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21ST LAWASIA INTERNATIONAL MOOT COMPETITION 2026

IN THE ASIAN INTERNATIONAL ARBITRATION CENTRE

MEMORIAL FOR CLAIMANT

THE CASE CONCERNING:

THE CONCERT PROMOTION AND PERFORMANCE AGREEMENT

BETWEEN

NOVA LIVE ASIA PTE LTD **… CLAIMANT**

AND

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

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STATEMENT OF JURISDICTION

The parties, Nova Live Asia Pte Ltd ("**Nova**" or "**CLAIMANT**") and Aurora Entertainment Co. Ltd. ("**Aurora**" or "**RESPONDENT**"), have agreed that the arbitration is to be conducted in accordance with the AIAC Rules, with Malaysia as the default seat of arbitration.

QUESTIONS PRESENTED

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 the RESPONDENT's deployment of a holographic replacement constituted a breach of the Agreement; and

IV. Whether the RESPONDENT's counterclaim ought to be granted.

STATEMENT OF FACTS

CLAIMANT and RESPONDENT are collectively referred to as the "**PARTIES**" to this arbitration.

CLAIMANT is a leading concert promotion and live events corporation incorporated in Reyna, recognised for its expertise in organising large-scale live entertainment events and has established a reputation for delivering productions of exceptional quality through meticulous planning, operational coordination, and industry professionalism.

RESPONDENT is an entertainment agency incorporated in Reyna, specialising in artist management and representation, and utilising advanced artificial intelligence systems and holographic technology.

2 January 2026	The PARTIES held an in-person pre-contractual coordination meeting concerning a flagship concert by the internationally acclaimed co-ed R-Pop group, "ECLIPSE". CLAIMANT highlighted the substantial commercial investment, reputational exposure, and logistical complexity involved, emphasising that any failure in performance would result in significant consequences. RESPONDENT assured CLAIMANT of its ability to deliver the agreed performance. Both PARTIES understood that ticket purchasers expected an

	authentic live performance by all members of ECLIPSE. These discussions were recorded in the Minutes dated 2 January 2026 ("**Minutes**").
5 January 2026	The PARTIES conducted a video conference to finalise the principal commercial terms of their collaboration and agreed to execute a streamlined agreement reflecting their essential obligations.
7 January 2026	The PARTIES formally executed the Concert Promotion and Performance Agreement dated 7 January 2026 ("**Agreement**"). Under Clause 3.1.1, RESPONDENT undertook to procure the live performance of ECLIPSE in accordance with the standards reasonably expected of a headline act. Relying on these assurances, CLAIMANT promoted the concert, resulting in the sale of all 90,000 tickets within two weeks.
24 January 2026	Unknown to CLAIMANT and the public, Luna (**"Luna"**), a member of ECLIPSE, experienced a security incident during a meet-and-greet event involving unsolicited physical contact by an international fan. RESPONDENT became aware that Luna suffered severe psychological distress, which increasingly affected her ability to participate in rehearsals and

perform. However, RESPONDENT failed to disclose these developments to CLAIMANT.

4 February 2026	After Luna failed to attend a scheduled rehearsal and became uncontactable, RESPONDENT attempted to locate her. RESPONDENT was informed that Luna had refused to perform due to her deteriorating psychological condition. Despite repeated attempts to persuade her to return, RESPONDENT was unable to secure her participation.
5 February 2026	With the concert imminent, RESPONDENT informed CLAIMANT that it could no longer deliver the complete live performance contemplated under the Agreement. RESPONDENT proposed using a holographic model to replicate Luna's appearance and stage performance. Due to the imminent concert date, the lack of alternatives, and the substantial consequences of cancellation, CLAIMANT reluctantly agreed on the express condition that the substitution remained strictly confidential.
6 February 2026	During the final rehearsal, CLAIMANT's representatives observed the holographic rendering of Luna. CLAIMANT discovered that a digitally generated model would replace Luna's physical presence during the performance.

7 February 2026	The concert proceeded as scheduled, with RESPONDENT deploying the AI-generated holographic replication of Luna throughout the performance.
10 February 2026	RESPONDENT issued an invoice dated 10 February 2026 demanding USD 3.6 million from CLAIMANT, including performance fees and related charges. RESPONDENT also demanded an accounting of CLAIMANT's gross revenues by 13 February.
13 February 2026	Public scrutiny arose after a social media user identified visual irregularities in Luna's holographic performance. Videos analysing the footage circulated widely on RooTube, leading to speculation that Luna had been replaced by a holographic substitute. The disclosure resulted in public criticism, refund demands, and reputational harm to CLAIMANT. RESPONDENT's public statement failed to resolve the concerns.
25 February 2026	Following an internal legal assessment, CLAIMANT notified RESPONDENT that the holographic substitution constituted a fundamental breach of the Agreement and deprived CLAIMANT of the performance contracted for.

26 February 2026	CLAIMANT subsequently terminated the Agreement and commenced arbitration proceedings, seeking damages of USD 2.2 million. RESPONDENT disputed both the termination and the existence of any binding arbitration agreement but, without prejudice to its jurisdictional objections, filed a counterclaim seeking payment of its outstanding invoice and royalties. Simultaneously, RESPONDENT commenced court proceedings to recover the outstanding sums, while CLAIMANT sought and obtained a stay on the basis that the dispute was subject to arbitration. To prevent parallel proceedings, the Reyna High Court granted a stay of the court proceedings. Thereafter, an Arbitral Tribunal was constituted pursuant to the AIAC Rules.

SUMMARY OF PLEADINGS

ISSUE 1: THE FORUM NON CONVENIENS LIES IN COURT PROCEEDINGS

The CLAIMANT respectfully submits that this Tribunal possesses jurisdiction as the PARTIES concluded a valid agreement to arbitrate. Under the Malaysian Arbitration Act 2005, the agreement satisfies s.9 as the RESPONDENT's own Minutes recorded the CLAIMANT's proposal and the RESPONDENT's unequivocal acceptance. The RESPONDENT cannot now deny its own contemporaneous record. Alternatively, arbitration agreement was incorporated through the PARTIES' established course of dealing, where six prior collaborations consistently adopted arbitration clauses. Given the PARTIES' shared intention to preserve confidentiality, arbitration is the only forum that gives effect to party autonomy and their agreed dispute resolution mechanism.

ISSUE 2: THE ORDER FOR SECURITY FOR COSTS OUGHT TO BE DISMISSED

The RESPONDENT's application for USD 2 million in security for costs is an exceptional interim measure unsupported by credible evidence. Under Rule 11.4 of the AIAC Rules, the RESPONDENT bears the burden of establishing irreparable harm and a reasonable possibility of success on the merits. The RESPONDENT has failed to satisfy either requirement. Its application relies solely on unverified rumours regarding the CLAIMANT's financial position, while the CLAIMANT remains financially capable of satisfying any adverse costs award. Further, the

RESPONDENT lacks a reasonable prospect of success as it failed to fulfil the contractual standard under the Agreement. In any event, the requested amount is excessive and disproportionate.

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

The RESPONDENT's deployment of Luna's holographic replacement breached the Agreement. First, Clause 3.1.1 originally required a live performance by all five members of ECLIPSE, as reflected by the PARTIES' common intention and contractual context. Second, although the PARTIES validly varied the mode of performance through mutual consent, such variation did not extinguish RESPONDENT's obligation to satisfy the agreed performance standard. Third, RESPONDENT failed to meet reasonable audience expectations by delivering a hologram that was distinguishable from Luna's live presence. As an industry pioneer, RESPONDENT was required to ensure an authentic and indistinguishable performance. Accordingly, RESPONDENT's breach entitles CLAIMANT to damages.

ISSUE 4: THE RESPONDENT'S COUNTERCLAIM OUGHT NOT TO BE GRANTED

The RESPONDENT's counterclaim ought to be dismissed. CLAIMANT's retention of the Concert revenue was lawful as it arose from RESPONDENT's fundamental breach of Clause 3.1.1, entitling CLAIMANT to suspend payment under Article 7.1.3 of the UNIDROIT Principles. Such retention did not constitute unjust enrichment, as it was a justified exercise of CLAIMANT's contractual rights. Alternatively, even absent a breach, RESPONDENT's invoice remained premature because payment was subject to further confirmation under Clause 5.1, and CLAIMANT's silence could not amount to acceptance. Accordingly, RESPONDENT had no crystallised entitlement to payment, and its counterclaim must fail.

PLEADINGS

I. THE FORUM NON CONVENIENS LIES IN COURT PROCEEDINGS.

1. The PARTIES' jurisdictional impasse stems from a simple question, "*which forum should decide the dispute?*". Contrary to the RESPONDENT's submission, the CLAIMANT submits that this Tribunal should decide the dispute.[1] Due regard has to be made to the agreed forum that exists through an agreement to arbitrate between the parties. This is well supported by the Singapore High Court in *Chang Chee Kheo v Fatfish Investment*,[2] where *"the court is concerned with the need to give effect to party autonomy by upholding the parties' bargain on the forum in which they have agreed for their disputes to be resolved "*

2. To determine the existence and formal validity of this agreed forum, the Tribunal must first establish the governing procedural law. Following the stay of proceedings by the High Court of Reyna, the parties expressly adopted the AIAC Rules.[3] Under these Rules, in the absence of an express choice by the parties, the default seat of arbitration is Malaysia.[4] Hence, by operation of s. 3 of the Arbitration Act,[5] The Arbitration Act is indeed the *lex arbitri*. Consequently, the formal validity of the arbitration agreement falls squarely under the strict statutory threshold set forth in s.9 of the Arbitration Act.

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[1] Facts, page 15, para 71.
[2] Chang Chee Kheo v Fatfish Investment [2023] SHC, (Singapore, High Court) Para 50.
[3] Clarification 14
[4] Rule 29 of AIAC Rules.
[5] Act 646.

3. The *lex arbitri* had indeed crystallised the CLAIMANT"s submission that an agreement to arbitrate undeniably exists. On this basis, the Tribunal's jurisdiction is securely founded on two grounds: **(A)** The PARTIES expressly concluded a binding agreement to arbitrate; and **(B)** Prior dealings mandate incorporation of the arbitration agreement.

A. The Parties Expressly Concluded A Binding Agreement To Arbitrate.

4. It is the CLAIMANT's position that a binding agreement to arbitrate was concluded between the PARTIES based on **(i)** The RESPONDENT's internal Minutes documented an unequivocal agreement to arbitrate; and **(ii)** The PARTIES' mutual intent for confidentiality leans to arbitration.

i. <u>The Respondent's Internal Minutes Documented An Unequivocal Agreement To Arbitrate.</u>

5. As evidenced by the Minutes, the RESPONDENT's representative, Madam Ye Bin, raised a fundamental concern regarding the mechanism for resolving any future disputes between the PARTIES. In response, the CLAIMANT's representative, Ms Choi, proposed that such disputes be referred to arbitration, expressly relying on the PARTIES' established practice in their previous collaborations. This proposal was

unequivocally accepted by the RESPONDENT's representative, Mr Jack.[6] Accordingly, the exchange of the CLAIMANT's proposal and the RESPONDENT's express acceptance was sufficient to conclude a binding agreement to arbitrate. This agreement is valid for two reasons. Firstly, **(a)** it satisfies the requirement that an arbitration agreement be in writing. Secondly, **(b)** the Minutes recording the PARTIES' consensus originated from the RESPONDENT's own internal document, thereby reinforcing the authenticity and reliability of the recorded agreement.

a. The agreement to arbitrate was in written form.

6. It is the CLAIMANT's contention that s.9 of the Arbitration Act does not require an agreement to arbitrate to bear the signatures of both PARTIES in order to satisfy the requirement of being "in writing". It is sufficient that the PARTIES' consensus is recorded in a written document, even where the agreement itself was reached orally. This principle was affirmed in Barrier Ltd v Redhall Marine Ltd,7 where the court held that an oral agreement to arbitrate is "evidenced in writing" as it was recorded in meeting minutes which satisfies s.5 of the English Arbitration Act 1996, which is largely similar to the lex arbitri.

7. Furthermore, the agreement to arbitrate concluded during the negotiation phase was never displaced by the subsequent Agreement. Crucially, the Agreement contains no

[6] Exhibit 1, page 4, paras 1-3.
[7] Barrier Ltd v Redhall Marine Ltd [2016] EWHC 381 (QB) (UK, High Court), Para 37.

entire agreement clause. That omission is determinative. As Lightman J observed in *Inntrepreneur Pub Co Ltd v East Crown Ltd*,[8] an entire agreement clause is the contractual mechanism by which parties exclude prior representations and agreements made during negotiations. In its absence, agreements reached during the negotiation stage continue to have legal effect. Accordingly, the PARTIES' agreement to arbitrate, as recorded in the Minutes, remains valid and binding notwithstanding that it was not incorporated into the final Contract due to the compressed timeline.[9]

b. The Minutes were the RESPONDENT's own internal document.

8. The RESPONDENT cannot evade the agreement to arbitrate merely because the Minutes were neither circulated nor signed by the PARTIES, which is an argument explored by the RESPONDENT. With all due respect, the evasion argument is unsustainable because the Minutes are the RESPONDENT's own internal record of the meeting.10 Having prepared the document, the RESPONDENT cannot now disclaim the very contents it chose to record, including the PARTIES' agreement to arbitrate. To permit otherwise would allow the RESPONDENT to approbate and reprobate by selectively relying on its own records.

[8] Inntrepreneur Pub Co Ltd v East Crown Ltd [2000] 3 EGLR 31 (UK, High Court), Page 33.
[9] Facts, page 8, para 34.
[10] Clarification 11.

9. Moreover, the Minutes carry significant evidentiary weight as a contemporaneous document prepared immediately following the negotiations.[11] They provide reliable and objective evidence of the PARTIES' mutual intention before the execution of the Agreement and accurately record the consensus reached on dispute resolution. Accordingly, once the CLAIMANT proposed arbitration and the RESPONDENT expressly accepted that proposal, a binding agreement to arbitrate came into existence. That agreement was subsequently reflected in the RESPONDENT's own Minutes. The RESPONDENT cannot now resile from its unequivocal acceptance by denying the existence of the arbitration agreement.

ii. The PARTIES' Mutual Intent For Confidentiality Leans To Arbitration.

10. Every contract must be interpreted based on the parties' common interest.[12] The common intention of the parties could be deduced by looking at several circumstances set out in Article 4.3 of the UNIDROIT Principles, *inter alia,* the preliminary negotiations between the parties. It is the CLAIMANT's submission that the common intention of confidentiality between the PARTIES, as derived from their preliminary negotiations, leans to arbitration. This is for two (2) reasons **(a)** PARTIES expressly contracted for privacy; and **(b)** Public litigation would materially contradict the PARTIES' intent.

[11] Wetton v Ahmed (also known as Mumtaz Properties Ltd) [2011] EWCA Civ 610, (UK, High Court), Para 14.
[12] Article 4.1 (1) of the UNIDROIT Principles.

a. PARTIES expressly contracted for privacy.

11. As established in the Minutes that recorded the first preliminary negotiations, the PARTIES' common intention is to settle their dispute privately. This is not merely a preference; it was a commercial choice. The PARTIES expressly, as recorded in the Minutes, sought to protect three critical pieces of information from the public view: (1) protect trade secrets, (2) the privacy of the idols and (3) commercial strategies.13

12. This was not an ancillary concern. The Minutes confirm that the PARTIES intended to have a dispute resolution mechanism that acted as a protection for that information mentioned in paragraph [11] above. Confidentiality was an important condition of the relationship between the PARTIES, a baseline expectation without which the PARTIES would never have proceeded. To the PARTIES, the ability to resolve disputes behind closed doors was the primary safeguard protecting the very integrity of their commercial enterprise.

b. Public litigation would materially contradict the PARTIES' intent.

13. The CLAIMANT's insistence on litigating the dispute in the National Court of Reyna is a direct contradiction of the PARTIES' agreement on privacy as the national court operates under a common law principle of open justice.[14] This principle is a process

[13] Exhibit 1, page 4, para 2.
[14] Clarification 2.

designed for public scrutiny, media accessibility, and mandatory record-keeping. These features are the antithesis of the confidentiality that the PARTIES agreed to preserve.

14. Effectively, once the dispute enters the national court domain, the PARTIES' private trade secrets and the performers' personal information become known to the public. Such exposure would trigger immediate, irreversible commercial harm, which is the precise harm the PARTIES sought to avoid. Consequently, as the national court system is structurally incapable of preventing public disclosure, arbitration is not merely an agreed forum, it is the only forum that can fulfil the PARTIES' clear mandate for privacy.[15]

15. Hence, arbitration is the only forum that structurally safeguards the confidential privacy of the performers and their proprietary trade secrets.

B. Alternatively, Prior Dealings Mandate The Incorporation Of Arbitration Agreement.

16. Even if the Tribunal finds that the oral agreement is insufficient, the PARTIES' history of six (6) consistent prior engagements (also known as "**Previous Agreements**") mandates incorporation of the arbitration agreement into the present contract. Relying on the factors articulated in *Lisnave Estaleiros Navais SA v Chemikalien Seetransport*

[15] Redfern and Hunter on International Arbitration, 6th ed. (Oxford: Oxford University Press, 2015), 30.

GmbH,[16] it was held that "*the incorporation of terms by a prior course of dealing is a question of fact and degree. It will depend, amongst other things, on the number of previous contracts, how recent they are, and the similarity in terms of subject matter and the manner in which they were concluded*."[17] As such, it is respectfully submitted that these criteria have been satisfied, where **(i)** The PARTIES have an established course of dealing, **(ii)** The Agreement functions as a targeted operational instrument, not an exhaustive agreement.

i. <u>The PARTIES have an established course of dealing.</u>

17. The present and the Previous Agreements involved the same PARTIES with the identical subject matter of organising concerts.[18] The volume of Previous Agreements further reinforced this argument because the PARTIES already had six (6) past engagements, and the present contract is their seventh (7th) collaboration. In all previous engagements, the PARTIES consistently included an arbitration agreement.[19] By having these consistent practices, it follows that PARTIES have a shared commercial understanding that arbitration will be the method to resolve any dispute.

18. Analogous to *R1 International Pte Ltd v Lonstroff AG*,[20] the Singapore Court of Appeal found that, although the contract does not contain an arbitration agreement,

[16] Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH [2013] EWHC 338, (UK, High Court), Para 27.
[17] Capes (Hatherden) Ltd v Western Arable Services Ltd [2010] Lloyd's LR 477, (UK, High Court), Page 35.
[18] Facts, page 8, para 34 and Clarification 5.
[19] Facts, page 8, para 34 and Additional Clarification 9.
[20] R1 International Pte Ltd v Lonstroff AG [2015] 1 SLR 521,(Singapore, Court of Appeal.), Para 65

"the parties' conduct throughout the course of the five (5) transactions," warrant the incorporation of an arbitration agreement given the fact that the parties have a shared understanding through the consistent conduct.

19. While the procedural pathways leading to arbitration exhibited minor differences, such as the multi-tiered dispute resolution mechanisms,[21] the end and final resolution method remained unchanged, where each of the six Previous Agreements mandated arbitration. This establishes a consistent course of dealing, which does not require absolute uniformity across every past transaction and ultimately refers to arbitration from the outset.[22]

ii. <u>The Agreement functions as operational instrument, not an exhaustive agreement.</u>

20. Furthermore, the present contract must be construed in light of its limited scope. It was never intended to serve as a comprehensive codification of the PARTIES' entire legal relationship. As recognised in *R1 International*,[23] it is standard commercial practice for parties to execute agreements covering only essential operational terms, with the understanding that prior, established norms, such as the agreed dispute resolution mechanism, remain operative.

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[21] Additional Clarification 9.
[22] Addax Energy SA v Petro Trade Inc [2022] EWHC 237 (Comm), (UK, High Court) Para 31
[23] *Supra note 20,* Para 52.

21. Similarly, a proper construction of the Agreement reveals that it was never intended to be an exhaustive codification of the PARTIES' legal relationship. Although a subsequent Zoom meeting finalised certain operational terms, the resulting Agreement was confined to the essential logistical framework of the Concert.[24] This limited purpose is confirmed by Recital (G), which states that the Agreement governs only the *"rights, obligations and risk allocation in connection with the promotion and* performance of the Concert."25 It was therefore drafted as a targeted operational instrument rather than a comprehensive contract.

22. Moreover, the PARTIES' conduct shows their contemplation of incorporating arbitration as a mechanism to resolve disputes, as reflected in the Minutes when the RESPONDENT's representative not only failed to object but even confirmed the use of arbitration in the past. Similar to the case of BASF Intertrade AG Singapore Branch v H&C S Holding Pte Ltd,26 where the court found the parties had intended to incorporate arbitration into the contract through their prior conduct of never objecting to the usage of arbitration in the past dealings.

23. In summary, the consistent conduct reflected via six (6) prior engagements gives rise to a shared commercial understanding that the PARTIES will resort to arbitration in the event of a dispute. These circumstances therefore mandate the incorporation of an arbitration agreement into the contract.

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[24] Facts, page 14, para 32.
[25] Exhibit 2, Recital G.
[26] BASF Intertrade AG Singapore Branch v H&C S Holding Pte Ltd [2017] SGHCR 10, (Singapore, High Court.), Para 40.

II. THE ORDER FOR SECURITY FOR COSTS OUGHT TO BE DISMISSED.

24. An order for security for costs is an exceptional form of interim relief granted before the conclusion of arbitral proceedings.[27] In the present case, the RESPONDENT seeks security for costs in the sum of USD 2 million, relying primarily on unsubstantiated rumours concerning the CLAIMANT's financial position.[28]

25. Under Rule 11 of the AIAC Rules, the burden rests squarely on the RESPONDENT to satisfy the cumulative requirements for the grant of an interim measure. Pursuant to Rule 11.4, the RESPONDENT must establish: First, (i) that it is likely to suffer irreparable harm absent the requested relief; and second (ii) that there is a reasonable possibility of succeeding on the merits.

26. The RESPONDENT has failed to discharge either requirement. On the basis of the above, the CLAIMANT respectfully submits that the application for security for costs must be dismissed for three reasons: **(A)** the RESPONDENT has failed to establish any risk of irreparable harm; **(B)** the RESPONDENT has not demonstrated a reasonable possibility of succeeding on the merits; and **(C)** in any event, the requested security of USD 2 million is manifestly excessive, disproportionate, and unsupported by the evidence.

[27] RSM Production Corporation and others v. Grenada, ICSID Case No. ARB/10/6, (ICSID Tribunal), Para 5.15.
[28] Facts, page 15, para 68 and 69.

A. There Exists No Irreparable Harm.

27. The RESPONDENT based its demand for security not on financial realities, but on sheer speculation and internet-driven rumours. Respectfully, it is the CLAIMANT's submission that an order for security for costs is granted only in extreme circumstances that demonstrate a serious risk of non-recovery by the other party, which will likely cause irreparable harm. To illustrate, the CLAIMANT submits two (2) contentions. Firstly **(i)** The rumours were not substantiated; and secondly, **(ii)** The CLAIMANT possesses the financial capacity to satisfy an adverse costs award.

i. The Rumours Were Not Substantiated.

28. As ruled in the case of *Commerce Group v El Salvador*,[29] the tribunal in this case held that *"As the guardian of the integrity of the proceeding, the Committee may, in the appropriate situation, use its inherent powers to order security for costs. However, the power to order security for costs should be exercised only in extreme circumstances, for example, where abuse or serious misconduct has been evidenced."* On this premise, the CLAIMANT submits that without clear evidence that demonstrates irreparable harm, this Tribunal should refuse to order for security for costs against the CLAIMANT.

[29] Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador, ICSID Case No. ARB/09/17, (ICSID Tribunal), Para 45.

29. The RESPONDENT's application rests entirely on speculative and unsubstantiated allegations rather than credible evidence. Its claim of the CLAIMANT's alleged embezzlement is founded on nothing more than hearsay, unsupported by any official investigation, judicial finding, or contemporaneous documentary evidence.[30] Likewise, the allegations of delayed payments to multiple entities originate from Blueddit, which is an unverified internet sources as well as market rumours, none of which have been independently corroborated. Such equivocal and unreliable material falls well short of the stringent evidentiary threshold required to justify the exceptional remedy of security for costs. It is incapable of establishing the *"extreme circumstances"* necessary to demonstrate a real and imminent risk of irreparable harm, and the RESPONDENT's application should therefore be dismissed.[31]

ii. <u>The CLAIMANT possesses the financial capacity to satisfy an adverse costs award.</u>

30. As established by the ICSID tribunal in *Unionmatex Industrieanlagen*,[32] although the claimant in this case is currently facing financial difficulties, this fact alone is not enough to constitute irreparable harm to warrant security for costs, as security for costs is only granted in exceptional circumstances which require supporting facts such as, *inter alia*, a history of failing to comply with costs orders and awards, and reliance on

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[30] Facts, page 14, para 62 and page 15, para 68.

[31] Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador, ICSID Case No. ARB/09/17, (ICSID Tribunal), Para 45.

[32] Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v.Turkmenistan, (ICSID Tribunal), Para 56.

third party funders. In line with that principle, the CLAIMANT has the financial capacity to satisfy an adverse costs award for two (2) reasons: **(a)** The CLAIMANT did not have financial difficulties; and **(b)** Lack of history of failing to comply with costs orders and awards.

a. The CLAIMANT did not have financial difficulties.

31. Here, the evidence is not only insufficient to show that the CLAIMANT is currently having financial difficulties, but the facts conversely show that the CLAIMANT is capable of paying the eventual adverse costs award, if any. This fact can be inferred from the fact that the CLAIMANT is able to pay the initial cost of this arbitration without relying on any third party funder. In addition to that, the CLAIMANT also has a steady stream of future income with multiple incoming collaborations with other entertainment entities.[33]

32. Unlike in *RSM Production Corporation v. Saint Lucia*, where security for costs was granted because, *inter alia,* it was proven that the claimant in that case was relying on third party funder to continue the proceedings,[34] here, no mention of any third party funder or external funder to assist the CLAIMANT in initiating this arbitration.

[33] Additional Clarification 11.
[34] RSM Production Corporation v. Saint Lucia, ICSID Case No. ARB/12/10, (ICSID Tribunal), Para 73.

b. Lack of history of failing to comply with costs orders and awards.

33. One of the strongest proof that non-recovery is likely to happen is when the CLAIMANT had a history of failing to comply with costs orders and awards. As laid down in *EuroGas v. Slovakia*, security for costs is warranted where there exists consistent failure to comply with previous costs orders and awards by the claimant.[35]

34. Conversely, nothing in the facts shows that the CLAIMANT had any history of failing to pay cost orders and awards from previous proceedings. In fact, the CLAIMANT has successfully paid the RESPONDENT for six (6) consecutive times in their previous collaboration without any issue.

35. Hence, these facts show that the CLAIMANT is financially capable of paying an adverse cost award, which directly defeats any potential irreparable harm of non-recovery that may arise out of the CLAIMANT's impecuniosity.

B. The RESPONDENT Does Not Have A Good Prospect Of Succeeding On The Merits.

36. Pursuant to Rule 11.4 of the AIAC Rules, the RESPONDENT bears the burden of establishing a good prospect of succeeding on the merits. Absent such demonstration, the exceptional remedy of an interim measure cannot be granted.

[35] EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic, ICSID Case No. ARB/14/14, (ICSID Tribunal), Para 122.

37. Here, it is without a doubt that the CLAIMANT may have agreed to the variation of the contract, namely the hologram deployment to replace Luna. However, the variation comes with an express condition that it still needs to meet the reasonable audience expectation and be indistinguishable from normal performance.[36]

38. Yet, the hologram deployed by the RESPONDENT was glitching during the live performance and was discovered by the audience,[37] thereby failing to meet the reasonable audience expectation. Therefore, by failing to meet their end of the bargain, the RESPONDENT did not have a good prospect of succeeding on the merits.

C. The Amount Of Security For Costs Is Disproportionate.

39. The CLAIMANT further submits that any order for security for costs must satisfy the requirement of proportionality. Although proportionality is not expressly stated in the AIAC Rules, it is an established consideration in assessing whether such an exceptional measure should be granted. In *Eskosol*,[38] the tribunal recognised that the "*requested measure must be proportionate and must not impose such undue burdens on the other party."* This requirement serves to ensure that security for costs is not used to unfairly restricts a party's ability to pursue a legitimate claim.[39]

[36] Facts, page 10, para 44.
[37] Facts, page 12, para 54.
[38] Eskosol SpA in liquidazione v Italian Republic (Procedural Order No 3, Decision on Respondent;'s Request for Provisional Measures, 12 April 2017) ICSID Case No. ARB/15/50,(ICSID Tribunal), Para 36.
[39] Chartered Institute of Arbitrators, *International Arbitration Practice Guideline: Applications for Security for Costs* (London: Chartered Institute of Arbitrators, 2016), 5.

40. Here, the amount requested by the RESPONDENT of 2 million USD is highly disproportionate, considering the fact that security for costs is meant to cover the legal fees and costs incurred in this proceeding.[40] The excessive nature of the requested amount is further demonstrated when compared with the RESPONDENT's own counterclaims. A security amount of USD 2 million would represent more than half of the total amount claimed by the RESPONDENT in its counterclaims, which is USD 3.6 million, thereby exceeding any reasonable estimate of potential costs arising from these proceedings.

41. Moreover, the RESPONDENT has provided no evidence or justification demonstrating why such an extraordinary amount is necessary. Without any justification, granting the application for security would place an undue financial burden on the CLAIMANT and risk impairing its ability to effectively pursue its legitimate claim before this Tribunal.

42. Accordingly, the RESPONDENT's application for USD 2 million in security for costs must be rejected for being disproportionate and inconsistent with the purpose of this exceptional interim measure.

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[40] Sundra Rajoo, *Law, Practice & Procedure of Arbitration*, 2nd ed. (Petaling Jaya: LexisNexis, 2016), 674.

III. THE RESPONDENT'S DEPLOYMENT OF A HOLOGRAPHIC REPLACEMENT CONSTITUTED A BREACH OF THE AGREEMENT.

43. CLAIMANT respectfully submits that RESPONDENT's deployment of a holographic replacement constituted a breach of the Agreement and should assume full liability for any damages incurred from such breach.

44. Based on this premise, RESPONDENT's deployment of a holographic replacement constitutes a breach for three (3) reasons: **(A)** The RESPONDENT's initial obligation required a live performance by all five members of ECLIPSE, **(B)** There is a variation to the contractual obligations mutually agreed upon by the PARTIES; and **(C)** The RESPONDENT's holographic replacement failed to satisfy the reasonable audience expectations.

A. The RESPONDENT's Initial Obligation Required A Live Performance By All Five Members Of ECLIPSE.

45. Prior to the subsequent variation, RESPONDENT's obligation under Clause 3.1.1 was to procure the live performance of all five members of ECLIPSE at the Concert. This interpretation is supported by two (2) arguments: **(i)** the RESPONDENT's obligation must be interpreted according to the PARTIES' common intention; and **(ii)** the PARTIES' expectation was for all five members of ECLIPSE to perform live at the Concert.

i. <u>The RESPONDENT's Obligation Must Be Interpreted According To The PARTIES' Common Intention.</u>

46. Clause 3.1.1 must be interpreted as requiring RESPONDENT to procure the live performance of all five (5) members of ECLIPSE, as this interpretation best reflects the common intention of the PARTIES at the time of contracting.[41]

47. Although Clause 3.1.1 expressly requires the RESPONDENT to procure the performance of ECLIPSE at the Concert, the scope of this obligation cannot be determined by examining the wording of the clause in isolation. Rather, the contractual obligation must be interpreted in light of the objective understanding reached by the PARTIES when they entered into the Agreement.[42]

48. This approach is mandated by the UNIDROIT Principles, which provides that contractual terms are to be interpreted according to the common intention of the PARTIES.[43] In determining such intention, Article 4.3 further requires consideration of the surrounding circumstances, including the preliminary negotiations and subsequent conduct of the PARTIES.[44]

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[41] Exhibit 2, page 4; and Article 4.1, UNIDROIT Principles.
[42] Article 4.1, UNIDROIT Principles.
[43] *TrakMotors v Moscow Region Customs, Case No. 09AP-49632/2023, Ninth Arbitrazh Appellate Court (Russian Federation)*; and Article 4.1, UNIDROIT Principles.
[44] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; *ICC Case No. 19127,* Final Award, 2013; and Article 4.3, UNIDROIT Principles.

49. Applying these principles, the circumstances surrounding the formation of the Agreement demonstrate that the PARTIES contemplated the participation of all five (5) members of ECLIPSE in the live performance.[45] The commercial purpose of the Agreement was not merely to secure an appearance by the group in name, but to deliver the performance that the PARTIES had specifically negotiated and understood.[46] Therefore, the RESPONDENT's obligation under Clause 3.1.1 must be interpreted as requiring the live performance of all five (5) members of ECLIPSE.

ii. <u>The PARTIES' expectation was for all five members of ECLIPSE to perform live at the Concert.</u>

50. The CLAIMANT respectfully submits that both the Agreement and the surrounding circumstances unequivocally demonstrate the PARTIES' common intention that all five members of ECLIPSE would perform live at the Concert.

50.1 First, Clause 1.1 defines the "Act" as ECLIPSE, a five-member co-ed R-Pop group, while the "Concert" is defined as the live performance of the Act, including rehearsals.[47] Read together, these provisions contemplate the participation of ECLIPSE as a complete group, rather than a partial or substituted performance..[48]

[45] Exhibit 1, page 3, para 1; Exhibit 2, page 3, Clause 1.1; and Exhibit 2, page 4, Clause 3.1.1.
[46] Exhibit 1, page 3, para 1.
[47] Exhibit 2, page 3, Clause 1.1.
[48] Facts, page 6, para 23; and Exhibit 1, page 3, para 1.

50.2 Second, during negotiations, RESPONDENT's representative, Madam Ye Bin, discussed logistical, security, and safety arrangements for the members, while CLAIMANT's representative, Ms Kim, proposed a fan meet-and-greet in conjunction with the merchandise release.[49] These preparations were premised on the physical attendance of all five members and would have been commercially unnecessary had the PARTIES contemplated anything less.[50]

51. Thus, both the Agreement and the surrounding circumstances at the time of contracting establish that the RESPONDENT's obligation under Clause 3.1.1 was to procure a live performance by all five members of ECLIPSE.

B. There Is A Variation To The Contractual Obligations Mutually Agreed By The PARTIES.

52. It is pertinent to note that the use of Luna's holographic replacement constituted a valid variation of the mode of performance under the Agreement. However, such variation did not extinguish RESPONDENT's underlying contractual obligations. Thus, two issues arise: (**i**) the PARTIES' mutual consent was sufficient to vary Clause 3.1.1; and (**ii**) the variation did not discharge RESPONDENT from its obligation to satisfy the contractual performance standard under Clause 3.1.1.

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[49] Exhibit 1, page 2, paras 5-6.
[50] Exhibit 1, page 2, paras 4-6.

i. <u>The PARTIES' Mutual Consent Was Sufficient To Vary Clause 3.1.1.</u>

53. CLAIMANT respectfully submits that the PARTIES' agreement to permit Luna's holographic replacement constituted a valid variation of Clause 3.1.1.

54. Article 3.1.2 provides that a contract may be modified by the mere agreement of the PARTIES without any further requirement.[51] This was affirmed in the *CAM case,* where the tribunal recognised that contractual obligations may be modified solely through the agreement of the parties.[52]

55. In the present case, CLAIMANT agreed to the holographic replacement on the strict condition that the arrangement remained confidential, thereby preserving the audience's expectations and the commercial purpose of the Concert.[53] The PARTIES therefore intended only to vary the mode of performance, not to replace, discharge, or novate the Agreement. Thus, RESPONDENT still remained bound by its existing contractual obligations.[54]

56. Further, *Rock Advertising case* is distinguishable as it concerns an express "No Oral Modification clause" restricting oral contractual variations.[55] In contrast, the present

[51] Article 3.1.2, UNIDROIT Principles.
[52] *Centro de Arbitraje de Mexico (CAM),* Award, 30 November 2006.
[53] Facts, page 10, paras 43-44; and Exhibit 1, page 3, para 1.
[54] *R (on the application of Cobalt Data Centre 2 LLP and another) v Commissioners for His Majesty's Revenue and Customs* [2024] UKSC 40.
[55] *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24, paras 10-11.

Agreement contains no "Entire Agreement Clause" and no provision expressly requiring contractual variations to be made in writing or prohibiting oral modifications. There is nothing in the Agreement to exclude the PARTIES' subsequent oral agreement. In the absence of any express restriction, the PARTIES' oral agreement was sufficient to validly vary the Agreement.[56]

ii. <u>The Variation Did Not Discharge The RESPONDENT From Its Obligations Under Clause 3.1.1.</u>

57. Although the PARTIES agreed to adopt holographic technology as an alternative means of performance, this did not alter the contractual standard RESPONDENT was required to satisfy. A variation modifies the manner of performance; it does not extinguish the underlying contractual obligations.[57]

58. The RESPONDENT therefore remained bound by Clause 3.1.1, which required the performance to satisfy two conjunctive standards: (i) generally accepted industry standards; and (ii) reasonable audience expectations.[58] While CLAIMANT accepts that holographic technology may satisfy the former, technological compliance alone does not establish contractual compliance. The holographic performance must also fulfil the reasonable audience expectations that the PARTIES intended to create.[59]

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[56] Facts, page 10, para 44.
[57] *Supra note 54.*
[58] Exhibit 2, page 5, Clause 3.1.1.
[59] Exhibit 2, page 5, Clause 3.1.1 and Exhibit 1, page 3, para 1.

59. Accordingly, the CLAIMANT does not dispute the validity of the variation or the use of holographic technology as an agreed method of performance. The issue before this Tribunal is therefore narrower: *whether RESPONDENT's implementation of the hologram satisfied the contractual standard of reasonable audience expectations under Clause 3.1.1 ?*, as addressed below.

C. The RESPONDENT's Holographic Replacement Failed To Satisfy The Reasonable Audience Expectations.

60. CLAIMANT respectfully submits that RESPONDENT failed to satisfy the standard imposed under Clause 3.1.1. The obligation was not merely to deploy a functioning hologram, but to preserve the authenticity and audience experience of ECLIPSE's live performance contemplated by the PARTIES.

61. The RESPONDENT failed to meet this standard for five (5) reasons: **(i)** a reasonable audience member expected a live performance by all five members of ECLIPSE; **(ii)** the standard of reasonable audience expectations is objective; **(iii)** the presence of visual irregularities demonstrates RESPONDENT's failure to satisfy reasonable audience expectations; **(iv)** the delayed discovery of the glitch does not negate the RESPONDENT's fundamental breach; and **(v)** the visual irregularities cannot be dismissed as mere speculation.

i. <u>A Reasonable Audience Member Expected A Live Performance By ECLIPSE.</u>

62. It is submitted that a reasonable audience member would have expected a live performance by all five (5) members of ECLIPSE at the Concert. Under Clause 3.1.1, the relevant inquiry is whether RESPONDENT delivered the experience reasonably contemplated by the PARTIES. Respectfully, the RESPONDENT failed to do so.

62.1 First, the Agreement itself establishes that the Concert contemplated the live participation of ECLIPSE as a complete group. Clause 1.1 defines the "Act" as ECLIPSE, a five-member co-ed R-Pop group, while the "Concert" is defined as the live performance of that Act.[60] Therefore, the essence of the contracted performance was not merely the reproduction of ECLIPSE's music, but the group's physical presence and live interaction with the audience.

62.2 Second, the commercial context of the Concert reinforces this interpretation. The Concert marked ECLIPSE's first live performance in Reyna and was promoted as a flagship production aimed at both domestic and international audiences.[61] In such circumstances, the audience's expectation extended beyond the performance itself to the opportunity to witness the group's physical presence on stage.[62]

[60] Exhibit 2, page 3, Clause 1.1.
[61] Facts, page 7, para 28.
[62] Facts, page 7, para 28.

62.3 Third, ECLIPSE had consistently been presented and marketed as a cohesive five-member group.[63] The audience therefore reasonably expected an experience centred on the collective presence and performance of all members. A holographic substitute that failed to convincingly replicate Luna's presence could not provide an equivalent experience.

63. Thus, RESPONDENT's obligation under Clause 3.1.1 extended beyond providing a technically functional hologram. It was required to deliver a performance consistent with the reasonable expectations attached to an authentic ECLIPSE live performance.[64]

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[63] Facts, page 6, para 23.
[64] Facts at Page 10, Para 43 and 44 & Exhibit 1, Page 3, Para 1.

ii. The Standard Of Reasonable Audience Expectations Is Objective.

64. Clause 3.1.1 requires the Tribunal to determine the audience expectations objectively. The Tribunal must consider what an ordinary and reasonable ticket purchaser, possessing the relevant background knowledge available at the time of contracting, would have expected from the Concert which is consistent with the approach adopted by the House of Lords in *Investors*.[65]

65. Such expectations are not derived from individual preferences or subjective disappointment, but from the nature of the event, the manner in which it was promoted, and the circumstances known to the PARTIES when entering into the Agreement.[66]

66. Here, RESPONDENT was aware of the significance attached to ECLIPSE's first live performance in Reyna and the audience's expectation of experiencing the group's physical presence.[67] Therefore, Clause 3.1.1 must be interpreted from the perspective of a reasonable ticket purchaser with the relevant background knowledge of the event.

a. The RESPONDENT is held to the standard of the industry.

67. CLAIMANT respectfully submits that RESPONDENT, having represented itself as a pioneer and expert in the entertainment industry, must be held to the higher standard

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[65] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896.
[66] Facts, page 6, para 23; page 7 para 28; and Exhibit 1, page 3, para 1.
[67] Facts, page 6, paras 23-24.

expected of such expertise.[68] An expert is judged by *"the standards reasonably expected of an ordinarily competent member of that.."* industry,[69] and contractual performance has to be of reasonable quality and not less than average in the circumstances.[70] Thus, RESPONDENT cannot avoid liability merely by demonstrating that holographic technology is generally accepted within the industry. Compliance with industry practice is only one element of Clause 3.1.1 and does not, by itself, establish contractual compliance.[71]

68. In the present case, the RESPONDENT was expected to deliver a holographic performance capable of fulfilling the very purpose for which the CLAIMANT agreed to the variation.[72] The CLAIMANT agreed to the variation solely because of the RESPONDENT's representations that the hologram would be: (i) state-of-the-art; and (ii) indistinguishable under live performance conditions.[73]

69. However, RESPONDENT failed to achieve this standard when visible irregularities appeared in Luna's holographic projection and were subsequently circulated widely online.[74] This was not a mere technical imperfection, but a failure that undermined the authenticity and audience experience RESPONDENT had undertaken to preserve.[75]

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68 Clarifications 3.
69 *Qatar Investment & Projects Development Holding Co & Anor v John Eskenazi Ltd & Anor,* [2022] EWHC 3023 (Comm), paras. 409–410.
70 Article 5.1.6, UNIDROIT Principles.
71 *Case No. 244/2014*, International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation.
72 Facts at Page 10, Para 43 and 44 & Clarifications No. 3.
73 Facts at Page 10, Para 43.
74 Facts, page 12, paras 54-55.
75 Facts, page 12, para 54.

iii. <u>The Presence Of Visual Irregularities Demonstrates The RESPONDENT's Failure To Satisfy Reasonable Audience Expectations.</u>

70. The visual irregularities in Luna's holographic representation demonstrate RESPONDENT's failure to comply with Clause 3.1.1, as the RESPONDENT was not merely required to provide a functioning hologram, but one capable of maintaining the appearance and experience of Luna's live participation.[76]

71. The RESPONDENT may contend that the irregularity was merely a minor glitch discovered only after the Concert.[77] However, the defect was detectable through frame-by-frame analysis of ordinary concert footage, without expert assistance or specialised equipment.[78] A defect observable from publicly available recordings confirms that the hologram was not indistinguishable under live performance conditions.

72. More importantly, the significance of this defect must be assessed against the purpose of the variation.[79] By allowing the hologram to become distinguishable from Luna's actual presence, RESPONDENT defeated the very objective of the variation and failed to meet the required performance standard.[80]

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[76] Facts, page 10, para 43.
[77] Facts, page 12, para 54.
[78] Facts, page 12, para 55.
[79] *Supra note 71*.
[80] *Supra note 54.*

iv. <u>The Delayed Discovery Of The Glitch Does Not Negate The RESPONDENT's Fundamental Breach.</u>

73. The CLAIMANT submits the fact that the visual irregularity was discovered only after the Concert does not absolve RESPONDENT from liability. The relevant consideration is not when the defect was detected, but *whether RESPONDENT fulfilled its contractual obligation at the time of performance*?

74. The RESPONDENT, as a pioneer in the entertainment industry, knew or ought reasonably to have known that modern performances are routinely recorded, disseminated, and scrutinised beyond the live Concert itself.[81] Thus, the RESPONDENT cannot limit its obligation to the conditions experienced by the audience present at the Concert alone.[82]

75. Further, the existence of a contractual breach must be distinguished from the time at which that breach is discovered. A defect does not arise only upon detection, rather, discovery merely reveals a failure that already existed at the time of performance.[83] Therefore, the delayed discovery of the defect does not diminish, but confirms, RESPONDENT's failure to deliver the contractual standard and audience experience contemplated by the PARTIES.

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[81] Facts, page 5, para 12 and 17, and Clarifications 3

[82] UNIDROIT Commentary 2, Article 5.1.6.

[83] *Greenway II, LLC v. Wildenstein & Co., Inc., No. 19-cv-4093 (CM) (RWL),* 2022 WL 1449187.

v. <u>The Visual Irregularities Cannot Be Dismissed As Mere Speculation.</u>

76. It is submitted that the existence of visual irregularities is sufficient to establish RESPONDENT's failure to perform in accordance with Clause 3.1.1. The determination of breach does not depend on the number of audience members who detected the defect or their individual reactions. Once the hologram became distinguishable from Luna's actual presence, RESPONDENT failed to satisfy the agreed performance standard.[84]

77. The RESPONDENT's contention that the irregularities are speculative, respectfully misconstrues CLAIMANT's evidence.[85] CLAIMANT does not rely on the isolated comments alone. In *Lachaux v Independent Print Ltd*, the UK Supreme Court affirmed that actual harm may be inferred from the nature and scale of the publication, the circumstances of its dissemination, and the inherent probabilities, without requiring evidence from every individual recipient.[86]

78. In the present case, the widespread circulation of the footage, public scrutiny, and subsequent refund requests demonstrate that the irregularity was not merely speculative.[87] While the precise cause of the defect may remain uncertain, the existence of the visible irregularity is not in dispute.[88]

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[84] *Mears Ltd v Costplan Services (South East) Ltd* [2019] EWCA Civ 502
[85] Facts, page 12, paras 54-56 and page 13, para 60.
[86] *Lachaux v Independent Print Ltd* [2019] UKSC 27, para 21.
[87] Facts, page 12, para 56 and page 13, para 58.
[88] Facts, page 12, para 54.

79. Moreover, the RESPONDENT also cannot attribute the irregularity to external factors such as camera angles or lighting.[89] Had such factors been responsible, the distortion would have affected the Concert generally. Instead, the irregularity was only confined to Luna's hologram. Therefore, RESPONDENT's failure to deploy an indistinguishable hologram constituted a fundamental deviation from the agreed performance, entitling CLAIMANT to damages amounting to USD 2.2 million.[90]

80. Thus, RESPONDENT's deployment of a holographic replacement, although validly agreed as a variation of the mode of performance, failed to satisfy the underlying contractual obligation under Clause 3.1.1 and therefore constituted a breach of the Agreement.

IV. THE RESPONDENT'S COUNTERCLAIM OUGHT NOT TO BE GRANTED.

81. RESPONDENT's counterclaim is premised on the assumption that CLAIMANT wrongfully withheld payment under the Agreement. However, respectfully, such assumption is misconceived as CLAIMANT's retention of the Concert revenue was a lawful consequence of RESPONDENT's failure to fulfil its contractual obligations. Further, even if this Tribunal finds that no breach occurred, RESPONDENT's demand

[89] Ibid

[90] Facts, page 14, para 65.

for payment remains premature as the contractual conditions for payment had not been satisfied.

82. In light of this, CLAIMANT relies on two (2) arguments: (**A**) CLAIMANT has lawfully retained the Concert revenue; and (**B**) Notwithstanding the foregoing, RESPONDENT's invoice remains premature.

A. The CLAIMANT Has Lawfully Retained The Concert Revenue.

83. Following the Concert, RESPONDENT issued an invoice amounting to USD 3.6 million, requiring payment within four (4) days from 10 February 2026 to 13 February 2026.[91] The invoice comprised two categories of charges: (i) promotional activities; and (ii) concert-related expenses, including the performance fee. However, prior to the payment deadline on 13 February 2026, a visual irregularity in Luna's holographic projection was discovered, raising concerns as to whether RESPONDENT had fulfilled its contractual obligation under Clause 3.1.1.[92]

84. It is respectfully submitted that CLAIMANT's retention of the Concert revenue was lawful and justified as a consequence of RESPONDENT's failure to perform its contractual obligations. The CLAIMANT did not unjustly withhold payment, but

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[91] Facts at Page 11, Para 51 and Para 52.
[92] Facts at Page 12, Para 54 & Clarifications 8.

exercised its contractual right to suspend its own performance in response to RESPONDENT's fundamental breach.

85. Based on this premise, CLAIMANT's retention of the Concert revenue was lawful for two (2) reasons: (**i**) CLAIMANT was entitled to withhold payment due to RESPONDENT's fundamental breach; and (**ii**) CLAIMANT's retention of the Concert revenue does not constitute unjust enrichment.

i. <u>The CLAIMANT Was Entitled To Withhold Payment Due To The RESPONDENT's Fundamental Breach.</u>

86. The withholding of payment was a lawful exercise of CLAIMANT's contractual rights arising from RESPONDENT's failure to perform in accordance with Clause 3.1.1 of the Agreement.

87. Article 7.1.3 embodies the principle of "*exceptio non adimpleti contractus"*, which literally translates to "exception of an unfulfilled contract", permitting a party to withhold performance where the other party has failed to properly perform its corresponding obligations.[93] Thus, RESPONDENT's failure to deliver the performance contemplated under the Agreement entitled CLAIMANT to suspend its payment obligation.[94]

[93] Article 7.1.3(2), UNIDROIT Principles.
[94] *ICC Case No. 16816*, Final Award, 2011.

88. Clause 5.1 did not impose an independent obligation to pay.[95] Rather, payment was contingent upon RESPONDENT's proper performance of the Concert, including compliance with Clause 3.1.1, which required the performance to satisfy generally accepted industry standards and reasonable audience expectations.[96]

89. As established above, RESPONDENT fundamentally breached Clause 3.1.1 by failing to deliver a holographic performance that remained indistinguishable from Luna's live presence.[97] Consequently, CLAIMANT was entitled to withhold payment, and such withholding cannot constitute a breach of its own contractual obligations.

ii. <u>The CLAIMANT's Retention Of Concert Revenue Does Not Constitute Unjust Enrichment.</u>

90. The RESPONDENT may contend that CLAIMANT's retention of the Concert revenue amounts to unjust enrichment. However, such contention is respectfully misconceived as the retention arose from CLAIMANT's lawful exercise of its contractual rights following RESPONDENT's breach.

91. As recognised in *Banque Financièr*e, a claim in unjust enrichment requires proof that: (i) the defendant was enriched; (ii) the enrichment was at the claimant's expense; (iii)

[95] Exhibit 2, page 5. Clause 5.1.
[96] Ibid.
[97] Facts, page 12, para 54.

the enrichment was unjust; and (iv) no applicable defence bars restitution.[98] Therefore, RESPONDENT bears the burden of demonstrating that CLAIMANT's retention of the Concert revenue was unjust.

92. In the present case, CLAIMANT's retention of the revenue resulted from RESPONDENT's failure to perform in accordance with the Agreement.[99] Thus, the RESPONDENT cannot rely on the consequences of its own contractual breach to establish that CLAIMANT was unjustly enriched.[100] Since CLAIMANT's retention of the Concert revenue was supported by both the Agreement and the applicable legal principles, it cannot constitute unjust enrichment.[101]

B. Notwithstanding The Foregoing, The RESPONDENT's Invoice Remains Premature.

93. Even if this Tribunal finds that RESPONDENT did not breach the Agreement, RESPONDENT's invoice remains premature as the conditions precedent to CLAIMANT's payment obligation had not yet been satisfied. In particular, this is due to two (2) reasons: (**i**) Clause 5.1 made payment contingent upon further confirmation and agreement on royalties; and (**ii**) CLAIMANT's silence does not amount to acceptance of RESPONDENT's invoice.

[98] *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221.
[99] Facts, page 14, para 64.
[100] Facts, page 15, para 67.
[101] Exhibit 2; and Article 7.1.3(2), UNIDROIT Principles.

i. Clause 5.1 Made Payment Contingent Upon Further Confirmation And Agreement On Royalties.

94. Clause 5.1 demonstrates that RESPONDENT's entitlement to payment had not yet crystallised at the time the invoice was issued as it requires further confirmation and agreement on royalties before payment obligations could be determined.[102] Accordingly, RESPONDENT was not entitled to unilaterally demand payment for amounts that had not yet been confirmed by the PARTIES.

95. This interpretation is reinforced by the Minutes, which demonstrate that the PARTIES intended to finalise the applicable royalties before payment obligations arose.[103] This understanding was subsequently reflected in Clause 5.1, which expressly provided that payment remained subject to further confirmation by the PARTIES.[104]

96. Despite the absence of such confirmation, RESPONDENT issued an invoice amounting to USD 3.6 million, including charges for promotional activities, preparation expenses, and the performance fee.[105] However, these additional charges had neither been agreed upon nor incorporated into the Agreement. By unilaterally imposing such amounts, RESPONDENT exceeded the scope of Clause 5.1.[106]

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[102] Exhibit 2, page 5.
[103] Exhibit 1, page 4, paras 7-8.
[104] Exhibit 2, page 5.
[105] Facts, page 11, para 51.
[106] Facts, page 11, para 51; page 13, para 60; page 14 para 63; and Exhibit 2, page 5.

Therefore, RESPONDENT's invoice was premature, as no payment obligation had crystallised in respect of unconfirmed royalties or additional charges.[107]

ii. <u>The CLAIMANT's Silence Does Not Amount To Acceptance Of the RESPONDENT's Invoice.</u>

97. It is submitted that CLAIMANT's temporary silence following receipt of the invoice cannot be construed as acceptance, particularly where the validity of the demand remained under review.

98. Following the issuance of the invoice, CLAIMANT was actively considering RESPONDENT's demand as the invoice did not comply with the payment mechanism established under Clause 5.1 of the Agreement.[108] This is further demonstrated by the subsequent phone call and follow-up letter, which indicate that CLAIMANT's legal team was reviewing the validity and scope of RESPONDENT's claim.[109]

99. It is a settled principle of commercial law that silence, absent exceptional circumstances, does not amount to acceptance.[110] The burden remains on RESPONDENT to establish that its invoice was validly issued and that the amounts claimed had become due under the Agreement.[111] This is consistent with the maxim

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107 Facts, page 11, para 51; page 13, para 60; and page 14 para 63.

108 Exhibit 2, page 5.

109 Facts, page 13, para 61; and page 64, para 14.

110 Article 2.1.6, UNIDROIT Principles; *Felthouse v Bindley* (1862) 142 ER 1037, applied in *Day, Ashley Francis v Yeo Chin Huat Anthony and others* [2020] 5 SLR 514 para 116. .

111 *Messrs J Tan Teoh Assoc (suing as a firm) v MSIG Insurance (M) Bhd* [2023] 2 MLJ 22.

semper necessitas probandi incumbit ei qui agit meaning "*he who asserts must prove*". Thus, the CLAIMANT's silence cannot cure RESPONDENT's failure to satisfy the contractual preconditions for payment.

100. Therefore, respectfully, RESPONDENT's counterclaim must fail, as CLAIMANT's retention of the Concert revenue was either a lawful exercise of its contractual rights following RESPONDENT's breach or, alternatively, justified by the fact that RESPONDENT's payment claim had not yet crystallised under the Agreement.

PRAYERS FOR RELIEF

In light of the submission above, counsel for the CLAIMANT respectfully invites the Tribunal to declare that:

I. The forum non conveniens lies in the court proceedings;

II. The order for security for costs ought not to be granted;

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

IV. The RESPONDENT's counterclaim ought not to be granted.