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21ST LAWASIA

INTERNATIONAL MOOT 2026

MEMORANDUM FOR CLAIMANT

ON BEHALF OF:

NOVA LIVE ASIA PTE LTD
Hall 12, Great Renyan Avenue,
Sunderson Valley, 13900, Renya
(CLAIMANT)

AGAINST:

AURORA ENTERTAINMENT CO., LTD
37 Everoak Lane
Sunderson City, 13896, Renya
(RESPONDENT)

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Cases

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STATEMENT OF JURISDICTION

CLAIMANT submits the following facts and arguments before the Arbitral Panel constituted at the Asian International Arbitration Centre pursuant to Parties’ agreement to a full hearing following the Reyna High Court’s grant of a stay of proceedings pending arbitration.

QUESTIONS PRESENTED

Parties will be presenting arguments on the following issues:

(i) Whether the *forum non conveniens* lies in the court proceeding or arbitration;

(ii) Whether an order for security for costs ought to be granted;

(iii) Whether RESPONDENT's deployment of a holographic replacement constituted a breach of the Agreement; and

(iv) Whether RESPONDENT's counterclaim ought to be granted.

Statement of Facts

1. CLAIMANT is a leading concert production company. RESPONDENT is a leading R-Pop entertainment company which developed a proprietary artificial intelligence system capable of generating holographs of its idols' performances for training (collectively, the "**Parties**"). The technology was used in a one-off concert to replicate the performance of a retired R-Pop group.
2. RESPONDENT elected to organise a concert starring their highly popular and commercially valuable group, ECLIPSE, with CLAIMANT. Parties discussed the proposed concert in a pre-agreement meeting on 2 Jan 2026, including performance expectations, financial scale, and commercial and reputational factors. Parties executed a written agreement on 7 Jan 2026 (the "**Agreement**").
3. Before the concert, a fan made unsolicited physical contact with Luna, an ECLIPSE member, who developed anxiety associated with public events. Luna later refused to perform three days before the concert.
4. When informed, CLAIMANT initially expressed frustration and insisted that Luna perform, but later agreed to RESPONDENT's proposal to deploy a holographic replacement of Luna on the express condition that it would be confidential.
5. During the concert on 7 Feb 2026, the holographic integration was synchronised with the performance and replicated Luna's on-stage persona. No audience member raised any concerns about the performance or member absences.
6. On 10 Feb 2026, RESPONDENT issued CLAIMANT an invoice for USD3.6 million for promotional activities and for the concert (the "**Invoice**"). This included USD750,000 for ECLIPSE's attendance, USD90,000 for rental of outfits, styling and accessories for promotional activities, USD2.5 million for the Concert and USD260,000 for the rental of outfits, styling and accessories for the Concert (the

"**Promotional Fee**", "**Rental Fees**", "**Performance Fees**" and "**Concert Fee**" respectively).

7. Several days later, a social media user noted a "minor glitch" involving Luna in a concert video, prompting speculation that neither Party addressed directly.
8. RESPONDENT issued another letter seeking payment and computation of royalties, to which CLAIMANT responded that it would not pay pending legal assessment.
9. On 26 Feb 2026, CLAIMANT issued a notice of termination of the Agreement and commenced arbitration proceedings against RESPONDENT, alleging breach of contract and seeking damages of USD2.2 million (the "**Claim**").
10. RESPONDENT disputed both CLAIMANT's termination and their right to unilaterally commence arbitration. RESPONDENT filed a counterclaim in the arbitration proceedings (the "**Counterclaim**"), seeking payment of its invoice, which CLAIMANT disputed.
11. Relying on Blueddit allegations that CLAIMANT had recently delayed payments to other agencies, RESPONDENT also applied to the arbitral tribunal for a USD2 million security for costs ("**SFC**") order.
12. RESPONDENT also commenced court proceedings against CLAIMANT to recover the invoices and royalties. CLAIMANT sought a stay of the proceedings pending arbitration which RESPONDENT opposed.
13. On 26 Feb 2026, the Reyna High Court granted CLAIMANT's application for a stay of court proceedings pending the outcome of the arbitration.
14. The matter is now set to be heard by the Arbitral Tribunal.

<u>SUMMARY OF PLEADINGS</u>

I. THE *FORUM NON CONVENIENS* LIES IN THE COURT PROCEEDING

First, there is a valid agreement between Parties to arbitrate the present dispute as (1) Parties' established practice evince their common intention to arbitrate the present dispute; (2) Parties' pre-agreement conduct demonstrates their common intention to arbitrate; and (3) the formal requirements of an arbitration agreement are satisfied. Second, RESPONDENT's challenge of the Tribunal's jurisdiction should be rejected as its inconsistent conduct has amounted to submission to the Tribunal's jurisdiction. Third, applying the *forum non conveniens* doctrine, arbitration is clearly the more appropriate forum to resolve this dispute. Parties do not suffer any prejudice or substantial injustice by arbitrating this dispute.

II. AN ORDER FOR SECURITY FOR COSTS SHOULD NOT BE GRANTED

RESPONDENT's application for SFC is not *bona fide* as (1) RESPONDENT has not established a serious risk that it will not recover its legal costs; (2) the claim and counterclaim substantially overlap; (3) the application of security of USD2 million is disproportionate to the claims in dispute; and (4) not all of RESPONDENT's costs might be shifted. Further, the claim has a reasonably good prospect of success. Accordingly, pursuant to Rule 11.4 AIAC, RESPONDENT has failed to prove that, if the tribunal does not grant the application, harm to RESPONDENT not adequately reparable by an award of damages would likely result and outweigh harm likely to result to CLAIMANT if security was granted. Ordering SFC would not be just and fair.

III. RESPONDENT'S DEPLOYMENT OF A HOLOGRAPHIC REPLACEMENT DID NOT CONSTITUTE A BREACH OF THE AGREEMENT

First, the deployment of a holographic replacement constituted non-performance as (1) non-performance includes all forms of defective performance; (2) the deployment of a holographic replacement was defective performance as it went against the express intentions of Parties to have a live, human performance by all members of ECLIPSE; and (3) The Agreement was unliterally varied without CLAIMANT's full consent, and thus does not constitute a valid contractual modification under PICC. Second, RESPONDENT's non-performance cannot be excused through the doctrine of force majeure as (1) Luna's inability to perform was not beyond RESPONDENT's control or unforeseeable; and (2) RESPONDENT failed to give reasonable notice of Luna's inability to perform.

IV. THE COUNTERCLAIM FOR THE FULL PAYMENT AND RESOLUTION OF THE INVOICE SHOULD BE GRANTED

Assuming the Agreement is terminated due to fundamental non-performance, an allowance of money should not be granted to RESPONDENT. The claim for restitution is impossible as RESPONDENT cannot restore in kind the benefit it received from CLAIMANT. Further, the restitution would be lower than the counterclaim amount. Even if the Agreement is not terminated, the counterclaim should not be granted as the the payment of the Performance Fee and Royalties was not guaranteed by the Agreement, and the Concert, Promotional and Rental Fees were not within the scope of the Agreement. Moreover, an omitted term for the Promotional and Rental Fees cannot be supplied as it would go against the common intention of Parties.

PLEADINGS

I. THE *FORUM NON CONVENIENS* LIES IN THE COURT PROCEEDING

A. There is a valid agreement between Parties to arbitrate the present dispute

1. Parties' common intention and consent to be "*bound* to arbitrate"[1] is objectively evinced by their (1) established practice and (2) pre-agreement conduct. There is an arbitration agreement ("**AA**") in writing and the formal requirements of an AA are satisfied.

1. Parties' established practice evince their common intention to arbitrate the present dispute

2. Parties' common intention to arbitrate is evident from their "history of consistent and repeated practice" in "successive contracts".[2] All six of Parties' prior agreements contain arbitration clauses governed by the AIAC Rules, with four requiring prior negotiation as a pre-condition to arbitration.[3] This establishes a practice of adhering to a multi-tiered dispute resolution mechanism, with no instance of Parties seeking court litigation.

3. In all prior disputes, Parties' sought arbitration without either contesting tribunal jurisdiction. This is based on Parties' mutual understanding and established commercial practice of resolving disputes by arbitration in their commercial relationship. Even where Parties entered mediation, it was at the suggestion of an arbitral tribunal.[4]

4. Parties' mutual agreement to an established practice of arbitration evinces an intention to form a binding AA between themselves. As Parties did not exclude the application of such

[1] *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific* [2017] 3 SLR 267 at [37]
[2] Ilias Bantekas et al, *UNCITRAL Law on International Commercial Arbitration* (Cambridge University Press, 2020) at p 133; Born at 5.04[D][6][e]
[3] Additional Clarification 9
[4] Clarification 6

usage or practice, they are bound by it to settle this dispute by arbitration pursuant to Article 1.9(1) PICC.[5]

2. The pre-agreement conduct of Parties demonstrates their common intention to submit this dispute to arbitration

5. Parties' pre-agreement conduct and entire course of negotiations, being a key factor in interpreting Parties' common intention to arbitrate this dispute,[6] firmly establishes Parties' consent to do so.

a) Parties' prioritisation of confidentiality is instructive

6. Parties have consistently arbitrated disputes due to the confidentiality afforded by arbitral proceedings and have repeatedly affirmed the importance of confidentiality in their pre-agreement meeting. RESPONDENT expressly stated that "everything relating to ECLIPSE and Aurora must be dealt with confidentiality". CLAIMANT also referred to Parties' use of mediation and arbitration in their prior dealings, reflecting an understanding that the confidential nature of both dispute resolution mechanisms is the primary reason for their use.[7] Parties' prioritisation of confidentiality coheres with their recurring reliance on arbitration, with no exchange in the meeting indicating that Parties intended to deviate from their established preference to arbitrate disputes.

b) Parties' acknowledgement of the compressed timeline is instructive

7. Parties' shared understanding was to prioritise the inclusion of essential commercial terms necessary to formalise the Agreement due to the compressed timeline of the Concert, rather than exhaustively document every provision.[8]

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[5] PICC Commentary, Article 1.9
[6] Article 4.3 PICC
[7] Exhibit 1, Page 4
[8] Facts at [30], [31], [32]

8. As Parties already share an established commercial practice, they simply agreed to document terms differently in the commercial context of *this particular performance*. Against this backdrop, Parties assumed that anything not drafted would follow their usual commercial practice, including arbitrating disputes. Therefore, the omission of an express arbitration clause was a matter of drafting circumstances rather than a deliberate choice to exclude the use of arbitration.

3. For the avoidance of doubt, the formal requirements of the arbitration agreement are satisfied

9. RESPONDENT's minutes of the pre-agreement meeting satisfied the formal writing requirements of an AA as the content, terms or language of the agreement was recorded. RESPONDENT's written internal minutes of the pre-agreement meeting is sufficient to fulfil the writing requirement as an oral AA was made.[9] As established at [6] *supra*, Parties' conduct at the pre-agreement meeting evinced their intention to arbitrate.

10. Even if the AA was not in writing, RESPONDENT is precluded from relying on formal requirements to invalidate the AA due to principles of good faith.[10] Given that a) RESPONDENT's pre-agreement conduct evinced an intention to arbitrate; and b) Parties have a long-standing business relationship where previous agreements contained arbitration clauses, it would not be in good faith for RESPONDENT to now rely on the lack of an express written undertaking to claim that there is no AA.

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[9] Born at 5.02[A][5][B] and Sundra Rajoo, *Law, Practice and Procedure of Arbitration* (2nd ed, LexisNexis, 2016) ("**Rajoo**") at p 107

[10] Born at 5.04[D][6][e]

B. RESPONDENT's challenge of the Tribunal's jurisdiction should be rejected as its inconsistent conduct has amounted to submission to the Tribunal's jurisdiction

11. RESPONDENT may deny its consent to arbitrate given its prior protest.[11] However, RESPONDENT's subsequent conduct in the proceedings is inconsistent with their jurisdictional challenge.

12. RESPONDENT has filed the Counterclaim, which necessitates going into the *substantive merits* of the dispute. This is not merely responsive, but directly invokes the Tribunal's authority and jurisdiction over a positive claim against CLAIMANT. In *Cosco Shipping*,[12] the court held that filing a counterclaim together with jurisdictional objections could risk inconsistency, especially if the counterclaim was not expressly pleaded in the alternative. RESPONDENT may contend that its counterclaim was filed without prejudice to its jurisdictional challenge, but this reservation cannot negate the effect of RESPONDENT's inconsistent conduct during the proceedings.[13] It has relied on the Tribunal's procedural powers to seek SFC which also covers the costs of its counterclaim, not merely its jurisdictional objections. This shows that RESPONDENT envisaged relying on the Tribunal's adjudicative powers to seek payment from CLAIMANT and settle the resolution of its invoice even before the issue of jurisdiction was resolved.

C. The doctrine of *forum non conveniens* points decisively to arbitration

13. Even though the doctrine of *forum non conveniens* ("**FNC**") is conventionally used by a court in exercising its discretion to stay court proceedings, its broad inquiry of determining

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[11] Born at 5.04[D][6][g]; Facts at [66],[67]

[12] *Cosco Shipping Specialized Carriers Co. Ltd v PT OKI Pulp & Paper Mills and others* [2025] SGHC 87 ("**Cosco Shipping**")

[13] *Beltran, Julian Moreno and another v Terraform Labs Pte Ltd* [2024] 4 SLR 674

whether the alternative forum is more appropriate so "the case may be tried more suitably in the interests of the parties and the ends of justice" is presently applicable.[14]

14. Application of the FNC doctrine to the present case, analogised to the *Spiliada* test, weighs in favour of arbitration. Applying the first stage of the *Spiliada* test, the factors of confidentiality and the governing law of the contract, *inter alia*, decisively point towards the Reyna High Court as the more appropriate forum for this case to be resolved.[15] Moreover, under the second stage, Parties do not suffer any prejudice or substantial injustice by arbitrating the present dispute, and there are no reasons for which justice requires that the Tribunal not refuse jurisdiction.[16]

1. The Tribunal is competent to decide on its jurisdiction.

15. The Tribunal can assume jurisdiction under the principle of *kompetenz-kompetenz*.[17] Per Rule 26.1 AIAC, the Tribunal is empowered to rule on its own jurisdiction, including any objections with respect to the existence or validity of the AA.

2. Arbitration is clearly the appropriate forum to resolve the dispute

a) Confidentiality is a determinative factor in favour of arbitration

16. First, the Parties' prioritisation of confidentiality, consistent with industry practice,[18] points towards arbitration as the more appropriate forum. Arbitrating disputes is a core feature of the R-Pop industry, with sufficient "regularity of observance" to justify its application here.[19] Article 1.9(2) PICC provides that parties are bound by a usage "widely known to and regularly observed in international trade by parties in the particular trade". The industry

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[14] *Rappo, Tania v Accent Delight International Ltd and another and another appeal* [2017] 2 SLR 265 ("***Rappo***") at [72], citing *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("***Spiliada***")
[15] *Rappo* at [68]
[16] *Ibid*.
[17] Additional Clarification 8
[18] Born at 5.04[D][6][e]
[19] *In re Cotton Yarn Antitrust Litg*., 505 F.3d 274 (4th Cir. 2007) ("**Cotton**") at [2]

norm favours arbitration as R-Pop idol-related disputes are typically resolved internally or addressed using alternative mechanisms to avoid public litigation.[20]

17. Second, litigation risks significant reputational and commercial harm. Public litigation will undermine RESPONDENT's efforts to carefully curate ECLIPSE's image as a group "free from internal conflict or scandal".[21] Further, fact-finding court proceedings may require RESPONDENT to disclose proprietary trade secrets publicly in an open court, allowing competitors to gain disproportionate insight into its Artificial Intelligence system and extensive performance database. This undermines RESPONDENT's technological competitive edge and position as a highly established industry pioneer.[22]

18. Similarly, litigation would damage CLAIMANT's reputation as a leading concert promoter.[23] CLAIMANT agreed to the hologram deployment on the express condition that its use remain strictly confidential to protect its reputation.[24] As established at [16] *supra*, Parties' prioritisation of confidentiality and avoidance of public scrutiny explain their repeated choice of arbitration. Therefore, Parties expressly contracted for confidentiality under Cl. 7 of the Agreement to minimise the commercial and reputational risks that the public litigation necessarily entails.

19. Third, open-court litigation will likely expose the dispute to a uniquely interested public, as R-Pop has evolved into a "prevalent way of life" in Reyna,[25] risking unnecessary pressure on judges. Conversely, arbitration provides a neutral forum[26] that minimises external pressure.

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[20] Facts at [7]
[21] Facts at [23]
[22] Clarification 3
[23] Clarification 4
[24] Facts at [44]
[25] Facts at [8]
[26] Born at 1.02B[1]

b) The nature and subject matter of the dispute favours arbitration

20. The present disputes turn on highly specialised commercial and technical matters where arbitral expertise is more apt than generalist court adjudication. International arbitration is favoured for tribunals' specialised expertise and parties' ability to nominate arbitrators.[27] The disputes require interpretation of industry-specific concepts, such as "live performance", "generally accepted industry standards", and "reasonable audience expectations", which are matters arbitrators with industry experience can evaluate efficiently.

c) The governing law of the Contract is better applied in arbitration

21. The Agreement is governed by PICC, a transnational instrument reflecting international commercial arbitration practice. The Tribunal is better equipped to give effect to PICC, especially where "the applicable regime of mandatory law" can be determinative of Parties merits. Arbitration allows PICC to operate directly as the *lex contractus*, giving effect to Parties' express choice for PICC to govern the contract. Litigation, however, might treat PICC only as contractual terms incorporated into a relationship that remains governed by an otherwise applicable State law. Parties' choice of PICC thus "functions best in combination with" arbitration.[28]

d) Reyna's non-signatory status to the NYC does not displace arbitration as the appropriate forum

22. As NYC requires national courts to recognise and enforce foreign arbitral awards, RESPONDENT may contend that non-enforceability risks militates against arbitration

[27] Born at 1.02[B][4]
[28] Eckart Brödermann, *UNIDROIT Principles of International Commercial Contracts. An Article-by-Article Commentary* (2nd ed, Kluwer Arbitration, 2023), Annex to Preamble at [30]

since Reyna is not party to NYC. However, there is no conclusive proof that arbitral awards are unenforceable in Reyna, with mechanisms such as a "common law right to sue on the foreign award".[29] Further, Parties repeated selection of AIAC arbitration in prior dealings indicates their belief that AIAC awards are enforceable, and thus cannot in good faith rely on non-enforceability to deny arbitration as the more appropriate forum.

3. Parties do not suffer any prejudice or substantial injustice by arbitrating the present dispute

23. There is no injustice requiring the Tribunal to refuse jurisdiction despite arbitration being the more appropriate forum.[30] Parties repeatedly referred disputes to AIAC arbitration, fully aware of what arbitration entails as commercially savvy entities.

24. RESPONDENT would not be deprived of juridical advantages in arbitral proceedings. Indeed, RESPONDENT seeks to ventilate its claim for payment and resolution of the Invoice before the Tribunal, demonstrating its belief in the Tribunal's ability to provide a just and final award.

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[29] Rajoo at p 799
[30] *Rappo* at [107]

II. AN ORDER FOR SECURITY FOR COSTS SHOULD NOT BE GRANTED.

25. The Tribunal should deny RESPONDENT's unjustified security for costs ("**SFC**") application. RESPONDENT has, *inter alia*, failed to prove that if the Tribunal does not grant the application, harm to RESPONDENT not adequately reparable by an award of damages would likely result and outweigh harm likely to result to CLAIMANT if security was granted (the "**balance of convenience**" test). [31] RESPONDENT's SFC application is not *bona fide* and grating security would be unfair and deter a genuinely meritorious claim.

A. RESPONDENT's application for security for costs is not *bona fide*.

1. RESPONDENT has not established a serious risk that it will not recover its legal costs as any evidence relating to CLAIMANT's inability or unwillingness to meet a potential costs award is speculative and lacks credibility.

26. CLAIMANT's financial position is robust and it can comply with any adverse costs award. RESPONDENT needs to establish CLAIMANT's inability or unwillingness to pay, but establishing this fact alone is insufficient for granting SFC.[32] However, RESPONDENT has not furnished credible evidence proving CLAIMANT's purported inability or unwillingness to pay. Therefore, there is no "material" or "sufficient" risk of non-recovery of legal costs.[33]

27. First, the evidential threshold in a SFC application is a high one. A "solid evidentiary basis" is required from RESPONDENT to satisfy its burden of proof relating to CLAIMANT's inability to pay the adverse costs award.[34] Before calling into question the exercise of discretion to order SFC, RESPONDENT must demonstrate CLAIMANT *will* be unable to

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[31] AIAC Rule 11.4(a)

[32] Chartered Institute of Arbitrators, *Applications for Security For Costs* ("**CIARB**") at p 7

[33] Cameron Ford, *Security for Costs in International Arbitration* (1st ed, Routledge, 2024) ("**Ford**") at 3.16

[34] Ajar Rab, *Interim Measures in International Commercial Arbitration: A Comparative Review of the Indian Experience*, Kluwer Arbitration [2022] ("**Rab**") at p 292

pay, not a *mere probability* of the same.[35] Even in litigation where SFC is more readily granted, courts still require more than a *doubt* that CLAIMANT is unable to pay.[36]

28. RESPONDENT's only evidence consists of rumours surrounding CLAIMANT's financial position, a Blueddit thread alleging delayed payments from CLAIMANT by several other agencies across multiple jurisdictions in recent months and a senior executive from TF Entertainment informing Madam Ye Bin to similar effect (collectively, "**RESPONDENT's adduced evidence**").[37] RESPONDENT's adduced evidence lack credibility and are insufficient to sustain any application for SFC. The alleged delayed or missing payments are either derived from unattributable sources and cannot be verified as genuine.[38] Further, tribunals typically require financial records such as annual accounts, statutory returns and financial reports in assessing an application for SFC.[39] RESPONDENT has not adduced any of these, failing to satisfy the minimum evidentiary threshold of "credible testimony"[40] required in any application for SFC.

29. Second, even if RESPONDENT argues (1) SFC should follow a less stringent standard of *prima facie* evidence required of interim measures in general[41] and (2) RESPONDENT's adduced evidence, though hearsay evidence, is admissible and thus sufficient, the Tribunal should err on the side of caution and reject RESPONDENT's SFC application.

30. To elaborate, RESPONDENT's adduced evidence cannot rise to the level of *prima facie* evidence[42] as it *merely* repeated allegations of CLAIMANT's delayed or non-payments

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[35] Gu Weixia, *Security for Costs in International Commercial Arbitration*, Journal of International Arbitration Volume 22(3) [2005] pp 167–206 ("**Gu**") at p 189
[36] *Explosive Learning Solutions Limited* [2023] EWHC 1263 (Comm) at [17]
[37] Facts at [62],[68]; Clarification 12
[38] Additional Clarification 6
[39] Rab at pp 292-293
[40] Gu at p 189
[41] Nathan O'Malley, *Rules of Evidence in International Arbitration* (2nd ed, Routledge, 2021) ("**O'Malley**") at 7.30
[42] O'Malley at 7.31

and was unable to "independently corroborate" the same. Further, while hearsay evidence *can* be admitted as rules of evidence in court proceedings are not binding,[43] the discretion to *admit*, and the *weight* given to such pieces of evidence still remains at the Tribunal's discretion.[44] Even if the allegations and rumours are *admitted* as valid evidence, its probative value and weight is little since they are uncorroborated and unverifiable.[45]

31. Lastly, CLAIMANT remains solvent to pay costs if necessary, as evidenced by the continued strength of its reputation in the R-Pop industry. RESPONDENT engaged CLAIMANT having regard to its strong financial backing and substantial portfolio of large-scale R-Pop events.[46] Moreover, CLAIMANT has several ongoing projects involving major artists and entertainment agencies.[47] The substantial concert revenue that CLAIMANT has retained also contributes to its strong financial standing. Indeed, RESPONDENT's commencement of court proceedings and counterclaim seeking payment indicate that it regards CLAIMANT as a solvent entity capable of satisfying an award. Given CLAIMANT has express warranty that it is "it is financially capable of performing its payment obligations" under the Agreement[48], any alleged risk of non-payment of a costs award is a bare assertion unsupported by credible evidence.

2. The Claim and Counterclaim substantially overlap.

32. RESPONDENT's SFC application covers its counterclaim.[49] Since the Counterclaim arises out of essentially the same facts and substantially overlaps with the original Claim, SFC should be refused because it gives an unfair advantage to RESPONDENT seeking SFC.

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[43] O'Malley at 8.26
[44] AIAC Rule 28.1(k)
[45] O'Malley at 7.31
[46] Facts at [27]
[47] Additional Clarification 11
[48] Exhibit 2, Cl. 6.2
[49] Additional Clarification 7

33. RESPONDENT's would gain a twofold unfair advantage if SFC were ordered. First, SFC would cover RESPONDENT's costs of pursuing its counterclaim for claims that would have been brought against CLAIMANT *in any event*, regardless of whether the original Claim was made. This contravenes the policy underlying SFC, which is to protect a respondent "who cannot avoid being sued", against the costs of the proceedings.[50] Furthermore, as argued below, RESPONDENT's deployment of a holographic replacement constituted a "fundamental deviation from the agreed performance", disentitling RESPONDENT from payment. Second, *if* security was ordered and not paid, CLAIMANT would be barred from pursuing its claim while still having to defend the same issues arising from the same facts in the Counterclaim.[51]

34. While RESPONDENT may argue no substantial overlap exists as it has other avenues to seek payment in its counterclaim, such as restitution, its counterclaim remains *inherently* connected to RESPONDENT's performance of contractual obligations. Both the Claim and the Counterclaim arise from essentially the same facts regarding RESPONDENT's performance under the Agreement and whether it is entitled to payment.

35. Accordingly, granting RESPONDENT's SFC application would contravene SFC's underlying policy of "achieving equality in procedure".[52] RESPONDENT's application should therefore be refused.

3. The application of security of USD2 million is disproportionate to the claims in dispute.

36. The quantum requested by RESPONDENT is exorbitant and disproportionate, unfairly prejudicing CLAIMANT. RESPONDENT seeks security of USD2 million, requiring

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[50] *Cova Group Holdings Ltd v Advanced Submarine Networks Pte Ltd and another* [2023] SGHC 178 at [52] ("***Cova***")
[51] *Cova* at [50]
[52] *Cova* at [49]

CLAIMANT to freeze liquid capital amounting to over 90% of the original Claim of USD2.2 million.

37. While RESPONDENT may argue that it only needs to offer a "broad-brush" estimate, this estimate still has to reflect what it could *reasonably* expect to incur during arbitration proceedings and must have an "evidentiary basis".[53] RESPONDENT submitted no documentary evidence supporting its estimate of USD2 million, relying instead on the substantial concert revenue retained by CLAIMANT to support its SFC application.[54] This is ultimately irrelevant as SFC is intended to address legal costs. Accordingly, the order for security of USD2 million is baseless and should be refused.

4. Not all of RESPONDENT's costs might be shifted

38. Per Rule 47.8 AIAC, the Tribunal has the discretion to allocate costs as it sees fit. Given RESPONDENT's lack of *bona fides* in its application for SFC, even if it were to be successful on the merits, CLAIMANT would not necessarily be ordered to pay *all* of RESPONDENT's costs, rendering an order for SFC even less necessary.

B. The Claim has a reasonably good prospect of success

39. The Claim has a reasonably good prospect of success. As elaborated in subsequent pleadings, CLAIMANT has factual and legal basis for its claim, as RESPONDENT's deployment of a holographic replacement constituted a breach of fundamental non-performance. This entitles CLAIMANT to terminate the agreement and releases CLAIMANT from its obligation to pay and resolve the invoice. Further, CLAIMANT has not engaged in any "bad faith actions", "serious misconduct" or "dilatory tactics" during the course of the proceedings.[55] The present proceedings arose from the Reyna High

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[53] Ford at 6.19
[54] Facts at [69]
[55] Orlandini v. Bolivia, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs in PCA Case No. 2018-39 of 9 July 2019 at [146]

Court's stay of proceedings, rather than, as RESPONDENT alleges, CLAIMANT's unilateral commencement of arbitration.

40. Accordingly, CLAIMANT advanced a "*prima facie* claim made in good faith" which has a reasonably good prospect of success. This militates against ordering SFC, since it would place constraints on a genuinely meritorious claim, thereby hindering CLAIMANT's access to justice.

C. Accordingly, the balance of convenience weighs in CLAIMANT's favour, and on a holistic assessment of the circumstances, ordering security for costs would not be just and fair.

41. The balance of convenience weighs in CLAIMANT's favour as the harm of granting RESPONDENTS's SFC application outweighs the harm of denying it. The heart of any application for SFC is the risk of *irreparable harm*, in this case RESPONDENT's "substantial expense" in defending the Claim "only to find that any costs order made in its favour goes unfulfilled".[56] Yet, RESPONDENT fails to adduce any credible evidence in establishing a sufficient risk of non-payment. Even assuming the evidence could pass legal muster, CLAIMANT's inability or unwillingness to pay is an insufficient justification for SFC.[57]

42. Moreover, RESPONDENT has no basis to suggest the inadequacy of funds to support the administration of the present arbitration, as under Rule 48.1 AIAC, CLAIMANT is required to pay 30% of the estimated costs of the arbitration once the commencement of the arbitration is confirmed. This advance not only reinforces CLAIMANT's financial

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[56] Alan Redfern and Sam O'Leary, *Why it is time for international arbitration to embrace security for costs*, in William W. Park (ed), Arbitration International, Volume 32(3) (2016) ("Redfern") at p 410
[57] CIARB at p 7

standing, but sufficiently protects RESPONDENT from non-recovery of a potential costs award. SFC is thus less necessary.[58]

43. Importantly, a tribunal should only grant SFC if, considering all the circumstances of the case, it is just and fair to do so.[59] Given that ordering SFC would only provide RESPONDENT with an unfair advantage and the balance of convenience falls on CLAIMANT, ordering security would only endanger the genuinely meritorious claim of CLAIMANT. The present circumstances do not warrant SFC insofar as SFC is meant to "ensure equal treatment" and "re-establish a level playing field in the proceedings"[60], protecting the Respondent who cannot avoid being sued.

44. Further, RESPONDENT's SFC application lacks *bona fides*. It covers a counterclaim which would have been brought in any event and is disproportionate. This points towards the application being a tactical attempt to unfairly pressure CLAIMANT. Accordingly, RESPONDENT has failed to satisfy its burden of proof under Rule 11.4 AIAC, and the Tribunal should rightly reject RESPONDENT's SFC application.

[58] CIARB at p 11; Rab at p 220
[59] Redfearn at p 410; CIARB at p 4
[60] Rab at p 270

III. RESPONDENT's deployment of a holographic replacement constituted a breach of the Agreement

A. The deployment of a holographic replacement constituted non-performance

1. Non-performance includes all forms of defective performance

45. RESPONDENT's deployment of the holographic replacement was defective in relation to its contractual obligations under Cl. 3.1.1 of the Agreement, and thus constitutes non-performance of the Agreement. Non-performance, under Article 7.1.1 PICC, is defined as a failure of a party to perform any of its obligations, and includes all forms of defective performance as well as a complete failure to perform.[61]

2. The deployment of a holographic replacement was defective performance as it went against the express intentions of Parties to have a live, human performance by all members of ECLIPSE

a) Parties' preliminary negotiations and subsequent conduct evince their common intention to require human performers for the "Act" contemplated under the Agreement

46. On a proper construction of the Agreement, RESPONDENT's replacement of Luna with a hologram constitutes defective performance pursuant to Cl. 3.1.1 of the Agreement and PICC. The Tribunal should "look primarily" at the words of the Agreement, having regard to all relevant circumstances, to determine the common intention of the parties at the point of contract.[62] Here, the Tribunal should consider the relevant circumstances of the preliminary negotiations and the conduct of the Parties subsequent to the conclusion of the

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[61] PICC Commentary, Article 7.1.1

[62] *Hansalaya Properties And Anr. vs Dalmia Cement (Bharat) Ltd* at [28]; Article 4.3 PICC

Agreement.[63] Accordingly, there was a common intention of Parties for a human performance under Cl. 3.1.1 of the Agreement.[64]

47. The express wording of Cl. 3.1.1 of the Agreement evinces a common intention for a live human performance, rather than an AI holographic replacement. RESPONDENT is contractually obliged to "procure the performance of ECLIPSE at the Concert". The "Concert" is defined as the live performance of the "Act", which is defined by Cl. 1.1 of the Agreement as the "R-Pop group…comprising five members known as Kim Ya Hoon, Heo Min Ji, Im Luna, Jay, and Kim E-Den".[65] The obligation under Cl. 3.1.1 of the Agreement, therefore, is for RESPONDENT to procure the performance of all 5 members of ECLIPSE, including Luna. There exists no express clause allowing the use of an AI holograph to replace the human performers in the Agreement.

48. RESPONDENT may assert it is contractually permitted to employ "digital or other production technologies" to discharge their obligations under Cl. 3.1.1 of the Agreement. However, firstly, such technologies are unlikely to refer to holographic replacements of ECLIPSE members, but rather the digital backdrop, videographic production, or other electronic technologies to aid in the support of the performance by the live ECLIPSE members. Secondly, there is nothing on a proper reading of Cl. 3.1.1 that expresses any common intention for RESPONDENT to use any such technologies to *substitute* or replace any part of a live, human performance. Correspondingly, as it was only intended for the use of such technologies to be used with a live, human performance of all 5 members of ECLIPSE, Cl. 3.1.1 provides no aid to RESPONDENT's case.

49. Preliminary negotiations conducted prior to the signing of the Agreement supports this interpretation. During the negotiations, RESPONDENT only mentioned that AI and digital

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[63] Article 4.3(2) PICC
[64] PICC Commentary, Article 4.3
[65] Exhibit 2, Cl. 3.1.1

modelling were used for "performance preparation" to ensure consistency.[66] This aligns with how ECLIPSE had been using AI to train their performers, an established practice that was well known in the industry.[67]

50. Parties' subsequent conduct further establishes a common intention for a live, human performance. CLAIMANT was clearly against the AI holograph replacement as an alternative, as it would affect "audience expectations".[68] RESPONDENT clearly prepared for a live, human performance through the rehearsals of its human members rather than immediately implementing holographic technology. RESPONDENT only proposed the use of the AI holograph as an alternative after Luna's refusal to perform.[69] Such conduct is inconsistent with a supposed belief that holographic substitution was part of the original contractual bargain between Parties. If a holographic concert was indeed RESPONDENT's intention from the signing of the Agreement, they would have proceeded ahead with the AI holographic replacement without having to consult CLAIMANT beforehand. Thus, Parties intended to have a live, human performance, and the use of the AI holograph constituted non-performance in breach of the Agreement.

b) Even if a common intention cannot be established, Cl. 3.1.1 of the Agreement should be interpreted to mean a live, human performance under the reasonableness test

51. In the alternative, if Parties common intention of Parties cannot be established, Cl. 3.1.1 of the Agreement should still be correctly interpreted to mean a live, human performance. The Tribunal should construe Cl. 3.1.1 of the Agreement according to the meaning which reasonable persons of the same kind as the parties would give to it in the same

66 Exhibit 1, Page 3
67 Facts at [15]
68 Facts at [44]
69 Facts at [43]

circumstances (the "**reasonableness test**"), if Parties' common intention cannot be precisely ascertained.[70]

52. Applying the reasonableness test, Cl. 3.1.1 was to procure a performance "in accordance with generally accepted industry standards and reasonable audience expectations for a live music concert of a similar scale and nature". The term "generally accepted industry standards" and "reasonable audience expectations" should be interpreted objectively, in accordance with the reasonableness test.

53. While RESPONDENT's holographic technologies have shaped R-Pop's industry practices, such practices are limited to the preparation of live, human performance. No industry practice exists to completely replace R-Pop performers during an actual performance, which is contrary to the audience expectations. Holographic performers have only been utilised by RESPONDENT in a one-off concert for a retired R-Pop group to perform a tribute concert.[71] In contrast, the Concert was ECLIPSE's debut performance in Reyna, with all 5 members of the and the group able to perform at the time of the Agreement.[72] Moreover, where holographic performers were used, audiences were well aware that the concert was performed using holographic technologies. Conversely, for the Concert, the audience neither knew of nor expected a holographic replacement as evinced by the post-concert reactions, with the speculation of the use of holographic replacement causing controversy.[73]

54. Thus, a reasonable person with the same knowledge and skills as Parties (who are both experienced in the R-Pop industry), would interpret Cl. 3.1.1 as an obligation to procure a live, human concert. They would know that the use of holographic concerts is not the

[70] PICC Commentary, Article 4.3
[71] *Ibid*.
[72] Facts at [26]
[73] Facts at [56]

prevailing industry standard, and would go against audience expectations of a music concert of a similar nature to ECLIPSE. The use of the holographic replacements should therefore constitute non-performance.

3. The Agreement was unliterally varied without CLAIMANT's full consent, and thus does not constitute a valid contractual modification under PICC

55. The Agreement was not validly modified to permit the use of a holographic replacement as CLAIMANT did not give its full consent. A contract can be modified by mere agreement of parties.[74] However, here there was no proper agreement as CLAIMANT objected strongly to the use of a holographic replacement and only proceeded as it was faced with "no other alternatives".[75]

56. Further, on a proper construction of the Agreement, any agreement to use the hologram would have a precondition that its usage must be strictly kept a secret. The modification has to be interpreted in a manner that is consistent with Cl. 3.1.1 of the Agreement, so as to not deprive Cl. 3.1.1 of its effect.[76] As such, the usage of the holograph must satisfy the requirements of "reasonable audience expectations" and "generally accepted industry standards".[77] This would necessitate a precondition that its usage be kept strictly secret, as any speculation of its use would go against audience expectations of a live, human performance. RESPONDENT represented that the holograph would be indistinguishable to the audience. However, the use of the holographic replacement sparked public speculation and controversy. Accordingly, the "mere agreement" of the CLAIMANT fails as the precondition of secrecy was not fulfilled.

[74] Article 3.1.2 PICC
[75] Facts at [44]
[76] Article 4.5 PICC
[77] Exhibit 2, Cl. 3.1.1

4. Even if the Agreement had been validly modified, RESPONDENT's performance was still defective

57. Even if the modification was validly accepted, RESPONDENT's performance remains defective relative to the modification. The modification was only accepted based on RESPONDENT's representations that the holographic replacement would be indistinguishable to the audience. Further, the modification included an express condition that the use of the hologram would remain strictly confidential.[78] Therefore, defective performance of this condition would constitute breach of the Agreement.

58. The condition of "strictly confidential" should be interpreted as requiring complete secrecy of the holographic replacement based on Parties' common intention. During preliminary negotiations, RESPONDENT emphasised that the replacement would be indistinguishable to audiences.[79] Likewise, CLAIMANT's objections focused on audience expectations and their reputation, leading to the express condition of confidentiality.[80] Parties' main concern for the holographic replacement was whether the public would be aware of its use. Accordingly, the condition requires complete secrecy, regardless of whether RESPONDENT itself disclosed the holographic usage.

59. Despite this, the Concert generated controversy and speculation over the holographic replacement. Through social media and video analysis, the public became aware of the potential replacement due to a technological glitch.[81] Regardless of RESPONDENT's non-admittance to the use of the holographic replacement, RESPONDENT breached its obligation to ensure complete secrecy. Thus, RESPONDENT's defective performance constitutes non-performance of their modified obligation.

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[78] Facts at [44]
[79] Facts at [43]
[80] Facts at [44]
[81] Facts at [56]

B. RESPONDENT's non-performance cannot be excused through the doctrine of force majeure

1. Luna's inability to perform was not beyond RESPONDENT's control or unforeseeable

60. RESPONDENT's non-performance cannot be excused through the doctrine of force majeure as it was not due to an impediment beyond RESPONDENT's control, unforeseeable at contract formation, and unavoidable in its effects.[82] Force majeure events must meet the requirements of "emergency and unavoidability",[83] where there are "extraordinary and unavoidable circumstances, which come from outside and which do not depend on subjective factors".[84]

61. The impediment of Luna's inability to perform was within RESPONDENT's control. The meet-and-greet event in which Luna was harassed was within RESPONDENT's control as it was in charge of the security measures.[85] The harassment depended on RESPONDENT's provision of security at the event.

62. Even if Luna's inability to perform was out of RESPONDENT's control as a psychological response, the inability of one of its performers was not unforeseeable at the time of contract. The possibility of the Act being unable to perform was even acknowledged by RESPONDENT themselves during preliminary negotiations. Similar to the case of *Kaptransstroy*, where the defendant had long-standing activity in its industry,[86] RESPONDENT should have foreseen such an event happening. Therefore, the event was not due to "extraordinary" circumstances.

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[82] Article 7.1.7 PICC

[83] Tribunal de Justiça do Estado do Paraná - 2ª Turma Recursal dos Juizados Especiais, Case No. Recurso Inominado nº 0037976-66.2019.8.1

[84] Ninth circuit Arbitrazh Court of Appeal, Case no. 09AP-55092/2015-GK, 09AP-57756/2015-GK

[85] Exhibit 2, Page 2

[86] *Kaptransstroy v TechnoSpecStroy*, Eighth Arbitrazh Appellate Court, Case no A70-17666/2017 ("***Kaptransstroy***")

2. RESPONDENT failed to give reasonable notice of Luna's inability to perform

63. Further, RESPONDENT failed to give reasonable notice of Luna's inability to perform. Under Article 7.1.7 (3) PICC, notice of the impediment must be given to the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment. The notice must be in accordance with the principles of reasonableness and good faith.[87]

64. While Luna's refusal to perform happened 3 days before the Concert, RESPONDENT had already known of Luna's psychological distress and her struggles to perform fully in front of live audiences two weeks prior.[88] RESPONDENT should or ought to have known that there was a possibility Luna could not perform given her condition. Despite this, RESPONDENT failed to inform the CLAIMANT earlier, violating the principles of good faith. RESPONDENT's reason to keep it internal ("to maintain continuity and avoid further public speculation") are unreasonable given that the CLAIMANT was their partner and was already obliged to keep such information confidential under the Agreement.[89] Since the impediment was within RESPONDENT's control and foreseeable, and they failed to give reasonable notice, RESPONDENT's non-performance cannot be excused.

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[87] *Ibid.*
[88] Facts at [37],[38]
[89] Exhibit 2, Cl. 7

IV. THE COUNTERCLAIM FOR THE FULL PAYMENT AND RESOLUTION OF THE INVOICE SHOULD NOT BE GRANTED

A. The Agreement should be terminated, and RESPONDENT should not be granted an allowance of money in lieu of restitution

1. The Agreement should be terminated as RESPONDENT has committed a breach of fundamental non-performance

65. RESPONDENT's counterclaim for the Invoice and Royalties should not be granted because RESPONDENT's holographic replacement constitutes non-performance of its obligations under the Agreement. RESPONDENT's non-performance was fundamental in nature, and thereby entitled CLAIMANT to terminate the contract pursuant to Article 7.3.1(1) PICC. This releases CLAIMANT from their obligation to pay for the full invoice and Royalties.[90]

66. RESPONDENT's non-performance will be considered *fundamental* non-performance pursuant to Article 7.3.1(2) PICC as the RESPONDENT could have reasonably foreseen that such non-performance was fundamental for CLAIMANT, to the extent that CLAIMANT would be deprived of what it was entitled to expect under the Agreement.[91]

67. As submitted at [47] *supra*, CLAIMANT had expected a live human performance at the time the Agreement was concluded. Any alleged or subsequent modification of the contract to permit holographic use was expressly conditioned on strict confidentiality of such usage.[92] Moreover, another fundamental expectation held by CLAIMANT under this Agreement was that it would be able to fulfill audiences' expectations. This expectation was integral to the entire commercial purpose of the Agreement. Consequently, usage of the hologram completely defeated audience expectations as seen from the public

[90] Article 7.3.1 PICC
[91] PICC Commentary, Article 7.3.1(2)(a)
[92] Facts at [44]

speculation and controversy over the holographic replacement.[93] The controversy also breached the Claimant's condition of complete confidentiality regarding usage of the hologram. CLAIMANT's reputation was resultantly damaged.[94] Cumulatively, these consequences stripped CLAIMANT of substantially the whole benefit of the Agreement. In this regard, RESPONDENT knew or ought to have known its proposed non-performance of such character was fundamental to the Agreement. Despite CLAIMANT's contemporaneous objections, RESPONDENT proceeded to commit its act of fundamental non-performance.[95]

2. RESPONDENT's claim for restitution must be rejected as it is impossible for RESPONDENT to restore in kind the benefit it received from CLAIMANT

68. Following RESPONDENT's fundamental non-performance, CLAIMANT rightfully terminated the Agreement on 26 February, 2026 when it issued the notice to RESPONDENT. Termination of the Agreement released both Parties from their obligation to effect and to receive future performance.[96] CLAIMANT holds no current obligation to pay the full Invoice or the Royalties. However, RESPONDENT remains liable to pay CLAIMANT damages due to its breach of the Agreement.[97]

69. RESPONDENT may submit that it is able to claim restitution of what it has supplied under the Agreement upon its termination as a one-time contract. However, restitution should not be granted to RESPONDENT as it is not able to concurrently make restitution of whatever it has received from CLAIMANT under the Agreement.[98] In applying Article 7.3.6 PICC, the Tribunal in *Anderson Consulting* barred a party from claiming restitution as it was

[93] Facts at [56]
[94] Facts at [65]
[95] Facts at [44]
[96] Article 7.3.5(1) PICC
[97] Article 7.3.5(2) PICC
[98] Article 7.3.6 PICC

"unjust" by reason that the same party could not return the benefits it received under the contract.[99] As regards the present Act, RESPONDENT received CLAIMANT's work to manage the safety, publicity and promotion of the performance, which constitutes intangible commercial value that RESPONDENT enjoyed from CLAIMANT's performance of its contractual obligations under the Agreement. Accordingly, given the nature of CLAIMANT's performance, there is simply no possibility for RESPONDENT to restore in kind the benefit it has already received from the CLAIMANT. Correspondingly, pursuant to Article 7.3.6 PICC, RESPONDENT's claim for restitution must be rightly rejected.

3. Even if restitution is granted, RESPONDENT should not be allowed its counterclaim in full

70. In any case, given the nature of CLAIMANT's performance of executing a concert, RESPONDENT would not be able to receive restitution in kind. Instead, an allowance of money amounting to the value of the performance received would be given.[100] This would likely be lower than the Respondent's Invoice as the performance was a holographic replacement, whereas the Performance Fee reflects the value of a live, human performance. Moreover, the Royalties and costs involved in the Concert and Promotion would not be granted as these costs do not form the "value" of the Concert.

71. Further, if restitution is granted, RESPONDENT would also have to return the benefits that it received under the Agreement. This would be restitution in kind for the obligations of the Claimant under Cl. 4.1 of the Agreement. Since this is not possible, an allowance of money should be granted. However, as submitted at [69] *supra*, since the benefits of the obligations are difficult to quantify, restitution should not even be allowed. Therefore, even

[99] *Andersen Consulting Business Unit Member Firms vs. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative*
[100] Article 7.3.6(2) PICC

if restitution is granted, RESPONDENT should not be able to recover in full its counterclaim, and CLAIMANT should also be entitled to an amount of money for what it has supplied under the Agreement.

B. Even if the Agreement has not been terminated, RESPONDENT's counterclaim must be denied.

72. Even if RESPONDENT's non-performance did not entitle CLAIMANT to terminate the Agreement, RESPONDENT's counterclaim for the Invoice and Royalties should not be granted based on RESPONDENT's non-performance and the express wording of the Agreement.

1. The Agreement does not guarantee the payment of the Performance Fee and Royalties

73. On the proper construction of the Agreement, the payment of the Performance Fee and Royalties is not guaranteed. In construing the Agreement, the Tribunal should consider the wording in the Agreement and relevant circumstances to determine the common intention of Parties.[101] Cl. 5.1 of the Agreement states that the RESPONDENT shall be entitled to the Performance Fee and Royalties "subject to further confirmation and performance of the Concert".[102] Accordingly, the Performance Fee and Royalties are conditional upon further agreement between Parties and the performance of the Concert.

74. Notwithstanding the above, RESPONDENT may submit that Cl. 5.1 of the Agreement is a price-determining clause and the Tribunal can impose a reasonable price.[103] However, the Agreement does not merely entail price determination, but relies also on the "performance of the Concert". Since the Concert was not performed in accordance with Cl. 3.1.1, the payment of the Performance Fee and Royalties should not be given.

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[101] *Hansalaya Properties And Anr. vs Dalmia Cement (Bharat) Ltd* at [28]; Article 4.3 PICC
[102] Exhibit 2, Cl. 5.1
[103] Article 5.1.7 PICC

75. The commercial purpose of the Agreement was for CLAIMANT's payment of the Performance Fee and Royalties in exchange for RESPONDENT's performance of its contractual obligations. This is especially true in the context of a Concert, where Royalties and Performance Fees are heavily dependent on audience attendance, performance quality and sale of merchandise. It is therefore consistent with the nature of the Agreement that Cl. 5.1 expressly makes payment "subject to further confirmation and performance of the Concert". Construing the clause as requiring payment regardless of whether the Concert was properly performed would be inconsistent with the commercial purpose of the Agreement.

2. The Agreement does not guarantee the payment of the Concert Fee

76. Further, RESPONDENT's request for the Concert Fee is outside the scope of the Agreement. Cl. 1.1 of the Agreement defines Performance Fee as "including [...] any preparation required to meet the standard reasonably expected of a headline act of similar stature", which should naturally include the Concert Fee. Cl. 4.1 of the Agreement expressly outlines specific terms for payment, such as "Performance Fee" and Royalties. In contrast, there are no express terms for payment of the Concert Fee. The deliberate choice to exclude such a term evinces a lack of intention for the Claimant to bear the costs of the Concert Fee.

77. The interpretation above is supported by preliminary negotiations. During the preliminary negotiations, Parties only discussed the division of logistics cost for promotional activities and did not mention the logistics cost (*i.e.* the Concert Fee) for the Concert itself.[104] Accordingly, there was no common intention for CLAIMANT to pay the Concert Fee. The

[104] Exhibit 1, Page 4

default position remains that each party bears the costs of their own performance.[105] Therefore, RESPONDENT's demand for the Concert Fee should be denied.

3. There is no contractual term for the payment of the Promotional and Rental Fees

a) There is no express term under the Agreement for CLAIMANT to pay for the Promotional and Rental Fees

78. The counterclaim should not be granted as there is no express obligation under the Agreement to pay for the Promotional and Rental Fees. Under Article 6.1.1 PICC, the default position is that each party should bear the costs of their own performance, unless the contrary is provided for in the Agreement. Under Cl. 5.1 of the Agreement, payment is strictly only for the Performance Fee and Royalties. There is no express provision for the payment for the Promotional Fee nor for the reimbursement of Rental Fees. As such, CLAIMANT should not have to pay for such Fees as it was not an obligation expressly indicated in the Agreement. There were no obligations outside the express terms of the Agreement.

79. Preliminary negotiations demonstrate Parties' common understanding to exclude any obligation by CLAIMANT to pay for the Promotional and Rental fees. In the preliminary negotiations, the Promotional and Rental Fees were raised by RESPONDENT. However, the allocation of these Fees was left undecided. While CLAIMANT initially proposed splitting the Rental fee, there was confusion as to whether this subsumed the Promotional fee. CLAIMANT subsequently decided that, as regard to the Promotional and Rental Fees, they would "cross that bridge when we get to it".[106] This is ultimately reflected in the final Agreement, where there is no express term for such Fees. Thus, there was no common

[105] Article 6.1.11 PICC
[106] Exhibit 1, Page 4

intention for CLAIMANT to solely bear responsibility for the Promotional and Rental Fees.

b) An omitted term for the Promotional and Rental Fees cannot be supplied

80. RESPONDENT cannot supply an omitted term to address the obligation to pay for the Promotional and Rental Fees. An omitted term can only be supplied where the parties have not agreed in respect of a term which is important for a determination of their contractual rights and duties.[107] This occurs where there are "gaps" in a contract, where a question arises that the parties have not regulated in their contract at all, either because they preferred not to deal with it or it was unforeseen.[108]

81. There is no such "gap" regarding the Promotional and Rental Fees. The Promotional and Rental Fees were clearly foreseen as they were discussed in the preliminary negotiations.[109] Despite this, Parties chose not to include any express terms regarding the Promotional and Rental Fees. The Fees were simply the costs borne by RESPONDENT in discharging their obligations under Cl. 3.1.2 of the Agreement as per Article 6.1.1 PICC. Thus, it is inappropriate to supply an omitted term because there were no rights and duties in the first place regarding the Promotional and Rental Fees.

c) Even if an omitted term is supplied, it would not be appropriate to supply a term of payment as Parties did not intend for there to be payment of Promotional Fees

82. Even if an omitted term regarding the Promotional and Rental Fee should be supplied to address a potential "gap", it should not be a term of payment. Instead, if a term has to be supplied, it should merely be a term for Parties to discuss the Fees. In determining the

[107] Article 4.8 PICC
[108] PICC Commentary, Article 4.8
[109] Exhibit 1, Page 4

appropriateness of supplying an omitted term, the Tribunal should consider the intention of Parties.[110]

83. As submitted at [79] *supra*, there was no common intention for CLAIMANT to pay for the Promotional and Rental Fees based on preliminary negotiations. If anything, they indicate that Parties deliberately postponed reaching agreement on those Fees, intending that they be "settled once we discuss royalties".[111] Thus, a term for Parties to discuss these Fees would be more appropriate according to the intention of Parties.

84. Therefore, based on the wording of the Agreement and RESPONDENT's non-performance, the counterclaim should not be granted.

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[110] PICC Commentary, Article 4.8

[111] Exhibit 1, Page 4

PRAYER FOR RELIEF

85. For the above reasons, CLAIMANT respectfully requests the Tribunal to declare that:

a. The *forum non conveniens* lies in the court proceeding;

b. An order for security for costs ought not to be granted;

c. Aurora's deployment of a holographic replacement constituted a breach of the Agreement; and

d. Aurora's counterclaim ought not to be granted.