to repair the cars, the former's offer to do so served only to discharge Respondent of its own obligation to UAM under the original sales contract between Respondent and UAM *(Proc. Order No. 2 § 15)*.

30 Finally, Respondent did not prompt the unjustified termination of the Sales Contract *(see infra §§ 86, 91 – 100, 105 – 112)*. Claimant would have avoided the contract even if Respondent had not been involved at all, as UAM itself could not repair the Tera cars *(Clex. No. 4)*.

31 To sum up, Respondent was not sufficiently involved in the Sales Contract to justify its inclusion in the scope of the Arbitration Agreement under the standards set out in the "group of companies" doctrine.

(c) None of the parties intended to include Respondent in the scope of the Arbitration Agreement

32 Even if the Tribunal were to decide that Respondent and UAM did form a single economic reality and were involved in the Sales Contract, the preconditions of the "group of companies" doctrine are still not met. Contrary to the cases in which it was developed, there is no "mutual intent of all parties" to arbitrate *(Dow Chemical, see also Cl. Memo. § 38)* that could justify an extension of the Arbitration Agreement to Respondent. Neither Claimant nor UAM included or even mentioned Respondent in the Sales Contract and thereby in the arbitration clause *(Clex. No. 1)*, giving rise to the reasonable presumption that neither of them had any intention to include Respondent in the Arbitration Agreement. Even if UAM and Claimant actually had intended to include Respondent, this would not amount to the mutual consent of all parties. In *Dow Chemical,* the non-signatory subsidiaries were the ones seeking to join the arbitration proceedings even though they were not parties to the arbitration agreement. Likewise, the majority of cases concerning extension of an arbitration agreement to a non-signatory party involve a non-signatory claimant willing to join arbitration proceedings *(Dow Chemical v. Isover St. Gobain (ICC); ICC Cases Nos. 5730, 5103, 6519; Peterson Farms (England); In Re Vesta (US)).* In contrast, Respondent did not consent to arbitrate at all *(see supra §§ 2, 3).* Accordingly, the "group of companies" doctrine should not be applied on the grounds that there is no mutual intent of all parties to include Respondent in the Arbitration Agreement.

33 In summary, none of the requirements set out in "group of companies" case-law is fulfilled. Consequently, the honorable Tribunal should not extend the Arbitration Agreement and thus deny its jurisdiction over Respondent.

D. The Arbitration Agreement Cannot be Extended Under a "Related Contracts" Doctrine

34 Claimant contends that the alleged close relationship between the Sales Contract and the agreement between UAM and Respondent according to which Respondent would endeavor to repair the defective Tera cars (hereinafter the Repair Agreement) justifies an extension of the Arbitration Agreement to Respondent. Claimant's argument in this matter seems to presuppose that the accord between UAM and Respondent contains an implied choice of forum through its interrelation with the Sales Contract *(Cl. Memo. § 60)*. This argument fails on both levels. First, the Sales Contract and the Repair Agreement cannot be viewed as sufficiently related contracts to justify the drawing of inferences from the Sales Contract to the

other agreement **(1)**. Second, even if they were related, there is no justification for an extension of the Arbitration Agreement from one contract to another, as the parties are not identical **(2)**.

1. The Sales Contract and the Repair Agreement between UAM and Respondent are no closely related contracts

35 Contrary to Claimant's allegation that the Repair Agreement is a contract closely related to the Sales Contract *(Cl. Memo. § 59)*, it is Respondent's position that the Repair Agreement is not an independent contract, but rather constitutes a part of the sales contract between Respondent and UAM clarifying the details of the supplementary performance. Since the Repair Agreement is thereby not an independent contract, no "relation" between it and the Sales Contract between UAM and Claimant can exist.

36 Even if the Repair Agreement did constitute an independent contract, as an agreement between UAM and Respondent it falls within the scope of the Distributor Agreement, which contains an arbitration clause in favor of arbitration before the Equatoriana International Arbitration Center *(Proc. Order No. 2 § 14)*. Since a distributor agreement by nature covers all aspects of the sale of merchandise from a manufacturer to its distributor, this arbitration clause covers the sales contract between Respondent and UAM as well as the Repair Agreement, irrespective of whether or not it is an independent contract. Accordingly, contrary to Claimant's assertion *(Cl. Memo. § 62)*, there is no reason to extend the arbitration clause contained in the Sales Contract between Claimant and UAM to the Repair Agreement.

2. Arbitration Agreements cannot be extended to third parties under a "related contracts" doctrine

37 Even if the Repair Agreement constituted a closely related contract to the Sales Contract, there is no legal basis to extend the Arbitration Agreement from one contract to another based on such a relation.

38 Claimant's allegations to the contrary reveal a series of misapprehensions. Its argumentation relies on the *Comments on the Green Paper (Cl. Memo. §§ 58 et seq.),* which discuss the question whether or not an implied choice of law can be established from related contracts between identical parties. Claimant, however, seeks to draw an analogy between choice of law and choice of forum clauses and further alleges that an extension is appropriate even when the parties to the contracts in question are not identical *(Cl. Memo. §§ 61, 62)*.

39 Thereby, it misconceives that a choice of law clause and a choice of forum clause are not comparable. Arbitration, as shown above, deprives a party of its basic right to seek recourse

with the courts *(see supra § 15)*. A choice of law, on the other hand, will always be subject to the basic guarantees of due process and public policy in force in the forum state.

40 Besides disregarding the abovementioned contradiction, Claimant further misapprehends that an implied choice of law may only be assumed between related contracts of identical parties. Concerning third parties, the *Comments on the Green Paper* clearly state that there is "no prima facie ground to subject [a] third party to the law of the principal contract" *(Comments on the Green Paper p. 37)*. In fact, "the general rule is that the proper law must be determined for every contract separately", a rule that "prima facie applies to related contracts with a third party" *(Comments on the Green Paper p. 37)*. This result is in line with logical deliberations: typically, there is no reason why a party to a certain contract would intend to subject itself to the choice of law of a different contract to which it is not a party and on which it had no influence.

41 Accordingly, even if one assumes that the sales contract between UAM and Respondent and the Repair Agreement, which forms a part of the former, were not covered by the arbitration agreement contained in the Distributor Agreement, the extension of the arbitration clause agreed upon by Claimant and UAM to Respondent is not justified by a certain "related contracts" construction.

In summary, no reasoning brought forth by Claimant supports or justifies an extension of the Arbitration Agreement to Respondent as a non-signatory. Respondent never consented to arbitrate and UAM was neither Respondent's agent, nor could Claimant reasonably believe that it was. The "group of companies" doctrine is unpersuasive as a legal concept and, in any case, inapplicable as UAM and Respondent did not form such group. Finally, there is no justification for an "extension" of the Arbitration Agreement contained in the Sales Contract to Respondent based on a "group of contracts". The Tribunal therefore lacks jurisdiction over Respondent.

II. THE ARBITRATION AGREEMENT IS VOID

42 In the event that the Tribunal should find in favor of extending the Arbitration Agreement in principle, there is, at this point, no valid arbitration agreement that could be extended to include Respondent. By virtue of the law of Oceania, the Arbitration Agreement between Claimant and UAM has been voided upon commencement of insolvency proceedings *(Clex. No. 14)*. Claimant's contention that the insolvency law of Oceania (hereinafter OIL) has no effect on the Tribunal's jurisdiction *(Cl. Memo. §§ 7 - 26)* fails on several grounds. First and foremost, the law of Oceania is the law applicable to the Arbitration Agreement **(A)**. Should the Tribunal decide otherwise, the OIL Provision under which the Arbitration Agreement is

voided should be applied as a *loi de police* **(B)**. In addition, UAM was retroactively deprived of its capacity to enter into an arbitration agreement **(C)**. Finally, international cross-border insolvency statutes and the principles of comity support Respondent's request to end the arbitral proceedings **(D)**.

A. The Arbitration Agreement is Governed by Oceanian law and Therefore Void

43 Contrary to Claimant's allegations *(Cl. Memo. §§ 3 - 26)*, the Arbitration Agreement has become void because Oceanian law is the law applicable to determine the validity of the Arbitration Agreement.

44 Respondent does not dispute the fact that the parties did not explicitly choose a law to apply to the Arbitration Agreement *(Cl. Memo. § 7)*. Absent such a choice, the arbitration agreement is governed either by the law of the seat of arbitration, or by the substantive law of the main contract containing the arbitration clause *(BORN p. 111; DICEY/MORRIS 16-012, 16-014; REDFERN/HUNTER 2-87)*. Claimant's contention that Danubian law should be applied as the "lex fori" *(Cl. Memo. § 7)* fails, since an international arbitral tribunal, as a judicial body that is not grounded in any specific national legal system, has no lex fori *(BERGER in Arb. Int. p. 508; BERGER 24-14; REDFERN/HUNTER 2-80)*.

45 Instead, the Tribunal should follow the "very strong presumption in favor of the law governing the substantive agreement which contains the arbitration clause" *(LEW p. 143; see also ICC Case Nos. 3572, 6379)*. The doctrine of separability does not speak against such a decision. While the Tribunal could, theoretically, apply a different law to the Arbitration Agreement than to the Sales Contract itself, it is common practice and complies best with the parties' interest to apply the same law to the main contract as to the arbitration clause *(ICC Case Nos. 2626, 3572, 6379; Court of Appeal The Hague, August 4, 1993 (Netherlands); JACOBS/STANLEY/MASTERS p. 274; MUSTILL & BOYD p. 63)*. Especially in cases such as the present one in which the arbitration agreement forms one of many clauses within the same contract document, it is reasonable to apply a uniform law to all clauses *(Sonatrach v. Ferrell (England); MUSTILL & BOYD p. 63; REDFERN/HUNTER 2-86)*.

46 Respondent agrees with Claimant that the United Nations Convention on Contracts for the International Sale of Goods (hereinafter CISG) is the law governing the Sales Contract *(Cl. Memo. §§ 66 - 86)*. The CISG, however, does not cover issues regarding the validity of contracts in general, Art. 4 (2) (a) CISG, and dispute resolution clauses in particular *(SCHWENZER/FOUNTOULAKIS p. 49)*. In cases in which parts of a contract to which the CISG

applies are not covered by its scope, so called external gaps, the rules of private international law determine the applicable law *(Bonell in BIANCA/BONELL Art. 7 § 2.3.1; Ferrari in SCHLECHTRIEM/SCHWENZER Art. 7 § 43)*. The most accepted principle of private international law is the closest connection test, according to which, absent a choice of law by the parties, a contract is governed by the law to which the contract has the closest connection *(ICC Case Nos. 6281, 6527; Harnischfeger v. MORT (Iran-US); TLDB-principle XV.1; TETLEY p. 232)*. The most closely connected law to a contract is that of the country of its characteristic performance *(ICC Case No. 4237; Art. 4 (2) Rome Convention; Imperial Bathroom Company v. Sanitari Pozzi S.p.A. (Italy))*. In contracts for the sale of goods, the characteristic performance is the performance of the seller *(ICC Case Nos. 5713, 5885; Oberlandesgericht Karlsruhe December 10, 2003 (Germany); Blessing Congress Series p. 414; LANDO p. 143; MATIĆ p. 63)*, in this case UAM. Since UAM is seated in Oceania *(St. of Cl. § 4)*, Oceanian law applies to those provisions of the Sales Contract that are not governed by the CISG.

47 The law of Oceania unambiguously states that "any arbitration agreement" in existence with an insolvent party is void *(Clex. No. 14)*. Claimant's assertions as to insolvency laws of countries completely unrelated to the present dispute *(Cl. Memo. § 11)* are therefore irrelevant. Given that UAM entered insolvency proceedings on April 9, 2008 *(Clex. No. 14)*, the Arbitration Agreement between Claimant and UAM is, accordingly, invalid.

B. The OIL Provision Should be Applied as a Loi de Police

48 In the event the Tribunal should not consider Oceanian law to be the proper law of the Arbitration Agreement, the OIL Provision should still be applied as a mandatory rule of immediate application or *loi de police*.

49 In international arbitration, a third country's mandatory laws should be applied, provided that the third country has a strong and legitimate interest in giving its laws effect and is closely connected to the contract in dispute *(ICC Case No. 6320; Ingmar v. Eaton (ECJ); Mitsubishi v. Soler (US); Art. 7 (1) Rome Convention; Art. 19 Swiss IPRG; LANDO pp. 157 et seq.)*. Respondent submits that the nature of the OIL Provision as a mandatory rule protecting legitimate state interests **(1)** and the facts of the present case call for its application as a *loi de police* **(2)**.

1. The OIL Provision protects a strong and legitimate state interest

50 The purpose of the Oceanian Insolvency Law is the same purpose other insolvency laws pursue, namely the protection of the debtor's estate (in the present case UAM's estate) from individual actions of creditors *(LAZIĆ p. 38)*. To achieve this result, the OIL Provision invalidates any forum selection clause entered into by the debtor and requires all creditors to

file their claims before the competent Oceanian Insolvency Court *(Clex. No. 14)*. Such centralization of insolvency claims of non-preferred creditors lies "at the very essence of bankruptcy proceedings" *(LAZIĆ p. 235)*. Therefore, most if not all major legal systems provide for the preclusion of individual actions, such as arbitration, outside of bankruptcy proceedings *(Legislative Guide p. 83; LAZIĆ p. 246)*. Claims brought against an insolvent are not comparable to the original claim against the defendant. The bankruptcy's system of relative distribution transforms what were originally multiple relationships between each creditor and the debtor into a multilateral relationship, so that the creditor-versus-debtor conflict is converted into a creditor-versus-creditor competition *(FLETCHER p. 9; HARVARD LAW REVIEW p. 2307)*. As a consequence, any successful action against the estate will reduce the other creditors' share. Since these other creditors would not have legal standing in arbitration proceedings based on an agreement they are not party to and accordingly could not contest any claims made against the insolvent, arbitration cannot ensure adequate protection of other creditors comparable with centralized insolvency proceedings. In other words, bankruptcy and arbitration present a "conflict of near polar extremes" *(Sonatrach v. Distrigas (US))* with bankruptcy policy calling for a centralized proceeding while arbitration would unduly infringe upon other creditors' rights to protect their share of the estate. The effect of the OIL Provision ensures that these rights are not violated by arbitration, which not only excludes other creditors but would also allow a prevailing creditor to execute an award directly into an insolvent's assets. The Provision thereby protects a legitimate state interest, namely equity and fairness in Oceania's economic system. Consequently, the first precondition for the application of the OIL Provision as a *loi de police* is fulfilled.

2. The facts of the case justify the application of the OIL Provision

51 Furthermore, application of the OIL Provision is justified in the present case. In deciding whether a third-country's mandatory law should be applied, a tribunal as well as a judge should take regard of the purpose of the rule in question as well as the consequences of its non-application *(Amsterdam Grain Trade Association; cf. Art. 7 (1) Rome Convention)*. The purpose of the OIL Provision would be seriously infringed upon by disregarding it in this case **(a)**. In addition, its non-application would create the risk that an unenforceable award would be rendered by the Tribunal **(b)**.

(a) The purpose of the OIL Provision calls for its application as a loi de police

52 As noted above, the purpose of the OIL - as of any insolvency law - is to protect the estate of the debtor and consequently of its creditors. Here, Claimant, whose claim is an ordinary non-

secured monetary claim and who therefore takes no priority over other creditors, is seeking to initiate an action separate from the insolvency proceedings against the estate of UAM, a proceeding in which UAM's other creditors would have no legal standing. Claimant might allege that it is not bringing an action against the estate, but against UAM's assets located in Polaria (hereinafter the Polarian Assets), and that as a consequence "arbitration should not be understood as conflicting with insolvency proceedings" *(Cl. Memo. § 14)*. However, Claimant cannot assert a preferential claim over the Polarian Assets compared to UAM's other creditors. The mere fact that the Polarian Assets have not been included in the insolvency estate as of yet *(Proc. Order No. 2 § 34)* does not entitle ordinary creditors like Claimant to circumvent insolvency proceedings to execute directly into such assets. If creditors, hypothetically, were allowed to do so, this would result in a chaotic race among creditors in order to find and seize assets not yet part of the debtor's estate, in clear violation of insolvency laws' aim to distribute the estate as efficiently and orderly as possible *(cf. Legislative Guide p. 12)*.

53 If the OIL Provision were not to be applied as a mandatory rule, arbitration of the present controversy would undermine the legitimate interest of the OIL to ensure a fair and equal distribution of UAM's assets amongst all creditors. Arbitration would deprive other creditors of the protection afforded by a neutral judicial officer, (such as the Regional Court of Port City), and would favor the creditor who manages to remove himself from the adjudicatory scheme *(HARVARD LAW REVIEW p. 2308)*. Accordingly, it would be highly inequitable if Claimant and UAM could, through arbitration, deprive all creditors of the protection guaranteed by the OIL.

(b) Disregarding the OIL Provision endangers enforceability of the Award

54 Additionally, non-application of the OIL Provision would cast serious doubts on the enforceability of the award the Tribunal will render (hereinafter the Award). Pursuant to Art. 47 Arbitration Rules of the Stockholm Chamber of Commerce (hereinafter SCC Rules), the Tribunal shall ensure that all awards are legally enforceable. Since UAM has assets in Oceania, where it has its place of business *(St. of Cl. § 4)* as well as in Polaria *(Proc. Order. No. 2 § 34)*, enforcement is most likely to be sought in one of these two countries. Both Oceania and Polaria are party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter NYC; *St. of Cl. § 26; Proc. Order No. 3)*. Therefore, the courts have discretion to deny enforcement on the grounds set out in Art. V NYC. Respondent respectfully requests the Tribunal to consider that successful enforcement of the Award would be unlikely in both Oceania and Polaria.

55 First, enforcement of the Award under the NYC would fail in Oceania. Pursuant to Art. V 2 (b) NYC, enforcement can be denied when doing so would contravene the enforcement country's public policy. As shown above, the OIL Provision aims to protect creditors in insolvency proceedings by providing for fair and equal distribution of the debtor's assets against individual actions, which represents a strong and legitimate interest of the state of Oceania *(see supra §§ 50)* and is consequently part of Oceania's public policy.

56 Second, enforcement of the Award is also likely to be denied in Polaria and other countries in which Claimant may seek to circumvent the insolvency proceedings in Oceania. Even if Polarian arbitration and insolvency law offered no grounds for refusal of enforcement pursuant to Art. V 2 NYC, a Polarian enforcement court would pay due regard to public policy considerations of the *lex concursus*, in the present case the OIL. This discretion of the enforcement court is ensured by principles of international comity and serves to provide for an economical and expeditious administration of the estate and to prevent preferential or fraudulent disposition of property of the estate *(Cunard v. Salen (US))*. Comity has been defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard (…) to the rights of (…) persons who are under the protection of its laws" *(Hilton v. Guyot (US))*. Respondent maintains that the protection of UAM and all its creditors can be best assured only through recognition of the relevant provisions of Oceanian Insolvency Law.

57 Courts in countries where enforcement of an award is sought are therefore obliged by comity considerations to deny enforcement and defer the party applying for enforcement to foreign bankruptcy proceedings *(Felixstowe v. United States Lines (England); Cunard v. Salen (US); Hilton v. Guyot (US); Victrix v. Dry Cargo (US))*. The Polarian courts as well as any other court before which enforcement might be sought will thus most likely extend comity to the jurisdiction of Oceanian Insolvency Courts granted by the OIL Provision and refuse enforcement of the Award.

58 In conclusion, both prerequisites for the application of the OIL Provision as a *loi de police* are fulfilled. The Provision serves a legitimate interest of the Oceanian state in conducting fair and orderly insolvency proceedings, a purpose which would be directly endangered if the Provision were disregarded. Moreover, the enforceability of the Award would be jeopardized by the Provision's non-application which should consequently be applied by the Tribunal as a *loi de police*.

C. UAM Lacked the Capacity to Enter Into an Arbitration Agreement

59 Regardless of the law applicable to the Arbitration Agreement or the OIL Provision's mandatory nature, UAM retroactively lost the capacity to enter into a valid arbitration agreement when the Sales Contract containing the arbitration clause was concluded.

60 To enter into a valid and binding arbitration agreement, a party must have the capacity to do so *(Art. 34 (2) (a) (i) ML; Art V (1) (a) NYC; REDFERN/HUNTER 3-25)*. In international arbitration, the law applicable to the question of capacity of parties is the law applicable to them *(Art. VI (2) Geneva Convention; Art. V (1) (a) NYC)*, i.e. the parties' personal law. In the case of juridical entities, like UAM, the relevant "personal law" is the law of the country of incorporation or its place of business *(LEW/MISTELIS/KRÖLL 6-50; REDFERN/HUNTER 3-27; VAN DEN BERG p. 276)*.

61 Since UAM is both incorporated in Oceania *(St. of Cl. § 4)* and sells and ships its products from Oceania *(Clex. No. 1),* making Oceania its place of business*,* the personal law of UAM is the law of Oceania. Oceanian Insolvency Law voids arbitration agreements *ab initio* when an Oceanian party becomes insolvent *(Proc. Order No. 2 § 5)*. UAM entered insolvency proceedings on April 9, 2008 *(Clex. No. 14)*. As a legal fiction, the OIL Provision thereby retroactively deprived UAM of its ability to enter into a valid arbitration agreement on account of its later insolvency. Capacity is generally defined as the legal possibility of a party to enter into a binding legal relationship on its own intent and in its own name and account *(Anzorena in GAILLARD/DI PIETRO p. 621)*. Therefore, the effect of the OIL Provision amounts to a deprivation of an insolvent party's capacity to enter into any forum selection agreements, including agreements to arbitrate. Due to the retroactivity of this effect, UAM did, from a legal point of view, not possess the capacity to enter into such agreement. Accordingly, there is no valid agreement to arbitrate that could be extended to Respondent and the Tribunal should deny its jurisdiction.

D. International Cross-Border Insolvency Statutes and Principles of Comity Support a Restraint of the Tribunal's Jurisdiction

62 Furthermore, Respondent requests the Tribunal to consider the provisions and spirit of two major efforts in establishing a legal framework in cross-border insolvency cases, namely the UNCITRAL Model Law on Cross-Border Insolvency (hereinafter MLCBI) and the European Community Regulation 1346/2000 (hereinafter EC Insolvency Regulation), as well as the principles of international comity. All of these rules and principles, which aim to frame rules

for the fair and efficient distribution of an insolvent's estate in international bankruptcy cases, do so by staying individual actions of creditors against an insolvent's estate.

63 While the MLCBI is not in force in Danubia, it has been adopted in the countries from which both Claimant and Respondent hail *(Proc. Order No. 2 § 2)* and, as an international effort to harmonize the handling of cross-border insolvencies, offers a persuasive guideline to both judges and arbitrators.

64 The purpose of the MLCBI is to attain legal certainty for trade and investment, fair and efficient insolvency administration and the protection of a debtor's assets (Preamble of the MLCBI). To accomplish these goals, the MLCBI provides that a foreign insolvency representative may apply for recognition of the insolvency proceeding in other jurisdictions, Art. 15 MLCBI. Upon recognition by a foreign court, all individual actions concerning the debtor's assets, rights, obligations or liabilities are stayed, Art. 20 (1) (a) MLCBI. Applied to the current situation, the notice given by Ms. Powers, UAM's insolvency representative *(St. of Cl. § 8)*, of the insolvency proceedings and the ensuing invalidation of the Arbitration Agreement to both Claimant *(Clex. No. 14)* and the SCC Arbitration Institute *(problem p. 30)* is comparable to an application for recognition. As a result, individual actions outside the insolvency proceedings, such as this arbitration, would be stayed in favor of the centralized adjudication before the proper forum, namely the Oceanian Insolvency Court.

65 Likewise, the EC Insolvency Regulation, while not in force in the countries involved, represents a legal consensus of 27 countries, including both civil and common law systems. According to the Regulation, the commencement of insolvency proceedings in the country where the debtor has its main center of interest (Art. 3 (1) EC Insolvency Regulation) "shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceeding", Art 17 (1) EC Insolvency Regulation. Moreover, the law applicable to insolvency proceedings and their effects shall be that of the state in which the insolvency proceedings were opened, Art. 4 (1) EC Insolvency Regulation. Since the main center of interest for UAM was Oceania *(St. of Cl. § 4),* Oceanian Insolvency Law would accordingly be applied to all matters related to the insolvency under the EC Regulation.

66 In addition to these statutes, the principles of international comity provide courts and tribunals with flexible rules permitting them to take into account foreign proceedings to assure an economical and expeditious administration of an insolvent's estate, consistent with just treatment of all creditors *(Cunard v. Salen (US)).* As shown above *(see supra § 50, 53),* the protection and just treatment of all UAM's creditors can only be achieved through centralized

bankruptcy proceedings. Therefore Respondent respectfully requests the Tribunal to extend the same comity to the Oceanian insolvency proceedings as a national court would do *(cf. Victrix v. Dry Cargo (US))* and to stay the present action instigated by Claimant to circumvent the safeguards against unjust enrichment of certain creditors at the expense of others.

67 Concluding, both major international statutes and established principles of comity support Respondent's position that the Tribunal should defer its jurisdiction over Claimant's action, which is in clear defiance of Oceanian law, in order to allow for efficient and universal bankruptcy adjudication by the courts of Oceania.

In summary, the Arbitration Agreement is void by virtue of the law of Oceania as the law applicable. Alternatively, the OIL Provision must be applied as a *loi de police*, or, failing such argument, UAM was nevertheless deprived of its capacity to enter into an arbitration agreement in retrospect. Finally, international cross-border insolvency statutes and the principles of comity advocate the denial of the Tribunal's jurisdiction over Respondent.

III. RESPONDENT IS NOT LIABLE FOR THE BREACH OF CONTRACT BY UAM

68 In repudiation of Claimant's suggestion that "there are several different facts which could serve as good grounds for establishing Universal's liability" *(Cl. Memo. § 87)*, Respondent submits that it holds no liability towards Claimant, as it neither is party to the Sales Contract **(A)** nor assumed any liability thereunder **(B)**. Furthermore, there is no basis for Claimant's assertion that Respondent is liable due to a "group of contracts" **(C)** or that it is appropriate to "pierce the corporate veil" between UAM and Respondent **(D)**.

A. Respondent is not Party to the Sales Contract

69 As a common element of jurisdictions all over the world, generally referred to as *privity of contract*, a contract creates obligations only between the parties to the contract, while third parties cannot be subjected to a burden by a contract which they have not concluded *(Art. 1372 codice civile; § 241 I Bürgerliches Gesetzbuch; MCKENDRICK p. 1168)*. Respondent did not become party to the Sales Contract in any way. Neither did Respondent sign the Sales Contract, nor was it named on the document itself, nor did it ever communicate any intent to become a party *(see supra § 3)*. Moreover, UAM did not act as Respondent's agent neither with actual nor with apparent authority, and Claimant fails to provide any substantiation to support its contention to the contrary *(see supra §§ 4 - 12)*. Accordingly, Respondent is not party to the Sales Contract and thus, with regard to the principle of *privity of contract,* Respondent cannot be held liable for a breach thereof.

B. Respondent did not Assume any Liability Under the Sales Contract

70 Even if Claimant were to allege that Respondent has assumed liability under the Sales Contract by offering to undertake the repairs, Respondent maintains that by undertaking the repairs, it did not act for the purpose of creating or fulfilling any obligations towards Claimant. In fact, no such obligation of Respondent towards Claimant existed. Rather, Respondent's contractual partner was only UAM – it initially sold the Tera cars to UAM *(Proc. Order No. 2 § 15)* - and hence, by offering to cure the defects, Respondent only fulfilled its contractual obligation towards UAM.

71 Furthermore, a reasonable person cannot deduce any intent to assume liability from the mere circumstance that a third person who is not party to the contract performs a part or the entire contract *(FRANK p. 279)*. Even more, Respondent clearly stated that it would undertake the repairs "without admission of liability" and that "UAM is, of course, responsible [to Claimant] for the condition of the Tera cars" *(Clex. No. 4; emph. add.)*. With this in mind, no reasonable person in the position of Claimant could have interpreted Respondent's offer to repair the cars as an assumption of liability for the defects of the cars. Hence, Respondent did not assume any obligation under the Sales Contract and is therefore not liable for the breach committed by UAM.

C. Respondent is not Liable Under a "Group of Contracts" Theory

72 Claimant contends that the Repair Agreement and the Sales Contract are closely related, allegedly resulting in Respondent's liability for the breach of the Sales Contract *(Cl. Memo. §§ 59, 96 - 98)*. First and foremost, such an approach is not only unfounded by legal doctrine or scholarship, it also fundamentally contradicts the acknowledged principle of *privity of contracts*. As delineated above *(see supra § 69)*, this principle provides that obligations under a contract can only arise as between the parties of the contract, irrespective of any connection to another contract. Accordingly, a "group of contracts" theory is no basis for holding Respondent liable.

73 Moreover, Claimant appears to deduce Respondent's liability from the mere fact that the latter "played a major role in the performance of the [Sales Contract]" *(Cl. Memo. § 97)* by offering to repair the defective cars *(Clex. No. 4)*. Claimant thereby merely repeats its "group of companies" argumentation which has been reputed above *(see supra §§ 13 - 33)*.

D. The "Group of Companies" Doctrine or "Piercing the Corporate Veil" Considerations do not Justify an Extension of Liability

74 Claimant alleges that Respondent is liable for the breach of the Sales Contract committed by UAM by applying the "group of companies" doctrine *(Cl. Memo. §§ 90 - 91)* and general piercing the corporate veil considerations *(Cl. Memo. §§ 92 - 95)*. Countering Claimant's first allegation, Respondent maintains that the "group of companies doctrine" is no basis for holding Respondent liable *(see supra §§ 13 - 33)*.

75 Claimant further seems to refer to general "piercing of the corporate veil" considerations *(Cl. Memo. §§ 92 - 95)* by its allegation that Respondent exercised "remarkable control" over UAM *(Cl. Memo. § 95)* and that it "played a significant role in the insolvency of UAM" *(Cl. Memo. § 94)*. Claimant thereby appears to conclude that the distinct corporate forms should be disregarded and therefore Respondent should be held liable for the breach of the Sales Contract.

76 Above all, as a general principle of company law, a limited liability company – such as UAM *(St. of Cl. § 4)* - is an entity separate and distinct from its shareholders - such as Respondent - who are liable only to the extent that they have contributed to the company's capital *(Salomon v. Salomon & Co. Ltd. (England); VANDEKERCKHOVE p. 1)*. Respondent acknowledges that courts have, in certain cases, extended this liability under the heading of "piercing the corporate veil". Piercing, however, is a "truly exceptional doctrine" *(Multiponics v. Herpel (US))* which may be taken into consideration only in "exceptional cases" *(Bridas v. Turkmenistan (US))* under "special circumstances" and with "great caution" *(Quinn-Matchet v. Parker (US); Thomsen v. Peterson (US))*.

77 The facts of the present case do not allow to qualify it as one of these rare instances, as none of the following three cumulative factors established in case law is met: First, there must be a lack of independent existence of the subsidiary, arising from lack of real-world existence, disregard of corporate forms and formalities or from excessive exercise of control *(BLUMBERG 10-8)*. Second, the corporate form must have been abused in order to accomplish a fraudulent, inequitable, or wrongful purpose *(BLUMBERG 10-8)*. Third, there has to be a causal relationship between the defendant's wrongful conduct and the plaintiff's loss *(BLUMBERG 10-8)*.

78 As the first precondition indicates, the corporate veil is typically pierced only between a parent and a subsidiary *(Bridas v. Turkmenistan (US); Carte Blanche v. Diners (US); Fish et al. v. East (US); Integrated Business Information Service v. The Dun & Bradstreet (US); Main Bank of Chicago v. Jerome Baker et al (US); Medco Research v. Fujisawa Pharmaceutical (US))*. A common understanding of the

term "subsidiary company" implies that another company holds more than 50 % of its shares or factually controls the company by holding a majority of voting rights in the board of directors *(cf. sec. 46 Corporations Act 2001 (Australia); sec. 1159 Companies Act 2006 (England))*. As the facts of the case show, Oceania Partners held 90 % of UAM's shares, while Respondent held only the remaining 10 % *(Proc. Order. No. 2 § 12)*. In addition, Respondent did not have the right to veto decisions agreed upon by the majority of the Governing Board, consisting of four members of Oceania Partners and only one representative of Respondent *(Proc. Order No. 2 § 12)*. Accordingly, UAM cannot be qualified as Respondent's subsidiary. It would be prima facie inequitable to hold a minority shareholder liable for any of the company's actions which it could not block in order to avert any ensuing damages. If the Tribunal should nevertheless consider to pierce the corporate veil, Respondent maintains that the second part of the first precondition, a lack of independent existence of the "subsidiary", is not met. This would require an absolute control of the parent company typically indicated by factors such as: control of (almost) all shares, common management, direction of the subsidiary's affairs by the parent and non-observance of corporate formalities *(Worldwide Carriers v. Aris Steamship (US))*. Not a single of these prerequisites, outlined in the aforementioned case, is met in the case at hand. Less exercise of control than continuous control over the day to day decision-making of the subsidiary is not sufficient for piercing purposes *(De Castro v. Sanifill (US); Townley v. Emerson Elec. (US); VANDEKERCKHOVE 3.7.3)*. The day to day management of UAM, however, was at the sole responsibility of Oceanian citizens unconnected to Respondent *(Proc. Order No. 2 § 12)*. Hence, Respondent did not have a degree of control over UAM which would allow the corporate veil to be lifted. Any influence Respondent had did not exceed the influence any supplier has on its business partner.

79 As to the second prerequisite, Claimant alleges interferences in UAM's affairs on part of Respondent leading to UAM's insolvency *(Cl. Memo. §§ 94, 95)*. This allegation is unsupported by the facts of the case. What Claimant considers "interference" is nothing but the legitimate decision not to finance UAM's adventurous expansion plans, providing for the establishment of subsidiaries in several countries to which it re-exported cars *(Proc. Order No. 2 § 32)*. As it turned out, Respondent's concerns have been confirmed, since UAM finally became insolvent during and due to its expansion *(Proc. Order No. 2 § 32)*. Respondent's decision not to support this economically hazardous expansion cannot be classified as misconduct, but rather as a result of common business sense, accurate market analysis and an apprehension of the then-imminent crisis in the auto industry *(about the crisis: Financial Times December 19, 2008; Frankfurter Allgemeine Zeitung January 4, 2009; Handelsblatt January 13, 2009; Il Sole 24 Ore January 14, 2009)*.

80 Claimant also appears to perceive wrongful behavior in Respondent's unwillingness to allow UAM to sell cars other than those manufactured by Respondent *(Cl. Memo. ∫ 94)*. Thereby, Claimant might also refer to Respondent choosing Patria Importers as its new distributor, a company that also sells cars produced by other manufacturers *(Proc. Order No. 2 ∫ 33)*. Such an argument would fail to recognize the different nature of the two situations. UAM was founded by Respondent and Oceania Partners for the sole purpose of distributing Respondent's cars in Oceania and the surrounding region *(Proc. Order No. 2 ∫ 12)*. Indeed, UAM stands for "Universal Auto Manufacturers" *(Proc. Order No. 2 ∫ 11)*. Therefore, Respondent's reputation would be seriously damaged if UAM, a distributor bearing its name, sold cars of other manufacturers, implying a lack of trust in its main brand.

81 On the other hand, its new partner Patria Importers bears a name which is not associated with that of Respondent. Therefore, the latter's reputation is not harmed if Patria Importers sells cars of different manufacturers. Moreover, as Respondent was left without a distributor in Oceania after UAM's insolvency *(Clex. No. 15)*, it had to react quickly to this development by entering into a joint venture with an already existing company. To establish a new company selling exclusively Respondent's cars would have been a time-consuming and logistically challenging decision. With this in mind, Respondent's resistance to UAM's expansion plans was both comprehensible and necessary from an economic point of view and thereby cannot qualify as "misconduct". Accordingly, the second precondition for veil-piercing is also not fulfilled.

82 Finally, the third prerequisite requiring a causal relationship between misconduct and loss is not fulfilled, as Respondent at no time conducted itself wrongfully. Claimant's loss derives simply from the insolvency of its contractual partner, an intrinsic risk of a free market economy (see e.g. *Insolvency Statistics,* showing that in 2007 and 2008, more than 250,000 companies became insolvent in Western Europe alone).

83 Thus, there is no legal basis to pierce the corporate veil and the Tribunal should respect the separate and distinct corporate identities of UAM and Respondent as well as the limited liability of Respondent as one of UAM's shareholders.

In summary, Respondent never became party to the Sales Contract and also did not assume any liability thereunder. Neither does a "group of contracts" construction, the "group of companies" doctrine or "piercing the corporate veil" apply in the present case. Respondent is thus not liable for the breach of the Sales Contract.

IV. CLAIMANT WAS NOT AUTHORIZED TO AVOID THE SALES CONTRACT

84 In response to Procedural Order No. 1 § 13, Respondent submits that - contrary to Claimant's allegation *(Cl. Memo. §§ 64 et seq.)* - the breach of contract committed by UAM was not fundamental within the meaning of Art. 25 CISG and therefore Claimant was not authorized to avoid the Sales Contract pursuant to Art. 49 (1) (a) CISG **(A)**. Even if the Tribunal were to decide that a fundamental breach has occurred, Claimant lost its right to avoid the Sales Contract according to Art. 39 (1) CISG, because it failed to notify UAM of the lack of conformity within a reasonable time **(B)**. Moreover, Respondent submits that Claimant's right to avoid the Sales Contract was suspended until Respondent had undertaken to cure the defects according to the prohibition of *venire contra factum proprium inter alia* embodied in Art. 48 (2) CISG **(C)**. If the Tribunal disagrees, it is Respondent's position that Claimant was only entitled to avoid the Sales Contract with regard to the first consignment, because the latter did not have good grounds to conclude that a fundamental breach would occur with respect to future instalments, as required by Art. 73 (2) CISG **(D)**.

A. The Breach of the Sales Contract Committed by UAM Does not Amount to be Fundamental in Terms of Art. 25 CISG

85 According to Art. 49 (1) (a) CISG, only a fundamental breach in the sense of Art. 25 CISG establishes the right to avoid the contract. One of the major policy considerations that underlies the Convention is the objective to keep the contract alive and to avoid unnecessary transfer of goods *(HUBER/MULLIS p. 199)*. Avoidance should hence be regarded as *ultima ratio (Huber in MÜKO Art. 49 § 3; PILTZ § 5-229; Magnus in STAUDINGER Art. 49 § 4)*. Respondent therefore rejects Claimant's assertion *(Cl. Memo. §§ 69, 75)* that the non-conformity of the 25 cars delivered by UAM caused such detriment to Claimant as to substantially deprive it of what it was entitled to expect under the Sales Contract pursuant to Art. 25 CISG **(1)**. In any case, Respondent maintains that – contrary to Claimant's argument *(Cl. Memo. §§ 76 - 77)* - the former as well as a reasonable person of the same kind in the same circumstances was unable to foresee the alleged substantial detriment **(2)**.

1. Claimant was not substantially deprived of what it was entitled to expect under the Sales Contract

86 In repudiation of Claimant's assertion *(Cl. Memo. § 71),* Respondent submits that the breach committed by UAM does not classify as a fundamental breach in terms of Art. 25 CISG, because the delivered Tera cars were not unfit for resale **(a)**, the delivery of the cars did not

cause Claimant's precarious situation **(b)** and Respondent's offer to cure the breach prevented Claimant from being substantially deprived of what it was entitled to expect under the Sales Contract **(c)**.

(a) Claimant still could have resold the Tera cars

87 In accordance with Claimant's allegations *(Cl. Memo. § 71),* the contractual agreement of the parties is of paramount importance in defining whether a breach substantially deprives the non-breaching party of what it could expect under the contract *(HUBER/MULLIS p. 214)*. The parties can expressly or implicitly attach particular weight to certain obligations with the consequence that their breach will be regarded as fundamental *(Schlechtriem in SCHLECHTRIEM/SCHWENZER Comm. Art. 25 § 9)*. Since the parties did not specify what amounts to a fundamental breach under the Sales Contract – as Claimant correctly points out *(Cl. Memo. § 71)* - the relevant question is whether or not the general purpose of the contract has been frustrated *(Magnus in STAUDINGER Art. 25 § 13)*.

88 Claimant undisputedly ascertained that the purpose of the Sales Contract was delivery of the Tera automobiles for resale *(Cl. Memo. § 66)*. Although the 25 delivered Tera cars were not exactly in the condition expected by Claimant due to an issue relating to the Engine Control Unit (hereafter ECU) *(St. of Cl. § 11)*, they were still somewhat fit for retail. It is acknowledged that as long as the goods are not totally useless to the buyer, he is restricted to claims for damages and mitigation, because the unwinding of a contract would cause additional losses and risks for the goods *(Schlechtriem in SCHLECHTRIEM/SCHWENZER Comm. Art. 25 § 21 a)*. Thus, if the goods can be resold, even at a giveaway price, avoidance should not be allowed *(Schlechtriem in SCHLECHTRIEM/SCHWENZER Comm. Art. 25 § 21 a)*. Claimant as a car trader selling both new and used cars *(St. of Cl. § 3)* would have been able to market the Tera cars for a lower price: they were brand new and everything was working just fine - except for the ECU, which in turn could be repaired without much difficulty *(Clex. No. 12)*. Bargain hunters are usually enthusiastic to buy new but defective goods for a diminished price – as indicated by the fact that factory outlets selling second-rate products are by now a major business segment *(ECOSTRA)*.

89 This view was also taken in a case Claimant itself relies on *(Cl. Memo. § 71)*. The court refused the defendant's request for avoidance on the grounds that he still could have retailed the defective goods. It further ruled that the contract could have been avoided only if the goods were totally unfit for resale *(Oberlandesgericht Frankfurt 1994 (Germany))*. As discussed above, also the delivered Tera cars still could have been resold. Accordingly, the purpose of the Sales

Contract was not completely frustrated, meaning that Claimant was not substantially deprived of its expectations.

(b) The breach of contract did not cause Claimant's precarious situation

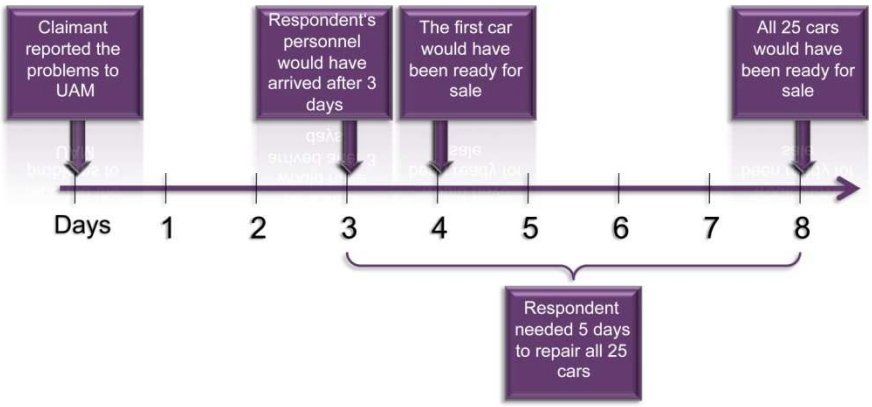
90 Claimant further argues that its expectations have been disappointed by alleging that it was unable to gain any profit and that it had almost no other cars in store, which apparently might have caused the insolvency of its business *(Cl. Memo. § 72)*. While Respondent regrets Claimant's "extremely difficult position" *(Cl. Memo. § 72)*, the negative development of its business situation was in no way related to the delivery of non-conforming cars. Claimant's situation cannot have been as desperate as it purports. It still had cars for sale on stock *(Clex. No. 2)*, and seemingly it was also in funds to pay for a second deposit amounting to a total of USD 15.400 after accepting an offer from Patria Importers *(Proc. Order No. 2 § 30; Clex. No. 9)*. Notwithstanding, neither UAM nor Respondent can be held accountable for Claimant's inability to arrange for sufficient stock. As the Sales Contract does not provide for delivery at any fixed date, Claimant was not entitled to expect the consignment from UAM to replenish its stock in time. Quite to the contrary, the contract terms allow for delivery as space is available *(Clex. No. 1 § 3),* meaning that delivery still would have been in compliance with the Sales Contract if the first consignment had arrived after months. By planning its business activities accordingly *(Proc. Order No. 2 § 28)*, it seems that Claimant imprudently put all eggs in one basket, and hoped that there would be space available on a ship before Claimant completely ran out of stock. Yet, Respondent must not be held responsible for the risk Claimant created by its abovementioned misjudgment, causing itself to face the likelihood of becoming insolvent. Respondent therefore submits that the alleged difficult situation Claimant encountered is not to be considered in determining the fundamentality of the breach.

(c) Respondent's offer to cure counteracts the breach from being fundamental

91 Respondent further agrees to Claimant's correct assessment *(Cl. Memo. § 82)* that a breach is not fundamental if the defective goods can easily be repaired and the seller is willing and able to cure the defects without unreasonable delay and without causing the buyer unreasonable inconvenience *(HONNOLD Art. 48 § 296; Müller-Chen in SCHLECHTRIEM/SCHWENZER Art. 48 § 15; Magnus in STAUDINGER Art. 48 § 30)*. For this reason, Respondent maintains that – contrary to Claimant's allegation *(Cl. Memo. § 81)* - its offer to cure prevented Claimant from being substantially deprived of what it was entitled to expect under the Sales Contract, meaning that there was no fundamental breach. As a preliminary matter, it is irrelevant in what way the seller intends to accomplish repairs *(PILTZ § 4-68; Müller-Chen in*

SCHLECHTRIEM/SCHWENZER Art. 48 § 6). The seller may therefore commission this task to a third person (*Saenger in BAMBERGER/ROTH Art. 37 § 4)* or perform repair itself – either way, the seller is entitled to a right to cure, as long as a breach can be cured within the limitations of Art. 48 (1) CISG and a serious offer to repair is made.

92 In the present case, Respondent offered to cure UAM's breach of the Sales Contract by sending special equipment and specially trained personnel to Mediterraneo *(Clex. No. 4).* Contrary to Claimant's contention that UAM could not remedy the defects within a reasonable time *(Cl. Memo. § 84),* Respondent maintains that it was capable to cure the breach without unreasonable delay. All of the 25 cars were fixed within only five working days in Equatoriana *(Proc. Order No. 2 § 22).* As Mr. Steiner, Regional Manager for Respondent *(St. of Cl. § 13)* ascertained, this result could have been equally achieved while the cars were in Mediterraneo *(St. of Cl. § 23)*, since Respondent employed the same personnel and equipment to repair the cars as it had planned to send to Claimant's premises *(Proc. Order No. 2 § 23).* Thus, as Respondent's service personnel and equipment would have needed only three days to arrive *(Clex. No. 4)* and Respondent was able to find and fix the problem on the very first day *(Proc. Order No. 2 § 22)*, Claimant would have had at least one car ready for sale after only four days – and all of the other cars in the course of the following four working days *(see timeline).*



Claimant itself admits that seven or ten days would have been a reasonable time to cure *(Cl. Memo. § 84)*, and Respondent was even able to repair all 25 cars in significantly less time *(Proc. Order No. 2 § 22).* With this in mind, Claimant's contention lacks any substance, and the Tribunal should hold that Respondent was capable to cure the defects without unreasonable delay.

93 Claimant further cannot contest that Respondent's capability to fix the cars within five days is irrelevant on the grounds that "there were no circumstances from which Claimant could conclude this" *(Cl. Memo. § 84).* When Claimant asked Mr. Steiner to guarantee that the first

cars would be ready for sale within one week, Mr. Steiner replied that he was sure it would happen *(St. of Cl. § 17)*. What is in fact irrelevant is Respondent not providing for any such guarantee, as the seller's right to cure does not presuppose any guarantee that repair will be successful, much less within a certain period of time. Considering the fact that the seller may be permitted to undertake several attempts at subsequent performance *(Müller-Chen in SCHLECHTRIEM/SCHWENZER Comm. Art. 48 § 6)*, meaning that it is not necessary to accomplish repairs at first try, it follows that a guarantee is not a requirement for a right to cure under Art. 48 (1) CISG. Furthermore, providing for a guarantee would have constituted a modification of contract, as no guarantee was granted in the original Sales Contract. However, a seller cannot be compelled to agree to such a considerable modification in order to be entitled to a right to cure under the original contract. Consequently, Respondent's offer to undertake the repairs and its assurance that Claimant would have cars for sale within one week *(St. of Cl. § 17)* was perfectly sufficient to obtain a right to cure under Art. 48 (1) CISG.

94 Respondent further rejects Claimant's opprobrious allegation that Respondent was not able to cure the defects without causing Claimant unreasonable inconvenience in terms of Art. 48 (1) CISG *(Cl. Memo. § 83)*. The likelihood for Claimant to become insolvent by making no income from the resale of the Tera cars cannot be regarded as 'unreasonable inconvenience' within the meaning of Art. 48 (1) CISG, as Claimant purports *(Cl. Memo. § 83; St. of Cl. § 18)*. Claimant could have resold the cars, albeit for a diminished price *(see supra §§ 87 - 89)*. Moreover, Respondent is not responsible for Claimant's apparent lack of competence to coordinate its stock *(see supra § 90)*. If the uncertainty whether or not the Tera cars would be ready for sale within a week or only within ten days perturbs Claimant's business to such an extent, this is certainly regrettable, but Respondent's offer to cure has no causal link to Claimant's precarious situation. Once again: according to the contract terms, the cars could have arrived at any time, it was blind chance that space was available so soon. Assuming the cars' defects would have been detected and repaired at UAM's premises prior to delivery and sent to Mediterraneo afterwards, Claimant would have no legal grounds to blame Respondent for running out of stock. Neither can the happenstance that the delivery actually did arrive early create such grounds.

95 Furthermore, Claimant cannot contend that the possibility of a strike taking place at the airport of Mediterraneo "aggravated matters" *(Clex. No. 10)* and caused Claimant unreasonable inconvenience *(Cl. Memo. § 83)*. As a preliminary matter, the strike never occurred *(Proc. Order No. 2 § 35)*. Besides, such a strike would have been beyond Respondent's sphere of control and therefore may not deprive it of its right to cure under Art. 48 (1) CISG. This idea is

expressed in Art. 79 CISG: where the promisor fails to perform due to an unforeseeable impediment beyond his control, he is exempted from liability towards the promisee. It has been held that a strike of flight control personnel is such an impediment beyond one's control *(Schwenzer in SCHLECHTRIEM/SCHWENZER Art. 79 § 24)*. Accordingly, this idea should also govern the present situation, although liability is not at issue here. Respondent simply cannot be burdened with the risk of such a strike, as it is both beyond its control and unforeseeable: Whereas the threat of the strike was only featured in news broadcasts in Mediterraneo *(Proc. Order No. 2 § 35)*, a company like Universal selling in more than 120 countries *(St. of Cl. § 6)* cannot reasonably be expected to observe the news in each of these countries every day. Respondent may therefore not be deprived of its right to cure on grounds of the mere possibility that such a strike could have occured.

96 As Respondent was both willing and capable to cure the breach of the Sales Contract committed by UAM within the limitations of Art. 48 (1) CISG, i.e. without unreasonable delay and without unreasonable inconvenience for Claimant, Respondent was entitled to a right to cure. The latter's offer to cure prevented Claimant from becoming substantially deprived of its essential expectations and thus, the breach committed by UAM is not fundamental in the sense of Art. 25 CISG.

2. The alleged substantial detriment was unforeseeable

97 Respondent repudiates Claimant's submission *(Cl. Memo. § 76 - 77)* that UAM was able to foresee that the delivery of 25 non-conforming cars might have caused Claimant a substantial detriment. Therefore, the breach committed by UAM is not fundamental in terms of Art. 25 CISG, even if the Tribunal holds that Claimant is substantially deprived of its expectations under the Sales Contract.

98 As Claimant correctly states *(Cl. Memo. § 76),* the relevant time for assessing foreseeability is the date of the conclusion of the contract *(HUBER/MULLIS p. 216)*. Respondent agrees with Claimant's contention *(Cl. Memo. § 77)* that at the time UAM entered into the Sales Contract, the latter was aware that Claimant operated as a sole car trader *(St. of Cl. § 3)* and that banks in Mediterraneo did not furnish businesses with working capital *(Proc. Order No. 2 §17)*. Yet, no reasonable person in the situation of UAM could have concluded from these facts alone that a delivery of non-conforming goods would result in Claimant's insolvency without any information on Claimant's cash reserves or its remaining inventory. Most notably, Claimant's urgent need for retailing the cars was not expressed in the Sales Contract and Claimant failed to provide any evidence that it informed UAM by any other means at the time of contract

conclusion. In light of this, Claimant cannot reasonably maintain that UAM was able to foresee any substantial detriment.

99 Above all, Respondent itself must have been able to foresee the alleged substantial detriment, since it is Respondent from whom Claimant seeks reimbursement. In general, the foreseeability element of Art. 25 CISG serves to protect the party which runs the risk of being held liable for the fundamental breach. Respondent has never been party to the Sales Contract – if UAM as the contractual partner itself already is unable to foresee any substantial detriment, how should a non-involved party like Respondent be capable thereof? In fact, Respondent did not know any details of Claimant's financial position *(Proc. Order No. 2 § 17)* or that it spent almost all of its working capital for the down payment. Respondent therefore could not anticipate that Claimant might face financial difficulties. Hence, neither UAM and even less Respondent or a reasonable person in their situation was able to foresee that Claimant might confront the risk of becoming insolvent.

100 In conclusion, Claimant was neither substantially deprived of what it was entitled to expect under the Sales Contract, nor was the alleged detriment foreseeable for UAM, Respondent or any reasonable person in the same situation. The breach committed by UAM is thus not fundamental within the meaning of Art. 25 CISG, and therewith Claimant had no legal basis to avoid the Sales Contract.

B. Claimant Lost any Right to Avoid the Sales Contract According to Art. 39 (1) CISG

101 Even if the Tribunal should conclude that the breach committed by UAM was fundamental, Claimant lost its right to rely on the lack of conformity by reason of its failure to give proper notice of the defects to UAM within a reasonable time after it became aware of them according to Art. 39 (1) CISG.

102 First of all, Claimant's statement that it did report the problem the day after discovering the non-conformity *(Cl. Memo. § 80)* is incorrect. It was already on February 18, 2008 that Claimant noted the engines did not run smoothly when driving the cars from the port to the showroom *(St. of Cl. §§ 10, 11)*. However, it took the allegedly almost-insolvent Claimant four entire days until it finally reported these findings to UAM on February 22, 2008 *(St. of Cl. §§ 11, 12)*. As the period for giving notice under Art. 39 (1) CISG begins when the buyer has actual knowledge of the lack of conformity *(Schwenzer in SCHLECHTRIEM/SCHWENZER Comm. Art. 39 § 19)*, Claimant would have needed to notify UAM within a reasonable time

after February 18. Considering the circumstances of this very case, the lag of four days is not reasonable in terms of Art. 39 (1) CISG.

103 In international trade, it is controversial what timeframe can be regarded as a 'reasonable time' *(Schwenzer in SCHLECHTRIEM/SCHWENZER Comm. Art. 39 § 17)*. Some courts tend to assume short periods of only few days *(Landgericht Tübingen 2003 (Germany); Gerechtshof Arnhem 2004 (Netherlands); Kantonsgericht Appenzell Ausserrhoden 2006 (Switzerland))*. Although other courts approve of longer periods, it must be noted that such liberal time limits might have been adequate when the Convention was drafted in 1980 and notice was mainly given by way of ordinary mail. However, nowadays electronic messaging has replaced the traditional means of communication, allowing for the transfer of an e-mail in a matter of seconds. Long periods of several weeks for notifying the seller are therefore out-dated and no longer adequate.

104 There is widespread agreement that all circumstances of the specific case must be considered when calculating the period, and that special circumstances may advocate a reduction or an extension thereof *(Sono in BIANCA/BONELL Art. 39 2.4; HERBER/CZERWENKA Art. 39 § 4; Schwenzer in SCHLECHTRIEM/SCHWENZER Comm. Art. 39 §§ 16, 17)*. Taking into account the precarious situation Claimant allegedly found itself in, the period needs to be quite short: Claimant purports that enduring only a few days without the Tera cars might have put an end to its business *(Clex. No. 13)*. With this in mind, it would be fairly unreasonable to grant Claimant a period of four days for giving notice to UAM. Claimant itself supposes seven or ten days to be a reasonable time to await repair *(Cl. Memo. 84)*. This would require Respondent's personnel to undertake the complicated repairs in only four or seven days, given that their arrival already would have taken three days *(Clex. No. 4)*. Claimant taking four days for submitting an ordinary notice is disproportionate to the period of four or seven days which Respondent would have to accomplish the repair of 25 cars. For this reason, the period for notifying UAM must be calculated shorter than four days: In light of Claimant's urgent need for salable cars and its demand for prompt repairs, Claimant itself would have needed to give prompt notice within only one or two days. This result is in line with the fact that the period must be calculated shorter if the buyer wants to reject the goods than if he only intends to claim damages *(Schwenzer in SCHLECHTRIEM/SCHWENZER Comm. Art. 39 § 16)*. Thus, Claimant's rejection of the delivery after realizing that it did not want to await repair makes a short period of one or two days even more adequate and reasonable in terms of Art. 39 (1) CISG. There are no reasons to grant Claimant a longer period: it was able to give prompt notice, as Claimant knew who to contact, it knew the symptoms of the defects, and as sole proprietor of Reliable Auto Imports it did not need to await a long-lasting internal

decision making process. Consequently, as Claimant calmly let four days lapse before it suddenly became impatient about an in-time repair, it consciously forfeited its right to rely on the lack of conformity according to Art. 39 (1) CISG, meaning that it lost the right to exert the remedy of contract avoidance.

C. Claimant was Estopped From Cancelling the Sales Contract Under the Principle of *Venire Contra Factum Proprium*

105 If the Tribunal should not follow the foregoing line of argumentation, Respondent maintains that Claimant was nevertheless estopped from cancelling the Sales Contract. It is widely recognized that if the buyer accepts an offer for subsequent performance, he is bound to it according to general legal principles *(Huber in MÜKO Art. 49 § 21; Müller-Chen in SCHLECHTRIEM/SCHWENZER Comm. Art. 48 § 27).*

106 By stating that it was "very pleased that Universal will undertake the repairs" *(Clex. No. 5)*, Claimant explicitly accepted Respondent's offer to cure the defects and was therefore bound to its acceptance. It follows that Claimant was therefore estopped from avoiding the Sales Contract, as the subsequent cancellation thereof is inconsistent with the general principle of *venire contra factum proprium* underlying the Convention as an element of the notion of good faith in Art. 7 (1) CISG *(MAGNUS pp. 480, 481).*

107 This principle is particularly implemented in Art. 48 (2) CISG. "If the buyer has, expressly or by remaining silent, "accepted" the seller's offer under Art. 48 (2) CISG, the seller's right to cure takes precedence over the buyer's right to avoid the contract" *(HUBER/MULLIS p. 221).* Art. 48 (2) CISG provides that during the time the seller has indicated for his attempts at cure, the buyer may not resort to any remedy which is inconsistent with performance by the seller *(HUBER/MULLIS p. 221)*; i.e. above all avoidance of the contract. If the buyer wishes to reject the seller's offer to remedy a defect within a specified period of time, he must object without delay *(Müller-Chen in SCHLECHTRIEM/SCHWENZER Comm. Art. 48 § 2).* Hence, the right to remedy by subsequent performance pursuant to Art. 48 (2) CISG suspends the buyer's right to declare avoidance for the time he has agreed on for the repairs to be performed.

108 Although Respondent could not precisely answer what period of time it would need to repair the cars *(Clex. No. 6),* Claimant accepted the former's offer without a time limitation. After announcing that it is "very pleased that Universal will undertake the repairs", Claimant parenthetically mentioned "I would just ask how long it will take for the cars to be fixed" *(Clex. No. 5)*, instead of stating, for instance, "I will just accept your offer to cure if you can guarantee that the cars will be fixed within one week". As the latter's statement can reasonably

be regarded as its consent to repairing the cars, Claimant was estopped from avoiding the Sales Contract. Rather, it was obliged to await the repair pursuant to the general principle of *venire contra factum proprium* embodied in Art. 48 (2) CISG.

D. Claimant was not Authorized to Cancel the Sales Contract With Respect to the Future Instalments, Art. 73 (2) CISG

109 In accordance with Claimant's assertion *(Cl. Memo. § 73)* the breach committed by UAM occurs only with respect to the first consignment. Even if the Tribunal should hold that the delivery of non-conforming cars in the first instalment did constitute a fundamental breach, such a partial breach still did not entitle Claimant to avoid the entire Sales Contract. In support hereof, Arts. 73 (1), 51 (1) CISG provide that the exertion of remedies under Arts. 46 - 50 CISG is only permitted concerning the non-conforming part of a contract. If the aggrieved party wants to cancel the entire contract, the promisor's failure to perform any of his obligations in respect of any delivery must give the aggrieved party good grounds to conclude that a fundamental breach would occur with respect to future instalments, Art. 73 (2) CISG.

110 Contrary to Claimant's allegation *(Cl. Memo. § 73)*, the defectiveness of the first consignment did not justify Claimant to have the apprehension that the same problem could arise with respect to the outstanding cars. In order to underline its allegation *(Cl. Memo. § 73),* Claimant relies on a decision of the Higher Regional Court of Cologne *(Oberlandesgericht Cologne 2002 (Germany))*, in which the contract provided for the delivery of seasonal designer clothes. Almost all of the clothes delivered in the first consignment proved to be unmerchantable. Thereupon, the seller merely pronounced that he intended to "try" to deliver goods in a faultless fit or to find a solution. Even more, the seller stated that he would be unable to fix all of the miscut clothes. It was therefore highly uncertain whether the buyer would receive merchantable fashion products for the summer season, which in that case was about to start. On these grounds, the court ruled that the buyer was entitled to apprehend that similar difficulties would arise with the goods still to be delivered and was therefore authorized to avoid the entire contract.

111 Compared to the case in question, the relevant facts differ significantly. Respondent offered Claimant to fix all of the 25 defective cars *(Clex. No. 4)*, and it assured Claimant that the latter would have cars for sale within one week *(St. of Cl. § 17)*. Moreover, as Claimant repeatedly purchased Universal cars from UAM *(Proc. Order No. 2 § 17)* establishing a strong foundation

of trust, this cannot be unsettled by just one defective delivery. Thus, Claimant was not entitled to have the apprehension that future deliveries would show any defects again.

Notwithstanding, Respondent submits that nobody could reasonably have believed that UAM would deliver defective cars again after it already had done so once. Being aware of the difficulties after Claimant informed the Sales Manager of UAM *(St. of Cl. § 12)*, UAM as an experienced distributor would have ensured that the same problem would not arise again. Finally, as this incident was the first time UAM had ever heard of any such difficulty *(St. of Cl. § 12)* and as the new model of the Tera automobile received enthusiastic reviews in the trade press before *(St. of Cl. § 9),* the problems that occurred appeared to be an unprecedented exception and were therefore unlikely to recur.

112 Taking into account all the circumstances mentioned above, Respondent respectfully requests the Tribunal to find that Claimant did not have good grounds under Art. 73 (2) CISG to conclude that the same problems would arise with regard to future instalments, which might have resulted in a fundamental breach. As a result, Claimant was not authorized to cancel the entire Sales Contract and hence, this cancellation was unjustified.

In summary, the breach of contract committed by UAM was not fundamental within the meaning of Art. 25 CISG, thus not authorizing Claimant to avoid the Sales Contract pursuant to Art. 49 (1) (a) CISG. Moreover, Claimant lost any right to avoid the Sales Contract according to Art. 39 (1) CISG, or, failing such argument, this remedy was suspended according to the prohibition of *venire contra factum proprium.* Finally, Claimant was not entitled to avoid the Sales Contract with regard to future consignments pursuant to Art. 73 (2) CISG.

REQUEST FOR RELIEF

In light of the above made submissions, Counsel for Respondent respectfully requests the honorable Tribunal to find that:

- Respondent is not bound by the Arbitration Agreement contained in the Sales Contract between Claimant and UAM **(I.)**
- The Arbitration Agreement is void by virtue of Oceanian Insolvency Law **(II.)**
- Respondent is not liable for the breach of the Sales Contract committed by UAM **(III.)**
- No fundamental breach has occurred and therefore Claimant was not entitled to avoid the Sales Contract **(IV.)**