

**SIXTH ANNUAL  
WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL ARBITRATION  
MOOT**

HONG KONG - MARCH 2009

JOSEPH TISK, DOING BUSINESS AS RELIABLE AUTO IMPORTS, *CLAIMANT*

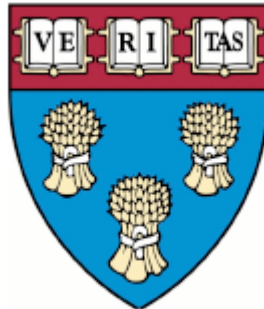
V.

UAM DISTRIBUTORS OCEANIA LTD, *FIRST RESPONDENT*

AND

UNIVERSAL AUTO MANUFACTURERS, S.A., *SECOND RESPONDENT*

**MEMORANDUM FOR RESPONDENT**



SARAH BECKERMAN  
JUSTIN KLIGER  
JONATHAN PASSARO  
MATTHEW SULLIVAN  
DIORA ZIYAEVA

*Counsel for RESPONDENT*

**HARVARD LAW SCHOOL  
CAMBRIDGE, MASSACHUSETTS USA**

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## ABBREVIATIONS

&	And
Arb.	Arbitration
Art./Arts.	Article/Articles
BGH	Bundesgerichtshof [Federal Supreme Court—Germany]
Cir.	Circuit
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
Cl. Ex.	CLAIMANT’S Exhibit
Cl. Mem.	CLAIMANT’S Memorandum
Co.	Company
Conv. Agency	Convention on Agency in the International Sale of Goods (1983)
Corp.	Corporation
Ct.	Court
Dist.	District
ECU	Engine Control Unit
Ed.	Edition
ed./eds.	Editor / Editors
e.g.	exemplum gratii [for example]
Et seq.	et sequens [and the following]
F.Supp.	Federal Supplement [United States Federal District Court reporter]
Fed.	Federal
Ger.	Germany
GmbH	Gesellschaft mit beschränkter Haftung [Legal entity – Ger.]
ICC	International Chamber of Commerce
ICC Rules	Rules of Arbitration of the International Chamber of Commerce
id.	idem [the same]
i.e.	id est [that is]

Inc.	Incorporated
Int'l	International
Ins.	Insurance
Ltd.	Limited
Mfg.	Manufacturing
Nat'l	National
No./Nos.	Number / Numbers
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 7 June 1959
¶ / ¶¶	paragraph / paragraphs
Para./para.	paragraph
Proc. Ord. No. 2	Clarifications given by the President of the Tribunal in Procedural Order No. 2
§	Section
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SCC Rules	Arbitral Rules of the Arbitration Institute of the Stockholm Chamber of Commerce
SpA	Societate per Azioni [Italy]
St. of Claim	Statement of Claim submitted by CLAIMANT to the Tribunal
UAM	Universal Auto Manufacturers Distributors, Ltd.
U.K.	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration of 1985
UNIDROIT	International Institute for the Unification of Private Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts of 2004
US	United States of America
USD	United States Dollars
v.	versus [against]
Vol.	Volume

## STATEMENT OF FACTS

CLAIMANT Joseph Tisk, doing business as Reliable Auto Imports, is an automobile retailer located in Mediterraneo. On 18 January 2008, CLAIMANT contracted with RESPONDENT UAM for the purchase of Tera vehicles [*Cl. Ex. No. 1*]. RESPONDENT Universal never signed the contract, nor was it connected to the contract except incidentally as the car manufacturer [*Cl. Ex. No. 1*].

RESPONDENT UAM is a corporation located in Oceania whose management consists of Oceanian citizens [*Proc. Ord. No. 2 ¶ 12*]. The Governing Board of UAM is controlled by Oceania Partners, a group that invests in Oceanian enterprises. RESPONDENT Universal is a car manufacturer. Rather than do business in many countries directly, Universal sells its products to distributors and importers [*St. of Claim ¶ 6*]. UAM is one such distributor: UAM buys cars from Universal and then resells them in Oceania and Mediterraneo [*Proc. Ord. No. 2 ¶ 20*]. Universal owns a small stake in UAM, but it does not have the power to block any business decisions [*Proc. Ord. No. 2 ¶ 12*]. UAM had a right to sell cars in the Mediterraneo market, where Universal had chosen not to conduct business itself [*St. of Claim ¶ 7*].

The 18 January 2008 sales contract between CLAIMANT and UAM provided for the sale and purchase of 100 Tera vehicles, to be delivered in a number of instalments, at a price of USD 7,600 per vehicle [*St. of Claim ¶9*]. The cars were to be shipped on a space-available basis; no dates were specified for delivery, and no additional payments were due until UAM had made the final delivery [*Cl. Ex. No. 1*]. CLAIMANT paid 50% of the sales price (USD 380,000) as a deposit [*St. of Claim ¶9*]. The contract provided for the settlement of disputes arising from the contract through arbitration under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce [*Cl. Ex. No. 1*]. The clause provided for arbitration in Vindobona, Danubia [*Cl. Ex. No. 1*] but contained no choice of law provision [*St. of Claim ¶ 25*].

On 11 February 2008, the first shipment of 25 Tera cars arrived in Mediterraneo. The vehicles cleared customs on 18 February. CLAIMANT drove the vehicles to his showroom, encountering problems along the way when they did not run smoothly [*St. of Claim ¶ 11*]. As CLAIMANT had done previously when problems arose with cars from UAM, he contacted a mechanic. Three days later, on 21 February, the mechanic inspected the cars and suggested that the problem might

be related to the vehicles' Engine Control Unit (ECU) [*St. of Claim ¶ 11*]. CLAIMANT contacted Mr. High at UAM to report the problem [*St. of Claim ¶ 12*].

After UAM notified Universal, Universal promptly contacted CLAIMANT with a phone call from an engineer, Mr. Frank Jones [*St. of Claim ¶ 13*]. Mr. Jones outlined two possible problems and the solutions to both [*Cl. Ex. No. 3*]. The next day, CLAIMANT received an e-mail from Mr. Harold Steiner of Universal. Mr. Steiner explained that UAM was responsible for the condition of the cars and that Universal was not at all liable [*Cl. Ex. No. 4*]. Nonetheless, Universal promised to send repair equipment and personnel to Mediterraneo [*Cl. Ex. No. 4*].

CLAIMANT said he was satisfied to have the repair work begin in three days when the Universal personnel would arrive [*Cl. Ex. No. 5*]. He also asked Mr. Steiner how long the repairs would take [*Cl. Ex. No. 5*]. Mr. Steiner responded that very day to CLAIMANT'S concerns [*St. of Claim ¶ 17*]. He assured CLAIMANT that "everything possible" would be done to speed the repair that should not take "very long" but said he could not give an exact estimate [*Cl. Ex. No. 6*]. On the same day, Mr. Steiner told CLAIMANT on the phone that he was sure CLAIMANT would be able to start selling cars within one week, but that Universal could not guarantee the estimate. [*St. of Claim ¶17*]. It later turned out that Universal was able to diagnose the problem in one day and repair all cars within five days [*Proc. Ord. No. 2 ¶ 22*].

Just one day later, on 29 February, CLAIMANT received generous payment terms from another car distributor [*St. of Claim ¶ 20*]. CLAIMANT was not in a position to accept this offer while under contract with UAM [*St. of Claim ¶ 19*]. Therefore, that same day, CLAIMANT notified Mr. High at UAM that he was canceling the contract, including all future instalments [*St. of Claim ¶ 21*]. CLAIMANT then let Universal know that it was unnecessary to send personnel for repairs because he had cancelled the contract with UAM.

UAM filed for bankruptcy and entered into insolvency proceedings, represented by Ms. Judith Powers, in Oceania on 9 April 2008 [*Cl. Ex. No. 14*]. In an 11 April letter to CLAIMANT, Ms. Powers indicated that under Oceanian law, the initiation of insolvency proceedings "automatically voids" any arbitration agreement that UAM entered into [*Cl. Ex. No. 14*]. Nevertheless, CLAIMANT filed a Request for Arbitration on 15 August 2008.

## SUMMARY OF ARGUMENT

### **I. The Tribunal lacks jurisdiction due to the insolvency proceedings being held in Oceania.**

The arbitration clause contained within the contract of sale became void when UAM Distributors entered insolvency proceedings in Oceania. The Tribunal should find it has no jurisdiction to hear this claim, as it cannot render an enforceable award. Alternatively, these proceedings should be suspended pending the outcome of the insolvency proceedings.

**II. The Tribunal lacks jurisdiction over Universal.** Not only did Universal have no contractual relationship with CLAIMANT, but the former also never consented to arbitrate. Universal did not sign the contract of sale, and cannot be bound through principles of agency, as UAM was a distributor and not an agent. In addition, neither a group of companies theory nor principles of good faith can bind Universal to arbitrate.

**III. Universal committed no fundamental breach of the contract.** No fundamental breach of the contract of sale occurred, because the failure to immediately deliver goods in perfect conformity does not reach the level of a fundamental breach. Rather, Universal's ability to cure its performance quickly and without unreasonably burdening CLAIMANT prevented UAM's defective performance from rising to the level of fundamental breach. Accordingly, CLAIMANT was not permitted to avoid the contract. Even if UAM's performance constituted a fundamental breach, the CISG precludes CLAIMANT from avoiding the contract in its entirety, as the breach affected only the instalment at issue.

**IV. There is no basis for holding Universal liable for any breach of contract claim between CLAIMANT and UAM Distributors.** No agency relationship existed between Universal and UAM Distributors under which Universal could be bound. In addition, Universal and UAM were not operating as a group of companies. Subsequent conduct of the parties does not alter the analysis, in part because Universal made clear that UAM alone remained bound by the contract. Principles of good faith also weigh against holding Universal liable.

## ARGUMENT

### I. THE TRIBUNAL LACKS JURISDICTION BECAUSE THE ARBITRATION AGREEMENT HAS BEEN VOIDED.

1. RESPONDENTS concur that the contract of 18 January 2008, signed by CLAIMANT and Samuel High, Sales Manager for UAM, contains an arbitration clause [*Cl. Ex. No. 1*]. However, because UAM has entered insolvency proceedings, that arbitration agreement is void [A]. As a result, the Tribunal should decline jurisdiction because it cannot render an enforceable award [B]. At the very least, these proceedings should be suspended until the conclusion of the insolvency proceedings in Oceania [C].

#### A. Oceanian Law Terminates the Arbitration Agreement and Deprives the Tribunal of Jurisdiction.

2. UAM has entered insolvency proceedings. Therefore, under Oceanian law the arbitration agreement is void. Accordingly, on 11 April 2008, Judith Powers, the Insolvency Representative for UAM, sent a letter explaining that Oceanian law automatically terminates any forum selection clause in any contract with UAM, including an arbitration clause [*Cl. Ex. No. 14*]. There is broad international consensus on the issue, upholding the idea that insolvency proceedings take precedence over all other proceedings and hence invalidate forum selection clauses [*Allstate v. Linter at 1000; Wood p. 215-16*]. The letter further clarified that under the insolvency law of Oceania, any claims against the insolvent UAM would be adjudicated in the court charged with the insolvency procedures—in this case, the Regional Court in Port City, Oceania [*Cl. Ex. No. 14*].
3. Here, the arbitration agreement becomes ineffective as soon as the insolvency order is made. Without a valid arbitration agreement, there is no basis for the Tribunal to exercise jurisdiction. Therefore, CLAIMANT’S action should become part of the insolvency proceedings in Oceania rather than being adjudicated under a separate arbitration in Danubia. This accords with the principle of *lex concursus* (superiority of the law of the country which initiated the insolvency proceedings [*EC Regulation No. 1346/2000*]), which dictates that the insolvency proceedings in Oceania inherently impose limits on related proceedings in other jurisdictions [1]. Furthermore, a finding that this tribunal

lacks jurisdiction would preserve the equality of creditors [2]. Finally, domestic insolvency proceedings have exclusive jurisdiction over the dispute [3].

**1. Under the principle of *lex concursus*, the insolvency proceedings in Oceania impose limits on related proceedings in other jurisdictions.**

4. According to commonly accepted principles of private international law, the jurisdictional reach of the Oceanian insolvency court extends to related proceedings in foreign jurisdictions. The insolvency of UAM involves four separate jurisdictions: Mediterraneo (the registration venue of CLAIMANT), Oceania (the registration venue of UAM), Equatoriana (the venue of incorporation for Universal), and Danubia (the seat of the arbitration proceedings, as agreed to in the contract) [*St. of Claim* ¶¶ 1, 4, 5, and 27].
5. The related principles of universality and *lex concursus* should lead the Tribunal to defer to the insolvency proceedings in Oceania. Under the principle of universality, an insolvency proceeding in one state has an effect not only in that state but also in all other states implicated by the insolvency. Similarly, the principle of *lex concursus* dictates that the law of the state in which the insolvency proceedings are commenced determines the effects of those proceedings in other relevant states. *Lex concursus* establishes (among other aspects) the “voidability or unenforceability of legal acts detrimental to all the creditors” [*Bogdan p. 2*]. Given these two principles, the Tribunal should find it lacks jurisdiction in light of the proceedings in Oceania.

**2. A finding that this Tribunal lacks jurisdiction, as required under Oceanian law, would preserve the equality of creditors.**

6. Equality of creditors is a paramount and universally accepted principle of insolvency law. Insolvency proceedings in Oceania will ensure the equitable distribution of assets among all creditors. During these proceedings, all of the debtor’s assets are assembled in a common pool, which is then divided fairly among all creditors. Distributing assets in this way promotes equality among the creditors, who must engage in the same, streamlined proceeding or sacrifice their claim against the debtor [*ICC Case No. 7205*].

7. The assertion of jurisdiction by the Tribunal in this case inequitably interferes with the duty of the Insolvency Representative to distribute the assets of UAM among its creditors in accordance with the applicable law of Oceania.
8. Equal treatment of creditors is a fundamental objective of bankruptcy law [*Warren/Westbrook p. 494*]. All unsecured and non-preferred creditors are paid a pro-rata share of the bankruptcy estate [*id.*]. Individual proceedings against the debtor are suspended or stayed to avoid individual creditors from claiming assets that should be available to the pool of creditors [*id.*]. Even in such pro-arbitration jurisdictions as France awards have been set aside when they violated the principle of equality of creditors [*Saret v. SBBM, as cited in Fouchard/Gaillard/Goldman at 345*]. Equality of creditors is “a matter of both domestic and international public policy.” [*id.*]. Equitable distribution of assets from the insolvency estate leads to the efficient administration of estate. A debtor with limited resources focuses all its resources into a single proceeding, thus maximizing the remaining value to be distributed to creditors. The fair, efficient distribution to creditors would be severely undermined if CLAIMANT were permitted to pursue assets outside the consolidated insolvency proceeding.

**3. Domestic insolvency courts have exclusive jurisdiction over the dispute.**

9. Furthermore, under the principle of *vis attractive concursus*, the commencement of an insolvency proceeding grants that court jurisdiction over a range of other related matters despite lacking jurisdiction absent those insolvency proceedings [*EC Regulation No. 1346/2000*]. As such, the Tribunal should decline to exercise jurisdiction here. By contrast, should the Tribunal proceed with arbitration parallel to the insolvency proceedings in Oceania, this principle would be violated. The concept of *vis attractive concursus* mandates high deference to an insolvency court where, as here, the parties did not specify that another jurisdiction’s law should govern the validity of their arbitration agreement [*St. of Claim ¶ 27*].

**B. The Tribunal should decline jurisdiction because it cannot render an enforceable award.**

10. Pursuant to Article III of the New York Convention, an arbitral tribunal has a duty to render an enforceable award, as this objective is the *raison d'être* of the Convention [Platte]. Oceanian law does not recognize the validity of the agreement [Cl. Ex. No. 14], which makes the arbitration agreement ineffective and undermines the *res judicata* effect of any award rendered.

**1. Any award rendered will be unenforceable on public policy grounds.**

11. The public policy provision set out in Article V(2)(b) of the New York Convention acknowledges the right of a state and its courts to exercise ultimate control over the arbitral process. Accordingly, an Oceanian court would likely refuse to recognize an award rendered in violation of Oceanian law for the underlying violation of public policy [Hilmarton v. Omnium]. Enforcement of the award would violate Oceania's basic notion of justice and introduce an element of illegitimacy into the proceedings [Parson v. RAKIA].

12. Enforcement of the award would be contrary to the principle of *ordre public international* as it would abrogate the integrity of the insolvency proceedings and the equality of the creditors [Warren], and thus violate international public policy [Saret v. SBBM; NY Conv. Art. V(2)(b)]. Given the cross-border character of such illegitimate action, the violation of the Oceanian public policy will influence enforceability in other states relevant to this dispute [Racine].

**2. The arbitration agreement's invalidity renders any potential award unenforceable.**

13. Under Article V(1)(a) of the New York Convention, a court has the power to assess the validity of an arbitration agreement. An award is unenforceable in any signatory state jurisdiction if the arbitration agreement is void under the laws of the State where enforcement is sought. Here, there is no indication that the award would be enforceable in Danubia. Even if the award were rendered under the *lex arbitri* of Danubia, an enforcing

court there could determine that the violation of Oceanian public policy also implicates the public policy of Danubia, and deem the award unenforceable based on principles of comity. Other courts “have long recognized the particular need to extend comity to foreign bankruptcy proceedings” [*Victrix v. Salen at 713*].

**3. Any award rendered is unlikely to be enforceable in Polaria.**

14. Contrary to CLAIMANT’S argument, it is improbable that a court in Polaria would enforce an award rendered by this Tribunal [*Cl. Memorandum ¶ 68*]. UAM does have a claim for monetary assets owed to it in Polaria, which CLAIMANT asked a Polarian court to safeguard pending the outcome of the arbitral proceeding. UAM’s Insolvency Representative has asked the court to allow the money to enter Oceania and be distributed among the creditors in the insolvency proceeding [*Cl. Ex. No. 14*]. However, the court in Polaria has no authority to grant similar provisional measures to further a foreign *arbitral* proceeding [*Proc. Ord. No. 2 ¶ 34*]. Such legal uncertainty substantially undermines any claim that UAM has assets against which an award could be enforced.
15. As noted, the law of Polaria offers neither statutory nor case law guidance as to whether a provisional measure may be instituted pending an arbitration [*id.*]. In the absence of relevant laws, principles of international comity will likely apply. “The granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion” [*Cunard v. Salen Reefer at 458*]. Here, any interim measure would materially impact the domestic insolvency proceedings in Oceania by limiting the amount of resources available to creditors.
16. By contrast, it is likely that a foreign insolvency representative may appear in Polarian courts if the appearance is consistent with Polarian law. As a general matter, and as the Model Law on Cross-Border Insolvency reflects, foreign insolvency representatives are granted direct access to national courts [*Model Law drafting notes at ¶ 75*]. Although Polaria has not adopted the Model Law on Cross-Border Insolvency, there is no indication that its law deviates on this particular point from the common practice

established in the Model Law. Absent any express limitation to the contrary, it is likely that UAM's Insolvency Representative will be permitted to appear in court in Polaria.

17. Because enforceability of an award in Polaria is scarcely more probable than in other states, UAM's possible access to assets there provides the Tribunal with little assurance that any award rendered will be enforceable.

**C. At minimum, the tribunal should not exercise jurisdiction prior to the conclusion of the insolvency proceedings in Oceania.**

18. Even if the Tribunal finds that the agreement to arbitrate is not void, this arbitration should be suspended until completion of the insolvency proceedings [*ICC Case No. 7563*]. The arbitration may negatively affect the value of the property of UAM's estate and violate the supremacy of national law in Oceania. CLAIMANT should not benefit from UAM's insolvency to the extent that it would harm the claims of other creditors in the pool of the estate.
19. Furthermore, commencing the arbitral proceedings will deplete UAM's estate. Delaying the arbitral proceeding in order to ensure that the estate is equitably distributed is an acceptable course for this tribunal to take. For example, under German Law, the impecuniosities of a party may lead to the inoperability of an arbitration agreement [*Mistelis/Lew p. 374*].
20. Thus, should the Tribunal find that the agreement to arbitrate is not terminated, it should nevertheless decline to exercise jurisdiction until the conclusion of the Oceanian insolvency proceedings. Although the outcome of the insolvency proceedings in Oceania is indeterminate, any legal claims still in existence at the conclusion of those insolvency proceedings that were not resolved during the process may be asserted at that time. Given that the proceedings in Oceania have begun, the present hearings in Danubia should be stayed pending the outcome of the insolvency proceedings in Oceania.

## II. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIM AGAINST UNIVERSAL.

21. Arbitration is contractual in nature and consequently, the consent of the parties is an essential prerequisite to arbitral proceedings [*Várady p. 85*]. In this case, Universal never consented to arbitrate with CLAIMANT. Universal's name is contained nowhere in the contract and it therefore is not directly bound as a party to the contract [A]. Only under specific, very limited circumstances can a non-signatory be compelled to arbitrate. In the case at hand not only is it clear that UAM was not operating in an agency relationship with Universal [B], but it is also evident that under a group of companies theory, Universal's actions did not later make it a party to the contract [C]. Furthermore, under general principles of arbitration and good faith in business dealings, Universal should not be bound to the contract [D].

### **A. Universal was not a party to the Contract at the time it was concluded.**

22. Universal was not a party to the original sales contract containing the arbitration agreement and was thus not a party initially. Universal never signed any contract with CLAIMANT and did not suggest through action or letter any intention to be bound by the same. Universal's name appears nowhere in the contract between UAM and CLAIMANT. As a general principle, an arbitration agreement binds only those parties that have entered into it [*Fouchard/Gaillard/Goldman p. 280*]; Universal did no such thing. Universal was therefore not, as CLAIMANT contends, "integrated into the original contract" [*Cl. Memorandum ¶ 7*].

23. CLAIMANT correctly asserts that the CISG applies to the merits of this dispute, but misapplies CISG Article 8 [*Cl. Memorandum ¶ 6*]. CLAIMANT relies on Article 8(2), yet that provision only applies when Article 8(1) is inapplicable. Under Article 8(1), "statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." Universal's action of not signing the contract is clear; it did not intend to become a party. In fact, there is nothing in the record to suggest that Universal and CLAIMANT had any direct contact before the dispute, nor that Universal participated in any of the negotiations between UAM and CLAIMANT. Furthermore, its statement that "UAM is, of course,

responsible to you” [*Cl. Ex. No. 4*] would lead a reasonable person to understand that Universal was not taking responsibility over the contract, but merely making assurances to protect its commercial reputation. This last contention will be explored more in depth below [*see ¶¶ 40–42*].

24. Arbitral tribunals have refused to extend liability to a parent company when, as in the case at hand, the arbitration clause had been signed only by the subsidiary [*ICC Case No. 4402 as cited in Hanotiau p. 56*]. In one case, the tribunal found it dispositive that, at the time of signature, the claimants knew the subsidiary and not the parent would perform the work [*id.*]. It follows that “if they had intended to include the parent company in the agreement, they should have done so before signing” [*Hanotiau p. 56*]. If a full-fledged parent company is found not to be a party to a contract under these circumstances, then surely a company who remains a mere 10-percent shareholder, like Universal [*Proc. Ord. No. 2 ¶ 32*], should not be considered a party either.
25. As will be explored in more detail below [*see ¶¶ 43–51*], UAM was not authorized to enter into any agreement on behalf of Universal. Its actions must therefore be viewed as its own. If CLAIMANT had intended that Universal be bound, he should have specified such a requirement in the original contract.
26. Furthermore, any award against Universal will likely be held unenforceable under the New York Convention. Article II(2) requires an arbitration agreement to be “in writing.” Given the fact that Universal never consented to arbitration, never signed any arbitration agreement, and its name appears nowhere in the entire contract—let alone the arbitration agreement—there is no arbitration agreement “in writing” binding Universal. Thus, the standards for enforceability pursuant to the New York Convention have not been met. The enforceability of an award under the New York Convention is a significant factor in deciding whether the proposed arbitration is appropriate, as CLAIMANT also notes [*Cl. Memorandum ¶ 36*].
27. Because Universal did not sign the contract at issue and expressly stated that UAM was the responsible party, no reasonable person could have concluded Universal was party to

the contract. Therefore, Universal was not a party to the contract *ab initio* and should not be bound to arbitrate under the contract.

**B. Universal did not become a party to the contract as part of a group of companies.**

28. Universal cannot be bound to the contract by a group of companies theory. Under that theory, a non-signatory parent can only be bound by the terms of a contract entered into by a subsidiary where a parent and subsidiary are operating as an “*unité économique*” [*Blessing*] or “single business enterprise” [*Green v. Champion Ins. Co.*]. The relationship between Universal and UAM Distributors falls far short of that standard.
29. In determining whether a parent and subsidiary are operating as a single business enterprise, courts and tribunals have looked to the following factors: the parent company’s level of control over the subsidiary, the insolvency of the subsidiary, and “[t]he cessation of meaningful activities by the subsidiary and its own management” [*Fouchard/Gaillard/Goldman* ¶ 501, quoting *ICC Case No. 8385*]. Because Universal and UAM Distributors were operating as distinct entities, Universal should not be required to arbitrate this claim. As mentioned above, UAM was fully responsible for its own business policy, as evidenced by its choosing a policy against Universal’s wishes [*Proc. Ord. No. 2* ¶ 32]. It should also be noted that UAM was not insolvent at the time of the complained-of events. Furthermore, Universal’s ownership amounted to no more than 10 percent of UAM’s shares and at all times UAM maintained an independent management [*id.*].
30. Assumption of performance of the contract containing the arbitration clause can also in some circumstances bind the non-signatory parent to arbitrate [*ICC Case No. 4131*]. However, as CLAIMANT rightfully points out, such a situation only arises “under special circumstances” [*Cl. Memorandum* ¶ 17]. Here, Universal should not be bound to arbitrate pursuant to the arbitration clause signed by UAM because the two companies were operating not as a single business enterprise, but as distinct business entities [1], Universal had little control over UAM [2], and Universal’s aid was both minimal and given on the condition it would not be bound to the contract [3].

## **1. Universal and UAM operated as distinct business entities.**

31. Universal and UAM operated as distinct business entities. Universal only maintained a small minority share of 10 percent in UAM [*Proc. Ord. No. 2 ¶ 12*]. While Universal may have reviewed the wording of UAM’s form contracts, it did not have the power to “mandate any of [the] terms”, and the process was established between the two companies solely to ensure that “there was nothing that violated Universal’s policies regarding the sale of its motor products” [*Proc. Ord. No. 2 ¶ 16*]. This is consistent with Universal’s general desire to “stand behind its product” [*Cl. Ex. No. 4*], and is not, as CLAIMANT contends, indicative of any more intimate relationship between UAM and Universal [*Cl. Memorandum ¶ 21*].
32. The fact that UAM’s formal name, Universal Auto Manufacturers Distributors, Ltd. [*Cl. Memorandum ¶ 18*], is related to that of Universal does not change the analysis. It is possible UAM wanted to more clearly associate itself with Universal in order to benefit from the latter’s well-regarded reputation. Other jurisdictions faced with similar problems have paid little or no attention to the names of the parties involved, however similar they may have been [*Merrill Lynch*]. Whatever the reasoning behind UAM Distributors’ title, the simple fact of a similar corporate designation, absent more, should not be considered by this tribunal as evidence that UAM and Universal were operating as a “single business enterprise.”
33. Therefore, because Universal and UAM were clearly operating as distinct entities, Universal cannot be required to arbitrate this claim.

## **2. Universal had little control over UAM’s business undertaking.**

34. Although Universal “worked closely” with UAM for several years [*Cl. Ex. No. 16*], its ability to influence the company’s policy and business plan was minimal. Day-to-day operations of UAM was controlled by management, all of whom are citizens of Oceania and who were “otherwise unconnected to...Universal” [*Proc. Ord. No. 2 ¶ 12*]. If Universal had real control over UAM, and thus an interest in its survival, it surely would not have allowed UAM to undertake an expansion strategy that it thought would be unsuccessful [*Proc. Ord. No. 2 ¶ 32*]. A “master of puppets,” [*Cl. Memorandum ¶ 21*], in

CLAIMANT’S words, surely would have been able to implement its desired business plan in its subsidiary and ward off insolvency given its knowledge of UAM’s flawed business plan for expansion. And yet, UAM proceeded directly against the suggestions of Universal [*Proc. Ord. No. 2* ¶32]. This was certainly not a case of Universal “abusing” CLAIMANT and hiding from responsibility behind its puppet [*Cl. Memorandum* ¶ 17].

35. In fact, there is nothing in the record that suggests that Universal and UAM were operating as a “single business enterprise” to such an extent that would justify overriding the party’s original intent to create a binding contract solely between CLAIMANT and UAM.

**3. Universal’s voluntary performance was minimal and on the condition that it would not be bound.**

36. Although assumption of performance of the contract containing the arbitration clause can in some circumstances bind the non-signatory parent to arbitrate under a group of companies theory [*ICC Case No. 4131, Dow Chemical*], in the case at hand, Universal’s performance should not be held to bind it to the contract *a posteriori* because it was minimal [a] and on the condition that it would not be bound [b].

**a. Universal’s performance was minimal.**

37. Universal’s actions in the dispute amounts to nothing more than an offer to send technical personnel in order to help UAM complete its contract with CLAIMANT [*Cl. Ex. No. 4*]. The technical personnel were never actually sent as CLAIMANT terminated the Contract before Universal had a chance to actually provide any services. As such, Universal’s involvement consists essentially of three emails [*Cl. Ex. No. 4, 6, and 12*].

38. Universal’s direct involvement with the CLAIMANT was a strictly *ad hoc* arrangement. On just one other occasion, Universal had provided assistance to a seller by providing technical assistance [*Proc. Ord. No. 2* ¶ 15]. The record does not show that such a situation has led to Universal being bound to arbitrate under UAM’s contracts. This type of assistance is obviously of little cost to Universal and should not be considered by this

Tribunal as anything more than minimal involvement that has never led it to arbitrate claims to which it never agreed.

39. Universal's minor role in the events leading up to this dispute can hardly be considered assumption of performance of the contract to such an extent as to justify binding a non-signatory party to arbitrate [*Cl. Memorandum ¶ 9*]. Universal is therefore not bound to the arbitration clause at issue.

**b. Universal's offer of performance was made on the express condition it would not be bound.**

40. Not only was Universal's actual involvement with CLAIMANT minimal, but its offer to provide assistance was made under the express condition that UAM alone would remain responsible for its contractual obligations. Universal intervened in order to maintain its reputation, but expressly stated that "UAM is, of course, responsible to you for the condition of the Tera cars" [*Cl. Ex. No. 4*]. In applying the group of companies doctrine, the Tribunal must consider that "it is not so much the existence of a group that results in the various companies of the group being bound, by the agreement signed by only one of them, but rather the fact that such was the true intention of the parties" [*Fouchard/Gaillard/Goldman ¶ 500*]. Universal's express communication that UAM was the sole responsible entity put all parties on notice of its intention not to be bound; no objections were raised, thus leading to the conclusion that all parties consented to the arrangement.

41. Furthermore, the group of companies doctrine is far from universally accepted. Jurisdictions (such as Switzerland) have expressly rejected the notion of a group of companies doctrine, and have only agreed to bind a parent company in the case of fraud or an abuse of rights, which is not present here [*Hanotiau p. 57*]. Swiss arbitral tribunals have explained their policy in the following manner:

"the principle according to which a company may be considered a party to a contractual undertaking made by another company as a consequence of the fact that both companies belong to a group which constitutes one economic reality, does not exist in Switzerland *de lege lata*" [*Chambre de Commerce et d'Industrie de Genève at 781*].

42. Not only has it been demonstrated that UAM and Universal do not constitute “one economic reality,” but Universal’s express declaration not to be bound suggests it was expressly making all parties aware of its “economic distance” from UAM. Extending the group of companies doctrine is thus inappropriate when not only the legal reality suggests the two companies are separated, but the intentions of the two parties were clearly voiced as being against an agency relationship as well.

**C. UAM did not contract with CLAIMANT as Universal’s agent.**

43. Equatoriana, Oceania, and Mediterraneo have all adopted the Convention on Agency in the International Sale of Goods, and CLAIMANT and UAM are located in different states. Therefore, the Convention on Agency may be applied to this dispute pursuant to Article 2(1).

44. An agency relationship between a parent and a subsidiary cannot be presumed, but must be proven [*Hanotiau p. 11*]. CLAIMANT has not asserted a set of facts sufficient to prove such a relationship. Not only did UAM not have the authority to bind Universal [1], but the structure of the two companies clearly evidences the separate corporate identities they both hold [2].

**1. UAM had no authority to bind Universal.**

45. When UAM contracted with CLAIMANT, it did so of its own initiative and not on behalf of Universal. CLAIMANT has presented no evidence displaying UAM’s authority to act as Universal’s agent. Instead, the agreement between Universal and UAM Distributors provided for UAM to act as a distributor, not as an agent entitled to bind a principal [*Proc. Ord. No. 2 ¶ 13*].

46. CLAIMANT mistakenly relies on the Convention on Agency to assert that Universal should be bound to arbitrate [*Cl. Memorandum ¶ 10*]. The Convention, however, only applies where one party, the agent, “has the authority or purports to have the authority” to act on behalf of another party [*Conv. Agency Art. 1(1)*]. In the case at hand, UAM was never given such authority and there is no indication in the record to suggest CLAIMANT thought UAM was ever given such authority.

47. Even if the Tribunal finds that the Convention applies, its provisions would not bind Universal to arbitrate. The Convention on Agency Article 12 provides that “[w]here an agent acts on behalf of a 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, the acts of the agent shall directly bind the principal and the third party to each other....” In the case at hand, UAM had the authority to bind only itself and not Universal. Moreover, CLAIMANT could not, in good faith, have reasonably believed it was contracting with Universal through UAM. Universal itself made no manifestations to the relevant third party—here, Mr. Tisk, as CLAIMANT—that UAM Distributors had authority to bind Universal.
48. Since UAM did not have the authority to bind Universal or act as its agent, and because CLAIMANT could not have, in good faith, believed it was contracting with Universal, this Tribunal should not bind Universal to arbitrate.

**2. UAM and Universal are clearly operating as distinct corporate entities.**

49. UAM and Universal were clearly operating as separate business entities. Universal possessed only a 10-percent share in UAM [*Proc. Ord. No. 2* ¶ 12]. Furthermore, because Universal maintained a minimal presence on the board, which was far below that necessary for a blocking majority, it was unable to institute its suggested business policy at UAM. Instead, Universal was forced to watch as UAM chose to undertake an expansion that eventually led to its insolvency [*Proc. Ord. No. 2* ¶ 32].
50. While CLAIMANT contends that UAM relies for its business on obtaining contracts from Universal [*Cl. Memorandum* ¶ 11], this fact is insufficient to prove agency. It is common for companies to rely on one another for revenue in the same attenuated way that UAM relied on Universal; such relationships require much more before they can approach the level of an integrated, single corporate enterprise. Further, there are many valid reasons for companies to operate in such a fashion, none of which indicate an agency relationship. UAM may have wished to occupy Universal’s market in the region and thereby to concentrate its energies exclusively on the Universal’s products. UAM might have found this business model simpler, as it was able to profit from Universal’s

expertise and legal resources. Perhaps UAM simply could not sell more cars because its network was too small. Whatever the case, the simple fact that UAM relied on Universal for much of its business is not alone sufficient to establish an agency relationship. The Tribunal is urged not to create additional liabilities for Universal simply because UAM sought business only from one entity.

51. Agency relationships cannot be presumed, and CLAIMANT bears the burden of proving that such an agency relationship exists [*Hanotiau p. 11*]. The facts show that UAM and Universal were operating as two distinct corporate entities. CLAIMANT has asserted no persuasive facts to the contrary. Therefore, this Tribunal should find no such relationship and should not bind Universal to arbitrate.

**D. Equity and policy considerations weigh against binding Universal to arbitrate.**

52. Considerations of equity and policy should further lead the Tribunal not to bind Universal to arbitrate. Not only should the fact that Universal never consented to arbitrate be given dispositive weight by this Tribunal [1], but principles of good faith should also lead it to conclude that binding Universal is not the proper course of action [2].

**1. Universal never consented to arbitrate.**

53. Article 7.2 of the UNCITRAL Model Law, which Equatoriana and Mediterraneo have adopted [*Proc. Ord. No. 2 ¶ 2*], requires that an arbitration agreement be recorded in any form. Article 7.2 establishes the basic test that there must be proof that each party has declared their consent to arbitration in writing; consent is the trigger. [*Holtzmann/Neuhaus p. 146*]. Universal never signed any agreement to arbitrate, and, to the contrary, expressly stated its intention to provide aid while not being bound by the terms of the contract between UAM and CLAIMANT [*Cl. Ex. No. 4*].
54. If this Tribunal were to bind Universal it would be acting contrary to the fundamental principle of arbitration that parties may only be forced to submit to arbitration if they have consented to do so. Furthermore, any award rendered would be unenforceable under

the New York Convention [see above ¶¶ 13–17]. The Tribunal cannot bind Universal to the arbitration agreement.

## **2. Principles of good faith weigh against binding Universal.**

55. CISG Article 7(1) requires that regard be had for the “observance of good faith in international trade.” In offering to provide technical services to CLAIMANT, Universal was attempting to both stand behind its product and to develop a “long and mutually profitable relationship with” CLAIMANT [Cl. Ex. No. 4]. This intention is further evidenced by Universal’s attempt to maintain business relations with CLAIMANT after UAM’s insolvency became apparent by making CLAIMANT aware of Universal’s new partnership with Patria Importers [Cl. Ex. No. 12]. Universal made a voluntary attempt, in good faith, to assist a deteriorating relationship between CLAIMANT and UAM accompanied by an express statement that its performance was not to alter the contractual responsibility UAM had to CLAIMANT [Cl. Ex. No. 4].

56. The fact that Universal, of its own initiative and outside of any contractual obligations, exceeded its responsibilities in assisting CLAIMANT and UAM in their dispute should not be later held against it by binding it to a contract it did not sign. Granting the relief CLAIMANT seeks would only punish Universal’s willingness to go beyond its contractual obligations in order to facilitate good business relationships. Such an outcome would promote the fear that helping others would later come back to haunt the generous party.

57. The encouragement of good faith in international commercial dealings requires a finding that Universal’s extra-contractual aid should not be punished. The Tribunal is therefore urged not to bind Universal to arbitrate.

### **III. BECAUSE UAM’S FAILURE TO IMMEDIATELY DELIVER PERFECT GOODS DOES NOT CONSTITUTE FUNDAMENTAL BREACH, CLAIMANT WAS NOT ENTITLED TO AVOID THE CONTRACT.**

58. Once a seller’s delivery of goods has been carried out, CISG Article 49 permits a buyer to avoid the related sales contract only “if the failure by the seller to perform any of his obligations under the contract . . . amounts to a fundamental breach of contract” [CISG Art. 49(1)(a)]. Commentators and courts agree that buyers are not ordinarily permitted to

resort to contract avoidance and that they must meet high standards of proof to establish their right to do so. For example, Germany's Supreme Court stated that under the CISG "avoidance of contract is only supposed to be the [buyer]'s last resort to react to a breach of contract by the other party which is so grave that the [buyer]'s interest in the performance of the contract essentially ceases to exist" [*Cobalt sulphate case (Ger.)*]. CLAIMANT does not meet this high standard. UAM's delivery of non-conforming goods does not alone constitute fundamental breach [A]. Therefore, CLAIMANT was not entitled to avoid its contract with UAM [B].

**A. UAM's failure to immediately deliver perfect goods does not constitute fundamental breach.**

59. CISG Article 25 declares that a breach of contract is fundamental only where "it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract." CLAIMANT'S assertion that Respondent's delivery of defective goods alone constitutes a fundamental breach of contract fails to take into account Universal's ability to remedy the initial breach [*Cl. Memorandum ¶ 69*]. Article 25 was drafted with situations similar to the instant case in mind, where "claims that goods are defective . . . are made only after expensive transport to the buyer's place of business" [*Honnold p. 206*]. Therefore, "[i]t is not only the objective seriousness at the time of delivery that is relevant in determining the fundamental nature of the breach of contract" [*Schlechtriem p. 568*]. In other words, contract expectations include *both* the quality of the goods and the timeframe in which the goods were to be provided. CLAIMANT'S reading of CISG Article 25 fails to distinguish between non-conformity of goods and fundamental breach and, as a result, would render CISG Articles 25 and 35 redundant. Because the contract was not time-sensitive [1] and UAM invoked its right to cure the Tera cars' initial defect [2], the cars' malfunctioning as a result of a single defective part was insufficient to substantially deprive the CLAIMANT of what he was entitled to expect under the contract.

**1. The contract was not time-sensitive.**

60. The duration of a contractual breach is a key consideration in determining whether or not a non-conforming delivery amounts to a fundamental breach ("the relevant detriment is

not a static element, but in many instances occurs only when the breach of contract continues” [*Enderlein/Maskow p. 113*]. Of course, “the expectations of the aggrieved party have to be discernible from the contract” [*id.*]. UAM had no way to reasonably foresee from the contract or negotiations that CLAIMANT would suffer “major detriment,” due to any minor delays [*Cl. Memorandum ¶ 75*]. CLAIMANT provided no guidelines for the timing of the shipment of the Tera cars; the parties agreed that the vehicles would be shipped on a space-available basis [*Cl. Ex. No. 1*]. CLAIMANT’S contention that the delivery of non-conforming Tera vehicles was a fundamental breach despite the fact that they could be repaired fails to take into account both the requisite time element of CISG Article 25 and the nature of the sales contract itself. In a case involving a contract for advertising devices, a Swiss court held that the failure of the parties to agree upon a specific date of delivery precluded the buyer’s avoidance because the initial defective performance “did by no means exclude the subsequent performance” for the remainder of the contract [*Inflatable triumphal arch case (Switz.)*]. Universal never “remained idle” as CLAIMANT maintains [*Cl. Memorandum ¶ 85*] but rather remained in constant email and telephone contact with CLAIMANT until CLAIMANT abruptly cancelled the contract [*St. of Claim ¶¶ 13–21*]. Given the temporal flexibility of the contract and Universal’s immediate dispatch of personnel and equipment to identify and rectify the problem with the Tera cars, CLAIMANT’S declaration of a fundamental breach eleven days after its receipt of the cars is both misguided and disingenuous.

**2. FIRST RESPONDENT had a right to cure its initial failure to perform its contract obligations.**

61. CLAIMANT’S argument that “[a] problem with the ECU is such a particularly serious defect that it justifies to deprive Respondents of their possibility of curing the defect” [*Cl. Memorandum ¶ 68*] would deprive CISG Article 48 of all effect: a buyer cannot unilaterally deprive a seller of its right to cure absent exceptional circumstances. A key consideration for determining whether or not a breach is fundamental is “the capacity and willingness of the seller to remedy the defect completely, by the type of subsequent performance appropriate to the individual case, without unreasonable delay and unreasonable inconveniences for the buyer” [*Schlechtriem p. 568*]. For example, a German appellate court found that “[e]ven a severe defect may not constitute a

fundamental breach of contract in the sense of Art. 49 CISG, if the seller is able and willing to remedy without causing unreasonable inconvenience to the buyer” [*Acrylic blankets case (Ger.) (holding that because a seller expressed its “sincere intention to remedy” its defective performance, Buyer was not justified in avoiding contract)*]. Here, Universal demonstrated both its capacity and willingness to remedy the defect with the Tera cars [a] in a timely manner that foreclosed any unreasonable burdens on CLAIMANT [b].

**a. Universal was both willing and able to repair the Tera cars.**

62. As soon as UAM notified Universal of the problem with the Tera cars, Universal took immediate and decisive steps to identify and correct the problem. Mr. Frank Jones, a Universal engineer, phoned CLAIMANT and followed up with a detailed email explaining the potential scope of the problem and potential solutions [*St. of Claim ¶ 13; Cl. Ex. No. 3*]. From that day forward, Universal was in nearly constant contact with CLAIMANT, immediately arranging for repair by sending equipment and personnel to arrive in Mediterraneo just over one week after learning of the problem [*Cl. Ex. No. 4*]. Respondent repeatedly assured CLAIMANT that the problem would be fixed quickly [*Cl. Ex. No. 4; St. of Claim ¶ 17*]. Universal’s continual contact with CLAIMANT, its repeated advice on the technical aspects of the problems with the vehicles and its willingness to immediately dispatch personnel and equipment to Mediterraneo all demonstrate that it was both willing and able to repair the Tera cars and cure UAM’s non-conforming delivery before the breach became fundamental.

**b. Universal demonstrated its ability to remedy the ECU problem without unreasonably burdening CLAIMANT.**

63. Simply put, “the seller’s right to perform after the date for delivery [were such a date fixed] constitutes the rule and unreasonableness the exception, which must be proved by the party relying on it” [*Schlechtriem p. 567*]. CLAIMANT has failed to meet its burden to prove that Universal’s offer to cure would have created an unreasonable burden. CLAIMANT was required to advance no further funds for payment of the vehicles until after the last shipment of vehicles was received [*Cl. Ex. No. 1 ¶ 2*]. Therefore, other than minimal storage fees (which amounted to less than USD 1 per car per day [*St. of Claim ¶*

35)), CLAIMANT’S mere possession of the vehicles presented no economic burdens in addition to those already incurred under the terms of the purchase agreement. An exception to the general rule that the seller is permitted to cure even after the date of delivery has passed exists “only if the defect is objectively serious and immediate avoidance of the contract is justified by a particular interest of the buyer. The buyer has such an interest above all where the contract requires delivery by a fixed date, and in similar cases in which late performance is of no interest to him” [*Schlechtriem p. 568*]. Here, CLAIMANT fixed no such delivery date nor expressed that delivery was in any way urgent [*Cl. Ex. No. 1*].

64. CLAIMANT’S assertions that it risked insolvency due to Respondent’s delayed performance, and that as a result Universal’s offer to cure was not “able to eradicate the substantial detriment CLAIMANT suffered” must be disregarded because such consequences were unforeseeable given the flexible terms of the contract [*Cl. Memorandum ¶ 78*]. The terms of the contract were clear in establishing that the vehicles would be shipped “as space is available,” with no reference to a date by which such shipments must be completed [*Cl. Ex. No. 1*]. Even if CLAIMANT establishes that FIRST RESPONDENT and SECOND RESPONDENT were aware of the basic business practices in Mediterraneo, knowledge that working capital is difficult to come by in no way establishes awareness that CLAIMANT risked insolvency as a result of CLAIMANT’S inability to immediately sell vehicles shipped pursuant to this flexible instalment contract.
65. Moreover, the Tribunal should disregard CLAIMANT’S assertion that it risked insolvency. CLAIMANT’S ability to secure enough capital to purchase new vehicles from a different distributor suggest its claims lack justification [*Cl. Ex. No. 9*]. In addition to demonstrating that Universal’s pending cure placed CLAIMANT’S business in no great danger, CLAIMANT’S behavior raises serious questions as to its true motivation in avoiding the contract with UAM. In the face of its clear ability to effectively continue its business operations while Universal effected its timely cure—leaving enough working capital free to effect purchase of an entire new stock in vehicles—the Tribunal should find that CLAIMANT’S assertions with respect to its purported insolvency are simply post-

hoc attempts to justify seeking out a more attractive contract when it had no justifiable grounds for avoiding its contract with UAM.

66. Finally, CLAIMANT does not contend that the consumer vehicle market in Mediterraneo risked any major shifts that would warrant a particular interest in receiving cars by a specific date. In addition, the vehicles are durable goods and risked no diminution in value while Universal cured its performance. These factors, along with the absence of a fixed delivery date in the sales contract, require the Tribunal to find that the CLAIMANT has not met its high burden to prove that Respondent should be denied its right to cure performance under CISG Article 48.

67. Respondent's delivery of non-conforming Tera vehicles to CLAIMANT does not in itself constitute a fundamental breach of contract. Given the flexible terms of the contract and its international status, CLAIMANT should not have denied FIRST RESPONDENT an opportunity to cure its performance. Universal's demonstrated ability to cure UAM's initially deviant performance without unreasonably burdening the CLAIMANT establishes that the breach was not in fact fundamental.

**B. CLAIMANT was not entitled to avoid the contract.**

68. Because UAM's first shipment of non-conforming Tera cars did not constitute a fundamental breach, CLAIMANT was not entitled to avoid the contract. In the context of an international sale of goods, "[s]ince every avoidance of contract can entail additional expenses and risks, the ceiling for exercising [the right to avoid a contract] should be raised high" [*Enderlein/Maskow p. 192*]. As a Swiss court interpreting the CISG clearly stated, "[w]hen in doubt, the contract is to be maintained even in case of fundamental defects, and an immediate contract avoidance should stay exceptional" [*Inflatable Triumphal Arch Case (Switz.)*]. When evaluating the CLAIMANT'S right to invoke CISG Article 49, the Tribunal must also account for CLAIMANT'S obligation to mitigate damages under CISG Article 77. Therefore, CLAIMANT could not avoid the contract until Respondent demonstrated an unwillingness or inability to cure [1]. Contrary to CLAIMANT'S assertions, Universal was not required to immediately provide a definite timeframe for cure [2]. Finally, even if the Tribunal were to find that the initial non-

conforming delivery constituted a fundamental breach of Respondent's contractual obligations, CLAIMANT was not justified in avoiding the contract in its entirety [3].

**1. CLAIMANT had no grounds for avoiding the contract until RESPONDENT established its unwillingness or inability to cure.**

69. CISG Article 48 establishes that “the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations” [*CISG Art. 48(1)*]. Therefore, “[i]n cases . . . where cure is feasible and where an offer of cure can be expected, one cannot conclude that the breach is fundamental until one knows the answer to this question: Will the seller cure?” [*Honnold p. 321*]. For example, a Swiss court held that, pursuant to CISG Article 48, “the buyer is obliged to accept a remedy (subsequent cure of the defect) offered by the seller” [*Inflatable triumphal arch case (Switz.)*]. Where, as here, non-conforming goods are repairable and the lack of conformity *alone* does not immediately constitute a fundamental breach of contract, “[t]he buyer is . . . obliged to accept the cure” [*Enderlein/Maskow p. 187*]. Universal assured CLAIMANT that the Tera cars would be repaired quickly and immediately dispatched personnel and equipment to prevent a fundamental breach of contract. By denying Universal the opportunity to directly evaluate the Tera cars, CLAIMANT prematurely avoided the contract, frustrating any ability to cure under the CISG. In so doing, CLAIMANT declared a fundamental breach without the requisite knowledge that the vehicles would remain out of conformity for an unreasonable length of time. Universal's ability to locate the source of the problem within one day and fix all 25 cars within five working days demonstrates that Universal would have been able to cure within a reasonable period of time [*Proc. Ord. No. 2 ¶ 22*]. Regrettably, CLAIMANT did not provide Universal with such an opportunity and instead chose to breach its contract with UAM.

70. CLAIMANT justifies its avoidance in part by invoking a possible airport strike's potential effect on Universal's ability to cure [*Cl. Memorandum ¶ 88*]. This argument must be disregarded as it directly contravenes CISG Article 79, which absolves any party of liability “for failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control” [*CISG Art. 79(1)*]. General strikes fall within the purview of Article 79 because “the promisor cannot be expected to avert a general strike

by his own works” [*Schlechtriem p. 827*]. In any event, the strike did not occur [*Proc. Ord. No. 2 ¶ 35*].

**2. Universal was not obligated to provide a definite timeframe for cure.**

71. CISG Article 48(1) establishes a seller’s *right* to cure defective performance and does not require that a seller provide a definite time frame for relief. As long as the seller is able to perform its obligations before a breach becomes fundamental, a buyer is not permitted to avoid the contract. Universal declined to immediately set a definite timeframe within which all repairs would be complete because it did not have direct physical access to the vehicles in need of repair. Regardless, Universal repeatedly assured CLAIMANT that the Tera cars would soon be fully repaired [*St. of Claim ¶ 17*]. Such assurances were enough to eliminate CLAIMANT’S uncertainty as to Universal’s ability to quickly identify and address the problem with the vehicles. Ultimately, it was CLAIMANT’S decision to avoid the contract with UAM that thwarted Universal’s attempt to access the vehicles—access which would have immediately allowed Universal to provide a definite window within which the vehicles would be fixed. In the context of an international contract for the sale of goods with a flexible timeframe, CLAIMANT’S decision to avoid the contract was premature and unjustified.

**3. Even if the Tribunal finds that UAM’s delivery of non-conforming vehicles constituted an immediate fundamental breach of contract, CLAIMANT was not entitled to avoid the contract in its entirety.**

72. CISG Article 73 states that “In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided *with respect to that instalment*” [*CISG Art. 73(1), emphasis added*]. Article 73 functions “to avoid unnecessarily drastic consequences from the failure to perform a separable part of the contract”—in other words, to avoid precisely the situation at hand [*Honnold p. 443*]. On its plain terms, the Contract provided for delivery by instalment [*Cl. Ex. No. 1*]. Therefore, even if the Tribunal accepts CLAIMANT’S argument that Respondent’s delivery of non-conforming vehicles

constituted a fundamental breach of contract, CLAIMANT did not have the right to avoid the remainder of the contract. UAM's non-conforming delivery also fails to satisfy the limited circumstances in which the CISG provides for an exception to the above rule: if the breach gives the party good grounds to conclude that fundamental breach will occur with respect to future instalments [a] or if the instalments are so interdependent that one non-conforming delivery will frustrate the purpose of the contract in its entirety [b].

**a. The Tera cars' isolated defect did not indicate that fundamental breach would occur with respect to future instalments.**

73. According to CISG Article 73, the appropriate test for whether defective performance of one part of the contract allows a buyer to avoid the contract in its entirety is whether a breach with respect to part of the contract "gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments" [CISG Art. 73(2)]. Such a situation might arise where a series of breaches establishes the possibility that a future breach is likely [Honnold p. 443]. CLAIMANT'S first correspondence with Mr. Frank Jones would have indicated to any reasonable businessperson that Universal was aware of the nature of the problem and that it would ensure it was not repeated in any future deliveries. In an email to the CLAIMANT, Jones laid out a detailed "worst-case scenario" of the potential depth of the problem with the Tera car along with a comprehensive plan for repairing the issue [Cl. Ex. No. 3]. The letter demonstrates technical know-how on behalf of Universal and the ability of Universal to quickly and effectively address the problem at hand. Finally, Jones indicated that such a problem had not been encountered with any other Tera vehicles [Cl. Ex. No. 3]. CLAIMANT had additional assurance that such a non-conformity would not occur in any future instalments: Mr. Samuel High of UAM indicated that he had never before encountered such a difficulty with the vehicles [St. of Claim ¶ 12] and the cars had "received enthusiastic reviews in the trade press" [St. of Claim ¶ 9]. An isolated problem with 25 Tera cars was not enough to give CLAIMANT good grounds that fundamental breach would occur with respect to future instalments, especially when Universal demonstrated its willingness to quickly remedy the problem. Indeed, only 40 Tera cars in total were discovered that had the same problem [Proc. Ord. No. ¶ 29].

**b. Each instalment of the contract was independent from the remainder of the shipments.**

74. CISG Article 73 allows for a buyer to avoid an entire contract pursuant to a single deficient instalment “if, by reason of their interdependence, these deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract” [CISG Art. 73(3)]. The contract in question was for the sale and purchase of a series of Tera automobiles that would be shipped in several instalments of varying and unspecified sizes and shipment dates [Cl. Ex. No. 1]. Because each vehicle can be sold separately and no one vehicle is required for the functioning or sale of another, the various instalments were in no way interdependent. Moreover, “[i]f the interdependence of the instalments is not clear from itself, the buyer has to inform the seller accordingly” [Enderlein/Maskow p. 297]. CLAIMANT made no indication to UAM that the shipments were in any way interdependent.

75. The initial non-conformity of the Tera cars did not constitute a fundamental breach of contract. CLAIMANT was not permitted to resort to the drastic measure of contract avoidance until Respondent had established its unwillingness or inability to cure its initial defective performance. Even if UAM’s performance had been so deficient and CLAIMANT’S need for vehicles so extraordinarily urgent so as to create a fundamental breach, the CLAIMANT was not permitted to avoid the contract in its entirety under the CISG.

**IV. UNIVERSAL SHOULD NOT BE HELD LIABLE FOR THE BREACH OF THE CONTRACT BETWEEN CLAIMANT AND UAM DISTRIBUTORS.**

**A. Universal was not a party to the contract, and thus cannot be held liable for the breach.**

76. The language of the contract of 18 January 2008 is unambiguous. CLAIMANT contracted with “UAM Distributors Oceania Ltd” for the purchase of 100 Tera cars. The contract further identifies Samuel High as the Sales Manager of UAM Distributors Oceania Ltd [Cl. Ex. No. 1]. The word “Universal” appears nowhere in the excerpt of the contract provided by CLAIMANT. As a non-signatory to the sales contract, Universal is not directly bound by the contract’s obligations.

## **B. Universal cannot be bound to the contract under a theory of agency.**

77. The Tribunal has no grounds for binding Universal to the contract between CLAIMANT and UAM Distributors, as UAM had no actual authority to bind Universal [1]; neither Universal nor UAM's actions support liability under an apparent agency theory [2]; and the parties' subsequent conduct created no agency relationship [3].

### **1. UAM Distributors had no authority to act on behalf of Universal.**

78. Universal gave UAM Distributors no actual authority to act on its behalf. Because the CISG does not address agency, the Convention on Agency governs [*Honnold § 98*].

79. Neither Article 12 [*Cl. Memorandum ¶ 59*] nor Article 13 of the Convention on Agency provide a basis for liability. These provisions apply where no issue exists as to the agent's authority to bind the principal. Here, however, CLAIMANT has presented no evidence that UAM had actual authority to bind Universal, as is required [*Hanotiau p. 11*]. Instead, the agreement between Universal and UAM provided for UAM to act as a distributor, not as an agent entitled to bind a principal [*Proc. Ord. No. 2 ¶ 13*]. Distributors who buy goods from a manufacturer on their own account and then sell them again in a particular territory—as UAM did—are not agents but rather independent contractors [*Saintier p. 89*].

### **2. Universal cannot be held liable under an apparent agency theory.**

80. Additionally, Universal cannot be held liable under a theory that UAM acted as its apparent agent. Under the Convention on Agency Article 14, a principal is not bound “[w]here an agent acts without authority or acts outside the scope of his authority.” Because UAM had no authority to bind Universal, CLAIMANT'S only colorable argument is under the Article 14(2) exception, which permits certain claims “where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal.” Other sources of international contract law confirm that a principal may be bound despite an agent's lack of authority only where the principal makes such manifestations to the third party [*UNIDROIT Principles Art. 2.2.5; Rest.2d of Agency §8*].

81. In this case, CLAIMANT could not have believed reasonably and in good faith that it was contracting with Universal. Universal itself made no manifestations to the relevant third party—here, Mr. Tisk, as CLAIMANT—that UAM had authority to bind Universal. The first contact between Universal and CLAIMANT did not occur until 27 February, more than five weeks after CLAIMANT’S contract with UAM was concluded [*St. of Claim* ¶ 13].
82. Other factors provide no basis for construing an agency relationship between Universal and UAM. Oceania Partners holds a controlling 90-percent stake in UAM; Universal held a small, minority share of 10 percent [*Proc. Ord. No. 2* ¶ 12]. Further, there is no factual basis for CLAIMANT’S contentions that Universal had “huge power to intervene” or that it had any authority “to change the contract” concluded between CLAIMANT and UAM [*Cl. Memorandum* ¶ 59]. To the contrary, “Universal did not mandate any of [the] terms or [the] wording” of the various form contracts its distributors used [*Proc. Ord. No. 2* ¶ 16]. Universal’s true purpose in reviewing the form contracts of all of its distributors, including UAM, was “to be sure there was nothing that violated Universal’s policies regarding the sale of its motor products” [*id.*]. Further, a manufacturer and a distributor each benefit from a manufacturer’s review of contracts, which ensures that no inaccurate representations about the products are made.

**3. Universal’s subsequent conduct does not create an agency relationship where none existed previously.**

83. Universal cannot be bound to the contract through a theory of ratification, because: no express ratification occurred [a]; its offer to repair was voluntary [b]; and it clearly waived any liability while affirming UAM’s liability under the contract [c].

**a. No express ratification occurred.**

84. Universal never created an agency relationship by ratifying the actions of UAM. The Convention on Agency Article 15(1) provides that an act by a non-agent can later be ratified by another party, binding that party as a principal. Here, Universal made no statement indicating that it was ratifying a contractual agreement between UAM and CLAIMANT.

**b. Universal made a voluntary offer of repair to CLAIMANT, with whom it had no contractual relationship.**

85. Universal's offer to evaluate the products and make repairs was a strictly voluntary, *ad hoc* arrangement. Universal had no contractual obligation to CLAIMANT to make such repairs. Further, UAM and Universal had no agreement obligating Universal to fix cars that it had manufactured [*Proc. Ord. No. 2* ¶ 15]. Nevertheless, due to UAM's lack of specific equipment and personnel, Universal agreed to undertake the repairs [*Cl. Ex. No. 4*]. Universal anticipated that the repairs would be minor and take little time [*Cl. Ex. No. 6*], and sought to assure CLAIMANT, the ultimate retail seller, of the quality of its products [*Cl. Ex. No. 4*].

86. CLAIMANT never accepted the terms of Universal's offer to make repairs, first insisting on a fixed time of repair and then canceling the contract [*Cl. Ex. No. 10*]. Even if Universal was found to assume any legal obligation with its offer to repair the cars, it cannot be held liable for the original breach of the contract concluded between CLAIMANT and UAM.

**c. Universal explicitly stated that it did not accept liability for the contract.**

87. Universal clearly stated that it did not accept UAM's contractual obligations. In an e-mail dated 28 February 2008, Universal made clear that "UAM is, of course, responsible to you for the condition of the Tera cars it has sold to you," and went on to emphasize that it would undertake repairs "without admission of liability" [*Cl. Ex. No. 4*]. Universal's subsequent statements and conduct, on which much of CLAIMANT'S argument relies, must be interpreted in light of these initial, express refusals to accept any liability [*Cl. Memorandum* ¶ 54]. CLAIMANT must not be permitted to rely on extraneous statements while willfully ignoring Universal's decisive statement disclaiming liability.

88. Universal's statements in its letter are typical of commercial correspondence. The indication that "Universal does not wish you to have any doubts about either the quality of the Tera brand of our cars or of the intention of Universal to stand behind its product" carries no legal weight. To eliminate any ambiguity, that statement of assurance is

immediately followed by the express denial of any liability in the following sentence [*Cl. Ex. No. 4*].

89. Giving significant weight to statements waiving liability is appropriate where, as here, liability derives from an inferred relationship based on a party's conduct alone. CISG Article 8 requires that "due consideration... be given to all relevant facts" in judging whether a party reasonably interpreted the actions of another. Therefore, in determining whether Universal might be bound not by a contract but rather through its actions, the Tribunal must consider all relevant facts—including the two statements denying any acceptance of liability, which clearly remained with UAM.

**C. Universal cannot be held liable as a member of a group of companies.**

90. Universal and UAM are separate corporate entities, and the facts here do not justify treating them as part of a group of companies [*see above* ¶¶ 28–42]. Holding Universal liable under such a theory undermines the independence of distributors, as that outcome reduces the autonomy of distributors with specialized knowledge of regional markets.

**D. Universal's subsequent conduct provides no other bases for liability.**

**1. Universal is not bound under a theory of assumption.**

91. Universal did not take on any obligation to perform under a theory of assumption [*Cl. Memorandum* ¶ 54]. CISG Article 29 refers only to the conduct of the actual parties to a contract [*Schlechtriem at 63*], and here, CLAIMANT provides no alternative legal principle by which Universal's role could constitute assumption [*Cl. Memorandum* ¶ 53].

92. The conduct of Joseph Tisk, representing CLAIMANT, demonstrates that he did not believe that Universal had assumed the contract. On 29 February, Tisk wrote not to Universal but rather to Samuel High of UAM to cancel the contract [*Cl. Ex. No. 10*].

**2. Universal cannot be bound by any modification of the contract.**

93. Universal had no authority to later modify the terms of the contract validly concluded between two other parties, CLAIMANT and UAM. CISG Article 29 "concerns the *parties*"

ability to modify or terminate a contract by agreement” [*Schlechtriem at 63 (emphasis added)*]; it provides for no third-party modification [*Cl. Memorandum ¶ 54*].

**E. Considerations of good faith weigh against CLAIMANT’S allegation of liability.**

94. Good faith is recognized as a substantive principle of international commercial law [*CISG Art. 7(1); UNIDROIT Principles Art. 1.7(1)*]. Here, considerations of good faith weigh in favor of Universal, due to Universal’s conduct in the face of UAM’s possible decline [1]; CLAIMANT’S agreement with Patria and its conduct toward Universal [2]; and the importance of encouraging good-faith business practices [3].

**1. Universal made a good faith decision in declining to support UAM’s ill-conceived expansion.**

95. UAM’s insolvency resulted from its own business decisions. Oceania Partners, which owns a 90 percent stake in UAM, supported UAM’s planned expansion; Universal, which holds only a 10 percent stake in UAM, resisted that effort [*Proc. Ord. No. 2 ¶ 32*]. UAM began to implement the expansion plans, yet it became insolvent even before it acquired any new assets in other countries. For its part, Universal was well within its rights to exercise its business judgment and decline to support what it deemed—correctly, it would appear—to be an unwise expansion given the market conditions [*id.*].

96. In response to these concerns, Universal took reasonable steps to prepare for UAM’s possible decline. Another distributor, Patria Importers, Ltd, initiated contact, first approaching Universal in October 2007 [*Proc. Ord. No. 2 ¶ 33*]. Only when it became clear that UAM would be proceeding with what Universal viewed as an unwise business strategy did Universal enter into more serious discussions with the other firm [*id.*]. When UAM entered into insolvency proceedings, thus jeopardizing Universal’s only means of marketing its cars in Mediterraneo, Universal reached an alternative arrangement with Patria Importers [*id.*; *Cl. Ex. No. 15*]. At each stage, Universal’s conduct was appropriate, deliberate, and necessary in light of the circumstances.

**2. CLAIMANT’S conduct is inconsistent with principles of good faith and fair dealing.**

97. The record suggests that alternative commercial opportunities motivated CLAIMANT’S decision to end discussions with Universal about repairing the cars. On 11 February, CLAIMANT declined a prior offer from Patria Importers, another distributor, to purchase Indo cars [*St. of Claim ¶ 19; Cl. Ex. No. 8*]. Yet after Patria amended the offer to include “generous payment terms,” CLAIMANT accepted their offer [*St. of Claim ¶ 20; Cl. Ex. No. 9*]. During that period, CLAIMANT had been engaged in ongoing discussion about the Tera cars with Mr. Steiner of Universal, who offered repeated assurances that the cars would be repaired quickly [*St. of Claim ¶ 17*]. Nevertheless, CLAIMANT used purported deficiencies in Steiner’s assurances regarding the repairs’ timing as a pretext for terminating the contract with UAM Distributors.

**3. Encouraging good-faith business practices requires a finding for Universal.**

98. Finding for Universal in this case preserves the incentive for a manufacturer to provide mutually beneficial repairs that, although not contractually required, both maintain that manufacturer’s reputation and ensure that downstream sellers will have marketable goods. By contrast, holding Universal liable would discourage such actions where no contractual obligation exists.

99. After CLAIMANT voided the contract, Universal had a lesser incentive to make immediate repairs; nevertheless, the source of the problem was discovered the first day the cars arrived in Equatoriana, and all 25 cars were repaired within five days [*Proc. Ord. No. 2 ¶ 22*]. The vehicles, moreover, were determined to be marketable as new products [*id. at ¶ 24*]. Yet instead of pursuing an accommodation as Universal had proposed, CLAIMANT cancelled the contract with UAM and ended discussions with Universal about a repair arrangement [*St. of Claim ¶ 21*].

## REQUEST FOR RELIEF

For the reasons stated above, RESPONDENT UNIVERSAL respectfully requests that the Tribunal find that:

- (1) The arbitration agreement is void due to the insolvency proceedings in Oceania and thus proceedings should be stayed indefinitely or at least until the conclusion of the insolvency proceedings;
- (2) The Tribunal lacks jurisdiction over CLAIMANT'S action against RESPONDENTS Universal and UAM Distributors;
- (3) There was no fundamental breach of the contract of 18 January 2008;
- (4) Universal cannot be held liable for any contractual breach.

(signed)

/s/ Sarah Beckerman

/s/ Justin Kliger

/s/ Jonathan Passaro

/s/ Matthew Sullivan

/s/ Diora Ziyaeva