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THE 21st LAWASIA INTERNATIONAL MOOT COMPETITION 2026

IN THE ASIAN INTERNATIONAL ARBITRATION CENTRE

MEMORANDUM *for* CLAIMANT

BETWEEN

NOVA LIVE ASIA PTE LTD …**CLAIMANT**

AND

AURORA ENTERTAINMENT CO. LTD. …**RESPONDENT**

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STATEMENT OF JURISDICTION

The CLAIMANT has invoked arbitration under the jurisdiction of this Arbitral Panel under the Asian International Arbitration Centre Rules 2026, with Kuala Lumpur, Malaysia as the default seat of arbitration under Rule 29 of the AIAC Rules.

Rule 29 of the Asian International Arbitration Centre Rules, 2026 reads as follows:

> *Rule 29 – Seat of Arbitration*
>
> *29.1 The Parties are at liberty to agree on the seat of arbitration.*
> *29.2 Where the seat of arbitration has not been agreed to by the Parties, the seat of arbitration shall be Kuala Lumpur, Malaysia, unless the*
> *Arbitral Tribunal determines, having regard to the circumstances of the case, that another seat is more appropriate.*
> *29.3 Without affecting the choice of the seat, the Parties and the Arbitral Tribunal are at liberty to agree to have meetings, conferences,*
> *deliberations, and hearings take place in person or virtually at a place or venue other than the seat of arbitration.*

QUESTIONS PRESENTED

ISSUE 1

WHETHER THE FORUM NON CONVENIENS LIES IN THE COURT PROCEEDING OR ARBITRATION?

ISSUE 2

WHETHER AN ORDER FOR SECURITY FOR COSTS OUGHT TO BE GRANTED?

ISSUE 3

WHETHER AURORA'S DEPLOYMENT OF A HOLOGRAPHIC REPLACEMENT CONSTITUTED A BREACH OF THE AGREEMENT?

ISSUE 4

WHETHER AURORA'S COUNTERCLAIM OUGHT TO BE GRANTED?

STATEMENT OF FACTS

THE PARTIES

Nova Live Asia Pte Ltd (hereinafter '**CLAIMANT**') is a leading international concert promotion and live events company incorporated under the laws of Reyna, with an established reputation for organising large-scale entertainment events across East Asia. Aurora Entertainment Co. Ltd (hereinafter **'RESPONDENT'**) is an R-Pop entertainment company headquartered in Reyna, which manages the co-ed group known as ECLIPSE, comprising five members.

BACKGROUND

In early 2025, at the peak of ECLIPSE's commercial success, the RESPONDENT was approached by at least four companies to organise and promote ECLIPSE's first live concert in Reyna. It elected to proceed with the CLAIMANT, having regard to its substantial portfolio of large-scale R-Pop events, its strong financial backing and the parties' prior successful collaborations where concerts were executed efficiently.

THE AGREEMENT

The Concert was intended to be one of the CLAIMANT'S flagship productions for 2026. Following a coordination meeting on 02.01.2026 and a Zoom meeting on 05.01.2026, the Parties executed the Agreement on 07.01.2026, governed by the UNIDROIT Principles, 2016 (hereinafter **"PICC"**). The Agreement defined the "Act" as ECLIPSE comprising all five named members and the "Concert" as the "live performance of the Act." The RESPONDENT was required to deliver a performance meeting the maximum satisfactory standards reasonably expected of a headline ECLIPSE concert.

The CLAIMANT swiftly activated promotional campaigns, finalized venue bookings, secured sponsorship arrangements and commenced ticket sales, all of which sold out within two weeks. The CLAIMANT'S entire commercial investment, including its reputation with sponsors, broadcasters and 90,000 ticketholders, was staked on the delivery of a live performance by all five members. Owing to the compressed timeline, the parties decided that the written agreement would only contain the essential terms and did not provide for a dispute resolution clause, although all their six prior agreements were resolved through arbitration.

THE SETBACK

On 24.01.2026, during a meet-and-greet event, a fan breached security and made unsolicited physical contact with Im Luna. The RESPONDENT was aware from 27.01.2026 that Luna was experiencing psychological distress, having arranged therapy sessions from that date. Despite this, the RESPONDENT failed to inform the CLAIMANT of Luna's deteriorating condition, despite her ability to participate in rehearsals being diminished.

THE HOLOGRAPHIC SUBSTITUTION

It was only on 05.02.2026, two days prior to the concert that the RESPONDENT finally disclosed Luna's unavailability and proposed deploying holographic technology as a replacement. The RESPONDENT'S belated disclosure deprived the CLAIMANT of any meaningful opportunity to consider alternatives, negotiate terms or mitigate its exposure.

At this stage, cancellation was commercially impossible. Faced with no viable alternative, the CLAIMANT reluctantly acquiesced, expressly raising concerns about the authenticity of the concert, audience expectations and the CLAIMANT'S reputation. Further, the usage of the holographic replacement was conditioned on its confidentiality.

THE CONCERT AND ITS AFTERMATH

The Concert proceeded on 07.02.2026. On 13.02.2026, online speculation arose after a social media user identified a visual irregularity in concert footage. A prominent RooTube creator analysed the footage frame by frame, publicly speculating that holographic technology had been deployed. The growing scrutiny exposed the CLAIMANT to significant reputational harm as promoter of a concert where the audience had been misled. It also received an e-mail from a fan, asking for a refund if the claim regarding holographic substitution was accurate.

The RESPONDENT issued an invoice of USD 3.6 million on 10.02.2026 but produced no medical evidence substantiating Luna's alleged unfitness.

THE DISPUTE

The CLAIMANT issued a notice of termination on 26.02.2026 and commenced arbitration, consistent with the parties' established course of dealing. The RESPONDENT initiated parallel court proceedings, which the Reynan High Court stayed on 31.03.2026, citing *Kompetenz Kompetenz*. Despite its jurisdictional objections, the RESPONDENT filed a counterclaim in the arbitration, thereby participating in the very proceedings it purports to challenge. The CLAIMANT opposes the RESPONDENT'S application for security for costs, maintaining that it is a financially solvent entity with several ongoing projects and publicly listed upcoming performances.

LIST OF IMPORTANT DATES

Date	**Event**
2nd January 2026	Coordination meeting between the parties
5th January 2026	Follow-up Zoom meeting

7th January 2026	Execution of the Agreement
24th January 2026	Meet-and-greet incident involving Luna
5th February 2026	Emergency video conference between the parties
7th February 2026	Concert at National Stadium of Reyna
10th February 2026	Invoice issued by the RESPONDENT
13th February 2026	Online speculation regarding minor glitch
25th February 2026	Issuance of formal follow-up letter
26th February 2026	Termination of Agreement by CLAIMANT
31st March 2026	Stay of Proceedings

SUMMARY OF PLEADINGS

ISSUE 1: THE ARBITRAL TRIBUNAL IS THE PROPER FORUM FOR THIS DISPUTE

The Arbitral Tribunal is the proper forum to hear the present dispute. *Firstly*, the arbitration agreement was incorporated into the present contract through the parties' prior course of dealing, given their six previous agreements, each providing for arbitration under the AIAC Rules. *Secondly*, the RESPONDENT waived its jurisdictional objections through its counterclaim and application for security for costs. This was inconsistent with any continuing objection and amounted to an acknowledgment of jurisdiction. *Thirdly*, where parties have validly agreed to arbitration, *forum non conveniens* has no application, particularly after the Reynan High Court stayed the proceedings in favour of arbitration.

ISSUE 2: AN ORDER FOR SECURITY FOR COSTS OUGHT NOT TO BE GRANTED

The RESPONDENT is not entitled to an order for security for costs because the Interim Measure clauses within the AIAC Arbitration Rules 2026 do not provide for granting it. Further, the CLAIMANT poses no risk of non-compliance with such an award. The RESPONDENT does not fulfil the standard for granting security, since there is no demonstrable injury irreparable by an award for damages or a reasonable possibility that it would succeed on merits. The rumours regarding the CLAIMANT'S financial position do not meet the high standard of necessity. Further, the quantum demanded is neither proportionate nor justified, as it would affect the CLAIMANT'S ability to pursue its claims.

ISSUE 3: AURORA'S DEPLOYMENT OF A HOLOGRAPHIC REPLACEMENT CONSTITUTED A BREACH OF THE AGREEMENT

The RESPONDENT'S deployment of a holographic replacement constituted breach of the Agreement. *Firstly*, the contract does not permit holographic substitution. The Concert was defined as a live performance of the Act, and the same was expressly defined to include all five members of ECLIPSE. The preliminary negotiations disclose no common intention to permit holographic replacement of any performer, and the RESPONDENT'S liberty to employ digital or other production technologies extends only to enhancement of human performances. *Secondly*, the purported waiver was invalid and of no legal effect. The CLAIMANT'S consent was obtained under economic duress three days before the concert, and was conditional upon confidentiality, which the RESPONDENT failed to maintain. *Thirdly*, the RESPONDENT cannot rely upon force majeure, having contractually assumed responsibility for the safety of all promotional events.

ISSUE 4: AURORA'S COUNTERCLAIM OUGHT NOT TO BE GRANTED

The Tribunal must dismiss the RESPONDENT'S counterclaim. *Firstly*, the CLAIMANT validly terminated the Agreement. The RESPONDENT'S failure to procure a live human performance by all five members of ECLIPSE amounted to fundamental non-performance, depriving the CLAIMANT of the entire ECLIPSE experience for which it had contracted. Termination discharged both parties from any obligation to effect or receive performance, including payment. *Secondly*, estoppel does not assist the RESPONDENT, which assumed the risk of Luna's unavailability and would in any event have deployed the hologram irrespective of the CLAIMANT'S consent. *Thirdly*, the CLAIMANT is entitled to withhold payment under Article 7.1.3 of PICC since the RESPONDENT performed only in part.

PLEADINGS

ISSUE 1: THE ARBITRAL TRIBUNAL IS THE PROPER FORUM FOR THIS DISPUTE

1. Given the parallel proceedings that have unfolded before both this Tribunal and the Reynan High Court, the CLAIMANT submits that this dispute properly belongs before the former, for the following reasons: ***firstly,*** there was a valid arbitration agreement between the parties **[1.1]**; ***secondly,*** Aurora acknowledged the jurisdiction of the Arbitral Tribunal and waived its objections **[1.2]**; ***thirdly,*** the Arbitral Tribunal is the agreed forum and cannot be displaced **[1.3]**.

[1.1] THERE WAS A VALID ARBITRATION AGREEMENT BETWEEN THE PARTIES

2. An arbitration agreement may be incorporated into a subsequent contract by the parties' previous course of dealing.[1] Where parties have concluded a series of similar contracts on the same conditions, those conditions may be incorporated into a subsequent contract concluded without express reference to them.[2]

3. Whether incorporation arises through a prior course of dealing is a question of degree and fact and is determined by the following factors: **(i)** the number of previous contracts, and **(ii)** the similarity in terms of subject matter and manner in which they were concluded.[3] The CLAIMANT submits that in the present case, both factors strongly support incorporation. The parties had collaborated on six prior occasions, with each of the previous agreements containing arbitration clauses providing for arbitration under the AIAC Arbitration Rules.[4] Significantly, none of the ensuing arbitrations gave rise to any jurisdictional challenge.[5]

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[1] *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625.
[2] *McCutcheon v David Macbrayne Ltd* [1964] 1 W.L.R. 125 (HL) ¶128.
[3] *Capes (Hatherden) Ltd v Western Arable Services Ltd* [2010] Lloyd's LR 477 ¶35.
[4] ¶9, Additional Clarifications.
[5] ¶6, Corrections & Clarifications.

4. Further, each agreement related to the organisation of concerts featuring artists managed by the RESPONDENT, including one concert involving ECLIPSE itself.[6] The parties deliberately chose to record only the essential commercial terms, relying on their established commercial relationship to govern matters that were not explicitly addressed.[7] Operating under a compressed timeline, the parties deferred the remaining terms, expecting them to operate as in previous collaborations unless varied.

5. When parties have consistently contracted in a particular manner, there is no reason why a subsequent contract should produce a different result.[8] Since no such refinements were made, the previous agreements' mandatory reference to arbitration under the AIAC Rules[9] is deemed to be incorporated into the present contract as well.

6. In *R1 International Pte Ltd v Lonstroff AG*,[10] the Singaporean Court of Appeal was dealing with a similar factual scenario and had to determine whether the arbitration agreement had been incorporated into the main contract by a previous course of dealing between the parties. There, the parties had agreed on a set of essential terms to bind themselves, with liberty to discuss the remaining terms and finalize other details later.[11] The present case stands on a materially different footing. Unlike *R1 International*, where only a single prior transaction existed,[12] the parties here entered into six previous agreements, each containing materially identical arbitration clauses. These repeated dealings are sufficient to establish a consistent course of dealing from which incorporation follows.

[6] ¶5, Corrections & Clarifications.
[7] ¶32, Moot Problem.
[8] Kim Lewison, *The Interpretation of Contracts* (5th edn, Sweet & Maxwell 2011) p.129.
[9] ¶34, Moot Problem.
[10] *R1 International Pte Ltd v Lonstroff AG* [2014] SGCA ¶56.
[11] ibid ¶52.
[12] ibid ¶39.

[1.2] AURORA ACKNOWLEDGED THE JURISDICTION OF THE TRIBUNAL AND WAIVED ITS OBJECTIONS

7. The CLAIMANT submits that the RESPONDENT waived its objections to the jurisdiction of the Tribunal by actively participating in the proceedings, by filing a counterclaim as well as a subsequent application for an order that the CLAIMANT provide security for costs.[13]

8. Rule 26.2 of the AIAC Rules, 2026, provides that a plea that the Arbitral Tribunal does not have jurisdiction must be raised no later than in the statement of defence or in the defence to the counterclaim or set off, where the same have been raised.[14]

9. Rule 53.1 of the AIAC Rules, 2026, states that a failure by any party to promptly object to any non-compliance with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make an objection. Similarly, section 7(b) of the Malaysian Arbitration Act, 2005 states that a party who knows that any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating its objection to such non-compliance without undue delay, shall be deemed to have waived its right to make an objection.[15]

10. Courts have held that although a party may assert that its actions were intended to support its jurisdictional challenge, a tribunal must look beyond such claims and examine the substance of actions.[16] In essence, parties should not be allowed to hedge their actions and must be decisive in

[13] ¶¶67 & 69, Moot Problem.
[14] Asian International Arbitration Centre (Malaysia), AIAC Arbitration Rules 2026 (AIAC 2026) Rule 26.2.
[15] Arbitration Act 2005 (Malaysia), s 7(b).
[16] *Beltran v Terraform Labs Pte Ltd* [2023] SGHC 340 ¶45.

whether they are insisting on arbitration or litigation and the courts must disregard disingenuous reservations.[17]

11. Further, an earlier reservation may be waived by clearly inconsistent conduct of the party as one cannot be permitted to approbate and reprobate simultaneously.[18] In the present case, the RESPONDENT filed a counterclaim, notwithstanding its jurisdictional objections and without prejudice to its position.[19] However, its subsequent application to the Tribunal for an order for security for costs was not expressly confined to its jurisdictional challenge.[20] Thus, in the present case, the CLAIMANT submits that the RESPONDENT'S "without prejudice" reservation should be deemed to have been waived, given its inconsistent conduct of trying to hedge its options in both forums.

12. The question of submission to the Arbitral Tribunal requires an objective analysis of all the circumstances, examining whether the party submitted to the Tribunal's jurisdiction and intended to participate in the proceedings.[21] In the present case, it is evident that the RESPONDENT was willing to participate in the arbitration proceedings, if its application for security for costs had been granted.

[1.3] THE ARBITRAL TRIBUNAL IS THE AGREED FORUM AND CANNOT BE DISPLACED

13. The doctrine of *forum non conveniens*, as established in *Spiliada Maritime Corp v Cansulex Ltd,*[22] identifies the natural forum as that with which the dispute has the most real and

[17] *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 ¶93.
[18] ibid ¶101.
[19] ¶67, Moot Problem.
[20] ¶9, Additional Clarifications.
[21] *Excalibur Ventures LLC v . Tex. Keystone Inc.* [2011] EWHC 1624, ¶61.
[22] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

substantial connection.[23] This doctrine empowers courts to decline jurisdiction in favour of a more convenient and appropriate forum. Establishing the existence of such an alternate forum requires proving that there exists another competent forum, where the case may be tried more suitably for the interests of all parties and for the ends of justice.[24] It is submitted that where the parties have validly agreed to arbitration, the forum is settled by consent, and thus, the convenience test does not apply.

14. Further, in instances such as the present case where the court has already granted a stay pending the outcome of the arbitration proceedings under *kompetenz-kompetenz*, this doctrine cannot be applied.

15. Additionally, the principle of party autonomy requires that the courts should be hesitant to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitration.[25] In the present case, the parties' successful resolution of prior disputes through arbitration lends further weight to the argument that the court should not interfere.

16. In any case, even if the connecting factors were relevant to determine forum selection, they would not support the RESPONDENT. *Firstly*, as established above, the Arbitral Tribunal is the more convenient forum. *Secondly*, the law governing the contract, the UNIDROIT Principles are neutral and can be applied with equal competence by the Arbitral Tribunal. Lastly, given that both parties are incorporated in Reyna,[26] and still chose a neutral Arbitral forum to resolve their disputes, they clearly evince their intention to submit to the jurisdiction of the Arbitral Tribunal.

[23] *The Abidin Daver* [1984] AC 398 p.415.
[24] *Sim v. Robinow* 1892 19 R 665 p.668.
[25] *Tjong Very Sumito and Others v Antig Investments Pte Ltd* [2009] SGCA 41 ¶29.
[26] Exhibit 2.

ISSUE 2: AURORA IS NOT ENTITLED TO SECURITY FOR COSTS

17. The RESPONDENT'S application for security for costs rests on unsubstantiated allegations and falls well short of the high threshold required for this exceptional remedy. The CLAIMANT submits that this Tribunal ought to dismiss the application, for the following reasons: ***first***, that security for costs is an exceptional remedy and the threshold for granting it has not been met **[2.1]**; ***secondly***, Aurora does not satisfy the requirements under Rule 11.4 of the AIAC Rules **[2.2]**; ***thirdly***, there is no genuine risk that any future costs award would go unsatisfied **[2.3]**; and ***fourthly***, the quantum sought is disproportionate and unsubstantiated **[2.4]**.

[2.1] SECURITY FOR COSTS IS AN EXCEPTIONAL REMEDY AND THE THRESHOLD FOR GRANTING IT HAS NOT BEEN MET

18. *Firstly,* the RESPONDENT cannot use this Tribunal's powers to claim security in its own favour and deny its authority at the same time. In *Lissenden v Bosch Ltd,* it was held that a party cannot blow hot and cold based on its own procedural convenience.[27] Having invoked the Tribunal's discretionary power, the RESPONDENT cannot deny the very source from which these powers flow.

19. This Tribunal must exercise caution while considering the RESPONDENT'S application for an order for security for costs. Further, the burden rests squarely on the RESPONDENT to demonstrate compelling circumstances that justify requiring its contractual counterparty to furnish security before the merits have been determined.[28]

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[27] *Lissenden v CAV Bosch Ltd.,* [1940] AC 412 (HL).

[28] *Eskosol S.p.A. in liquidazione v Italian Republic*, ICSID Case No ARB/15/50, Procedural Order No 3 (12 April 2017).

20. The majority, in *RSM Production Corporation v Saint Lucia* ordered security for costs because of exceptional circumstances, including the CLAIMANT'S history of third-party funding, repeated non-compliance with prior costs awards, and demonstrable risk of non-payment.[29] Routine security for costs orders risk transforming arbitration from a consensual dispute resolution mechanism into a barrier to justice.[30] This barrier may take shape from any preliminary assessment of the merits that risks prejudging issues that should only be determined after both parties have been fully heard.[31]

21. Accordingly, this Tribunal must evaluate the present application in light of these considerations and grant security for costs only where the circumstances demonstrate that such an exceptional measure is truly necessary.

[2.2] AURORA DOES NOT SATISFY THE REQUIREMENTS UNDER RULE 11.4 OF THE AIAC RULES

22. Several considerations weigh against granting security. *Firstly,* security for costs is not expressly provided for within the Arbitration Rules governing the dispute. *Secondly*, it is entirely uncertain whether a future entitlement to a cost award is even a "right" deserving of an interim relief. *Thirdly*, an interim measure necessarily implies urgency and necessity, which is not the nature of security for costs, and *fourthly,* a security for costs award gravely prejudices future cost orders.[32]

23. Furthermore, Rule 11.4 of the AIAC Arbitration Rules,[33] requires the party seeking interim relief to establish two requirements: *firstly*, that it would suffer injury incapable of being

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[29] *RSM Production Corporation v Saint Lucia*, ICSID Case No ARB/12/10, 13 August, 2014.
[30] ibid, (J Edward Nottingham).
[31] ibid.
[32] *South American Silver Ltd (Bermuda) v Plurinational State of Bolivia*, PCA Case No 2013-15, Procedural Order No 10 (11 January 2016).
[33] AIAC Arbitration Rules 2026, r 11.4(a)–(b).

adequately compensated by an award for damages; and *secondly*, that there is a reasonable possibility that it will succeed on the merits of the claim. It is submitted that the RESPONDENT satisfies neither requirement.

(i) Aurora would not suffer injury that cannot be repaired by an award for damages

24. The RESPONDENT'S claim is, in substance, a monetary claim for unpaid royalties and outstanding invoices. Even if established, it is completely reparable by an award for damages. Such claims are, by their very nature, fully compensable through a final monetary award.

(ii) There is no reasonable possibility that Aurora will succeed on the merits of the claim

25. The RESPONDENT fails to demonstrate a reasonable possibility of succeeding on the merits of the claim. The parties concluded the Agreement to deliver ECLIPSE's first "live" performance in Reyna, and the "Act" was expressly defined as five identified performers, including Im Luna.[34] Further, the CLAIMANT'S consent to the holographic substitution, proposed by the RESPONDENT was obtained at the last minute, under commercial pressure and on the express condition of strict confidentiality.[35]

26. The "maximum satisfactory standards reasonably expected of a headline ECLIPSE concert" that the RESPONDENT itself was obligated to provide, are incompatible with an undeclared digital replacement of a performer, hidden from ticket buyers who expect a live human performance.[36] As a result, the RESPONDENT is unable to demonstrate a plausible chance of success that would satisfy the second limb.

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[34] ¶1.1, Exhibit 2.
[35] ¶44, Moot Problem.
[36] ¶3.1.1, Exhibit 2.

27. For the foregoing reasons, the RESPONDENT has failed to establish either limb of Rule 11.4 or produce reliable evidence of any risk to the enforcement of such award. It cannot now ask the Tribunal to grant a disproportionate remedy in circumstances tainted by its own conduct.

[2.3] THERE IS NO GENUINE RISK THAT ANY FUTURE COSTS AWARD WOULD GO UNSATISFIED

28. It is further submitted that Tribunals have emphasised in many disputes of this nature, that the threshold for proving a party's financial impunity to justify an order for security is high. In *South American Silver v State of Bolivia,* the Tribunal held that factors such as financial instability, the inability of a party to show availability of funds or even the lack of assets are not, in themselves sufficient to constitute the exceptional circumstances that are necessary for a security for costs order to be granted.[37]

29. The CLAIMANT is not a party that lacks resources. Its strong financial backing and substantial portfolio of large-scale R-Pop events were the exact reasons the RESPONDENT chose it amongst the multiple companies that had approached it.[38] The best evidence of the CLAIMANT'S financial situation is the RESPONDENT'S own contemporaneous commercial assessment, which was completed by the RESPONDENT itself prior to any disagreement.[39] Before considering a party's solvency as questionable, tribunals need objective proof of impecuniosity, such as audited accounts, bankruptcy procedures, or a proven pattern of default, rather than hearsay or rumours.[40] The RESPONDENT'S reliance on an anonymous *Blueddit* thread and a second-hand accusation about the CLAIMANT's interactions with an unaffiliated third party falls well below that standard.[41]

[37] *South American Silver v Bolivia* (n 32).
[38] ¶27, Moot Problem.
[39] ¶¶62 & 68, Moot Problem.
[40] *South American Silver v Bolivia* (n 32).
[41] ¶¶62 & 68, Moot Problem.

[2.4] THE QUANTUM SOUGHT IS DISPROPORTIONATE AND UNSUBSTANTIATED

30. The CLAIMANT submits that the quantum demanded by the RESPONDENT as security is disproportionate. In *Dirk Herzig v Turkmenistan,* the Tribunal held that such quantum must be proportionate and granted after considering the effect such an order may have on a party's ability to pursue its claims in the Arbitral process.[42]

31. The RESPONDENT seeks USD 2 million without offering any budget, comparator, or cost estimate in support of that figure. Tribunals have cautioned against speculative, *in terrorem* sums, especially in circumstances such as the present, where the order would immobilize some of the very operating capital the CLAIMANT needs to conduct its regular business.[43] Proportionality is integral to any order for security, and the application fails on that ground. [44]

ISSUE 3: AURORA'S DEPLOYMENT OF A HOLOGRAPHIC REPLACEMENT CONSTITUTED A BREACH OF THE AGREEMENT

32. The RESPONDENT's substitution of Im Luna with a holographic projection struck at the very heart of the parties' bargain for a live performance by ECLIPSE. The CLAIMANT submits that this substitution constituted a breach of the Agreement, for the following reasons: ***firstly***, the contract does not permit holographic replacement **[3.1]**; ***secondly***, the purported waiver of this requirement was invalid and of no legal effect **[3.2]**; and ***thirdly***, in any case, the principle of force majeure is not applicable **[3.3]**.

[3.1] THE CONTRACT DOES NOT PERMIT HOLOGRAPHIC REPLACEMENT

[42] *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v Turkmenistan*, ICSID Case No ARB/18/35. ¶49.
[43] ibid.
[44] ibid.

33. This argument relies on the interpretation of three contractual clauses: ***firstly,*** the contract contemplates 'live performance' **[3.1.1.]**; ***secondly,*** holographic replacement does not meet the 'generally accepted industry standards and reasonable audience expectations' **[3.1.2]**, and ***thirdly,*** Aurora's right to deploy 'digital or other production technologies' does not extend to the use of holographic replacement **[3.1.3]**.

[3.1.1] The contract contemplates 'live performance'

[3.1.1.1] There was no common intention between the parties to allow for holographic substitution.

34. Under Article 4.1(1) of PICC, the meaning of a contractual term must be determined according to the common intention of the parties,[45] which means the common state of mind shared by both parties at the time the contract was concluded.[46] Such intention may be established through the circumstances mentioned in Article 4.3 of PICC.[47] Preliminary negotiations, specifically the minutes of meetings,[48] constitute one such factor under this Article.[49]

35. The RESPONDENT may rely on the Agreement to assert that the parties' common intention was to permit holographic substitution. However, the coordination meeting was intended to allow the parties to align expectations,[50] where both parties intended to provide the ECLIPSE experience to the viewers.[51] Further, Madam Ye Bin's disclosure of AI assistance in analysis and digital modelling was qualified by her previous statement, effectively limiting AI usage to performance

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[45] *UNIDROIT Principles of International Commercial Contracts* (International Institute for the Unification of Private Law (UNIDROIT) 2016); UNIDROIT, UNIDROIT Principles of International Commercial Contracts (4th edn, UNIDROIT 2016) art.4.1(1).
[46] ibid, Official Comment 1, p.137.
[47] PICC art.4.3.
[48] Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn, OUP 2015) p.587.
[49] PICC art.4.3(a); *Great Hill Equity Partners II LP v Novator One LP* [2007] EWHC 1210 (Comm) pp.59-60.
[50] p.1, Exhibit 1.
[51] p.3, Exhibit 1.

preparation.[52] The digital elements Ms. Kim described as common in such shows were general technological enhancements to a live performance, not holographic replacements.[53] Hence, neither the minutes nor any other evidence indicates a common intention to replace the ECLIPSE members through technological means.

[3.1.1.2] In Any Case, Reasonable persons would understand the contract as requiring human performance

36. If a common intention under Article 4.1(1) of PICC cannot be established, the meaning of a contractual term must be determined with reference to an international standard of reasonableness under Article 4.1(2) of PICC. Additionally, parties to commercial transactions are unlikely to use language in a sense entirely different from that which would be attached to it by reasonable persons.[54] The relevant question is what reasonable professionals in the relevant sector as the parties would reasonably understand the contract to mean,[55] and the intention which reasonable people would have had if placed in the situation of the parties.[56] In establishing this understanding, the factors that are of a more general nature, including the nature and purpose of the contract and the meaning commonly given to terms in the trade concerned under Article 4.3 of PICC, are relevant.[57]

(i) Interpreting the meaning commonly given to words in the trade concerned under Article 4.3(e) of PICC

[52] ibid.
[53] ibid.
[54] PICC art.4.1, Official Comment 1, p.137; Hein Kötz, *European Contract Law* (Clarendon Press 1997) p.109.
[55] PICC art.4.1, Official Comment 1, p.137.
[56] *Reardon-Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 (HL), p.996.
[57] PICC art.4.3, Official Comment 2, p.140.

37. In ascertaining this 'reasonable' intention, great weight is placed on the natural and ordinary meaning of the words used by the parties.[58] While the specific meaning attributed to the terms in the industry concerned is also relevant,[59] strong countervailing arguments are required to deviate from the literal, natural or ordinary meaning of the words used under PICC.[60] In this case, the specific trade is that of artist promotion and concert management. No argument exists why such trade would deviate from the natural meaning of 'live performance'.

38. In the contract, "concert" is defined to be a "live performance of the Act".[61] Live performance is defined as something that involves a presentation, such as a play or concert in which both the performers and audience are physically present or an event that is broadcast or reported as it is occurring.[62] In the field of artistic performance, the essence of live performance is considered to be unmediated contact between performers and audience, which demands physical and temporal presence.[63] Under the traditional point of view, performances are transitory and ephemeral;[64] the artist(s) choose to make work directly in front of the audience, and the live art comes into being at the actual moment of encounter between the artist and a spectator.[65] A hologram, however, can reproduce the same performance twice, making it reproducible.

(ii) Interpreting the nature and purpose of the contract under Article 4.3 (d) of PICC

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[58] *Deutsche Genossenschaftsbank v Burnhope* [1995] 1 WLR 1580 (HL) 1589 (Lord Steyn).
[59] PICC art.4.3(e).
[60] Vogenauer (n 48) p.597.
[61] ¶1.1, Exhibit 2.
[62] *Merriam-Webster*, 'live' (online edn) <www.merriam-webster.com/dictionary/live> accessed 15 July 2026
[63] Edwin Wilson and Alvin Goldfarb, *Theatre and Film* (McGraw-Hill College Press 1999).
[64] Erika Fischer-Lichte, 'Theatre History as Cultural History' in *História do Teatro e Novas Tecnologias: Actas* (Centro de Estudos de Teatro 2004).
[65] Joshua Sofaer, 'What is Live Art?' (10 June 2011) <https://www.joshuasofaer.com/2011/06/what-is-live-art/> (accessed 15 July 2026).

39. Under Roman law, from which this article originates, the nature or the subject matter refers to the characteristic content of the type of contract in question.[66] In this case, the contract is a concert promotion and performance agreement between a party that manages live artists and another that promotes live events.[67] In the Agreement, the RESPONDENT has explicitly agreed to 'make ECLIPSE available for the concert'. Hence, from the nature of the Agreement itself being a performance contract for a live concert, there can be no reasonable intention of parties that may be established to allow holographic substitution of a member of ECLIPSE.

40. Under Article 4.1(2) read with Article 1.7 of PICC, contracts must normally be interpreted to achieve rational and reasonable results.[68] The more unreasonable the result, the more unlikely it is that the parties can have intended it, and they must have made such unreasonable interpretation clear.[69] If one interpretation leads to an absurd result, then the other must be presumed.[70]

41. To interpret the live performance requirement to allow for holographic replacement would mean that such replacement may be allowed for all performers. This would mean that the substance of the performance is lost, the customers who buy tickets are deceived, especially considering the cultural prevalence of R-Pop in cities across Asia, Europe and North America.[71] At a later instance, a talent management company might use only AI-based replacements and argue that it has conducted a live concert. This will be an affront to the millions of fans who view R-Pop as a shared cultural language and social reference point.[72]

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[66] Vogenauer (n 48) p.601.
[67] ¶¶A&B, Exhibit 2.
[68] M J Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn, 2005) p.141.
[69] *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (HL) p.251.
[70] Vogenauer (n 48) p.594.
[71] ¶8, Moot Problem.
[72] ¶9, Moot Problem.

42. The interpretation of contracts shall be in accordance with good faith and the principles of fair dealing.[73] It is evident now, as argued in **[3.1]**, that there was no indication of replacements at the conclusion of the contract and, in good faith, the object of the contract must be held to have been required to be delivered.

[3.1.2] Holographic Replacement Does Not Meet The 'Generally Accepted Industry Standards And Reasonable Audience Expectations'

43. According to the Agreement, the RESPONDENT was required to procure the performance of ECLIPSE at the Concert in accordance with generally accepted industry standards and reasonable audience expectations for a live music concert of a similar scale and nature.[74]

44. Although the RESPONDENT conducted a concert featuring holographic renditions before, it was a one-off concert and featured holographic renditions of a first-generation R-Pop group, members of which had already retired.[75] To differentiate, that concert was publicly known to feature holographic replacements for nostalgia, and it was only because of the same that it was accepted by the public.[76] Hence, the RESPONDENT'S use of holographic technology to reproduce human performance cannot be considered an industry standard, especially with the industry critics cautioning against the same.[77]

[3.1.3] Aurora's Right To Deploy 'Digital Or Other Production Technologies' Does Not Extend To The Use Of Holographic Replacement

[73] PICC art.1.7.
[74] ¶3, Exhibit 2.
[75] ¶16, Moot Problem.
[76] ¶17, Moot Problem.
[77] ¶15, Moot Problem.

45. Under Article 4.4 of PICC, terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear according to the principle that words cannot be understood in isolation.[78] According to the principle of *ejusdem generis*, when a contract term contains a list of specific words followed by a general word, the parties may be taken to have intended the general word to be confined to cover only the same type of matter as that covered by the specific words.[79] In *Association of British Travel Agents v British Airways plc*, the phrase 'and other charges' was viewed as naturally affected by the fact that it does not appear by itself but as part of the phrase "taxes and other charges".[80] Similarly, the words 'any other cause' following certain specified causes were construed ejusdem generis with the specified causes in *Tillmanns & Co v SS Knutsford Ltd.*[81]

46. According to the agreement, the RESPONDENT was allowed to employ stage, sound, lighting, visual, digital or other production technologies in connection with the Concert to discharge its obligations.[82] The specific items in the list must form a category due to their dominant nature,[83] which in this case are technological deployments to enhance the ECLIPSE performance.

47. Under Article 4.5 of PICC, contract terms shall be interpreted to give effect to all the terms rather than to deprive some of them of effect.[84] It can be assumed that the parties intended a reasonable result and thus wanted their agreement to be fully effective; the interpreter has to prefer a reading which gives the agreement full effect.[85] If 'other production technologies' was

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[78] PICC art.4.4; G McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (2nd edn, 2011) ¶¶4.01—4.34.
[79] *Cullen v Butler* (1816) 5 M & S p.461; *Harrison v Blackburn* (1864) 17 CBNS p.678.
[80] *Association of British Travel Agents Ltd v British Airways plc* [2000] 2 All ER (Comm) p.204.
[81] *Tillmanns & Co v SS Knutsford Ltd* [1908] 2 KB (CA) p.385.
[82] ¶3.1.1, Exhibit 2.
[83] *SS Magnhild v McIntyre Bros & Co* [1920] 3 KB p.321.
[84] PICC art.4.5; *Langston v Langston* (1834) 2 Cl & Fin 194, 6 ER 1128 (HL) p.1147.
[85] Vogenauer (n 48) p.599.

interpreted to include holographic replacements, such interpretations would deprive the term 'live performance' of its effect. Hence, a holistic and consistent interpretation should be adopted.

[3.1.4] No omitted terms may be supplied when interpreting this contract

48. Under Article 4.8 of PICC, a term which is appropriate in the circumstances shall be supplied, where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties. However, supplementation with an omitted term is justified only where the interpretative factors overwhelmingly support applying a contractual provision to circumstances not expressly covered by its terms.[86] Supplementation is impermissible where it would amount to rewriting the contract by altering the parties' agreed bargain or expanding the contract beyond their intended scope.[87]

49. The four factors listed in Article 4.8 (2) of PICC which may be regarded while determining such a term i.e., (a) the intention of the parties; (b) the nature and purpose of the contract; (c) good faith and fair dealing; and (d) reasonableness have been dealt with above and indicate that human performance from all idols was required. Hence, supplementation is not suitable in this case.

[3.2] THE PURPORTED WAIVER OF THIS REQUIREMENT WAS INVALID AND OF NO LEGAL EFFECT

[3.2.1] Nova's consent to the purported waiver was given under duress

[86] Vogenauer (n 48) p.612.
[87] ibid, p.616.

50. Under Article 3.2.7 of PICC, if a party has taken unfair advantage of another party's dependence, economic distress or urgent needs, the second party may avoid the contract if at the time of conclusion, the contract unjustifiably gave the other party an excessive advantage.[88]

51. The minimum requirement of this provision is an excessive advantage.[89] Additionally, this excessive advantage must have been secured in an unjust manner. Article 3.2.7 of PICC does not expressly require that the defendant who obtained the excessive benefit knew or ought to have known about any weaknesses on the side of the party seeking to invalidate. Where a contract contains terms that are at variance with contracts of that type, it may point to unjustifiable advantage-taking, even in the absence of weakness.[90]

52. In this case, the CLAIMANT was economically dependent on the urgency of the Concert having to take place on the scheduled date of February 7th. The RESPONDENT was aware of this situation as Ms. Choi had revealed the condition of the CLAIMANT during the negotiation meeting. She had stated that the CLAIMANT is in a delicate situation and would be laying down the groundwork for its downfall if cancellation happened.[91] Despite knowing this, the RESPONDENT did not inform it that Luna struggled to participate fully in rehearsals and group activities, and managed them internally till three days before the concert, thus pushing the CLAIMANT into a spot with no other option. The CLAIMANT raised immediate objections to the RESPONDENT's proposal of using holography to replicate Luna's presence on the grounds of authenticity and audience expectations.[92] It was only when faced with no other alternatives that it agreed to the same.[93]

[88] PICC art 3.2.7.
[89] Vogenauer (n 48), p.512.
[90] ibid, p.516.
[91] p.2, Exhibit 2.
[92] ¶44· Moot Problem.
[93] ibid.

Accordingly, the RESPONDENT exploited the CLAIMANT's economic distress to obtain an excessive monetary advantage beyond its contractual entitlement.

[3.2.2] In any case, the condition of confidentiality was not adhered to by Aurora

53. Statements, the precise legal significance of which must be established to determine whether a contract has been concluded, are interpreted under Article 4.2 of PICC. [94] If the addressee of the statement or other conduct did not know or could have been unaware of the intention of the party making the statement or engaging in the conduct, the meaning of the statement or the conduct must be determined with reference to a standard of reasonableness.[95]

54. When faced with no other alternative, the CLAIMANT ultimately agreed to proceed on the express condition that the use of the hologram remain strictly confidential.[96] This confidentiality was supremely important to the CLAIMANT, as can be observed from the statements made by Madam Ye Bin at the negotiations and has been explicitly incorporated into Clause 7 of the contract.

55. However, the visible glitch to a social media user triggered a RooTube video exposing the usage of the hologram. The RESPONDENT thereby failed to maintain the confidentiality on which the CLAIMANT'S consent was conditioned.

[3.3] IN ANY CASE, THE PRINCIPLE OF FORCE MAJEURE IS NOT APPLICABLE

[3.3.1] Clause 8 of the Agreement excludes Aurora's reliance on Article 7.1.7 of PICC

[94] PICC art.4.2, Official Comment 1, p.139.
[95] PICC art.4.2(2).
[96] ¶44, Moot Problem.

56. The parties expressly agreed upon a contractual force majeure Clause in the Agreement,[97] thereby allocating the risks that would excuse non-performance. Clause 8 of the Agreement limits force majeure to events beyond the parties' reasonable control, including acts of God, natural disasters, war, and government actions rendering performance impossible.[98] Luna's psychological condition does not fall within any of these categories.

57. Where the parties have specifically agreed upon the circumstances constituting force majeure, the RESPONDENT cannot invoke the broader default rule under Article 7.1.7 of PICC to rewrite that allocation of risk. Accordingly, the RESPONDENT's reliance on Article 7.1.7 is misplaced.

[3.3.2] In any case, Aurora fails to satisfy Article 7.1.7

58. Even assuming Article 7.1.7 of PICC applies, the RESPONDENT fails to establish its cumulative requirements.

59. *Firstly*, Luna's inability to perform was not an impediment beyond the RESPONDENT's control. In *Nuova Fucinati SpA v Fondmetall International AB*, the Court held that an event is beyond a party's control where it is external to the party's business risks and could not be prevented by reasonable diligence.[99] The Supreme Court of Lithuania has relied on Article 7.1.7 of PICC to hold that a contractor cannot rely on the principle of force majeure when one of its subcontractors failed to deliver performance due to force majeure.[100]

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[97] ¶8, Exhibit 2.
[98] ibid.
[99] *Nuova Fucinati SpA v Fondmetall International AB* (14 January 1993) 15 *Journal of Law & Commerce* (1995) p.153.
[100] UAB (Supreme Court of Lithuania, Case No 3K-3-10-421/2015, 4 February 2015) (Unilex).

60. In this case, the event in question is Im Luna refusing to attend the concert due to overwhelming anxiety and inability to appear on stage.[101] The RESPONDENT was in charge of the security for the promotional events.[102] Had the RESPONDENT discharged its security obligations, the incident causing Luna's condition would have been avoided.

61. *Secondly*, the alleged impediment was reasonably foreseeable. Im Luna's symptoms are consistent with conditions recognised in ICD-11 as anxiety or fear-related disorders.[103] Illness is part of the ordinary risk assumed by the parties.[104] The occurrence of an event cannot be considered unforeseeable by a party who in the course of its long-standing activity in a sector had already several times experienced similar events.[105] Following the stalking incident, the RESPONDENT remained fully aware of Luna's deteriorating condition, arranged therapy, excused her from promotional events and monitored her recovery.[106] The risk that its own contracted performer might become unavailable formed part of the RESPONDENT's contractual sphere of responsibility and cannot now be characterised as an external impediment.

62. Even assuming the RESPONDENT had nothing to do with a stalker or anxiety, a performer can always fall severely sick and be unable to attend a concert. The RESPONDENT agreed to 'make ECLIPSE available for such performance".[107]Additionally, it also claimed that it can "guarantee minimum attendance", through Mr. Jack during the negotiations.[108] A member's absence due to

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[101] ¶41, Moot Problem.
[102] ¶3.1.3, Exhibit 2.
[103] World Health Organization, *Clinical Descriptions and Diagnostic Requirements for ICD-11 Mental, Behavioural and Neurodevelopmental Disorders* (WHO 2024) 42–52 (Chapter 6B: 'Anxiety or Fear-Related Disorders').
[104] UNIDROIT Secretariat, *Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 Health Crisis* (15 July 2020), p.9.
[105] Centro de Arbitraje de México (CAM), Arbitral Award (30 November 2006) (Unilex).
[106] ¶38, Moot Problem.
[107] ¶D, Exhibit 2.
[108] p.4, Exhibit 1.

illness could have been considered, was foreseeable and hence does not amount to a force majeure event.

63. *Thirdly,* the RESPONDENT could be reasonably expected to have avoided the event. The risk of such absence was assumed by the RESPONDENT, as the contract specifically deems the RESPONDENT obligated to manage the "safety and welfare of the Act at the concert",[109] and priorly, even in the negotiations, Madam Ye Bin mentioned that it will be planning ahead to "ensure that their security and safety are well taken care of". Hence, the RESPONDENT has not satisfied the requirements to invoke force majeure.

ISSUE 4: AURORA'S COUNTERCLAIM OUGHT NOT TO BE GRANTED

64. Having fundamentally breached the Agreement by substituting Im Luna with a holographic rendering, the RESPONDENT cannot now seek payment as though full performance had been rendered. The CLAIMANT submits that the RESPONDENT's counterclaim ought not to be granted, for the following reasons: ***firstly***, that Nova's valid termination of the Agreement discharged any obligation of payment **[4.1]**; ***secondly***, that the principle of estoppel does not operate in Aurora's favour **[4.2]**; and ***thirdly***, that in any case, Nova was entitled to withhold payment under the principle of *Exceptio Non Adimpleti contractus* **[4.3]**.

[4.1] NOVA'S VALID TERMINATION OF THE AGREEMENT DISCHARGED ANY OBLIGATION OF PAYMENT

<u>[4.1.1] Aurora's Conduct Amounted To Fundamental Non-Performance</u>

[109] ¶3.1.3, Exhibit 2.

65. The first requirement for a right to terminate the contract under Article 7.3.1 of PICC is that there should have been a non-performance by the other party.[110] Under Article 7.1 of PICC, non-performance is the failure by a party to perform its obligations under the contract, including defective performance.[111] Any type of breach may, therefore, amount to a non-performance.[112]

66. As argued in **[3.1]**, the obligation owed has not been met, and hence, non-performance is established. When such failure to perform an obligation amounts to fundamental non-performance, the other party may validly terminate the contract.[113]

67. Non-performance is fundamental if it is 'material and not merely of minor importance'.[114] In determining whether there was fundamental non-performance, regard shall be given to several factors listed under Article 7.3.1(2) of PICC.[115]

[4.1.1.1] Nova was substantially deprived of what it was entitled to expect under the contract

68. When a part of the obligation was performed and another was not, the aggrieved party must show that the part that was not performed substantially deprives the aggrieved party of its interest in the contract.

69. The 'Act' is defined as "the co-ed R-Pop group known as ECLIPSE, comprising five members" in the contract.[116] Combined with the interest in the 'ECLIPSE experience' as discussed during negotiations,[117] it may be established that the CLAIMANT's interest lay in the entire five-member experience.

[110] Vogenauer (n 48) p.922.
[111] PICC art 7.1.
[112] ibid p.921.
[113] PICC art.7.3.1.
[114] PICC art.7.3.1, Official Comment, p.250.
[115] PICC art 7.3.1(2).
[116] ¶1, Exhibit 2.
[117] p.3, Exhibit 1.

(i) There was substantial deprivation

70. The substantial deprivation test in Article 7.3.1(2)(a) of PICC is very similar to the famous formula used by Diplock J in the *Hong Kong Fir* case.[118] Therefore, one must take guidance from the rule laid down by Diplock J that the right to terminate the contract depends entirely on the seriousness of the breach and whether it substantially deprives the innocent party of the whole benefit of the contract.[119]

71. The parties may implicitly attach weight to certain obligations with the consequence that a breach of such a term is regarded as fundamental.[120] In this case, as argued in **[3.1.1]**, human performance is an essential qualification of live performance as contracted.

72. In the present case, the breach is accompanied by multiple consequences, but particularly monetary implications for the sponsors. The importance of avoiding the same was particularly noted by the CLAIMANT during the negotiations. Ms. Park said that sponsors would expect consistency and Ms. Choi mentioned that sponsors should not be second-guessing their capabilities.

73. The CLAIMANT was also deeply apprehensive about the loss of reputation that would occur if concertgoers knew about this attempt to deceive them, as can be seen in their response to the RESPONDENT's proposition to use holographic replacements. Thus, a breach of this nature is clearly serious and substantial for the CLAIMANT.

(ii) The RESPONDENT could have foreseen the results

[118] *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 (CA) p.66 (Diplock LJ); *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61 ¶108.
[119] T'S 17 February 2010 (35/2010), Unilex; TS 9 July 2007 (812/2007), Unilex.
[120] Vogenauer (n 47) p.926.

74. The second limb of Article 7.3.1(2)(a) of PICC is the requirement of foreseeability by the other party. The test is what a reasonable person in the same situation could have foreseen.[121]

75. As mentioned above, the CLAIMANT had made these statements in the presence of the RESPONDENT and given that it was the maker of this technology, it would have known the chances of a glitch and hence was aware of the consequences of a breach. Hence, the RESPONDENT must have foreseen such results.

[4.1.1.2] Strict compliance of the obligation was of essence under the contract

76. A term can be implicitly characterised as of essence where a contract demands performance 'precisely' on a given date.[122] The contract and the negotiations reveal both parties' consensus on conducting the concert on 7 February and inability to postpone the same.[123]

77. The intention of the parties may also be evident from the commercial background of the transaction.[124] In this case, as argued above, the concert title and nature indicate the essence of a human live performance.

78. The test of Strict Compliance being of the essence employs similar factors as to the English Law Doctrine, where a breach of condition gives right to termination while a breach of warranty does not.[125] Whether a term is a condition or warranty depends on the parties' intention as derived from the contract and surrounding circumstances.[126]

[121] Vogenauer (n 47) p.928.
[122] Vogenauer (n 48) p.928.
[123] ¶33, Moot Problem.
[124] ibid.
[125] ibid, p.924.
[126] *Bentsen v Taylor Sons & Co* [1893] 2 QB 274 (CA) p.281.

79. In *Poussard v Spiers*, failure by a performer to attend the opening performances of an engagement due to illness was held to be a breach of condition, thereby entitling the other party to terminate the contract as the failure went to the root of the contract.[127] Similarly, the absence of Im Luna at the concert amounts to a breach of a condition and not a mere warranty.

80. Thus, the RESPONDENT'S failure to comply with the central obligation arising out of the contract must be held to amount to fundamental non-performance, as was held in the *Arthur Andersen* arbitration case. [128]

[4.1.2] Fundamental Non-Performance Leads To Termination

81. Under Article 7.3.1 of PICC, a party may terminate a contract if the non-performance amounts to fundamental non-performance.[129] Such right of a party must be exercised through notice within a reasonable time after it has or ought to have become aware of the non-conforming performance under Article 7.3.2 (2) of PICC.[130]

82. The reasonable period should be at least sufficient to give the aggrieved party time to ask for legal advice and to take a (speedy) decision on that basis.[131] If the same type of performance is not easily available, a longer period is acceptable.[132]

83. In this case, the CLAIMANT came to know about the breach three days before the concert and issued notice on 5th February,[133] and terminated the contract on 26th February.[134] The

[127] *Poussard v Spiers and Pond* (1876) 1 QBD 410.
[128] ICC Award in Case No 9797, *Andersen Consulting Business Unit Member Firms v Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Coopérative* (Award, Geneva, 28 July 2000) ¶33 (Unilex).
[129] PICC art 7.3.1.
[130] PICC art 7.3.2.
[131] Vogenauer (n 48) p.944.
[132] PICC art.7.3.2, Official Comment 3, p.254.
[133] ¶3, Additional Clarifications.
[134] ¶¶63&64, Moot Problem.

intervening period was used by the CLAIMANT'S legal team to conduct its analysis,[135] and hence may be considered reasonable.

84. The effect of such termination of contract is to release both parties from their obligation to effect and receive any performance under Article 7.3.5(1) of PICC including the obligation to pay.[136] Hence the CLAIMANT is no longer liable to pay the RESPONDENT.

[4.2] THE PRINCIPLE OF ESTOPPEL DOES NOT OPERATE IN AURORA'S FAVOUR

85. Under Article 1.8 of PICC, a party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.[137] This provision is a general application of the principle of good faith and fair dealing under Article 1.7 of PICC.[138] In a commercial world, certainty and consistency are inalienable as businessmen need to be able to rely on what others said and did.[139]

86. In *Pickard v Sears*, Lord Denman CJ held that common law estoppel arises where a party, by words or conduct, wilfully induces another to believe in a certain state of affairs and to act on that belief to his detriment, whereupon the former is precluded from asserting a contrary position.[140] To alter his position must mean that there was a loss,[141] known as detriment or prejudice.[142]

[135] ¶64, Moot Problem.
[136] PICC art.7.3.5(1).
[137] PICC art.1.8.
[138] PICC art 1.7.
[139] Pickering, 'Estoppel by Conduct' (1939) 55 LQR 400, p.403.
[140] *Pickard v Sears* (1837) 6 Ad & E 469, p.474.
[141] Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2000) p.111.
[142] *Carr v London and North Western Railway Co* (1875) LR 10 CP 307; *Greenwood v Martins Bank Ltd* [1933] AC 51 (HL).

87. In *Watts & Ready v. Story*, it was held that there can be no claim of estoppel without detrimental reliance.[143] This requirement of detrimental reliance is, however, not met in this case. It can only be unconscionable for the representor to enforce his strict rights if the other party's conduct has been influenced by the representation.[144] Oliver J in *Taylor Fashions* held that there was no claim for estoppel as the party would have gone ahead with its actions irrespective of the representation.[145]

88. The RESPONDENT, in this case, would have gone ahead with using their holographic technology to replace Im Luna, irrespective of whether the CLAIMANT agreed to it. Therefore, a claim for estoppel would not succeed.

[4.3] IN ANY CASE, NOVA WAS ENTITLED TO WITHHOLD PAYMENT UNDER THE PRINCIPLE OF *EXCEPTIO NON ADIMPLETI CONTRACTUS*

89. Under Article 7.1.3 of PICC, where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed.[146] The text does not explicitly address the question which arises where one party performs in part but does not perform completely. However, the other party is entitled to withhold performance if it is consonant with good faith and fair dealing.[147]

90. To invoke this principle, the mutual obligations of the parties must be under the same mutually binding contract,[148] which is true in the present case.

[143] *Watts & Ready v. Story* [1984] 134 NLJ 631.
[144] Cooke (n 140), p.113.
[145] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 (Ch) p.56.
[146] PICC art.7.1.3.
[147] PICC art.7.1.3, Official Comment 1.
[148] Cour de cassation (France), 14 May 1938.

91. However, the RESPONDENT has partly performed its obligations with respect to only four of the idols. This does not amount to performance, and the CLAIMANT may withhold its performance till the RESPONDENT fulfills its obligations.

PRAYER FOR RELIEF

Considering the facts stated, issues raised, authorities cited, and arguments advanced, the Counsel for the CLAIMANT respectfully requests the Tribunal to:

I. Declare that the Arbitral Tribunal is the proper forum for this dispute;

II. Dismiss the application for an order for security for costs in the sum of USD 2 million;

III. Declare that Aurora's deployment of a holographic replacement constituted a breach of the Agreement and grant damages; and

IV. Dismiss Aurora's counterclaim of USD 3.6 million.