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21ST LAWASIA INTERNATIONAL MOOT COMPETITION 2026

IN THE ASIAN INTERNATIONAL ARBITRATION CENTRE

MEMORIAL FOR RESPONDENT

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

Notwithstanding the following Pleadings, 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 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 the "**PARTIES**" to this arbitration.

CLAIMANT is an international concert promotion and live events corporation incorporated in Reyna. CLAIMANT operates as a commercial promoter focused on large-scale entertainment events, prioritising financial returns, ticket sales metrics, and venue exploitation.

RESPONDENT is a highly established and pioneering international entertainment agency incorporated in Reyna, distinguished globally for its industry-defining technological innovations. RESPONDENT manages top-tier performing artists, utilising advanced proprietary artificial intelligence and digital modelling to responsibly enhance live performance standards, consistency, and artist welfare.

2 January 2026	The PARTIES met in person to coordinate pre-agreement on technical parameters for an upcoming concert featuring the co-ed R-Pop group ("**ECLIPSE**"). RESPONDENT explicitly detailed its significant reliance on AI assisted analysis, digital modelling and technological infrastructure as fundamental instruments for ensuring performance consistency. CLAIMANT expressly admitted that it was aware of the widespread use of these digital elements in modern live

performances. The discussions were subsequently recorded in the minutes of the meeting dated 2 January 2026 (“**Minutes**”).

5 January 2026	The PARTIES held a follow-up video conference confirming that, due to a highly compressed timeline, their immediate operational priority was mobilising technical and promotional efforts rather than engaging in prolonged contractual negotiations.
7 January 2026	The PARTIES executed the Concert Promotion and Performance Agreement dated 7 January 2026 (“**Agreement**”). To accommodate the rapid setup, Clause 3.1.1 expressly granted RESPONDENT unfettered operational discretion to “employ stage, sound, lighting, visual, digital or other production technologies in connection with the Concert” to fulfil reasonable audience expectations.
24 January 2026	During a promotional event, an international fan bypassed security measures and engaged in an unsolicited physical assault on ECLIPSE member Im Luna (“**Luna**”). RESPONDENT immediately prioritised human welfare over commercial interests by arranging for intensive daily therapy sessions to treat the acute psychological trauma and performance anxiety Luna was injured after the incident.

4 February 2026	During a scheduled rehearsal, Luna experienced an overwhelming anxiety episode, rendering her uncontactable and physically incapable of taking the stage. RESPONDENT exhausted all reasonable means, but her severe psychological distress persisted.
5 February 2026	RESPONDENT, acting in full commercial transparency, immediately arranged an emergency video conference to inform CLAIMANT of the health crisis. To avoid cancellation, RESPONDENT provided a state-of-the-art technology contingency by deploying its proprietary AI virtual human technology to seamlessly holographically integrate Luna. The system was of such exceptional quality that the CLAIMANT expressly agreed to proceed with the concert with the use of the hologram.
6 February 2026	RESPONDENT conducted a full technical rehearsal. CLAIMANT's representatives observed the holographic rendering in operation and were astonished by its seamless and highly realistic reconstruction.
7 February 2026	The concert was flawlessly executed at the National Stadium. RESPONDENT's real-time holographic integration successfully delivered the exact "ECLIPSE experience"

contracted for, executing the choreography and signature fan interactions without a single report of disruption from the live audience or dissatisfaction among attendees.

10 February 2026	Following the undisputed success of the event, CLAIMANT publicly praised the performance on its official corporate accounts. RESPONDENT subsequently issued a valid invoice dated 10 February 2026 for USD 3.6 million covering the promotional expenditures and performance fees.
13 February 2026	A local internet comment picked up a microscopic visual anomaly lasting less than a second that was completely invisible to the live audience. The sensationalist online content creator latched onto this minor digital artefact to fuel unverified conspiracy theories about a holographic replacement. The CLAIMANT, despite the overwhelmingly positive public reception, used this speculative online commentary as a pretext to avoid its financial obligations.
25 February 2026	Amid industry-wide rumours that its Chief Financial Officer had misappropriated company funds, CLAIMANT experienced acute liquidity issues and delayed outstanding payments to multiple agencies.

26 February 2026	CLAIMANT then unilaterally terminated the Agreement and commenced arbitral proceedings claiming damages in the amount of USD 2.2 million. The RESPONDENT consistently denied the purported termination and the presence of any binding arbitration agreement. The RESPONDENT filed a counterclaim for its outstanding invoice and royalties, without prejudice to its jurisdictional objections and solely to preserve its rights. The RESPONDENT also commenced court proceedings to collect the outstanding amounts, claiming that the dispute was within the jurisdiction of the national court. The CLAIMANT's application was granted by the Reyna High Court and the court proceedings were stayed to avoid parallel proceedings. An Arbitral Tribunal was then constituted under the AIAC Rules.

SUMMARY OF PLEADINGS

ISSUE 1: THE FORUM NON CONVENIENS LIES IN ARBITRATION

The RESPONDENT respectfully submits that this Tribunal lacks jurisdiction as the CLAIMANT has failed to establish a valid arbitration agreement. Under section 9 of the Malaysian Arbitration Act 2005 ("**Arbitration Act**"), arbitration requires clear and unequivocal consent, which is absent in the present case. The final Agreement contains no arbitration clause, while the Minutes merely record preliminary discussions without any definite agreement to arbitrate. Further, confidentiality concerns cannot be equated with consent to arbitration. Moreover, the doctrine of incorporation is inapplicable as the PARTIES' previous agreements were individually negotiated and do not establish a consistent practice. Accordingly, the Tribunal must decline jurisdiction.

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

The RESPONDENT respectfully submits that security for costs is necessary to prevent a potential "paper victory" where a favourable costs award becomes incapable of recovery. Pursuant to Rule 11.4 of the AIAC Rules, the RESPONDENT satisfies the requirements of irreparable harm and a reasonable prospect of success. The CLAIMANT's fragile financial position, admitted liquidity concerns, delayed payments, and allegations of financial misconduct establish a genuine risk of non-recovery. Further, the RESPONDENT possesses a strong *prima facie* contention, having performed its obligations following the CLAIMANT's consent to holographic substitution.

Accordingly, the USD 2 million security sought is justified, proportionate, and necessary to protect the RESPONDENT's legitimate interests.

ISSUE 3: THE RESPONDENT'S DEPLOYMENT OF A HOLOGRAPHIC REPLACEMENT DOES NOT CONSTITUTE A BREACH OF THE AGREEMENT

The RESPONDENT did not breach the Agreement by deploying a holographic replacement. Firstly, the PARTIES validly varied Clause 3.1.1 to permit a holographic replacement, through an oral modification which is fully effective in the absence of contractual restrictions. Alternatively, the deployment constituted an appropriate cure under Article 7.1.4 of the UNIDROIT Principles. Secondly, the performance fully satisfied reasonable audience expectations under Article 5.1.6, as the hologram was entirely indistinguishable to the live audience, meaning the CLAIMANT's reliance on post-event, frame by frame analysis of an alleged minor glitch cannot retroactively establish a breach of a live-performance standard.

ISSUE 4: THE RESPONDENT'S COUNTERCLAIM OUGHT TO BE GRANTED

The RESPONDENT's counterclaim must be granted because, firstly, the CLAIMANT's retention of USD3.6 million in ticket revenue satisfies all elements of unjust enrichment under Article 7.3.6 of the UNIDROIT Principles, as it represents a quantifiable commercial windfall at the RESPONDENT's expense. Secondly, the RESPONDENT's invoice was contractually valid, maturing immediately upon the performance of the concert under Clause 5.1 of the Agreement and triggering an obligation to pay that the CLAIMANT ignored despite three successive demands.

Thirdly, the RESPONDENT’s conduct did not constitute a fundamental non-performance, as the CLAIMANT substantially received the core objective of the Agreement, which is a highly successful, fully attended concert that met all reasonable audience expectations.

PLEADINGS

I. THE FORUM NON CONVENIENS LIES IN ARBITRATION.

1. The RESPONDENT respectfully submits that this Tribunal does not have the jurisdiction to hear the present dispute. The CLAIMANT's attempt to establish an arbitration agreement where none exists is legally unsustainable. In the absence of a valid arbitration agreement, this Tribunal has no jurisdiction *ratione voluntatis*, and the dispute remains within the exclusive jurisdiction of the national courts of Reyna.

2. The Tribunal's jurisdiction must be determined by reference to the governing procedural law. Following the stay granted by the High Court of Reyna, the arbitration commenced under the AIAC Rules. Pursuant to the AIAC Rules, the default seat of arbitration is Malaysia, thereby making the Arbitration Act the applicable *lex arbitri* under s.3. Consequently, the existence of a valid arbitration agreement must satisfy the mandatory requirements of s.9 of the Arbitration Act. Unless those statutory requirements are fulfilled, the Tribunal cannot assume jurisdiction, which we argue otherwise.

3. The CLAIMANT has failed to meet this jurisdictional threshold. Accordingly, the RESPONDENT submits that the Tribunal must decline jurisdiction for two reasons: (**A**) no valid arbitration agreement exists between the PARTIES; and **(B)** the doctrine of incorporation is inapplicable on the facts and in law.

A. The Tribunal Is Devoid Of Jurisdiction In The Absent Of A Valid Arbitration Agreement.

4. The RESPONDENT respectfully submits that there is no valid arbitration agreement due to three (3) reasons. **(i)** The PARTIES never manifested unequivocal consent to arbitrate; **(ii) t**he preliminary discussions lack the essential details required to form a binding agreement; and **(iii)** the PARTIES' shared desire for confidentiality does not mandate an arbitral forum.

i. <u>The PARTIES never manifested unequivocal consent to arbitrate.</u>

5. It is undeniable that a clear and unequivocal consent must be reflected before parties can refer any dispute to arbitration.[1] This fundamental principle was reiterated in no uncertain terms by the United Kingdom ("UK") Supreme Court in *Dallah Real Estate*,[2] which established that an arbitral tribunal cannot assert jurisdiction in the absence of a clear, mutual, and demonstrable agreement to arbitrate since *"...the whole basis of arbitration is that, as a means of deciding disputes, it is founded on consent"*. Where consent is absent, the tribunal is devoid of any jurisdiction.[3]

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[1] Redfern and Hunter on International Arbitration, 6th ed. (Oxford: Oxford University Press, 2015), 16.
[2] *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, (UK, Supreme Court), Para 74.
[3] *Supra note 1*, 16.

6. It is self-evident that the Agreement executed by the parties is completely silent on this front, containing no arbitration clause or agreement whatsoever. Recognising this fatal omission, the CLAIMANT is now attempting to manufacture consent from the text of the preliminary negotiation from the Minutes by creating an inference out of thin air. Assuming that this argument is taken to its highest, the RESPONDENT submits that this thin-air attempt shall fail. This is not a novel matter, but an issue that has been crystallised by the court in *Federal Bulk Carriers INC v C Itoh & CO Ltd & Ors*,[4] the intention to arbitrate disputes must *"require very clear and very explicit words."* and the absence of which, respectfully, shall not give the tribunal the jurisdiction

7. As such, the Minutes record no such baseline. The exchanges fail to capture any discernible offer to arbitrate or any corresponding acceptance. The discussions were strictly confined to a separate commercial objective, keeping internal corporate and performance matters away from public view.[5]

ii. <u>The preliminary discussions lack the essential details required to form a binding agreement</u>

8. Even if the CLAIMANT could establish a vague, subjective intent to create a dispute resolution mechanism, that intent lacks the structural certainty required to form a

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[4] *Federal Bulk Carriers INC v C Itoh & CO Ltd & Ors* [1895] 2 Q.B. 539 at 545, (UK, High Court), and *Food Ingredients LLC v Pacific Inter-Link Sdn Bhd and another application* [2012] 8 MLJ 585 at 620, (Malaysia, High Court)

[5] Exhibit 1, page 4, para 1.

binding contract. As emphasised in the Malaysian High Court in *Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc & Anor*,[6] the court made it clear that *"...the agreement to arbitrate is just like a contract and it must be clear and certain. It will be construed to be void for uncertainty if its meaning is so ambiguous that it is incapable of being construed to give the agreement a certain degree of certainty."*

9. On the basis of the above, the Minutes fail this test of certainty. It merely record a transient, introductory mention of two entirely separate dispute resolution pathways, namely mediation and arbitration. We contend that the parties did not and in fact never chose or made a decision between the two options. As such, it is impossible to determine whether the parties intended to pursue non-binding mediation or binding arbitration, leaving the mechanism entirely indeterminate. Had the parties genuinely intended to commit to arbitration, essential procedural frameworks would have been finalised during their subsequent negotiations.

10. In short, there is no binding arbitration agreement between the parties based on the minutes. It lacks the clear *and* unequivocal consent to arbitrate. An arbitration agreement must be precise, however here, the Minutes offer only a vague discussion, leaving the actual dispute resolution mechanism unresolved. Respectfully, the law does not permit this Tribunal to conjure a binding obligation out of such profound ambiguity.

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[6] Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc & Anor [2008] 5 MLJ 254. (Malaysia, High Court), Para 23.

iii. <u>The PARTIES’ shared desire for confidentiality does not mandate an arbitral forum.</u>

11. The CLAIMANT’s submission is fundamentally flawed because it conflates two legally distinct concepts. While the PARTIES agreed on the need to protect trade secrets and performers’ privacy, that substantive commercial objective cannot be equated with consent to arbitrate. An agreement on confidentiality does not, without more, constitute an agreement to submit future disputes to arbitration. The CLAIMANT’s attempt to infer such consent is unsupported by both the factual record and the Agreement.

12. The concern raised during the negotiations by the RESPONDENT's representative, Madam Ye Bin, related solely to the protection of trade secrets and the performers’ privacy. Consistent with that objective, the PARTIES incorporated a comprehensive confidentiality clause into the Agreement. Significantly, no corresponding arbitration clause was included, demonstrating that the PARTIES chose to formalise only their consensus on confidentiality and not any alleged agreement to arbitrate.[7]

13. The existence of a confidentiality obligation does not legally dictate arbitration as the exclusive adjudicative forum. Litigating a commercial dispute in a domestic court does not dissolve a contract’s privacy protections. It is submitted that national courts possess sufficient procedural mechanisms capable of safeguarding sensitive

[7] Exhibit 2, clause 7.

commercial information. As precisely demonstrated in the case of *Sierra Club of Canada v. Canada (Minister of Finance),*[8] the court recognised the paramount need *"to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation"*. The court achieved this by granting a comprehensive protective order that legally restricted public access to court documents and filings.

14. Here, the CLAIMANT's concern regarding public disclosure is entirely capable of being addressed within the national court system. The protection of trade secrets and performers' privacy may be preserved throughout the litigation by way of protective orders, confidentiality orders, or orders sealing the court records. Such measures are functionally equivalent to the confidentiality afforded in arbitration. Moreover, the RESPONDENT has every reason to support such protective measures. Having expressly agreed to the confidentiality obligation under the Agreement, the RESPONDENT would have no basis to oppose any application reasonably necessary to preserve the confidentiality of the PARTIES' commercially sensitive information. Accordingly, the confidentiality of the transaction can be fully maintained in domestic court proceedings. Therefore, the CLAIMANT's concern over public exposure provides no basis for inferring an agreement to arbitrate. The availability of equivalent protective mechanisms in the national courts conclusively rebuts the contention that confidentiality, by itself, necessitates an arbitral forum.

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[8] *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (Canada, Supreme Court), at Page 540 and *Toso Co Ltd v Goodmeyer Curtain Accessories Supply Sdn Bhd* [2025] 9 MLJ 379, (Malaysia, High Court), Para 35.

B. The Doctrine Of Incorporation Is Not Applicable.

15. The CLAIMANT attempts to circumvent the absence of an express arbitration clause in the final contract by relying on the doctrine of incorporation via a prior course of dealing. However, the prevailing view is that the doctrine of incorporation is only applicable when there's a direct reference to another contract. This view is in line with s. 9(5) of the Arbitration Act, the *lex arbitri*, that clearly stipulates "*a reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement*".

16. Even if the doctrine may be applicable via a prior course of dealing, the RESPONDENT respectfully submits that the circumstances do not meet the strict legal thresholds of standard terms and consistent practice. Hence, the RESPONDENT submits the following: **(i)** The previous agreements do not constitute standard terms; and **(ii)** There's no consistent practice.

i. The Previous Agreements Do Not Constitute Standard Terms.

17. The doctrine of incorporation cannot apply because it presupposes the existence of a standard term capable of being incorporated.[9] This requirement is reflected in numerous authorities concerning the incorporation of arbitration agreements through

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[9] *Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH* [2013] EWHC 338 (Comm), (UK, High Court) Para 24, *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, (Singapore, Court of Appeal.), Para 59, and *BASF Intertrade AG Singapore Branch v H&C S Holding Pte Ltd* [2017] SGHCR 10, (Singapore, High Court.), Para 39

standard terms. Article 2.1.19 of the UNIDROIT Principles defines standard terms as provisions prepared in advance for general and repeated use, intended to be applied without negotiation.[10]

18. The dispute resolution clauses contained in the PARTIES' previous agreements do not satisfy this definition. They were not boilerplate provisions routinely incorporated into the PARTIES' contracts without discussion. Rather, as evidenced by the Minutes, the dispute resolution arrangements were subject to active negotiation and reflected terms specifically agreed upon for each individual transaction.[11]

19. Accordingly, these bespoke arbitration clauses cannot be characterised as standard terms capable of automatic incorporation. The CLAIMANT therefore cannot rely on the doctrine of incorporation to import a previously negotiated arbitration agreement into the present Agreement where no such clause was expressly agreed by the PARTIES.

ii. <u>There's No Consistent Practice.</u>

20. The doctrine of incorporation demands strict consistency in the parties' prior transactions, a legal threshold established in *Lisnave Estaleiros Navais SA v Chemikalien Seetransport.*[12]

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[10] Article 2.1.19 of the UNIDROIT Principles.
[11] Exhibit 1, page 4, para 2.
[12] *Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH* [2013] EWHC 338 (Comm) , Para 24.

21. The CLAIMANT's assertion of a uniform established prior practice fails upon examination of the prior contracts. Four out of the six previous collaborations mandated negotiation as a strict precondition before commencing arbitration. Conversely, the remaining two agreements completely omitted this precondition.[13] This glaring discrepancy demonstrates that the PARTIES did not operate on a uniform standard term, rather, they adopted fundamentally different dispute resolution mechanisms tailored to accommodate different commercial realities. Without a consistent practice, there is no established baseline to incorporate.

22. Moreover, the PARTIES explicitly finalised the essential terms of their current commercial relationship during a follow-up Zoom meeting and deliberately elected not to include an arbitration clause.[14] The PARTIES had an ample six-day period between their initial meeting and the execution of the final agreement.[15] During this window, they actively chose to insert a confidentiality clause and a force majeure clause, yet they deliberately omitted arbitration or a dispute resolution clause.[16] RESPONDENT argues that the deliberate omission of such an essential dispute resolution mechanism constitutes a conscious, finalised commercial choice by the drafters. This tribunal possesses no authority to rewrite the contract and insert a term that the PARTIES purposefully excluded.

[13] Additional Clarification 9.
[14] Facts, page 8, para 32.
[15] Facts, page 7, para 29 and page 8, para 33.
[16] Exhibit 2, Clause 7 and Clause 8.

23. To conclude, the doctrine of incorporation is inapplicable to warrant the insertion of an arbitration agreement into the present contract. The PARTIES previous engagement reveal no uniform standard, they oscillated between different dispute resolution mechanisms. Furthermore, the PARTIES' deliberate omission of an arbitration clause during the final contract's drafting period constitutes a conscious and deliberate commercial choice. With these in mind, this tribunal possesses no authority to rewrite the contract to include a term the parties deliberately excluded and insert jurisdiction.

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

24. It is within this Tribunal's power to grant an order for security for costs as an interim measure to safeguard a party against the risk that a successful claim for costs may ultimately prove incapable of recovery.[17] Such relief is justified where monetary compensation after the conclusion of proceedings would be insufficient to remedy the harm arising from the inability to recover costs. This is consistent with Rule 11.4 of the AIAC Rules, which requires an applicant seeking interim measures to demonstrate: (**i**) the existence of irreparable harm; and (**ii**) a reasonable possibility of success on the merits.

[17] *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, (ICSID Tribunal), Para 5.15.

25. Based on those requirements, the RESPONDENT has three (3) submissions (**A**) There exists irreparable harm of non-recovery; (**B**) The RESPONDENT has a good prospect of succeeding on the merits; and (**C**) The amount is justified.

A. There Exists Irreparable Harm Of Non-Recovery.

26. It is a well-established principle that irreparable harm exists when a requesting party faces the risk of non-recovery out of this arbitration, or in other words, a risk of "paper victory". This fundamental principle was reiterated by the ICSID tribunal in *RSM Production v Saint Lucia*,[18] which established the "sufficient asset" test to scrutinise a claimant's capacity to satisfy an eventual adverse costs award. In the event that the claimant of the proceeding lacks sufficient assets, there exists a strong potential that the requesting party will not be able to recover anything after the conclusion of the arbitration. The CLAIMANT completely fails the asset sufficiency standard for two compelling reasons: (**i**) The CLAIMANT did not have readily available capital to satisfy an award, and (**ii**) A pattern of payment delays evinces an inability to meet future liabilities.

[18] *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, (ICSID Tribunal), Para 80

i. <u>The CLAIMANT Did Not Have Readily Available Capital To Satisfy An Award.</u>

27. In the absence of any credible evidence demonstrating financial stability or asset availability, the RESPONDENT faces a genuine risk that any future award of costs may remain unrecovered. The present facts clearly demonstrate that the CLAIMANT lacks the requisite financial stability to satisfy a costs award, as the CLAIMANT's representative admitted during preliminary negotiations that they are in a very "*delicate*" state.[19] This admission is corroborated by the CLAIMANT's immediate conduct, specifically its failure to settle outstanding dues with the RESPONDENT despite repeated formal invoices and subsequent follow-ups.[20] Had the CLAIMANT possessed sufficient capital, it could have timely paid the issued invoice.

28. The CLAIMANT cannot defeat this application by pointing to speculative future revenue streams,[21] as this does not satisfy the requirement that those assets will be readily available for effective performance.[22]

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[19] Exhibit 1, page 2, para 2

[20] Facts, page 14, para 63.

[21] Additional Clarification 9.

[22] Article 3(1), Chartered Institute of Arbitrators, *International Arbitration Practice Guideline: Applications for Security for Costs* (London: Chartered Institute of Arbitrators, 2016), 6.

ii. <u>A Pattern Of Payment Delays Evinces An Inability To Meet Future Liabilities.</u>

29. Although some of the allegations that formed the pattern are unconfirmed, the Tribunal is empowered with wide discretion to give weight to the rumours as stated in Article 9(1) of the International Bar Association ("**IBA**") Rules on the Taking of Evidence in International Arbitration,[23] and is not bound by the strict evidence rule. Given this broad discretion, the Tribunal is perfectly entitled to admit and assign significant weight to the compelling circumstantial evidence of the CLAIMANT's financial default, including delayed invoices and C-suite embezzlement allegations, without requiring the strict proof demanded in domestic courts.

30. With that in mind, the liquidity issue faced by the CLAIMANT is not based on a single isolated rumour. As evidenced in the facts, the CLAIMANT not only failed to pay the RESPONDENT after repeated demand,[24] there is also an outstanding invoice delayed for over three months to another entertainment entity, coinciding with grave allegations of embezzlement by the CLAIMANT's Chief Financial Officer.

31. At its highest, the alleged embezzlement involving the CLAIMANT's senior management fundamentally undermines confidence in the reliability and integrity of the CLAIMANT's financial records and internal controls.[25] Conduct of this nature, particularly at the C-suite level, raises serious concerns as to whether the CLAIMANT

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[23] Article 9(1), International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (London: International Bar Association, 2020).
[24] Facts, page 14, para 63.
[25] Facts, page 14, para 62.

possesses accurate financial visibility and the capacity to discharge its current and future liabilities.

32. These concerns are further compounded by reports of delayed payments involving other entities across multiple jurisdictions.[26] Viewed collectively, these circumstances demonstrate more than mere financial uncertainty, they establish a genuine and objectively reasonable concern regarding the CLAIMANT's ability to satisfy an adverse costs award if the RESPONDENT succeeds in these proceedings.

B. The RESPONDENT Have A Good Prospect Of Succeeding On The Merits.

33. As required by Rule 11.4 of AIAC Rules, the applicant for security for costs need only to demonstrate *a prima facie* prospect of success on the merits, meaning "*the Tribunal is neither required nor prepared to make detailed findings on the numerous factual issues that separate the parties. The Tribunal's task is instead more limited…to identify the broad areas in which [the moving party] has, or has not, made out a prima facie claim for relief.*" which was held in the landmark case of *NAI Case No. 1694 (1996)*[27] in its interim award. The threshold dictates that the tribunal is not required to conduct a deep, exhaustive examination of the merits at the interim stage, it suffices if the requesting party has a credible and valid defence against the claim.[28]

[26] Facts, page 15, para 68.

[27] *Interim Award in NAI Case No. 1694* (1996), Albert Jan van den Berg (ed), Yearbook Commercial Arbitration, vol. XXIII (Kluwer Law International 1998).

[28] *Supra note 22*, 21.

34. The present contractual dispute clearly favours the RESPONDENT's contention. Here, the CLAIMANT's primary allegation of breach is entirely contradicted by their own prior actions and agreements. The CLAIMANT explicitly gave their consent to deploy the hologram as a substitute performance.[29] At its highest, the CLAIMANT's case attempts to retroactively revoke this consent to allege a breach of contract. However, a party cannot go back on their word and allege breach after granting express permission for the substitute performance. The extensive submission on this point will be dealt with in issue III below of this Written Submission.

C. The Amount Is Justified.

35. Although on the surface, the request for security for costs by the RESPONDENT of USD 2 million may be exorbitant, this amount nonetheless could be justified.[30] There is no hard and fast rule in determining the amount for security for costs, however, as stated in the Guidelines for Security for Costs issued by the Chartered Institute of Arbitrators,[31] the tribunal must take into account the "*nature and complexity of the dispute*" in arriving to a proportionate amount for security for costs. It is undisputed that this Tribunal has a wide discretion to determine the amount of security and may order any amount up to the sum requested by the RESPONDENT. Its is pertinent to

[29] Facts, page 10, para 44.
[30] Facts, page 14, para 69.
[31] *Supra note 22*, 13.

note that the Tribunal "should be careful not to order…a nominal amount that would inadequately protect" the RESPONDENT.[32]

36. On the basis of the above, the RESPONDENT submits that the present request for the order of USD 2 million as a security for costs is proportionate and fully justified by the realities of this dispute. The requested amount accurately reflects the massive expenses necessitated by this proceeding. At their highest, the institutional costs and arbitrators' fees alone are estimated at USD 350,000, based on the calculation provided in Schedule 1 of the AIAC rules. The complexity of the case, which encompasses a jurisdictional challenge,[33] the primary claim by the CLAIMANT,[34] and a substantial counterclaim by the RESPONDENT,[35] will inevitably prolong the proceedings and incur high legal costs. Moreover, this dispute concerns the novel application of hologram technology that will require multiple expert witnesses to verify technical performance and quantify the withheld revenue and damages.

37. At its core, the requested amount is fair and justified. Without the protection of this security for costs, the RESPONDENT is forced to bear the massive expense of a complex arbitration while facing the risk of non-recovery.

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[32] *Supra note 22,* 13.
[33] Facts, page 14, para 66.
[34] Facts, page 14, para 65
[35] Facts, page 15, para 67.

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

38. The CLAIMANT alleges that the RESPONDENT breached the Agreement by deploying a holographic replacement that failed to satisfy Clause 3.1.1. The RESPONDENT respectfully rejects this allegation. The RESPONDENT submits that the holographic replacement was an agreed variation to the mode of performance and fully complied with the obligations arising under Clause 3.1.1. Accordingly, no breach of the Agreement has occurred.

39. As such, the RESPONDENT submits that the obligation under the Agreement had never been breached because: (**A**) there is a variation to the contractual obligation under Clause 3.1.1 of the Agreement; and **(B)** the RESPONDENT's deployment of the holographic replacement met the reasonable audience expectations.

A. There Is A Variation To The Contractual Obligation Under Clause 3.1.1 Of The Agreement

40. The RESPONDENT submits four submissions. Firstly, **(i)** there is a variation mutually agreed between the PARTIES; secondly, **(ii)** there is no entire agreement clause in the Agreement; thirdly, **(iii)** the RESPONDENT has successfully discharged its obligation to remedy the alleged non-performance under the Agreement; and lastly, **(iv)** the CLAIMANT's consent to the variation was not vitiated by economic duress.

i. <u>There Is Variation Mutually Agreed Between The PARTIES.</u>

41. It is undisputed that, at the time of contracting, Clause 3.1.1 of the Agreement required the RESPONDENT to procure ECLIPSE's performance at the Concert on 7 February 2026, which contemplated the physical presence of all five members of the co-ed R-Pop group. However, following the unsolicited physical contact suffered by Luna during the meet-and-greet event two weeks before the Concert, the PARTIES mutually agreed to modify the manner in which that obligation would be performed.

42. The United Kingdom Supreme Court in *HMRC* case[36] established that the determination of whether a subsequent agreement constitutes a variation or a replacement depends on the objective ascertainment of the PARTIES' common intention. The relevant inquiry is whether the PARTIES intended either *"to put an end to the existing contract and replace it with a new one"* or merely *"to vary the existing contract by altering one or more of its terms."* Where the former intention exists, a new contract arises; where the latter is intended, the original agreement continues to operate subject to the agreed modification.

43. Applying this test, the PARTIES did not intend to extinguish or replace the Agreement. Rather, they intended only to modify the mode of performance by

[36] *R (on the application of Cobalt Data Centre 2 LLP and another) v Commissioners for His Majesty's Revenue and Customs* [2024] UKSC 40, para 7.

permitting the use of holographic technology while preserving the continued operation of the RESPONDENT's existing obligations under Clause 3.1.1.

44. The variation to Clause 3.1.1 arose from the RESPONDENT's proposal to deploy a holographic replacement of Luna, accompanied by two express representations. First, that the hologram would utilize state-of-the-art technology and second, that it would be indistinguishable to the live audience under concert conditions **("Standard")**.[37] The CLAIMANT subsequently accepted this proposal, subject to the additional express condition that the holographic replacement remain strictly confidential in order to preserve the authenticity of the Concert and maintain reasonable audience expectations.[38]

45. Accordingly, the subsequent agreement between the PARTIES constituted a variation of the contractual obligation under Clause 3.1.1, rather than a replacement of the Agreement.

46. The RESPONDENT therefore did not assume an entirely new obligation, nor did the CLAIMANT waive the contractual standard required under Clause 3.1.1. Instead, the PARTIES merely agreed that holographic technology would serve as an alternative method of performance, provided that it preserved the same intended outcome. Since the fundamental objective of the Agreement remained intact, the PARTIES' common

[37] Facts at page 10 para 43.
[38] Facts at page 10 para 44.

intention was clearly to vary the existing contractual framework rather than extinguish it.

ii. <u>There Is No Entire Agreement Clause In The Agreement.</u>

47. The *Rock Advertising* case establishes that the no oral modification clause in an agreement is fully enforceable, especially if it mandates that all variations must be in writing and signed.[39] Any subsequent oral or informal variation failing to comply with the mandated written format is invalid and contractually ineffective since *"the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation."*[40]

48. In contrast, in the absence of a formal mechanism requiring writing in the Agreement, the subsequent variation between the PARTIES to deploy a holographic replacement is contractually effective notwithstanding its oral form. This is further supported by the fact that the Agreement has no oral modification clause or an entire agreement clause prescribing mandatory formalities for contractual alterations.

iii. <u>The RESPONDENT Has Successfully Discharged Its Obligation To Remedy The Alleged Non-Performance Under The Agreement.</u>

[39] *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24.
[40] *Supra note 39*.

49. The RESPONDENT's proposal to deploy a holographic replacement fully satisfies its duty to cure under Article 7.1.4 of the UNIDROIT Principles. Article 7.1.4 establishes a conjunctive four-part framework governing the effective exercise of the duty to cure non-performance, namely:

49.1 the notice of the proposed cure must be given to the aggrieved party without undue delay;

49.2 the proposed cure must be objectively appropriate to the circumstances of the non-performance;

49.3 the aggrieved party must have no legitimate interest in refusing the proposed cure; and the cure must be capable of being; and

49.4 actually be, effected promptly.

a. The RESPONDENT gave notice of the proposed cure without undue delay.

50. Article 7.1.4 of the UNIDROIT Principles provides that the duty to cure is triggered only upon the non-performing party becoming aware of the non-performance and receiving notice thereof. Accordingly, the relevant time for assessing the RESPONDENT's duty to cure is not when the potential issue first existed, but when

the RESPONDENT became aware that the agreed performance could no longer be achieved.

51. In the present case, although the RESPONDENT provided notice to the CLAIMANT three days before the Concert, such timing was justified by the circumstances. The RESPONDENT only became aware of the potential non-performance when Luna became uncontactable and failed to attend the scheduled rehearsal.[41]

52. Therefore, the RESPONDENT acted promptly upon becoming aware of the issue by notifying the CLAIMANT and implementing the agreed alternative arrangement. The RESPONDENT cannot be faulted for failing to provide earlier notice of a non-performance that had not yet become apparent.

b. The holographic replacement is highly appropriate under the circumstances.

53. The test to determine the appropriateness of the cure is whether the proposed cure promises to be successful in resolving the problem.[42] This requirement was satisfied by the RESPONDENT, as demonstrated by the CLAIMANT's own representatives' reaction during the rehearsal. Upon witnessing the digitally reanimated virtual model of Luna, the CLAIMANT's representatives were astonished by its reconstructive

[41] Facts, page 9, para 40.
[42] UNIDROIT Commentary 3, Article 7.1.4.

accuracy and lifelike quality. This contemporaneous reaction confirms that the holographic replacement achieved the Standard represented by the RESPONDENT and was capable of preserving the intended audience experience under the Agreement.[43]

c. The CLAIMANT has no legitimate interest to refuse the cure.

54. The aggrieved party is presumed to permit the non-performing party to cure if the notice has been sufficiently given to the former and the cure is appropriate in the circumstances.[44] Since the notice of cure was given by the RESPONDENT without delay and the deployment of holographic replacement was the most appropriate cure to be carried out at the material time, the CLAIMANT's consequently has no legitimate interest to refuse the proposed cure.

d. The cure is effected promptly.

55. The cure is effected promptly because the holographic integration was synchronised with the live performance in real time concert and effectively replicating Luna's on-stage persona,[45] with the call-and-response interaction between Luna and the audience was perfectly recreated.[46]

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[43] Facts, page 10, para 45.
[44] UNIDROIT Commentary 4, Article 7.1.4.
[45] Facts, page 11, para 47.
[46] Facts, page 11, para 48.

B. The Respondent's Deployment Of Holographic Replacement Met The Reasonable Audience Expectations.

56. The RESPONDENT submits four submissions, namely **(i)** the RESPONDENT's deployment of a holographic replacement fully satisfied the objective standard of reasonable audience expectations, **(ii)** Clause 3.1.1 of the Agreement requires a reasonable quality of performance from the RESPONDENT, **(iii)** the absence of audience complaints during the Concert confirms the holographic replacement by the RESPONDENT met the reasonable expectation, and (**iv)** the allegation concerning a minor glitch constitutes inadmissible hearsay.

i. <u>The RESPONDENT's deployment of a holographic replacement fully satisfied the reasonable audience expectations.</u>

57. The RESPONDENT respectfully submits that the deployment of the holographic replacement during the Concert did not constitute a breach of Clause 3.1.1 of the Agreement. Notwithstanding the initial interpretation of Clause 3.1.1 of the Agreement requires the physical appearance of all five (5) members of ECLIPSE, as established in **III(A)** of this Written Submission, the PARTIES agreed to a valid oral variation of the strict physical performance obligations originally contemplated under

Clause 3.1.1, subject only to two clear conditions that the deployment of the hologram remain strictly confidential and the reasonable audience expectation be satisfied.[47]

58. By consenting to the hologram, the CLAIMANT agreed that a physical presence was no longer the exclusive means of satisfying Clause 3.1.1 of the Agreement. Instead, the performance by the deployment of holographic replacement was to be judged against the reasonable audience expectation standard during the Concert. Therefore, the CLAIMANT's contention on the strict interpretation of the RESPONDENT's contractual obligation is untenable.

ii. <u>Clause 3.1.1 of the Agreement requires a reasonable quality of performance from the RESPONDENT.</u>

59. Under Article 5.1.6 of the UNIDROIT Principles, where the quality of contractual performance is neither expressly fixed nor determinable from the agreement, a party is mandated to render a performance of a quality that is reasonable and not less than average in the circumstances. The reasonableness of performance may be ascertained according to the prevalent practice of technological advancement relating to holograms at the time of the Concert.[48]

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[47] Facts, page 10, para 44.
[48] UNIDROIT Commentary 1, Article 5.1.6.

60. In light of the RESPONDENT's elite standing in the industry as one of the most influential and commercially successful entertainment companies in the market,[49] the reasonableness standard in Article 5.1.6 of the UNIDROIT Principles was expected to be successfully discharged in the deployment of a holographic replacement during the Concert and the replication of Luna should not also be less than average compared to other practices within the R-Pop industry.

iii. <u>The absence of audience complaints during the Concert confirms the holographic replacement by the RESPONDENT met the reasonable expectation.</u>

61. It is submitted that the RESPONDENT's promise to the CLAIMANT is that the holographic replacement of Luna would be indistinguishable to the audience under live performance conditions.[50] During the Concert, not a single audience member raised any concern, inquiry, or complaint regarding the physical absence of Luna, nor were any reports of technical irregularity or dissatisfaction recorded.[51]

62. Furthermore, any allegation of substandard quality is entirely irreconcilable with the post-event conduct of the CLAIMANT and industry observers. Following the Concert, the CLAIMANT publicly praised the event,[52] and industry commentators, alongside fan communities, widely lauded it as one of the most commercially and artistically

[49] Facts, page 6, para 18.
[50] Facts, page 10, para 43.
[51] Facts, page 11, para 49.
[52] Facts, page 11, para 50.

successful events organized by the CLAIMANT in recent years.[53] This level of undisputed acclaim serves as conclusive evidence that the reasonable audience expectation was not only met but exceeded by the RESPONDENT.

iv. <u>The allegation concerning a minor glitch constitutes inadmissible hearsay.</u>

63. To establish the RESPONDENT's liability, the CLAIMANT bears the burden of proving that the alleged harm is certain.[54] Under the established principles of international commercial law, compensatory damages are strictly remedial and should not be awarded for speculative and hypothetical losses.[55] The US Court of Appeal in the *Ron Meyer v Susan Seidel* also held that even general media and public reports do not suffice to establish the wrongdoing in the arts industry.[56]

64. Regarding the alleged "minor glitch" involving Luna during the Concert, the CLAIMANT has failed to establish that the irregularity constituted a breach of the RESPONDENT's contractual obligation. The alleged defect was first raised by a single social media user several days after the Concert,[57] whose comment merely invited speculation that the irregularity was attributable to the use of holographic

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[53] Facts, page 12, para 53.
[54] Article 7.4.3, UNIDROIT Principles.
[55] UNIDROIT Commentary 1, Article 7.4.3.
[56] *Ron Meyer v Susan Seidel, Susan Seidel Inc., Jamie Frankfort* No. 21-2221 (US, Court of Appeal).
[57] Facts, page 12, para 54.

technology.[58] Such speculation, without more, cannot constitute reliable evidence of non-performance.

65. Additionally, the RESPONDENT's representation was explicitly confined to a clear standard, which is the holographic replacement would be indistinguishable to a live audience member during the performance. This standard is measured solely by the real-time sensory perception of the live audience members, and not by any frame by frame analysis or technological intervention.[59] Since the alleged minor glitch was entirely imperceptible to the bare human eye under normal viewing conditions, a post-event digital discovery cannot retroactively constitute a breach of the Agreement.

66. Further, the reactions of other fans do not demonstrate a widespread belief that the hologram had failed to meet the contractual standard. Rather, the responses reflected uncertainty and disagreement with the social media user's speculation.[60] This demonstrates that the alleged irregularity was neither objectively apparent nor sufficiently established among the audience.

67. Moreover, the UK High Court in *Qatar Investment & Projects Development Holding Co & Anor John Eskenazi Ltd & Anor* further ruled that a higher reliability of evidence, such as scientifically-proven reports, should be submitted to corroborate the

[58] Facts, page 12, para 55.
[59] Facts, page 12, para 54.
[60] Facts, page 12, para 56.

claim for breach of contract in a dispute.[61] Nonetheless, the allegation on the "minor glitch" has never been verified by any independent expert or technical assessment capable of determining whether the irregularity resulted from the holographic technology itself. In the absence of reliable technical evidence establishing a defect in the hologram, the CLAIMANT cannot satisfy its burden of proving that the RESPONDENT failed to perform in accordance with Clause 3.1.1.

IV. THE RESPONDENT'S COUNTERCLAIM OUGHT TO BE GRANTED.

68. CLAIMANT seeks to establish that RESPONDENT's alleged fundamental breach of the Agreement precludes the RESPONDENT from maintaining its counterclaim. The RESPONDENT's counterclaim ought to be granted because **(A)** firstly, the CLAIMANT's retention of the concert revenue constitutes unjust enrichment; **(B)** secondly, the RESPONDENT's invoice was valid; and **(C)** thirdly, the RESPONDENT's conduct did not amount to a fundamental non-performance.

A. The CLAIMANT's Retention Of The Concert Revenue Constitutes Unjust Enrichment.

69. Article 7.3.6 of the UNIDROIT Principles allows the restitution of whatever has been received by one party from another in the event of termination of contract, and failure to perform the restitution would lead to the unjust enrichment situation. The House of

[61] *Qatar Investment & Projects Development Holding Co & Anor v John Eskenazi Ltd & Anor* [2022] EWHC 3023 (Comm) (UK, High Court).

Lords in *Banque Financière de la Cité SA v PARC (Battersea) Ltd* has laid down four elements to prove the unjust enrichment claim,[62] namely **(i)** the enrichment of the defendant, **(ii)** at the expense of the claimant, **(iii)** the enrichment was unjust and **(iv)** there are no defenses that can deny the restitution.

i. <u>The CLAIMANT has received a quantifiable enrichment.</u>

70. The first element is satisfied as the CLAIMANT has obtained and retained a substantial financial benefit arising directly from the Concert. Following the sale of tickets to the audience, the CLAIMANT received and retained the sum of USD 3.6 million in ticket proceeds, notwithstanding that the RESPONDENT had subsequently issued an invoice for the performance provided.[63]

71. The retention of such proceeds constitutes a clear enrichment of the CLAIMANT at the RESPONDENT's expense. The CLAIMANT derived the full commercial benefit of the Concert, including the revenue generated from ticket sales, while failing to discharge the corresponding payment obligation owed to the RESPONDENT. Such retention is particularly significant because the ticket revenue was generated from the very performance arrangement that the RESPONDENT was contractually engaged to provide.

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[62] *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221 (UK, House of Lords).
[63] Facts, page 11, para 51.

ii. <u>The CLAIMANT's enrichment was directly at the expense of the RESPONDENT.</u>

72. The second element is satisfied because the CLAIMANT's enrichment was obtained directly at the expense of the RESPONDENT. The RESPONDENT incurred substantial costs and resources in fulfilling its contractual obligations, including the management and arrangement of the Concert expenses as instructed by Mr. Park during the meeting recorded in the Minutes.[64]

73. The requirement that the enrichment be *"at the expense of"* the claimant is satisfied where *"the defendant has received a benefit, and that the claimant has suffered a loss through the provision of this benefit."*[65] In the present case, the CLAIMANT obtained the commercial benefit of the Concert, including the revenue generated from ticket sales, while the RESPONDENT bore the financial burden associated with procuring and delivering the performance. Therefore, the benefit retained by the CLAIMANT directly corresponds with the expenditure and loss suffered by the RESPONDENT.

iii. <u>The CLAIMANT's retention of the enrichment is unjust.</u>

74. The third element is also satisfied because there is no legal basis for the CLAIMANT to retain the benefit conferred by the RESPONDENT without providing

[64] Exhibit 1, page 4, para 4.
[65] *Lunak Heavy Industries (UK) Ltd v Tyburn Film Productions* Ltd [2025] EWCA Civ 1643, para 30.

corresponding consideration. The RESPONDENT's performance constituted the benefit conferred upon the CLAIMANT, namely the successful procurement and delivery of the Concert through the agreed deployment of the holographic replacement.

75. However, despite receiving the commercial benefit of the performance and retaining USD 3.6 million in ticket proceeds, the CLAIMANT failed to provide the agreed payment or any equivalent counter-performance to the RESPONDENT. Such retention is unjust because the CLAIMANT would otherwise obtain a windfall at the RESPONDENT's expense. The US Court of Appeals in *Henry Bloomgarden v Charles* ruled that the principle of restitution exists precisely to prevent a party from retaining a benefit where it has not provided the corresponding consideration required in exchange for that benefit.[66] Therefore, the CLAIMANT's continued retention of the enrichment, without compensating the RESPONDENT who conferred that benefit, is unjustified.

iv. <u>No defence exists to preclude the RESPONDENT's claim for restitution.</u>

76. Finally, the CLAIMANT has no applicable defence capable of defeating the RESPONDENT's claim for restitution. The mere termination of the Agreement does not permit the CLAIMANT to retain benefits already obtained without compensating the party that provided them.

[66] *Henry S. Bloomgarden v Charles B. Coyer et al* 479 F.2d 201 (US, Court of Appeals).

77. Since the RESPONDENT has established the above, the RESPONDENT's counterclaim for restitution must be allowed notwithstanding the subsequent termination of the Agreement.

B. The RESPONDENT's Invoice Was Validly Issued.

78. For this argument, there are three points to be submitted. Firstly, **(i)** the CLAIMANT is not entitled to withhold payment as the RESPONDENT fully performed its obligation under the Agreement, secondly **(ii)** the RESPONDENT's right to payment matured upon performance, and lastly, **(iii)** the CLAIMANT failed to respond to three successive demands for payment from the RESPONDENT.

i. <u>The CLAIMANT is not entitled to withhold payment as the RESPONDENT fully performed its obligations under the Agreement.</u>

79. Article 7.1.3(2) of the UNIDROIT Principles provides that if the parties are required to perform the contractual obligations consecutively, the party that is to perform later may withhold its performance until the first party has performed its part. This concept is in accordance with the legal maxim of *exceptio non adimpleti contractus*.[67] The International Court of Arbitration in *ICC Case No. 16816* further ruled that the

[67] UNIDROIT Commentary, Article 7.1.3.

withholding of performance may be done even in the cases of partial performance by the non-performing party.[68]

80. Based on the Agreement, the CLAIMANT is bound to make payment to the RESPONDENT subject to confirmation and performance of the concert.[69] As submitted earlier, the RESPONDENT had effectively fulfilled its obligation under Clause 3.1.1 to procure the performance of concert that satisfied the reasonable audience expectations, which triggers the CLAIMANT's duty to pay under Clause 5.1 of the Agreement. Hence, the RESPONDENT's performance of the concert was not defective or partial, which may be used by the CLAIMANT as a ground to withhold the sum of money.

ii. <u>The RESPONDENT's right to payment matured upon performance.</u>

81. The UK Court of Appeal in *Consulting Concepts International Inc v Consumer Protection Association (Saudi Arabia)* establishes that the payment for work done arises after the services are tendered, and it does not depend on the invoice or demand submitted or the time period for payment expires.[70] Moreover, if the parties have stipulated in the contract the circumstances that must occur for the imposition of a

[68] *ICC Case No. 16816*.
[69] Exhibit 2, Clause 5.1.
[70] [2022] EWCA Civ 1699 (UK, Court of Appeal).

legal obligation to pay, the party thereafter is not bound to pay the other party in the absence of those circumstances.[71]

82. Accordingly, Clause 5.1 of the Agreement expressly stipulates that the payment to the RESPONDENT is contingent upon the confirmation and performance of the Concert.[72] Both conditions precedent have been satisfied by the RESPONDENT. Firstly, the confirmation of the Concert occurred at the time of the execution of the Agreement between the PARTIES,[73] and secondly, the performance of the Concert took place as scheduled on 7 February 2026.[74]

iii. <u>The CLAIMANT failed to respond to three successive demands for payment from the RESPONDENT.</u>

83. The Malaysia Court of Appeal in *Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd* ruled that the failure and refusal to pay the outstanding sum of invoices, despite receiving repeated demands, including a formal demand letter would render the defendant liable for withholding the money.[75]

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[71] *Barton and others (Respondents) v Morris and another in place of Gwyn Jones (deceased) (Appellants)* [2023] UKSC 3 (UK, Supreme Court).
[72] Exhibit 2, Clause 5.1.
[73] Facts, page 8, para 33.
[74] Facts, page 10, para 46.
[75] *Wee Lian Construction Sdn Bhd v Ingersoll-Jati Malaysia Sdn Bhd* [2010] 3 MLJ 425.

84. Following the Concert, the RESPONDENT made three successive attempts to exercise its contractual entitlement to payment from the CLAIMANT, demonstrating its consistent and good faith efforts to secure settlement of the outstanding amounts.

84.1 First, three days after the Concert, the RESPONDENT issued an invoice to the CLAIMANT for the fees payable under the Agreement and requested the necessary computation of royalties. This constituted the RESPONDENT's formal exercise of its contractual right to payment following completion of the performance.

84.2 Second, following the emergence of speculation regarding the alleged minor glitch, Mr. Jack contacted Ms. Kim by telephone. This communication further demonstrates the RESPONDENT's attempt to engage with the CLAIMANT directly and resolve any concerns while preserving its entitlement to the agreed payment.

84.3 Third, on 25 February 2026, the RESPONDENT issued a formal follow-up letter to the CLAIMANT reiterating its request for settlement of the outstanding invoice and completion of the royalty calculation. Despite these repeated efforts, the CLAIMANT failed to discharge its payment obligations.

85. Therefore, the RESPONDENT consistently asserted its right to payment through multiple channels and provided the CLAIMANT with sufficient opportunity to fulfil

its contractual obligations. The CLAIMANT's continued failure to make payment therefore constitutes an unjustified retention of the benefit received from the RESPONDENT's performance.

C. Alternatively, The RESPONDENT's conduct did not amount to a fundamental non-performance.

86. In the case of fundamental non-performance by a party, the UNIDROIT Principles allow the termination of the contract by the aggrieved party.[76] The RESPONDENT's conduct did not amount to a fundamental non-performance because **(i)** the CLAIMANT substantially received the objective of the Agreement; and **(ii)** the RESPONDENT fulfilled the strict compliance with the contractual obligation which is of the essence of the Agreement.

i. The CLAIMANT substantially received the objective of the Agreement.

87. Amongst the factors to be taken into consideration to determine whether the RESPONDENT's conduct amounts to a fundamental non-performance is whether it substantially deprives the CLAIMANT of what it was entitled to expect under the contract,[77] with the persistent failure to rectify the defects falls within this scope of fundamental non-performance.[78]

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[76] Article 7.3.1(1), UNIDROIT Principles.
[77] Article 7.3.1(2)(a), UNIDROIT Principles.
[78] *Eltecho v The Department of Municipal Property* A55-26979/2024 (Russian Federation, Arbitrazh Court of Samara Region).

88. In contrast, the CLAIMANT's entitlement to what was expected under the Agreement has been substantially achieved since all of the tickets purchased by 90,000 live audience members were retained by them.[79] The objective of the Agreement to procure the Concert was achieved with the CLAIMANT themselves has publicly praised the ECLIPSE performance.[80] Furthermore, the RESPONDENT at all times have discharged its duty to rectify the absence of Luna by deploying the holographic replacement on the actual day of Concert.[81]

ii. <u>The RESPONDENT fulfilled the strict compliance with the contractual obligation which is of the essence of the Agreement.</u>

89. The second factor to constitute a fundamental non-performance is if the strict compliance with the obligation which has not been performed by the RESPONDENT is of the essence under the contract.[82] The International Court of Arbitration in *Andersen Consulting Business* has also ruled that failure to discharge the duty of best efforts may be held as a fundamental non-performance under this circumstance.[83]

90. The RESPONDENT respectfully submits that the essence of the Agreement is the procurement of live Concert performance by the ECLIPSE that meets the reasonable

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[79] Facts, page 14, para 64.
[80] Facts, page 11, para 50.
[81] Facts, page 11, para 47.
[82] Article 7.3.1(2)(b), UNIDROIT Principles.
[83] *Andersen Consulting Business Unit Member Firms v Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative* ICC Case No. 9797 (International Court of Arbitration).

audience expectation.[84] In light of the foregoing submissions, this fundamental obligation was successfully discharged by the RESPONDENT, thereby precluding any finding of fundamental non-performance in the present dispute.

[84] Exhibit 2, Clause 3.1.1.

PRAYERS FOR RELIEF

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

I. The forum non conveniens lies in arbitration;

II. The order for security for costs ought to be granted;

III. The RESPONDENT's deployment of a holographic replacement does not constitute a breach of the Agreement; and

IV. The RESPONDENT's counterclaim ought to be granted.