21ST ANNUAL LAWASIA

INTERNATIONAL MOOT COMPETITION

13 SEPTEMBER TO 16 SEPTEMBER 2026

ASIAN INTERNATIONAL ARBITRATION CENTRE

MEMORANDUM FOR THE RESPONDENT

HOLOGRAMS OF FAME: IDOLS AND AI

CLAIMANT		**RESPONDENT**
NOVA LIVE ASIA PTE LTD	**V.**	**AURORA ENTERTAINMENT CO. LTD**

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STATEMENT OF JURISDICTION

Nova Live Asia Pte Ltd ("**Claimant**") and Aurora Entertainment Co. Ltd ("**Respondent**") have agreed to submit this dispute between them to arbitration administered in Kuala Lumpur, Malaysia, in accordance with the Asian International Arbitration Centre Arbitration Rules 2026 ("**AIAC Rules 2026**"). Consistent with the Tribunal's power to rule on its own jurisdiction pursuant to Rule 26.1 of the AIAC Rules 2026, the Respondent has, without prejudice to its jurisdictional objection, participated in these proceedings. The parties agree that the Tribunal will determine, as a threshold issue, whether the appropriate forum for this dispute lies in arbitration or before the Reyna High Court, together with the remaining issues between the parties.

QUESTIONS PRESENTED

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

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

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

(d) Whether Aurora's counterclaim ought to be granted

STATEMENT OF FACTS

1. The Respondent is a leading R-Pop entertainment company.[1] Among the Respondent's most valuable acts is ECLIPSE.[2]

2. In early 2025, ECLIPSE's popularity had reached unprecedented levels.[3] The Respondent was approached by the Claimant to organise an ECLIPSE concert.[4]

3. On 2 January 2026, the parties convened a meeting to discuss,[5] and shortly after, confirmed the concert date.[6] At a follow-up conference, the parties agreed to a written contract capturing only the salient commercial terms.[7] Given the compressed timeline, the Agreement did not provide for a dispute resolution clause, although the parties' previous agreements for other collaborations expressly mandated reference to arbitration.[8]

4. Approximately two weeks before the concert, ECLIPSE attended a meet-and-greet event where a fan made unsolicited physical contact with a member of ECLIPSE, Im Luna ("**Luna**").[9] After the event, she appeared visibly shaken. Unknown to the Claimant or the public, Luna developed ongoing psychological distress and heightened anxiety.[10] The

[1] Record, [12].
[2] Record, [12]; Exhibit 2, Clause 1.1.
[3] Record, [25].
[4] Record, [27].
[5] Record, [29].
[6] Record, [30].
[7] Record, [32].
[8] Record, [34].
[9] Record, [36].
[10] Record, [36] and [37].

Respondent arranged daily therapy sessions for Luna and managed her intermittent difficulties internally.[11]

5. Three days before the concert, Luna expressed a firm refusal to attend the concert.[12] The Respondent's attempts to persuade Luna to perform "*were stonewalled*."[13]

6. Jack, Assistant Director for the Respondent, informed the Claimant of the situation.[14] The Respondent proposed deploying a holographic replacement of Luna, explaining that it would be "*indistinguishable to the audience under live performance conditions*".[15] The Claimant raised immediate objections, but ultimately agreed to proceed "*on the express condition that the use of the hologram remain strictly confidential*".[16]

7. A full rehearsal was conducted the next day without any issues,[17] and the concert proceeded as scheduled on 7 February 2026,[18] with the deployment of a holographic replacement of Luna and "*synchronised with the live performance in real time*",[19] and no audience member raised any concern.[20]

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[11] Record, [38].
[12] Record, [41].
[13] Record, [41].
[14] Record, [42].
[15] Record, [43].
[16] Record, [44].
[17] Record, [45].
[18] Record, [46].
[19] Record, [47].
[20] Record, [49] and [50].

8. On 10 February 2026, the Respondent issued an invoice to the Claimant for US$3.6 million, comprising ECLIPSE's promotional and performance fees and related expenses,[21] accompanied by a request for a full accounting of the Gross Concert Revenue and calculation of royalties by 13 February 2026.[22] Before the Respondent received a response to the request, several days later, a social media user noted a "*minor glitch*" involving Luna in concert footage, prompting a RooTube video speculating that the irregularity resulted from the use of holographic technology.[23] The video also attracted numerous fan responses, ranging from criticism of the speculation to comments suggesting that a holographic replacement of Luna was used.[24] A fan wrote to the Claimant requesting confirmation of the speculation and of any entitlement to a refund.[25] Internally, the Respondent advised the Claimant to "just ignore the speculations," while separately noting that the Claimant had "*yet to settle [Aurora's] invoices*".[26]

9. The Claimant's management decided not to reply and instructed its legal team to assess the matter.[27] Around this time, Madam Ye Bin, the Respondent's Head of Operations and Marketing, was also informed by a third-party agency, TF Entertainment, that the Claimant's Chief Financial Officer had "*allegedly misappropriated company funds*" and that TF Entertainment had not received payment from the Claimant for over three months.[28]

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[21] Record, [51].
[22] Record, [52].
[23] Record, [54] and [55].
[24] Record, [56].
[25] Record, [58].
[26] Record, [60].
[27] Record, [61].
[28] Record, [62].

10. On 25 February 2026, having received no payment, the Respondent issued a formal follow-up letter seeking settlement of its invoice.[29] The Claimant responded that its legal team was reviewing whether the Respondent had complied with its contractual obligations and would not make payment pending further assessment.[30]

11. On 26 February 2026, the Claimant issued a notice of termination of the Agreement and commenced arbitration against the Respondent claiming damages.[31] The Respondent disputed the existence of a valid arbitration agreement,[32] filed a counterclaim, without prejudice to its jurisdictional objections, seeking payment of its invoice,[33] and applied for security for cost.[34]

12. On the same day, the Respondent also commenced court proceedings at the Reyna High Court ("**RHC**").[35] The Claimant applied for a stay, which the RHC granted.[36] The parties subsequently agreed to a full hearing at the Asian International Arbitration Centre.

[29] Record, [63].
[30] Record, [64].
[31] Record, [65].
[32] Record, [66].
[33] Record, [67].
[34] Record, [69].
[35] Record, [71].
[36] Record, [72] and [76].

SUMMARY OF PLEADINGS

I. THE FORUM NON CONVENIENS ("FNC") LIES WITH ARBITRATION

1. Arbitration is not available because the parties never entered into a valid arbitration agreement ("**AA**"). Since there is no express choice of law governing the AA, it is either the law of the seat, or the law of the main contract. Under Malaysian law, the law of the seat, no valid AA exists.

2. Alternatively, under the UNIDROIT Principles of International Commercial Contracts 2016 ("**UNIDROIT Principles**"), the law of the main contract, there is no valid AA. In any event, Reyna is the forum with the closest connection to the dispute. The concert, the parties, and the dispute are rooted entirely in Reyna. There is no risk of injustice arising from litigating there.

II. AN ORDER FOR SECURITY FOR COSTS ("SFC") SHOULD BE GRANTED

3. The requirements of SFC are met. First, there is a reasonable possibility that the Respondent will prevail, given the Claimant's express permission to use holographic technology. Second, the Respondent would suffer harm not adequately reparable by damages, since there is a real risk that the Claimant cannot satisfy an adverse costs award, nor produce any evidence of solvency. Third, the Respondent's potential harm without the order substantially outweighs the harm that the Claimant would likely incur, because the Claimant continues to retain all concert revenues. Lastly, the condition of

urgency is met, as the Claimant's finite revenue pool will likely be the target of competing claims from refund requests.

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

4. The Respondent's deployment of a holographic replacement satisfied Clause 3.1.1 of the Agreement. The "*live performance of the Act*" entailed ECLIPSE's brand experience of the five members' on-stage personas rather than their physical presence. The holographic replacement that seamlessly replicated Luna's on-stage persona fulfilled this requirement. The usage of a holographic replacement is also consistent with "*generally accepted industry standards*" that allow holographic technologies at concerts. "*[R]easonable audience expectations*" were met, given that fans praised the Concert as "*one of the most successful events*" from the Claimant.

5. In the alternative, the parties modified the Agreement. The Respondent fulfilled this modified obligation. The "*minor glitch*" did not breach strict confidentiality as it only gave rise only to unconfirmed online speculation that does not affect the Claimant's revenue or reputation.

IV. THE RESPONDENT'S COUNTERCLAIM SHOULD BE GRANTED

6. The Claimant agreed to pay the Performance Fee in the Agreement. The Claimant separately agreed, through the parties' preliminary negotiations, to reimburse the Respondent for the attendance, rental of outfits, and styling and accessories for both the

promotional activities and the ECLIPSE concert. In any case, the Claimant cannot act inconsistently with its obligation and promise to reimburse the Respondent.

7. The Claimant also cannot rely on termination to avoid payment because the grounds for termination are not met. The Respondent's conduct did not amount to a fundamental non-performance since the Claimant suffered no substantial deprivation.

PLEADINGS

I. THE REYNA HIGH COURT IS THE MORE APPROPRIATE FORUM FOR THIS DISPUTE

1. The RHC is the more appropriate forum as arbitration is not an option available to the parties owing to the lack of a valid AA. In the present case, when applying Malaysian law, the law of the seat, the parties did not enter into a valid AA. Alternatively, when applying the UNIDROIT Principles, the law of the main contract, the parties did not enter into a valid AA. In any event, the connecting factors point to the RHC as the more appropriate forum, and there are no special circumstances that warrant favouring arbitration because the RHC does not pose any risk of injustice.

A. When applying Malaysian law, the law of the seat, the parties did not enter into a binding AA.

2. In the present case, the law governing the main contract is the UNIDROIT Principles.[37] The parties also agreed that this arbitration would be conducted in accordance with the AIAC Rules 2026.[38] Following Rule 29.2, when the parties fail to stipulate an express choice of seat, the law of the seat is Malaysian law.[39]

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[37] Exhibit 2, Clause 9.
[38] Clarifications, 14.
[39] Rule 29.2, AIAC Rules.

(1) Malaysian law governs the AA

3. The applicable law to disputes concerning the existence of an AA is the law that the parties have chosen. However, since parties have not expressly chosen a law to govern the AA, the tribunal must apply the law of the seat, Malaysian law. When the AA is separate from the main contract, the law of the seat governs the AA.[40] In this case, since the AA does not form part of the Agreement, the significance of the choice of the law of the seat is an "*overwhelming*" indication of the implied choice of the governing law of the AA.[41]

4. The Claimant cannot rely on the presumption in *Enka* that the law governing the AA should be the law governing the main contract. This principle applies only where the AA is embedded within the main contract,[42] or when the AA is concluded concurrently with the main contract.[43] An AA entered at a different time would require a "*different analysis*".[44]

5. In the present case, the principle does not apply as no arbitration clause exists in the main contract, and the AA was not concluded at the same time as the Agreement. The AA was also not entered into concurrently, but five days before the Agreement, during

[40] *Sulamerica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2012] EWCA Civ 638 ("***Sulamerica***"), [26].
[41] *Sulamerica*, [26].
[42] *Enka Insaat Ve Sanayi AS v. Insurance Company Chubb and Chubb European Group SE* [2020] UKSC 38 ("***Enka***"), [170(i)] and [170(iv)].
[43] *Enka*, [230].
[44] *Enka*, [230].

the pre-agreement coordination meeting.[45] Hence, Malaysian law should be the law governing the AA.

6. This approach also aligns with the prevailing international commercial arbitration regimes[46] and cited by international textbooks.[47] This approach has been applied by arbitral tribunals,[48] common law,[49] and civil law jurisdictions.[50]

(2) Under Malaysian law, the parties did not enter into a valid AA

7. Under Malaysian law, the parties did not enter into a valid AA as the intention to arbitrate was not clear and unequivocal. The Malaysian Arbitration Act 2005 ("**MAA**") allows for an AA to be entered into orally or by conduct, provided that it is recorded.[51] When an AA takes this form, the intention to arbitrate must be clear and unequivocal.[52]

8. Although an AA may be found in the Pre-Agreement Coordination Meeting ("**Meeting Minutes**"), the nature of the words used must be sufficiently unequivocal to evidence an intention to arbitrate.[53] In *Sebor*, the court held that the parties entered a valid AA because the unequivocal nature of the words used by the parties revealed an intention

45 Exhibit 1, p 4.
46 Article V(1)(a), 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards - "The New York Convention"; *Enka*, [125].
47 Nigel Blackaby, Constantine Partasides, et al., Redfern and Hunter on International Arbitration (Seventh Edition) (2023) ("**RFH**"), [3.19]; Gary Born, Chapter 4: Choice of Law Governing International Arbitration Agreements, 4.02.
48 *Waterville Holdings (BVI) Limited v The Attorney General of the Republic of Ghana, Ministry of Justice, Accra, Republic of Ghana*, ICC Case No. 20561/TO, [93]; *Sanum Investments Limited v ST Group Co. LTD*, ICC Case No. 25100/PTA/XZG, [316].
49 *China Railway (Hong Kong) Holdings Limited v Chung Kin Holdings Company Limited* [2023] HKCFI 132, [27] (Hong Kong); *BCY v BCZ* [2016] SGHC 249, [32] (Singapore); *Thai-Lao Lignite Co Ltd v Government of the Lao PDR* [2017] 9 CLJ 273 (Malaysia).
50 RFH, [3.14].
51 s 9(3)-(4) MAA.
52 *TH Heavy Engineering Bhd v Daba Holdings (M) Sdn Bhd* [2018] 7 MLJ 1 ("***Heavy***"), [43].
53 *Sebor Marketing & Services Sdn Bhd v SA Shee Sdn Bhd* [2000] 6 MLJ 1 ("***Sebor***"), p 7.

to arbitrate.[54] The Meeting Minutes recorded that the parties specifically named the arbitrator, explicitly recorded that his decision would be "*final, conclusive and binding on the parties*", and the timing of the arbitration.[55] The arbitrator also issued a written acceptance of his appointment.[56] When a dispute arose, the parties participated in fourteen meetings before the arbitrator for over two years. The sum of this evidence demonstrated an intention to refer disputes to arbitration.[57]

9. However, none of the factors above are evident in the present case. The Meeting Minutes lack explicit language regarding the finality of the process or the formal appointment of an arbitrator.[58] While the parties did mention mediation and arbitration in the Meeting Minutes, it was only in the context that confidentiality was important in relation to trade secrets and the privacy of idols.[59] This is unlike in *Sebor*, where the court could turn to the finality of the language used by the parties, appointment of an arbitrator, and sustained participation in arbitration, to find an intention to be bound from the meeting minutes. Hence, no such intention can be found in the present case.

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[54] *Sebor,* p 7-8.
[55] *Sebor*, p 6.
[56] *Sebor*, p 6.
[57] *Sebor*, p 6-7.
[58] Exhibit 1, p 4.
[59] Exhibit 1, p 4.

B. In the alternative, the parties did not enter into a valid AA under the UNIDROIT Principles

10. Under Article 2.1.1 of the UNIDROIT Principles, an AA can be evinced by parties' conduct.[60] Tribunals will look at parties' conduct to determine if there is an intention to be bound by an agreement to arbitrate.[61]

11. Evidence of the parties' intention to be bound is interpreted, in accordance with Article 4.1 of the UNIDROIT Principles, in light of the parties' common intention.[62] Further, Article 4.3 of the UNIDROIT Principles allows this tribunal to rely on relevant circumstances,[63] like practices which the parties have established between themselves and preliminary negotiations.[64] These factors indicate that the parties did not enter into an AA.

12. First, the Claimant cannot rely on past practice alone to demonstrate an intent to arbitrate. In *ICC Case No. 10422*, while the tribunal referenced the parties' past practice of arbitrating under Article 4.1 of the UNIDROIT Principles, the bulk of the analysis rested on the interpretation of the ambiguous arbitration clause within the contract.[65] The tribunal found a common intention to arbitrate from the clause referring to a neutral law,[66] excluding the jurisdiction of the parties' domestic courts,[67] and the parties' desire

[60] UNIDROIT Principles, Article 2.1.1.
[61] UNIDROIT Principles, Article 2.1.1; Vogenauer, Commentary on the UNIDROIT Principles ("**Vogenauer**"), p 34.
[62] Vogenauer, p 34.
[63] UNIDROIT Principles, Article 4.3.
[64] UNIDROIT Principles, Article 4.3.
[65] *ICC Case No. 10422*, [5] and [5.4].
[66] *ICC Case No. 10422*, [5].
[67] *ICC Case No. 10422*, [5].

for a neutral mechanism to resolve disputes.[68] The tribunal only relied on the parties' past practice of arbitrating at the International Chamber of Commerce ("**ICC**") to confirm that the parties intended to submit their disputes to the ICC.[69]

13. In contrast, the Agreement contains no mention of arbitration, no neutral mechanism for resolving dispute, and no indication that parties intended to exclude the jurisdiction of the courts. Hence, any indication of past practice or reference to such in the Meeting Minutes is insufficient in the absence of more concrete indicators of arbitration in the Agreement.

14. Second, the preliminary negotiations, as recorded in the Meeting Minutes, do not demonstrate that the parties intended to arbitrate. Instead, the Meeting Minutes only suggest a general desire to avoid internal matters from becoming public.[70] The Respondent stated that "*[w]e're very careful about internal matters becoming public ... everything relating to ECLIPSE and Aurora must be dealt with confidentiality*".[71] To which the Claimant replied "*we agree ... Last time also we mediate and arbitrate ... to avoid publicity right*".[72]

15. Read in context, the Claimant was simply referring to their previous practice of mediation and arbitration to demonstrate that confidentiality was also important to the Claimants, in response to the Respondent's concerns. This exchange does not evince an intention to enter into a binding agreement to arbitrate. This desire to "*avoid*

[68] *ICC Case No. 10422*, [5.4].
[69] *ICC Case No. 10422*, [5.4].
[70] Exhibit 1, p 4.
[71] Exhibit 1, p 4.
[72] Exhibit 1, p 4.

publicity" is distinct from agreeing that the present disputes must be resolved through arbitration. Hence, the parties did not share an intention to arbitrate. Accordingly, under the UNIDROIT Principles, there is no valid AA.

C. In any event, the connecting factors point to the RHC

16. In any case, even if a valid AA exists, the RHC is the more appropriate forum. The appropriate forum is determined by the FNC test established in *Spiliada*.[73] Applying the two-stage test, first, the RHC is the forum with the closest connection to the dispute. Second, there are no special circumstances like injustice, leading to arbitration being favoured.

(1) The RHC is the forum with the closest connection

17. At this stage of the FNC test, connecting factors are considered to determine which forum has the "*most real and substantial connection*" with the dispute.[74] Connecting factors include factors affecting convenience or expense, the law governing the transaction, and the places where parties respectively reside or carry on business.[75]

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[73] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 *("**Spiliada**")*, p 477; Brand, Ronald A., and Scott R. Jablonski, 'Common Law Forum Non Conveniens: Four Countries, Four Approaches', *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements* (New York, 2007; online edn, Oxford Academic, 1 Jan. 2009), accessed 10 July 2026, p 3-4; Cheshire, North & Fawcett private international law (P. Torremans & J. J. Fawcett, Eds.; Fifteenth edition.). Oxford University Press (2017), p 393 and 394.
[74] *Spiliada*, p 478.
[75] *Spiliada*, p 478.

18. In *AK Investment*, the dispute involved Kyrgyz companies, under Kyrgyz law, and the dispute wholly occurred in Kyrgyzstan.[76] Accordingly, the court found that there was "*no doubt*" that Kyrgyzstan was the forum most closely connected to the dispute.[77]

19. Similarly, in the present case, the dispute wholly occurred in Reyna. The concert took place in Reyna,[78] and the dispute took place against the backdrop of a local R-Pop industry that is deeply embedded in Reynan social and commercial life.[79] Therefore, the RHC is the natural forum.

(2) The RHC does not pose any risk of injustice

20. The RHC does not pose a real risk of injustice. At this juncture, the Claimant bears the burden of proof to show that there is a real risk of injustice present,[80] by reason of incompetence, lack of independence, or corruption.[81]

21. In *Limbu*, the UK Court of Appeal held that there was injustice as there were practical obstacles to participation even if the claimants could attend the hearing remotely.[82] Such obstacles included the need for translators and an inequality in the standard of legal representation.[83] The court held that this created a real risk that the parties could

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[76] *AK Investment CJSC v Kyrgyz Mobil Tel Ltd and others and other appeals* [2011] UKPC 7 ("***AK Investment***"), [151].
[77] *AK Investment*, [151].
[78] Record, [46].
[79] Record, [28]; Record, [8].
[80] *Spiliada*, p 476 - 478.
[81] *AK Investment*, [95].
[82] *Limbu and others (Respondents) v Dyson Technology Limited and others (Appellants)* [2025] 2 All ER (Comm) 994 ("***Limbu***"), [60].
[83] *Limbu,* [75].

not obtain substantial justice.[84] In contrast, no such concerns arise here, as the concert took place in Reyna and both parties are Reynan companies.[85]

22. Additionally, the Claimant cannot argue that the RHC poses a real risk of injustice because confidential hearings are not available in this dispute.[86] Procedural differences are insufficient to constitute a real risk of injustice.[87]

23. Here, the RHC's adherence to the open court principle, compared to confidential proceedings in arbitration, is a procedural difference that does not amount to injustice. It is not the lack of obtainable justice that the Claimant truly objects to, but that the Claimant prefers to obtain justice privately. Therefore, the RHC remains the more appropriate forum.

[84] *Limbu*, p 996.
[85] Record, [28]; Exhibit 2, p 1.
[86] Clarifications, 2.
[87] *Joyvio Group Co., Ltd and other companies v Moreno and others* [2024] EWHC 2493 (Comm) ("***Joyvio***"), [28].

II. AN ORDER FOR SECURITY FOR COSTS SHOULD BE GRANTED

24. An order for Security for Costs ("**SFC**") can be made under Rule 11.4 of the AIAC Rules.[88] The requirements for an SFC order to be made must be met conjunctively.[89] The Respondent is able to meet the requirements for an SFC order. Furthermore, the evidence that the Respondent relies on reveals a pattern of financial instability, indicating that the Claimant is fast approaching impecuniosity.

25. For an SFC order to be granted, the Respondent must satisfy four requirements:[90]

    A. *Prima facie*, there is a reasonable possibility that the respondent would prevail in the case;

    B. The respondent would likely suffer harm not adequately reparable by an award of damages without the order;

    C. The respondent's potential harm without the order substantially outweighs the harm that the claimant would likely incur from the order; and

    D. The condition of urgency is met.

[88] Rule 11.4, AIAC Rules.
[89] *Tennant Energy, LLC v. Government of Canada,* PCA Case No. 2018-54 ("***Tennant***"), [133].
[90] *Windstream Energy LLC v. The Government of Canada (II)*, PCA Case No. 2021-26 ("***Windstream***"); *Tennant*; *Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela,* PCA Case No. 2013-03.

A. Prima facie, there is a reasonable possibility that the Respondent would prevail in the case

26. The tribunal only needs to consider if the claims made are not frivolous and there is a reasonable case assuming the facts alleged are proven.[91] In the present case, *prima facie*, the Respondent has a reasonable possibility of prevailing. The core of the dispute lies in whether the deployment of a holographic replacement amounts to a breach. Given that the deployment of a holographic replacement was explicitly permitted by the Claimant, there is no breach.[92]

B. The Respondent would suffer harm that is not adequately reparable by an award of damages without an order for SFC

27. The Respondent must prove that there is "*a serious risk that the claimant will be unable to pay the respondent's costs if the latter succeeds*".[93] If the circumstances show that the deterioration of the party's financial situation was caused by something other than an accepted business risk, an order for SFC may be justified.[94]

28. The Respondent must discharge this initial burden of establishing a reasonable basis that the Claimant is impecunious,[95] following which, the evidentiary burden is shifted

[91] *Sergei Paushok, CJSC Golden East Company and CJSCVostokneftegaz Company v The Government of Mongolia* [2007] Ad-Hoc Arbitration ("***Paushok***"), [55].
[92] Record, [44].
[93] Chartered Institute of Arbitrators, *International Arbitration Practice Guideline 5: Applications for Security for Costs* (2015) ("**CIARB**"), p 7.
[94] CIARB, p 8.
[95] *Tennant*, [178].

to the Claimant.[96] When the "*party against whom an order for [SFC] is sought is in the best position to provide evidence as to its financial situation, if it fails to produce accounts… arbitrators may draw the inference that the failure or delay favours requiring security*".[97]

29. In *Tennant*, the tribunal held that this initial burden was not discharged. This was because the only evidence the respondent adduced was that there was no public information which suggests that the claimant holds financial assets.[98]

30. However, five pieces of evidence in the present case, when seen together, reveal a pattern of financial instability, indicating that the Claimant is impecunious. First, from the onset, the Claimant revealed to the Respondent that they were in a "*delicate state*" financially.[99]

31. Second, a senior executive from TF Entertainment ("**TF**"), who recently organised an event with the Claimant, informed the Respondent that the Claimant's CFO allegedly misappropriated company funds, resulting in "*temporary liquidity issues*".[100] TF also added that they did not receive payment from the Claimant for over three months.[101]

32. Third, after the Claimant ignored the Respondent's initial invoice, the Respondent issued a formal follow-up letter to the Claimant seeking settlement of the invoice.[102]

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[96] *Tennant*, [178].
[97] CIARB, p 8.
[98] *Tennant*, [178].
[99] Exhibit 1, p 2.
[100] Record, [62].
[101] Record, [62].
[102] Record, [63].

However, the Claimant cited an ongoing legal review as an excuse, before issuing a notice of termination, commencing arbitration for breach of contract, seeking US$2.2 million in damages.[103]

33. Fourth, the Respondent discovered a Blueddit thread alleging delayed payments from the Claimant by several other agencies across multiple jurisdictions.[104] This suggests that the liquidity difficulties disclosed by TF was not a one-off occurrence. Instead, it is symptomatic of the Claimant's growing struggles regarding its payment obligations.

34. Lastly, similar rumours migrated out of the virtual space and were "*circulated within segments of the industry and were occasionally raised in informal conversations among event organisers, managers, promoters and even idols*".[105] Given how deeply the rumours have permeated into the R-Pop industry, this suggests the rapid deterioration of the Claimant's already delicate financial state.

35. The Claimant may seek to characterise this evidence as hearsay, and thus inadmissible. The AIAC Rules do not prohibit the admissibility of hearsay,[106] and tribunals typically have the discretion to determine the weight of such evidence.[107] Hearsay may be relied upon, even if by unidentified individuals, provided the opposing party had a fair

[103] Record, [65].
[104] Record, [68].
[105] Clarifications, 12.
[106] Rule 36, AIAC Rules.
[107] IBA Rules on the Taking of Evidence in International Arbitration, Adopted by a resolution of the IBA Council, International Bar Association (2020), Article 9.1.

opportunity to put his own case and respond to its contents,[108] to "*keep arbitration from becoming too cumbersome through procedural wrangling*".[109]

36. Therefore, the Respondent provided sufficient evidence to establish, on a reasonable basis, that the Claimant is impecunious. At a minimum, the Claimant bears the burden of providing evidence as to its financial situation. Given that the Claimants have failed to provide such evidence, an order for SFC is justified.

C. The Respondent's potential harm without the order substantially outweighs the harm that the Claimant would likely incur from the order

37. The Respondent must prove that, considering the surrounding circumstances, it would be fair to order SFC.[110] The test considers the potential harm to the Respondent, like the inability to recover costs, against the potential harm to a Claimant providing security, like stifling a genuine claim.[111]

38. In the present case, the Respondent faces potential harm due to its inability to recover its costs if no security is ordered. Absent an order for SFC, the Respondent would be left only to hold a costs award against a Claimant whose capacity to satisfy it is genuinely in doubt for the reasons set out in (B).

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[108] *CFJ v Office of the Children's Guardian* [2016] NSWSC 1625, [110].
[109] James A. Wright, The Use of Hearsay in Arbitration, Chapter 10, p 289, citing Eaton, *Labor Arbitration in the San Francisco Bay Area,* 48 LA 1381,1385 (1976).
[110] CIARB, p 10.
[111] *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. The Plurinational State of Bolivia*, PCA Case No. 2018-39, [145]; CIARB, p 10-11.

39. By contrast, the potential harm to the Claimant is minimal because the Claimant continues to hold all the revenues from the concert.[112] In *Windstream*, there was potential harm to the claimant as the respondent could seek to interrupt or suspend the proceedings if the interim measure was granted and the claimant failed to procure the undertaking.[113] In the present case, there is no such risk that the Respondent would seek to interrupt or suspend the proceedings because the Respondent is counterclaiming in these proceedings as well.[114]

D. The condition of urgency is met

40. To fulfil the condition of urgency, the Respondent must adduce evidence of an intervening event that materially increases its risk of non-recovery beyond what already existed.[115] SFC is only appropriate when it "*cannot await the outcome of the award on the merits*".[116] For this requirement to be met, the Respondent must demonstrate that the Claimant would lose the ability to pay an adverse cost award.[117]

41. In the present case, as analysed above in (B), the rumours of the Respondent's deteriorating financial position are the subject of discussion online and within the industry.[118] Furthermore, the urgency in the present case does not hinge on the rumours alone, but on what follows if the underlying facts are true.

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[112] Record, [69].
[113] Record, [67].
[114] Record, [67].
[115] *Windstream*, [55]-[63].
[116] Gary Born, Chapter 17: Provisional Relief in International Arbitration, [17.02(G)(3)(b)(ii)], citing *R.R. Dev. Corp v Guatemala*, Decision on Provisional Measures in ICSID Case No. ARB/07/23 of 15 October 2008, [34].
[117] *Orlandini*, [150].
[118] Clarification, [12].

42. In the present case, ticket holders and sponsors are likely to bring refund claims arising from the same concert. All of these claims are competing for the same finite pool of Gross Concert Revenue that the Claimant currently holds. The Respondent’s claim would then be reduced to a contest among multiple creditors, with no assurance that sufficient funds remain by the time an award is made. Therefore, the condition of urgency is met, and SFC should be ordered.

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

43. The Respondent did not breach the Agreement as the deployment of a holographic replacement is in accordance with Clause 3.1.1 of the Agreement. In the alternative, the Claimant agreed to modify the Respondent's contractual obligation to procure the deployment of a holographic replacement of Luna and the other four ECLIPSE members.

A. The holographic replacement did not breach the Agreement

44. Clause 3.1.1 of the Agreement states that the Respondent shall "*procure the performance of ECLIPSE at the Concert in accordance with generally accepted industry standards and reasonable audience expectations for a live music concert of a similar scale and nature"*.[119]

45. The Respondent's use of a holographic replacement is in accordance with Clause 3.1.1 as the deployment of a holographic replacement:

(1) fulfils the Respondent's obligation to procure a "*live performance of the Act*" at the ECLISPE concert;

(2) is in accordance with "*generally accepted industry standards*"; and

(3) aligns with "*reasonable audience expectations*".

[119] Exhibit 2, Clause 3.1.1.

(1) The deployment of a holographic replacement fulfils "live performance of the Act"

46. The definition of "*Concert*" in Clause 1.1 of the parties' Agreement is "*the live performance of the Act*", with the "*Act*" defined as "*the co-ed R-pop group known as ECLIPSE, comprising five (5) members*".[120] In deploying the holographic replacement, the requirement of a "*live performance*" under Clause 1.1 was met.

47. The "*live performance of the Act*" refers to putting on an ECLIPSE performance consisting of the five ECLIPSE members' *personas* in real time. Following Article 4.1 of the UNIDROIT Principles, terms are to be interpreted according to the parties' common intention.[121] In determining the parties' common intention, Article 4.3 of the UNIDROIT Principles allows for all relevant circumstances to be taken into regard.[122] Here, the R-Pop industry's landscape and parties' preliminary negotiations are two relevant circumstances to be considered.

48. First, within the current R-Pop industry, each R-Pop group is recognised by their branding and portrayed persona rather than the actual members themselves. R-Pop idols used to be "*relatable figures rather than untouchable icons*".[123] However, the R-Pop industry evolved into a "*commercial enterprise*".[124] This means that each group is no longer defined by the members' authentic personalities and skills, but carefully curated personas that matched the group's branding within R-Pop. Specifically, R-Pop is "*no longer defined solely by music, performance and natural talent*", but rather "*integrated*

[120] Exhibit 2, Clause 1.1.
[121] UNIDROIT Principles, Article 4.1.
[122] UNIDROIT Principles, Article 4.3
[123] Record, [2].
[124] Record, [11].

ecosystems of branding, technology, data analytics and contractual risk management".[125] Given the industry's emphasis on branding, the parties would understand upon contracting that the Agreement was for the five ECLIPSE persons rather than the human performers. Thus, a *"live performance of the Act*" refers to a performance with the five curated ECLIPSE members' personas.

49. Second, the parties' focus on the ECLIPSE brand experience in the Meeting Minutes suggests that "*Act*" refers to the five ECLIPSE members' on-stage persona, rather than their physical presence. In the Meeting Minutes, the Claimant highlighted that, "*[i]t's the energy, precision and chemistry. They don't analyse the mechanics. They just know it feels right. It's the vibes, that is most important*".[126] This suggests that a successful ECLIPSE concert hinges on the delivery of the ECLIPSE brand experience, as opposed to necessitating five human members at the concert. The Respondent's reply, "*[a]lright I get it, it's the ECLIPSE concert experience. We can definitely deliver that*",[127] further confirms that both parties understood a "*live performance of the Act*" to entail the delivery of the ECLIPSE energy, precision and chemistry, rather than the strict presence of the five human members.

50. Ultimately, the holographic replacement of Luna perfectly replicated her on-stage persona, fulfilling the contractual requirement of a "*live performance of the Act*". ECLIPSE's customary audience call-and-response interaction and Luna's on-stage stage presence, were perfectly recreated by the deployment of a holographic

[125] Record, [11].
[126] Exhibit 2, p 4.
[127] Exhibit 2, p 4.

replacement.[128] There were also "*no reports of disruption, dissatisfaction or irregularity during the show*".[129] Evidently, despite the deployment, the Respondent fulfilled their obligation by successfully delivering the ECLIPSE experience at the Concert.

(2) The deployment of a holographic replacement meets "generally accepted industry standards"

51. The Respondent's deployment of a holographic replacement is in accordance with "*generally accepted industry standards*". Following Articles 4.1 and 4.3 of the UNIDROIT Principles,[130] a contextual understanding is relevant to determine the parties' common intention.

52. The context reveals that the industry standard permits the deployment of holographic replacements. The Respondent, on one occasion, staged a tribute concert featuring holographic renditions of a first-generation R-Pop group.[131] Although critics cautioned that such technologies should not displace "*the central role of human performers*",[132] the tribute concert was proof that "*holographic technology could enrich audience experience without undermining artistic authenticity*".[133] The tribute concert's success shifted the industry standard to permit the use of holographic replacements in live concerts.

[128] Record, [47]-[48].
[129] Record. [49].
[130] Vogenauer, p 140-143.
[131] Record, [16]-[17].
[132] Record, [15].
[133] Record, [17].

53. As a trendsetter, the Respondent's practices also shape the industry norms on what constitutes "*professional*" and "*acceptable*" live performances.[134] The Respondent was "*praised for its technological advancements*" in the tribute concert, with the holographic technologies being "*met with widespread acclaim*" and regarded as a "*symbol of an industry adapting responsibly to technological change*".[135] The industry's receptiveness of the deployments at the tribute concert established that holographic replacements are permitted in live concerts.

54. Revealing the deployment is also not required under "*generally accepted industry standards*". In the R-Pop industry, where *"a single cancelled concert, visible performance lapse or public controversy could trigger cascading financial losses and reputational damage across multiple markets*",[136] information is routinely kept under wraps to ensure that the R-Pop group's branding is maintained.

55. In particular, the parties themselves agreed that "*everything relating to ECLIPSE and Aurora must be dealt with confidentiality*".[137] The parties routinely handle speculations, whether true or not. The Respondent explicitly told the Claimant to *"ignore the speculations*".[138] The Claimant also expressly requested for the deployment of a holographic replacement to be kept "*strictly confidential*".[139] This shows that both parties viewed keeping the deployment of holographic replacements a secret from the audience as being in accordance with "*generally accepted industry standards*".

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[134] Record, [19].
[135] Record, [16]-[17].
[136] Record, [7].
[137] Exhibit 1, p 4.
[138] Record, [60].
[139] Record, [44].

(3) The deployment of a holographic replacement meets "reasonable audience expectations"

56. The Respondent's deployment of a holographic replacement does not breach the Agreement as it aligns with "*reasonable audience expectations*". Reasonable audience expectations entail enjoying "*the ECLIPSE experience*". Following Articles 4.1 and 4.3 of the UNIDROIT Principles,[140] the parties' preliminary negotiations and contextual understanding are relevant to determine the parties' common intention.

57. The parties' preliminary negotiations acknowledge that the "*reasonable audience expectations*" are tied solely to the ECLIPSE experience at the Concert. In the Meeting Minutes, the Claimant raised that "*[f]rom an audience perspective, people come expecting the ECLIPSE experience… They don't analyse the mechanics. They just know if it feels right*".[141] The Respondent affirmed this understanding by replying, "*[a]lright I get it, it's the ECLIPSE concert experience*".[142] Here, the Claimant specifically references the audience's perspective at the Concert as the determining factors of whether "*reasonable audience expectations*" is met. This demonstrates that the parties shared a common intention for "*reasonable audience expectations*" to be determined by the subjective perspective of the audience at the Concert.

[140] Vogenauer, p 140-143.
[141] Exhibit 1, p3.
[142] Exhibit 1, p3.

58. Presently, ECLIPSE is marketed as "*a cohesive and emotionally synchronised unit, characterized by strong interpersonal chemistry and professionalism*" where "*ECLIPSE's performances were widely described as 'flawless'*".[143] "*Reasonable audience expectations*" entail experiencing ECLIPSE's chemistry, synchronisation, and professionalism.

59. From the audience's perspective at the Concert, the holographic replacement "*perfectly recreated ECLIPSE's distinctive and customary audience interaction typically initiated by Luna*" and "*taken up enthusiastically by the crowd*".[144] There were *"no reports of disruption, dissatisfaction or irregularity during the show*".[145] Given that the level of chemistry and fan interaction delivered were identical to that of other ECLIPSE concerts and there were no concerns regarding Luna's absence,[146] the delivered ECLIPSE experience met "*reasonable audience expectations*".

[143] Record, [23]-[24].
[144] Record, [47]-[48].
[145] Record, [49].
[146] Record, [49].

B. In the alternative, the Agreement was modified to permit Luna to be substituted with a holographic replacement

(1) The Claimant's agreement to replace Luna with a holographic replacement modified the Respondent's original contractual obligation

60. The parties modified the Respondent's contractual obligations under Clause 3.1.1 through the offer and acceptance of replacing Luna with a holographic replacement. Following Article 3.1.2 of the UNIDROIT Principles, a contract can be modified by mere agreement.[147]

61. The context of the parties' discussions reveals a trajectory from the Claimant's initial resistance to a successful bargained-for modification of the Agreement. When the Respondent informed the Claimant of Luna's refusal to perform, the Claimant repeatedly urged the Respondent to *"manage the situation and get her to do it*".[148]

62. Given that efforts to contact and persuade Luna to perform were stonewalled,[149] the Respondent knew that securing Luna's performance was not possible. Therefore, the Respondent suggested the alternative solution of deploying a holographic replacement. This was to ensure that the Concert proceeds as scheduled. Ultimately, the Claimant "*agreed to proceed on the express condition that the use of the hologram remain strictly confidential.*"[150]

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[147] Vogenauer, p 96.
[148] Record, [42].
[149] Record, [41].
[150] Record, [44].

63. Critically, the Claimant was not forced into submission but struck a bargain by adding an additional condition that the use of a holographic replacement remain "*strictly confidential*".[151] Despite their initial objections, the Claimant also did not state any caveat, nor did they reserve any rights, regarding the original obligation to procure the human, Luna.

64. Seen in this context, this exchange is a successful negotiation, resulting in the Claimant's agreement to modify the original obligation. The modification extinguished the Respondent's obligation of procuring the human member Luna. Accordingly, the parties successfully modified the Agreement, replacing the original duty with a new obligation to "*deploy a holographic replacement of Luna on the express condition that its use remain strictly confidential*".

C. The modified obligation was fulfilled as the Respondent did not disclose the deployment of a holographic replacement

(1) Strict confidentiality is only to the extent of preventing reputational harm

65. While the parties agreed to strict confidentiality, this confidentiality is only required to the extent necessary to prevent reputational harm. Following Article 4.1 of the UNIDROIT Principles, contractual terms must be assessed based on the parties' common intention, which can be determined from all relevant circumstances.[152] The

[151] Record, [44].
[152] UNIDROIT Principles, Article 4.1.3.

following circumstances are relevant: parties' prenegotiations and the context of the agreement.

66. First, the purpose of implementing a duty of confidentiality was to prevent reputational harm. In the Meeting Minutes, the Respondent stated, "*everything relating to ECLIPSE and Aurora must be dealt with confidentiality*".[153] The Claimant agreed to the importance of confidentiality and stated, "*[o]n our part, confidentiality is key as we also have several events lined up for this year and we cannot have our sponsors second-guessing our capabilities*".[154] Evidently, the Claimant was concerned about a breach of confidentiality causing actual reputational harm.

67. Second, speculations are a common occurrence in the R-Pop industry. As a key player in the R-Pop industry,[155] the Respondent is uniquely situated to provide insight into R-Pop-related speculation. In the Meeting Minutes, the Respondent raised the issue of keeping all matters relating to ECLIPSE confidential, but they also acknowledged that, "*[s]ometimes people speculate without knowing the full picture*".[156] When fans later speculated about the use of holographic technology, the Respondent expressed that "*We've handled situations like this before. Dating rumours, no matter whether true or false, get nipped in the bud like this all the time*". In fact, all R-Pop performances are subject to scrutiny,[157] and given the prevalence of R-Pop in Reynan culture,[158] it is inevitable that members of the public would comment on the Concert.

[153] Exhibit 2, p 4.
[154] Exhibit 2, p 4.
[155] Record, [18]-[19]; Clarifications, 3.
[156] Exhibit 2, p 4.
[157] Record, [7].
[158] Record, [8].

68. The parties would therefore have understood that the purpose of keeping the holographic replacement "*strictly confidential*" is not to prevent speculation. Instead, the purpose of strict confidentiality is to prevent reputational harm to the parties. This was implicitly recognised by the Claimant, who premised strict confidentiality on concerns that the Concert authenticity, audience expectations and the Claimant's reputation would be negatively affected.

(2) The Claimant did not suffer any reputational harm

69. While online speculations of the deployment arose from the "*minor glitch*", the speculations were harmless and did not negatively impact the Claimant's reputation. The "*minor glitch*" did not reveal the deployment to fans. The fans were in disagreement as to whether there was a glitch present. Some viewers analysed "*the footage frame by frame, while others attributed the perceived irregularity to camera angles, lighting effects or digital compression*".[159] There was no consensus as to whether a "*minor glitch*" even occurred at the Concert.

70. Even after a popular RooTube creator published a video analysing the footage frame-by-frame, fans were still not convinced that holographic technology had been used. Some stated, "*[s]top with the conspiracy smh*", "*[w]hat a joke?? I was there at the concert. If it was holography, I'm pretty sure 1 of 90,000 of us would have been able to tell*".[160] Evidently, these fans still viewed the Concert positively and believed that no holographic technology was used at the Concert.

[159] Record, [54].
[160] Record, [56].

71. Although some fans believed that holographic technology *might* have been used, their comments were overall neutral toward the Claimant. Some fans left comments such as "*I wouldn't be surprised if this turns out to be true*" and "*[c]an I subscribe to their holography tech? So that my bosses can't tell that I'm not at work physically hahaha* ><".[161] Notably, even after watching a frame-by-frame analysis of the Concert footage, none of these fans were certain that holographic technology was used. Furthermore, most of these comments had a humourous undertone which showed that fans were unbothered by the deployment.

72. While a few fans raised the issue of refunds, these were premised on the use of holographic technology being confirmed.[162] The Claimant's final decision in this matter was not to confirm the use of any holographic technology and no refunds were ultimately given.[163] In other words the Respondent successfully achieved the goal of preserving confidentiality. The Respondent preserved the Claimant's reputation and prevented harm and averted refunds. The Claimant cannot now claim that the Respondent breached the strict confidentiality obligation.

[161] Record, [56].
[162] Record, [56], [58].
[163] Record, [57].

IV. THE RESPONDENT'S COUNTERCLAIM SHOULD SUCCEED

73. The Respondent is entitled to the full counterclaim as the parties agreed to the payment in their Agreement. In any case, the Claimant caused an understanding that they would pay the counterclaim sums to the Respondent after the Concert. The Claimant cannot act inconsistently with this understanding relied on by the Respondent.

74. The total quantum of the counterclaim in the invoice is US$3.6 million. The invoiced sum consists of two main categories of items. First, ECLIPSE's Performance Fee of US$2.5 million.[164] Second, ECLIPSE's Secondary Fees.[165]

A. The quantum of the counterclaim is justified as the parties agreed on the Respondent's entitlement to each item

(1) The Performance Fee was incorporated into and agreed upon in the Agreement

75. Clause 5.1 of the Agreement stipulates that the Respondent is entitled to the "*Performance Fee of [US$2.5 million]*" and "*[r]oyalties, at a percentage to be agreed between Parties*". Accordingly, the Claimant has a contractual obligation to pay the Performance Fee and Royalties to the Respondent.

164 Record, [51].
165 Record, [51].

(2) The parties agreed for the Claimant to reimburse all Secondary Fees to the Respondent

76. Under Clause 4.1.1 of the Agreement, the Claimant is "*responsible for all logistics, venue booking, staging, sound, lighting and crowd management in connection to the Concert*". Clause 4.1.4 of the Agreement further states that the Claimant shall "*promote the Concert in a manner consistent with the Act's image and branding guidelines as provided by [the Respondent]*". In interpreting the scope of Clause 4.1.1 and 4.1.4, under Article 4.3(a) of the UNIDROIT Principles, this tribunal can consider the parties' preliminary negotiations.[166]

77. In the Meeting Minutes, the Claimant proposed that the Secondary Fees be paid by the Respondent first and later reimbursed by the Claimant. Specifically, the Claimant mentioned, "*[o]n logistics, we are proposing a 50-50 split on promotional costs, to be reimbursed to you post-event and payment of royalties.*"

78. The Claimant further added "*[c]ause it's quite inconvenient for us to pay for their stylists etc as we go along. Best you manage first*".[167] This demonstrates that the Claimant understood that the initial payments of Secondary Fees were under the Respondent's responsibility, to be reimbursed to the Claimant after the Concert.

79. The Respondent's reply, "*[a]t this stage, we are happy to withhold any charges*",[168] shows that the Respondent understood that the Respondent would temporarily bear the Secondary fees and charge the Claimant afterwards. The Respondent further elaborated:

[166] UNIDROIT Principles, Article 4.3.
[167] Exhibit 1, p 4.
[168] Exhibit 1, p 4.

"*[l]et the promotional activities go on and then their services can be settled at the end of it once you settle the costs incurred and we discuss payment of royalties*".[169] The Respondent's reply suggests that "*settling the costs incurred*" required the Claimant to pay for the Secondary Fees incurred. The Respondent's separate usage of "*settle*" and "*discuss*" also demonstrates that settling the costs incurred entailed payment of the fees rather than a discussion.

80. The Claimant then provided an affirmative response, "*Ah, ok ok… I get it. Let's cross that bridge when we get to it. Ultimately, it is to be settled once we discuss royalties*".[170] By mirroring the Respondent's usage of "settled", the Claimant acknowledges that the fees were an outstanding fee to be paid. This confirms the parties' common intention that the Claimant would reimburse the Respondent for the Secondary Fees. Accordingly, under Clause 4.1.1, the Claimant is contractually obligated to pay for the Secondary Fees

(3) In any case, the Claimant is estopped from acting inconsistently with its prior promise to pay the respective fees to the Respondent

81. Following Article 1.8 of the UNIDROIT Principles, a party cannot act inconsistently with an understanding it caused the other party to have and upon which that other party reasonably acted in reliance to its detriment.[171] This understanding is derived from the party's representation or conduct and reasonably relied upon by the other party.[172]

[169] Exhibit 1, p 4.
[170] Exhibit 2, p 4.
[171] UNIDROIT Principles, Article 1.8.
[172] Vogenauer, p 21.

82. In *Dunor*, the claimant conducted a performance test of the power plant.[173] The respondent approved of the performance test document, which included a "*degradation curves*".[174] When the respondent later refused to apply these "*degradation curves*", the claimant argued this was "*inconsistent conduct*" under Article 1.8 of the UNIDROIT Principles.[175] The tribunal held that the respondent did not act inconsistently as the claimant would have conducted the tests the same way regardless of the respondent's approval.[176] Since the respondent's approval did not alter the claimant's actions, the respondent's conduct was not the cause of the claimant's understanding.[177] Thus, there was no detrimental reliance suffered by the claimant from the respondent's agreement, and Article 1.8 of the UNIDROIT Principles did not apply.

83. In contrast, the Claimant' conduct directly induced the Respondent to alter its position, even if the Claimant did not formally agree to reimburse the Respondent. The Respondent repeatedly made its stance clear that the Claimant was liable for the Promotion Fees.[178] In response, the Claimant never objected; instead, they made statements implying that they bore a share of the financial responsibility.[179]

84. The Respondent repeatedly made its stance clear that the Claimant was liable for the Promotion Fees. In response, the Claimant never objected; instead, they made

[173] *Dunor Energia S.A.P.I DE C.V (Mexico) v Comisión Federal De Electricidad (Mexico)*, LCIA Arbitration Case No. 204865 (2022) ("***Dunor***"), [213].
[174] *Dunor*, [213], [223], [660].
[175] *Dunor*,[660].
[176] *Dunor*, [847]-[848].
[177] *Dunor*, [848].
[178] Exhibit 1, p 4.
[179] Exhibit 1, p 4.

statements implying they bore a share of the financial responsibility. Indeed, this indicates that the Claimant themselves knew they were liable for the Secondary Fees. This conduct created an understanding that induced the Respondent to front the costs for the Secondary Fees, so that the promotional events and Concert could proceed.

85. Unlike the claimant in *Dunor*, the Respondent acted in detrimental reliance on the understanding created by the Claimant. The Respondent would not have paid these sums out-of-pocket without this understanding created by the Claimant.

86. Accordingly, Article 1.8 of the UNIDROIT Principles applies, and the Claimant must pay the Respondent's counterclaim. Since the Claimant induced the Respondent to make payment for the Secondary Fees, it would be inconsistent for the Claimant to now deny responsibility.

B. There is no fundamental non-performance of the Agreement

87. Following Article 7.3.1 of the UNIDROIT Principles, a party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.[180] Even if the Respondent breached the Agreement, there was no fundamental non-performance. In determining whether there is a fundamental non-performance, the tribunal can look at whether the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract at the time of the conclusion of the contract.[181]

[180] UNIDROIT Principles, Article 7.3.1.
[181] UNIDROIT Principles, Article 7.3.1(2)(a); Vogenauer, p 254.

88. In *Andersen*, the claimant expected its professional practice to be coordinated with other member firms by the respondent and receive "*cooperative benefits*" like uniform global service and shared technology.[182] Applying Article 7.3.1 of the UNIDROIT Principles, the tribunal held that the claimant was substantially deprived of what they were entitled to expect due to the respondent's failure to coordinate the member firms.[183] Specifically, the claimant was deprived of the "*cooperative benefits*" as the claimant was making "*massive transfer payments*" without receiving the promised coordination, rendering the arrangement "*highly detrimental*".[184] Thus, the respondent's failure to coordinate the member firms that deprived the claimant of its expectations constituted fundamental non-performance.[185]

89. By contrast, there is no substantial deprivation suffered by the Claimant as the "*public reaction to the concert remained overwhelmingly positive*" and the Claimant retains all concert revenue. Following the ECLIPSE concert, fans praised the event as "*one of ECLIPSE's most memorable performances*", with "*industry commentators and fan communities describing the concert as one of the most successful events organised by the Claimant in recent years*".[186] Even with the online speculations, the Claimant still retains all concert revenue from the sold-out ECLIPSE concert and maintains its current public image within the R-Pop industry.

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182 *ACBU v AABU* ICC Case No. 9797/CK/AER/ACS ("***Andersen***"), [242].
183 *Anderson*, [236]-[242].
184 *Anderson*, [242].
185 *Anderson*, [237]-[242].
186 Record, [53].

90. Although there was some online speculation, this did not hurt the Claimant's reputation. The online comments ranged from fans speculating on the mere possibility that a holographic replacement was used. To fans remaining unconvinced and criticising other fans for speculating, criticising the speculation, "*[s]top with the conspiracy smh*".[187]

91. Crucially, there were little signs of negative criticism or backlash towards the Claimant, regarding the speculation of the speculation of the holographic replacements. Only one fan emailed the Claimant to seek a refund.[188] Despite this, the Claimant took no action, choosing only to reply if the fan followed up.[189] Thus, there is no loss of reputation or concert revenue suffered by the Claimant.

92. Since the Respondent's deployment of a holographic replacement is not a fundamental breach that substantially deprived the Claimant of the revenue and public recognition expected, the Claimant cannot terminate the parties' Agreement under Article 7.3.1 of the UNIDROIT Principles.

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[187] Record, [56].
[188] Record, [58].
[189] Record, [61].

V. CONCLUSION

93. For the foregoing reasons, this Tribunal lacks jurisdiction as no valid AA was entered into, either under Malaysian law or the UNIDROIT Principles. In any event, the RHC is the forum with the closest connection and poses no risk of injustice. Should the tribunal proceed, SFC should be ordered, given the Claimant's impecuniosity. The Respondent's deployment of a holographic replacement did not breach the Agreement, and the Respondent's counterclaim for US$3.6 million should succeed.

PRAYERS FOR RELIEF

94. For the foregoing reasons, the Respondent respectfully requests this Tribunal to issue an award:

(a) Declaring that the FNC lies in arbitration;

(b) Ordering the Claimant to put up SFC;

(c) Declaring that the Respondent is not in breach of the Agreement;

(d) Granting the Respondent's counterclaim.