The First UAE and Middle East Judgment on AI Liability: Institutional Accountability and Global Perspectives

September 3, 2026

In what stands as potentially the first judicial decision in the United Arab Emirates, and potentially the broader Middle East, addressing institutional liability for the failure of artificial intelligence (AI) and automated systems, the Abu Dhabi Commercial Court has established a direct precedent on corporate accountability. Financial institutions deploying AI for risk management, fraud detection, and advisory services cannot rely exclusively on standard security protocols, such as a One-Time Password (OTP), to avoid liability when those systems fail. The ruling establishes that an institution will be held liable for consumer losses if its automated risk assessment model is fundamentally flawed. This judicial precedent works in tandem with the UAE Securities and Commodities Authority (SCA) regulations, the UAE's September 2024 AI policy, and an emerging global consensus: algorithmic complexity does not absolve financial institutions of their legal duty of care, and structural failures in AI models will result in direct institutional liability.

The First Regional Precedent: Abu Dhabi Commercial Court Case No. 762 of 2026

In a case of first impression regarding AI and automated risk models (Case No. 762 of 2026), the Abu Dhabi Commercial Court of First Instance ruled on a dispute involving digital fraud, consumer liability, and the failure of a bank's automated monitoring systems. The claimant was the victim of a phishing scam in which an OTP was intercepted and used to activate Apple Pay on an unrecognized device. Within minutes, multiple high-value transactions were processed, consuming a large portion of the claimant’s credit limit.

Although the claimant reported the incident to the bank within two minutes, the bank allowed the settlements to process, delayed the investigation, and ultimately rejected the claim. The bank relied on its standard terms and conditions, arguing that because the transactions were authenticated via an OTP, the liability fell squarely on the consumer.

The Court appointed a banking expert and adopted their findings, ruling that the bank had breached its duty of care. The Court determined that strict reliance on procedural authentication terms is legally insufficient when the institution fails to implement functional safeguards capable of recognizing abnormal transaction patterns.

Addressing the bank’s automated monitoring capabilities, the Court stated verbatim:

“…as the real-time fraud detection system at the bank ‘failed’ to read the three consecutive red flags (abnormal chronological sequence, speed of transactions, depletion of 67% of the credit limit within seconds), which constitutes a fundamental error in the design of the risk assessment model.”

The Court further highlighted the discrepancy between the standard of care expected from institutions utilizing advanced technologies and the bank’s actual security measures, noting verbatim:

“Furthermore, the bank’s reliance on the OTP code alone without establishing strict and comprehensive auditing scenarios when receiving a request to add a card to a digital wallet constitutes a clear banking shortcoming that contradicts the level of due diligence expected from a financial institution claiming to possess advanced artificial intelligence systems.”

Based on these findings, the Court cleared the claimant of the disputed debt and ordered the bank and the fraudulent merchant to pay compensation for the material and moral damages incurred.

UAE Financial Regulation: The SCA Framework on AI Risks

This first-of-its-kind judicial finding in Abu Dhabi is closely aligned with the regulatory groundwork previously laid by the UAE Securities and Commodities Authority (SCA). Under the Decision of the Chairman of the SCA Board of Directors No. (13/R.M) of 2021 concerning the Rulebook for Financial Activities, the UAE regulator proactively defined the operational standards and specific liabilities associated with AI in finance.

The SCA Rulebook explicitly defines “AI Risks” (مخاطر الذكاء الاصطناعي) as hazards arising from the use of AI systems or algorithms in providing financial services. Crucially, the SCA identifies several technical failures that trigger institutional accountability, including:

- **Model Drift (انحراف النماذج):** Variations caused by changing input data or data imbalances.
- **Hallucination (القرارات غير المنطقية أو غير المتوقعة):** Illogical or unexpected decisions generated by the system.
- **Explainability Loss (فقدان القدرة على تفسير المخرجات):** The inability to interpret or explain the outputs generated by the AI.
- **Algorithmic Bias (التحيز الخوارزمي):** Flaws leading to unfair or inequitable results for certain consumer categories, often due to inappropriate or outdated training data.

Furthermore, for automated systems such as Robo-Advisors, the SCA mandates rigorous “Stress Testing” (اختبار الجهد) to simulate extreme scenarios, ensuring the accuracy and stability of these algorithms. The Abu Dhabi Court's penalization of the bank for a "fundamental error in the design of the risk assessment model" directly reflects the legal consequences of failing to mitigate the AI risks codified by the SCA.

The UAE's Stance on AI Policy (September 2024)

This intersection of judicial oversight and financial regulation is further reinforced by the UAE's broader national policy. In September 2024, the UAE published its "Position on Artificial Intelligence Policy at the International Level." The policy outlines six core guiding principles for AI development: Progress, Cooperation, Society, Ethics, Sustainability, and Safety.

For financial institutions, the principles of *Ethics* and *Safety* are paramount. The UAE has adopted an 8-principle ethical framework designed to ensure fair and safe treatment for all members of society. When AI systems unfairly penalize consumers for sophisticated fraud that the institution's own algorithms failed to detect, as ruled in Case No. 762, it directly contravenes this mandate. The judgment demonstrates that the UAE views AI innovation as inseparable from robust governance, ethical deployment, and strict consumer protection.

Global AI Considerations: The Institutional Liability Landscape

This inaugural UAE judgment is not an isolated development; it represents the localized application of a growing international regulatory shift regarding institutional liability for the use of AI.

- **The European Union:** Under the EU Artificial Intelligence Act, AI systems used to evaluate creditworthiness or assess risks in financial services are classified as "high-risk." This classification requires financial institutions to implement rigorous risk management systems and maintain continuous human oversight. The framework creates a direct line of accountability, meaning institutions are liable if their AI models exhibit systemic flaws.

- **The United States:** The Consumer Financial Protection Bureau (CFPB) has issued guidance emphasizing that the deployment of complex or "black-box" AI models does not exempt financial institutions from consumer protection laws. If an automated system fails to protect consumers or violates regulations, the institution bears direct liability. The CFPB maintains that institutions cannot use technological complexity as a defense for operational failures.
- **The United Kingdom:** The UK's Financial Conduct Authority (FCA) approaches AI liability through existing frameworks such as the Consumer Duty, which requires firms to proactively deliver good outcomes and avoid foreseeable harm. If an automated fraud-detection system fails to identify obvious anomalies, the FCA considers this a breach of the firm's overarching regulatory duties, holding senior management directly accountable.

Conclusion

The first judgment on AI liability in the UAE sets a clear and operational standard for the Middle East: the integration of AI and automated decision-making into financial operations requires a highly elevated legal duty of care. As evidenced by this precedent from the Abu Dhabi Commercial Court, supported by the SCA Rulebook's codification of AI risks and the UAE's September 2024 AI policy, judiciaries and regulators will evaluate the actual operational effectiveness of algorithms rather than deferring to traditional contractual defenses.

Wasel & Wasel advises on complex commercial disputes, international arbitration, and cross-border financial *litigation within the UAE courts and the broader GCC. The firm represents financial institutions, investors, technology companies, and commercial entities in high-stakes proceedings before the UAE Federal and Emirate-level Courts. Our practice includes navigating emerging technology and AI liability claims, managing multi-jurisdictional financial disputes, and enforcing regulatory and contractual rights amidst a rapidly evolving digital economy.*

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Enforcing Arbitral Awards After the Abolition of the DIFC-LCIA: The Ontario Court of Appeal's Pragmatic Approach

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The abrupt abolition of the Dubai International Financial Centre Arbitration Institute (the DIFC-LCIA Arbitration Centre) by the government of Dubai in September 2021 left the international dispute resolution community with a pressing dilemma. With the enactment of "Decree 34," the rights and obligations of the DIFC-LCIA were transferred to the Dubai International Arbitration Centre (DIAC). This raised a critical question: does the extinguishing of the DIFC-LCIA structure prejudice the enforcement of an award rendered under the substituted DIAC rules, when the underlying contract explicitly referenced the now-defunct DIFC-LCIA provisions?

Recently, the Court of Appeal for Ontario provided a clear answer for Canada (or at least Ontario) in its unanimous decision, *InFrontier AF LP v. Rahmani*, 2026 ONCA 289. The Court confirmed that the dissolution of the DIFC-LCIA structure does not inherently prejudice the enforcement of an award, charting a thoughtful path forward based on contractual interpretation.

The Background of the Dispute

The dispute arose from a September 2020 Term Loan Agreement involving a United Kingdom-based private equity firm, InFrontier AF LP, and Roeen Rahmani, who guaranteed a substantial loan. The parties explicitly agreed that disputes were to be resolved by arbitration in the Dubai International Financial Centre under the DIFC-LCIA Rules.

By the time the respondent commenced arbitration proceedings in 2023 for an alleged default, Decree 34 had abolished the DIFC Arbitration Institute. A joint press release by DIAC and the London Court of International Arbitration subsequently confirmed that arbitrations commenced after March 21, 2022, under agreements referencing the DIFC-LCIA Rules, would be administered under the new DIAC Rules.

Over the appellant’s objections, the arbitration was conducted under the DIAC Rules, culminating in an award ordering him to pay over $2.5 million USD. When the respondent sought to recognize and enforce this award in Ontario, the appellant resisted. Relying on Article V 1(d) of the New York Convention, he argued that the arbitral procedure “was not in accordance with the agreement of the parties” because they had contracted for the DIFC-LCIA Rules, not the DIAC Rules.

The Court’s Analysis: Contractual Interpretation

Writing for the Court, Justice Zarnett upheld the enforcement of the award. Rather than viewing the application of the DIAC Rules as an unlawful override by a foreign state, the Court framed the issue primarily as a matter of contractual interpretation.

Justice Zarnett observed that the application judge “did not, contrary to the Convention, allow the law of the place of arbitration to oust or override the parties’ agreement as to the applicable procedure. Rather, he interpreted their agreement to determine what procedure they had agreed to.” The Court closely examined the Preamble to the DIFC-LCIA Rules, which provided that agreeing parties were bound by those rules or “such amended version of those rules as the DIFC-LCIA Arbitration Centre may have adopted hereafter to take effect before the commencement of the arbitration”.

Addressing the appellant’s concern that relying on Dubai law to determine the applicable rules was improper, the Court respectfully disagreed. Justice Zarnett explained that “the parties’ Agreement about procedure makes the law of the place of arbitration relevant to the question of what rules the parties agreed to.” Because the parties had agreed to an evolving framework, the application judge was entitled to consider the foreign decree to determine that the DIAC Rules legally constituted the amended version of the DIFC-LCIA Rules.

The Court also dismissed the appellant’s public policy arguments, recalling the high threshold required: “to succeed on [the public policy ground] the award must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal.”

Global Perspectives: A Fractured Consensus

The Ontario Court of Appeal’s decision is particularly noteworthy when viewed alongside judgments from other jurisdictions grappling with the exact same institutional transition. As the Court politely acknowledged in a footnote, the international consensus remains fractured.

The courts of Singapore have taken a restrictive view. In *DFL v DFM*, [2024] SGHC 71 (affirmed at [2024] SGCA 41), the Singaporean judiciary viewed the differences between the two sets of rules as significant, demonstrating a reluctance to enforce awards where parties were subjected to a substituted institutional framework.

Conversely, the United States Court of Appeals for the Fifth Circuit adopted a pro-enforcement stance in *Baker Hughes Saudi Arabia Company Limited v. Dynamic Industries, Incorporated*, 126 F (4th) 1073 (5th Cir. 2025), dismissing concerns by characterizing the two sets of rules as “nearly identical.”

Ontario has charted a sophisticated middle ground. By rooting its decision firmly in the contractual interpretation of the phrase “such amended version,” the Court of Appeal elegantly sidestepped the need to conduct a comparative analysis of the institutional rules. As Justice Zarnett noted regarding the debate over whether the rules were materially different or nearly identical, “In view of the conclusion above, it is unnecessary to consider either question.”

Conclusion

With *InFrontier AF LP v. Rahmani*, the Court of Appeal for Ontario has provided a straightforward and commercially sensible judgment. By meticulously interpreting standard institutional preambles to encompass state-mandated amendments, the Court successfully ensured that the extinguishing of the DIFC-LCIA structure does not prejudice the enforcement of arbitral awards in Canada. It is a welcome decision that respects party autonomy while offering a practical solution to unexpected shifts in international dispute resolution.

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A Reading of the High Court of Australia Transcript on the Nature of Cryptocurrency in Poulton v Conrad: Judicial Considerations of Whether a Bitcoin Holding Can Be Possessed and Protected by the Torts of Conversion and Detinue

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A Reading of the High Court of Australia Transcript on the Nature of Cryptocurrency in *Poulton v Conrad*: Judicial Considerations of Whether a Bitcoin Holding Can Be Possessed and Protected by the Torts of Conversion and Detinue

In August 2026, the High Court of Australia heard oral arguments in *Poulton v Conrad* [2026] HCATrans 44, addressing a foundational question in digital asset law: can a Bitcoin holding be possessed at common law, and therefore be protected by the traditional torts of conversion and detinue? The transcript provides an extensive view of how an apex court assesses the integration of decentralized digital assets into established property paradigms. The inquiries raised by the Justices highlight the mechanical and conceptual difficulties of applying historic torts to modern technology. These deliberations hold significant implications for the cryptocurrency industry across common law jurisdictions, including the United Kingdom (UK), the Dubai International Financial Centre (DIFC), the Abu Dhabi Global Market (ADGM), Hong Kong, and the British Virgin Islands (BVI).

Identifying the "Thing"

A threshold issue for the Court was defining the exact subject matter of the dispute. To establish the torts of conversion or detinue, a claimant must prove interference with a possessory right over a specific, identifiable "thing."

Justice Gordon repeatedly sought clarity on this classification, asking counsel to isolate the exact asset in question: "Are we talking about the private key? Are we talking about the private key with the public key? Are we talking about the private key, plus the private key, plus something else?" She emphasized that "when we are talking about a legal relation, it is identification of the thing, whatever it is, between the two parties."

The respondent submitted that the relevant object is the Unspent Transaction Output (UTXO), the record of value on the public ledger. Justice Gleeson summarized the structural necessity of this identification: "But you need 'thing' in order to get possession, and you need possession in order to get the tort."

However, the appellant characterized Bitcoin as an "ideational asset," asserting that "bitcoin is just a string of data.

There is no coin, nothing tangible. There is nothing backing bitcoin; there is no promise, no resource," and argued that "information is not property, no matter how valuable or useful."

Justice Edelman expressed skepticism toward utilizing broad labels to solve specific legal questions. "I mean, I find this going round in circles with definitions of 'property' which apply in different ways, with different elements, in different contexts, to be incredibly unhelpful," he remarked. Instead, he tested a functional definition, asking whether there is anything wrong with "describing bitcoin as a liberty to alter the ledger?"

The Absence of a Counterparty and the Rule of Law

A crucial distinction between Bitcoin and traditional financial intangibles, such as bank accounts, is the absence of a centralized debtor. Justice Beech-Jones explored this distinction by comparing Bitcoin to a physical commodity rather than a contractual right.

Responding to analogies drawn between Bitcoin and fiat currency deposited in a bank, Justice Beech-Jones observed: "when we talk about a chose in action in the form of a debt in a bank, the thing is the debt owed by the bank to the individual. So, there is effectively a counterparty." He contrasted this with physical property: "When you own a diamond, there is no counterparty – it is the world. There is no counterparty obligation." Applying this to the crypto asset, he asked, "Are you not saying, well, the relevant analogy is bitcoin is not like a chose in action in that sense, because it is not a cause of action or a debt or a contractual right or anything of that kind against, say, the bank. It exists against the world – on one view, either against the world or against no one."

This architecture, an asset with no counterparty obligations maintained by a consensus protocol, prompted Justice Steward to question the legal enforceability of the network. He asked whether Bitcoin is simply "an unenforceable congeries of rights" and whether the appellant's argument meant that "bitcoin sits outside an ascertainable system of the rule of law – it is almost anarchial – and it cannot give rise to something that we can recognise at law?"

Systemic Legal Consequences and "The Gap"

The Justices critically assessed whether it was necessary to extend conversion and detinue, which are historically chattel torts, to intangible assets. Justice Edelman warned of the downstream effects on other legal domains, asking: "if one were to change the torts of conversion and detinue and extend them beyond tangible things or assets, then what would that do to other areas of the law?"

Both Justice Edelman and Justice Gordon interrogated whether there was a genuine legal vacuum requiring this extension. Justice Edelman pressed the respondent: "What is the gap? What is the factual scenario where an interference with somebody's so-called bitcoin – to use the term compendiously – would not give rise to an adequate legal remedy?" Justice Gordon similarly asked, "are there other remedies available that would give you the same relief?", noting that claims based on agency, breach of confidence, or contract might already provide adequate recourse without altering personal property torts.

Normative Choices and Third-Party Risks

Chief Justice Gageler framed the dispute as a policy decision for the common law. Noting that property is universally described as a legal relationship with a thing, he stated: "The question here is at the level of: should a legal relationship be recognised?" He subsequently outlined the challenge: "The question we have to address is whether the existing principles need to be adapted to meet it."

A major consequence of that normative choice involves third-party rights. The tort of conversion operates on strict liability. Gageler CJ noted the historical treatment of physical money: "If you steal money from me – if you take money out of my pocket, I can sue you for conversion, can I not?… If you then use the money to buy something from an innocent third party, I cannot sue the innocent third party who then holds the coin." He observed that "it is the negotiability of the property that allows for the innocent third party to have a defence."

He then pressed the respondent on whether Bitcoin possesses this attribute, asking, "Is bitcoin a currency? Is it negotiable?" If a court allows conversion claims for Bitcoin but does not extend a good-faith purchaser defense, an innocent third party who receives stolen Bitcoin could be strictly liable to the original owner.

Global Implications for Common Law Jurisdictions

The judicial debate in *Poulton v Conrad* is highly significant for the global cryptocurrency industry, particularly in offshore and regional financial hubs that rely on the common law. Jurisdictions such as the UK, DIFC, ADGM, Hong Kong, and the BVI frequently look to apex courts in Australia and England to clarify the treatment of novel commercial assets.

If the High Court of Australia rules that a Bitcoin holding is capable of possession and subject to conversion, it provides plaintiffs with a strict-liability proprietary remedy. Conversion does not require a breach of contract or fiduciary duty; it is an assertion of superior title against anyone who interferes with the asset. For digital asset exchanges, liquidators, and victims of cryptocurrency theft in hubs like Dubai, Hong Kong or the BVI, this would streamline asset recovery, establishing a direct claim over stolen digital assets and circumventing complex equitable tracing rules.

Conversely, if the Court determines that extending possessory torts to intangibles disrupts established law and that plaintiffs should rely on equitable and contractual remedies, industry participants will need to structure their custodial and trading agreements with greater reliance on express trusts and strictly drafted indemnities. Furthermore, if strict liability torts are applied without recognizing cryptocurrency as negotiable, digital asset exchanges in the DIFC or ADGM could face severe compliance and liability risks when handling deposited assets that may be tainted by prior theft.

Ultimately, the High Court’s examination of the UTXO, physical control, and the boundaries of personal property will shape the commercial realities and legal architecture of the digital asset economy across the common law world.

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War Series: The Multipolar Sanctions Minefield – China’s Supreme Court Outlaws “Overcompliance” with U.S. Sanctions

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The Headline Event: Overcompliance is Now a Direct Liability

In a landmark directive with immediate, severe implications for global supply chains and cross-border finance, China's Supreme People's Court (SPC) has formally utilized its 2021 Anti-Foreign Sanctions Law (AFSL). By elevating a recent Shanghai Maritime Court ruling into its official case database and giving it "strong exemplary significance," the SPC has established the mandatory application of the AFSL in commercial disputes.

The Crux: The End of the Sanctions "Safe Harbor"

The crux of this development is simple but overcoming: actions taken to comply with Western sanctions now systematically trigger legal liability within Chinese jurisdiction. There is seemingly no longer a neutral ground.

Historically, when Washington escalated economic restrictions, the corporate playbook was uniform: comply (or potentially overcomply) to avoid regulatory wrath, and sever or drawdown ties with targeted entities. Financial institutions relied on boilerplate "draw-stops." Logistics providers invoked the "fear of secondary sanctions" to halt shipments. Losses from these broken contracts were absorbed as the cost of doing business to appease the U.S. Office of Foreign Assets Control (OFAC).

That unipolar reality is now subject to reconsideration. The SPC has explicitly established that preemptive overcompliance to appease Western regulators may trigger lawsuits, asset seizures, and countermeasures inside China. Under the AFSL, enforcing or assisting in foreign "discriminatory restrictions" against a Chinese party is itself an illegal act.

The Precedent: The $740,000 Price of Obeying OFAC

The facts of the precedent-setting case are a wake-up call for international compliance officers. In late 2022, a Hong Kong-based company hired a Singaporean carrier to transport roughly RMB 4.99 million (USD 740,000) worth of electronics from Shanghai to Panama.

After loading the cargo, the Singaporean carrier discovered the Hong Kong shipper was on a U.S. sanctions list. To avoid secondary penalties from Washington, the carrier abruptly halted performance. It refused to issue a bill of lading, refused to deliver the cargo in Panama, and unilaterally shipped the goods back to Shanghai.

When the shipper sued for damages in China, the carrier defended its actions by citing standard contractual clauses, the overarching risk of U.S. secondary sanctions, and a foreign choice-of-law provision.

The Shanghai Maritime Court firmly rejected this defense, ordering the carrier to pay the full cargo value of RMB 4.99 million plus interest.

The Legal Trap: Voiding Boilerplate Defenses

The court's reasoning causes caution to traditional corporate defenses and establishes two significant realities for foreign businesses:

1. **Foreign Sanctions Are Not "Force Majeure":** The court ruled that the preemptive fear of foreign secondary sanctions does not excuse contractual non-performance. The carrier was not responding to a direct U.S. legal order; it acted out of internal compliance fears. The Chinese court viewed this preemptive overcompliance as actively assisting in illegal foreign discrimination.
2. **Contracts Cannot Override Chinese Law:** The carrier attempted to invoke Singaporean law based on its standard bill-of-lading terms. The court blocked this attempt, declaring the AFSL a mandatory provision of Chinese public policy. If a dispute involves Chinese

interests, Chinese courts will bypass foreign choice-of-law or international arbitration clauses to enforce the AFSL.

The Squeeze on Global Lenders and Supply Chains

This ruling places international lenders and logistics providers directly in the crosshairs. Because the SPC has mandated the AFSL's application, triggering a draw-stop against a Chinese entity out of fear of Western sanctions strips a lender of contractual protections within China. The traditional corporate protocol, assess exposure, freeze the account, and cease all communications before a regulatory deadline, is now a risk to being sued in a Chinese court, where foreign fora or arbitration protections may be disregarded.

Businesses can no longer rely on a passive, one-sided compliance approach. For corporate boards and legal counsel managing cross-border transactions, this precedent demands a tactical pivot. Standard OFAC-compliance clauses, automatic termination rights, and sanctions-related draw-stops are now highly vulnerable. Contracts involving Chinese entities must be revised to include localized grace periods or alternative performance mechanisms that do not explicitly cite "compliance with foreign sanctions" as a trigger for termination. Companies should also consider proactively engage in structured, court-facilitated mediations to engineer a structured settlement that safely navigates the fault lines of both U.S. and Chinese law.

Takeaway

Global businesses no longer face a single dominant regulatory regime. China's Supreme People's Court has delivered a definitive mandate: U.S. sanctions are not a valid excuse for disrupting Chinese commerce. Multinational entities must recognize that the very mechanisms they historically used to protect themselves from Western regulators are now the exact triggers for liability in the East. Navigating this multipolar minefield requires abandoning passive compliance in favor of highly sophisticated, transaction-specific risk management.

Wasel & Wasel advises on complex commercial disputes, international arbitration, and cross-border financial litigation. The firm represents international contractors, investors, and commercial entities in high-stakes proceedings before various courts and tribunals. Our practice includes navigating complex force majeure claims, managing multi-jurisdictional financial and trade disputes, and enforcing contractual rights amidst geopolitical crises and conflicting global regulatory regimes.

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Data Center Warfare and the Evidentiary Threshold for Financial Force Majeure – Applying the 2026 Dubai Cassation Court’s Banking Disruption Precedent to the

Iran War

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Introduction: Data Center Warfare, AI Targeting, and the Cross-Border Liquidity Squeeze

The 2026 Iran War, initiated by joint U.S.-Israeli airstrikes under Operation Epic Fury on February 28, 2026, has fundamentally altered the risk profile of commercial operations across the Middle East. Beyond traditional geopolitical and economic risks, the current conflict has escalated into "data center warfare," directly impacting the physical digital infrastructure that underpins international banking networks and cross-border liquidity.

As extensively documented in recent months, kinetic strikes on hyperscale cloud infrastructure have transitioned the risk of "banking disruptions" from a theoretical geopolitical issue to a tangible commercial crisis. This targeting is driven by the increasing commingling of civilian tech infrastructure with military intelligence. With U.S. and allied forces utilizing commercial AI models, such as Anthropic's Claude embedded in Palantir's Maven Smart System, for military targeting, commercial data infrastructure has been treated as a dual-use battlefield asset. Consequently, on March 1, 2026, Iranian Shahed drones struck Amazon Web Services (AWS) data centers in the United Arab Emirates and Bahrain.

According to *Responsible Statecraft* ("Why Gulf data centers became deliberate targets in Iran War"), these strikes "knocked out banking apps across a region of 50 million people." *TechPolicy.Press* further reports that the attacks critically impaired the UAE's ME-CENTRAL-1 cloud availability zones, causing immediate outages for major regional financial institutions, including Abu Dhabi Commercial Bank, Emirates NBD, and First Abu Dhabi Bank. The broader financial impacts were immediate: while the GCC's Islamic banking sector demonstrated structural resilience, maintaining 17.1% Tier 1 capital ratios with zero Fitch-rated sukuk defaults, cross-border liquidity tightened severely, and new dollar-denominated GCC sukuk issuance collapsed to zero in March 2026.

This disruption is both reciprocal and systemic. As noted by Georgia Tech, retaliatory strikes on March 11 targeted a Tehran data center operated by Iran's state-run Bank Sepah. The Modern War Institute highlighted that this emerging doctrine of targeting data centers deliberately disrupts digital services to banks and payment platforms to exert coercive economic leverage.

As these infrastructure disruptions choke international liquidity and delay wire transfers, commercial parties in the Gulf Cooperation Council (GCC) may seek to invoke these highly publicized "banking disruptions" and data center outages as a force majeure defense to excuse delayed payments or prevent the forfeiture of transaction deposits. However, as Dubai Court of Cassation Judgment No. 1004 of 2026 (Real Estate), issued on June 29, 2026, demonstrates, invoking the conflict as a blanket excuse for financial non-performance requires meeting a strict legal standard.

The Factual Matrix: The Real Estate Default and the "Regional Tensions" Defense

The dispute in Dubai Cassation Judgment No. 1004/2026 involved a high-value real estate transaction. On April 24, 2025, the appellant (the buyer) entered into a contract to purchase a plot of land in Dubai's Wadi Al Safa 3 for AED 22,000,000. Upon signing, the buyer issued a security cheque of AED 2,200,000 as earnest money (*Arboun*), with the remaining AED 19,800,000 due by June 24, 2025.

When the deadline arrived, the buyer had not transferred the remaining funds. Consequently, the sellers filed a lawsuit to terminate the contract and liquidate the AED 2.2 million *Arboun* cheque.

In their defense before the UAE courts, the buyer argued that the failure to pay was not a voluntary breach, but rather the result of force majeure circumstances. Pointing to the well-documented strikes on regional cloud infrastructure, the buyer asserted that the “regional tensions and the war” had directly affected international bank transfers, creating a circumstance completely beyond their control that prevented them from remitting the balance from abroad. The buyer further relied on electronic correspondence demonstrating their serious intent to close the transaction, noting they had explicitly requested an extension until the international banking disruptions subsided, which the sellers had refused.

The Court’s Ruling: Piercing the Blanket Defense of Wartime Disruption

The Dubai Court of Cassation rejected the buyer’s defense, ruling in favor of the sellers and affirming their right to terminate the agreement and retain the AED 2.2 million deposit.

Relying on Article 137 of the UAE Civil Transactions Law (Federal Decree-Law No. 25 of 2025), the Court reaffirmed that an *Arboun* payment makes a contract binding; if the buyer subsequently withdraws or fails to perform, the deposit is forfeited. The Court ruled that general claims of “regional tensions” and widely reported cloud banking disruptions do not automatically equate to a legal impossibility to perform.

The Court’s strict stance on financial obligations provides a stark contrast to how regional commercial entities handle physical trade disruptions. For example, following the closure of the Strait of Hormuz in March 2026, QatarEnergy successfully declared force majeure on its LNG supply contracts. While a maritime blockade constitutes an absolute physical impossibility for shipping a localized physical commodity, the Dubai courts recognize that *money is fungible*. A localized cloud outage does not inherently extinguish the ability to source funds globally. The Court found that the buyer was effectively attempting to use macro-level digital and infrastructural instability as a blanket excuse without proving a direct, insurmountable impediment to their specific transaction.

The Implied Evidentiary Threshold for Financial Force Majeure

Crucially, even though the Dubai Court of Cassation rejected the force majeure argument in this specific instance, its reasoning explicitly identified the exact evidence that would have been required to successfully substantiate a defense based on wartime banking disruption.

The Court noted that the defense failed because the buyer *“did not submit any document from a banking entity proving the impossibility of the transfer or its rejection, or anything indicating the existence of a legal ban or freezing of accounts, or an actual impediment preventing payment by any alternative means.”*

Despite highly publicized AWS data center outages and physical strikes on regional tech hubs, the definitive threshold for proving financial force majeure during the 2026 Iran War requires a party to produce:

1. **Official Banking Documentation of Rejection:** Citing reports from *TechPolicy.Press* or global news outlets about targeted strikes on cloud infrastructure is legally insufficient. A litigant must present authenticated documentation issued directly by their specific financial institution explicitly proving the absolute impossibility of the transfer or its outright rejection due to these outages.

2. **Proof of Legal Bans or Frozen Assets:** Administrative delays caused by compromised AWS availability zones do not constitute force majeure. A successful defense requires evidence of a formal legal prohibition, such as wartime capital controls, international sanctions, or official documentation proving that the remitting accounts were frozen by regulatory authorities directly due to the conflict.
3. **Exhaustion of Alternative Payment Methods:** This establishes the highest evidentiary hurdle. Under UAE civil law, financial obligations are rarely extinguished by external events because money is fungible. The Court explicitly required proof of an "actual impediment preventing payment by any alternative means." A party must demonstrate that they were entirely blocked from utilizing alternative financial routing, third-party liquidity, local assets, or localized credit facilities to fulfill the obligation, even when primary cloud or telecom routes failed.

Strategic Playbook for Cross-Border Financial Obligations in the 2026 Context

For commercial counterparties and foreign investors managing cross-border transactions amidst the infrastructural vulnerabilities of the 2026 Iran War, Judgment No. 1004/2026 offers critical tactical guidance:

- **Securing Immediate Institutional Evidence:** If data center attacks or wartime cyber measures block a transfer, counterparties must immediately demand formal written explanations from their banks. Official bank documentation explicitly linking the transaction's failure to the infrastructural outage is mandatory for GCC court litigation.
- **Structuring Redundant Payment Channels:** Because courts require proof that payment was impossible by any alternative means, corporate entities should structure

transactions with contingency payment mechanisms in mind (e.g., GCC-based escrow facilities, localized credit lines, or secondary banking networks unaffected by specific AWS/cloud outages) to bypass cross-border bottlenecks.

- **Precision in Contract Drafting for Dual-Use Infrastructure:** Standard force majeure clauses often fail to protect against financial delays. Because commercial cloud platforms are increasingly targeted as dual-use military infrastructure due to AI integrations, contracts drafted during the conflict should explicitly define "data center outages," "cloud infrastructure attacks," or "banking network disruptions" as specific trigger events that warrant predefined grace periods, avoiding the draconian legal standard of absolute impossibility.

Takeaway

The technological and infrastructural turbulence generated by the 2026 Iran War cannot be used as a blanket legal shield for failing to meet commercial obligations. Dubai Court of Cassation Judgment No. 1004/2026 firmly establishes that while UAE courts recognize the severe realities of regional conflict, from drone strikes on AWS availability zones to crippled digital banking platforms, they require stringent, localized, and specific evidentiary standards to disrupt the sanctity of a contract. To successfully claim financial force majeure, parties must cross a high evidentiary threshold, transitioning from broad geopolitical and infrastructural arguments to producing highly specific, bank-issued proof of absolute impossibility and the total exhaustion of alternative payment methods.

Wasel & Wasel advises on complex commercial disputes, international arbitration, and cross-border financial litigation within the UAE courts and the broader GCC. The firm represents international contractors, investors, and *commercial entities in high-stakes proceedings before the UAE Federal and Emirate-level Courts. Our practice includes navigating force majeure claims, managing multi-jurisdictional financial disputes, and enforcing contractual rights amidst geopolitical and regional crises.*

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The FAA Joins the Global Air Taxi Race: New Rules for eVTOLs and Supersonic Flight by 2027

September 3, 2026

At the Farnborough Airshow on 21 July 2026, the FAA announced that it would move to certify electric air taxis, civil supersonic aircraft, expanded drone operations, and commercial space launches, and that it would avoid being "too prescriptive" and let industry drive innovation.

Since 1973, 14 CFR § 91.817 has prohibited operating a civil aircraft over the United States above true Mach 1 speed. The only exception is a Special Flight Authorization for research and testing in isolated areas. The rule sits on the FAA's noise authority at 49 U.S.C. § 44715 and safety authority at § 44701. The FAA adopted it because the sonic boom measurement and mitigation technology of the era could not control overpressure at the source, so the FAA instead banned the speed outright.

Concorde is the most infamous example which absorbed the cost as the Anglo-French airliner entered service in 1976 and cruised at Mach 2, but § 91.817 forced it subsonic over US land. That confined the Concorde to transatlantic routes, and only London to New York turned a consistent profit. Fuel burn, the fatal 2000 Air France crash, and collapsing demand after 2001 resulted in the fleet’s retirement in 2003. No civil supersonic aircraft has carried a paying passenger since.

The reversal began in June 2025 with Executive Order 14304, titled “Leading the World in Supersonic Flight,” directing the FAA to repeal the overland prohibition within 180 days, set an interim noise-based certification standard, and revise § 91.818. The FAA issued the notice of proposed rulemaking “Enabling Supersonic Overland Flight” (Docket FAA-2026-6935) in the Federal Register on 2 July 2026, replacing the Mach-based ban with a performance standard. The FAA targets final rules, including a companion takeoff and landing noise rule, by mid-2027.

Under the Administrative Procedure Act, the FAA may repeal its own rule through notices and comment provided it gives a reasoned explanation for abandoning the premises that justified it. The record does that, citing advancements in boom-shaping and acoustic modeling since 1973. The House passed the Supersonic Aviation Modernization Act (H.R. 3410) in March 2026; Senate passage would codify the standard and remove the deference exposure left by Loper Bright.

Air taxis follow the same method. Electric vertical takeoff and landing aircraft (“eVTOLs”), functioning as a quiet, green hybrid between a helicopter and a small plane, are certified as a special class; the FAA’s integration pilot programme, launched in March 2026, now covers eight companies across 26 states and is generating the data certification and community acceptance required for nationwide eVTOLS. The commercial value for these aircraft is the routes that they make possible: short intra-city flights for the air taxis, and long city-to-city routes for the supersonic jets. The most illustrative example is New York to Los Angeles; overland supersonic flights could cover the route in under two and a half hours, whereas Concorde never could because of the 1973 ban.

The air taxi and supersonic rules are not separate developments. Taken together, they show the FAA building a single framework for point-to-point travel via short vertical flights within cities, supersonic flights between them, and eventually suborbital launches between distant points, which the FAA’s Office of Commercial Space Transportation already licenses under 51 U.S.C. chapter 509. All three rely on the same shift. Instead of banning the category of flight outright, the FAA sets a measurable limit on noise, safety, and sonic boom overpressure and clears any operator who meets it. If the FAA keeps that approach in its 2027 final rules, it becomes the certification model for point-to-point transportation for the next decade.

The race is already global and running rapidly. China’s EHang holds the world’s first eVTOL type certificate and has carried paying passengers on its autonomous EH216-S in Guangzhou and Hefei, adding a Shenzhen to Hong Kong route in January 2026. The UAE granted Joby Aviation a six-year exclusive with Dubai’s Road and Transport Authority and Archer have a parallel Abu Dhabi program, both targeting commercial service in late 2026 or early 2027. The UK is slower but deliberate with the Civil Aviation Authority targeting initial commercial passenger eVTOL flights by end-2028 or early 2029. For operators and investors, the optimal route is pursuing certification in the jurisdiction offering the most expeditious pathway, accumulating a demonstrable operational record, and leveraging that record within the US framework as the FAA finalizes its rules by mid-2027. The variable to watch is which standard each regulator adopts and whether there is reciprocal recognition of another authority's approvals.

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China's Space Momentum: The Long March 10B Catch, a State-Curated Consortium, and a Bifurcating Market

September 3, 2026

On 10 July 2026, China became only the second nation, after the United States, to recover an orbital-class booster under control, and the first anywhere to do so with a net rather than landing legs. The state-owned China Academy of Launch Vehicle Technology intends to re-fly the same stage before year's end.

The engineering is novel, but the more consequential story is legal and commercial. Reusability is the mechanism through which SpaceX collapsed launch costs and captured most of the world's orbital launches. Net capture removes landing-leg mass from the vehicle and shifts it to the recovery infrastructure, freeing payload and, if it scales, lowering cost per kilogram. A credible second source of low-cost, high-cadence launch would cause ripples across the commercial launch market.

A state-curated commercial base

The timing of the booster is not coincidental. On 1 July 2026, a body under the China State Administration of Science, Technology and Industry for National Defense published the membership of the national commercial space consortium established at China’s Space Day in April 2025. The roster runs to 271 vetted entities across nine groups, from launch and satellite manufacturing to ground segment and financial services. Because membership followed voluntary application and deliberate vetting, the list functions as a signal of which players the state treats as serious and which domains it intends to back: direct-to-device and non-terrestrial networks as a full value chain, commercial human spaceflight, hypersonic spaceplanes, and orbital compute.

The membership captures the state-commercial hybrid that defines Chinese “new space,” pairing state-linked launch arms with venture-backed firms that have independently reached orbit, alongside satellite operators. Whilst officially a coordination mechanism for policy, standards, and supply-demand matching, China has not yet enacted a dedicated national space law and thus the consortium, paired with China National Space Administration’s November 2025 action plan on commercial space, operates as an interim instrument for steering the sector and curating its industrial base. For counterparties, it also clarifies which Chinese entities are established, state-endorsed, and, almost uniformly, dual-use.

Two blocs, two legal regimes

The same rocket technology that is used by the Long March 10B supports the Long March 10A, the vehicle designed to carry China’s crew spacecraft and lander to the Moon before 2030 and eventually to the International Lunar Research Station (“ILRS”). The ILRS, led by China and Russia, is the rival to the U.S.-led Artemis Accords. It has become a real consortium, drawing in about seventeen countries and international organizations and more than fifty research institutions, including Pakistan, the UAE, Senegal, Venezuela, and Turkey. The Artemis Accords, by comparison, have sixty-six signatories. Two camps are taking shape, each with its own rockets, partners, and view of the law.

Export control is the force consolidating them. The Wolf Amendment bars NASA from bilateral cooperation with China, while International Traffic in Arms Regulations and the Export Administration Regulations restrict the flow of launch, satellite, and component technology, turning bloc affiliation into a threshold commercial decision. Entities wishing to work across both, as several Gulf states presently do, face a genuine compliance tightrope, sharpened by the dual-use character of the newly named Chinese consortium. Critically, Artemis and ILRS advance competing interpretations of the Outer Space Treaty's non-appropriation principle, of "safety zones," and of resource-utilization rights that China will begin to test in 2028.

The takeaway

China's momentum is compounding vis-à-vis a recovered booster, a crewed lunar architecture behind it, and a state-curated commercial base beneath it. The result is a structurally bifurcated market in which launch access, partnership eligibility, financing, insurance, and dispute resolution increasingly depend on which side of an export-control line a venture sits. For governments building space agencies and corporations structuring cross-border ventures, the decisive questions have become substantial questions of law.

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From Part 25 to Part 100: The FCC’s Space Licensing Overhaul Reaches Its Decisive Stage

September 3, 2026

On 1 July 2026, the Federal Communications Commission (“FCC”) released the tentative agenda for the FCC’s Open Meeting scheduled for 22 July 2026. Among the items is *Space Modernization for the 21st Century* (SB Docket No. 25-306), a Report and Order and Further Notice of Proposed Rulemaking (“FNPRM”) that would overhaul how the FCC licenses space and earth stations. The centerpiece is a proposal to sunset Part 25 of the FCC’s rules and replace it with an entirely new rule part, Part 100, built around what the FCC calls a “licensing assembly line.”

This is the resolution stage of a proceeding that opened in October 2025. The FCC adopted the underlying Notice of Proposed Rulemaking (“NPRM”), designated FCC 25,69, on 28 October 2025; comments closed on 20 January 2026 and reply comments on 18 February 2026. The 22 July item would convert those proposals into binding rules, while the accompanying Further Notice seeks comment on additional changes that build on the new Part 100. If adopted, it would represent the most significant restructuring of US commercial space licensing in decades.

The Current Framework: Part 25 Under Strain

Part 25, titled “Satellite Communications,” has governed satellite and earth station licensing for decades. It sits within Subchapter B (Common Carrier Services) and has been revised repeatedly and piecemeal as the industry evolved. Its architecture reflects an earlier era: a small field of largely quasi-governmental, geostationary orbit (“GSO”) operators, reviewed through narrative-heavy, discretionary, case-by-case adjudication.

That model has struggled to scale with the industry. The FCC received circa 290 space station applications and circa 2,680 earth station applications in 2024, compared with 124 and 974 respectively in 2016, tracking a more than ten-fold rise in objects launched into orbit over the past decade. In conjunction, applications have grown more complex and non-traditional, spanning large non-geostationary orbit constellations (“NGSO”), direct-to-device services, Earth observation, in-space servicing, and lunar missions that fit awkwardly within the existing taxonomy.

The strain shows up as delay and unpredictability. Timelines for acting on some applications can run to years and staff spend disproportionate resources sifting through non-standardized materials to establish completeness. The subjective requirements produce inconsistent levels of review and frequent back-and-forth between applicants and the FCC. Given the capital-intensive nature of the industry, where financing depends on speed and demonstrated progress, that uncertainty carries real cost.

The Proposed Overhaul: Part 100 and the “Licensing Assembly Line”

The reform is organized around four statutory review concerns the FCC has identified as the proper focus of its public-interest analysis: harmful interference, spectrum efficiency, space safety, and foreign ownership. Everything else in the process is designed to move applications toward a decision on those questions as efficiently as possible.

A new rule part. Part 100 would be titled “Space and Earth Station Services” and relocated to Subchapter D (Safety and Special Radio Services), reflecting that not all licensees are common carriers but all use radio services. It would be organized into four subparts (General; Applications and Licenses; Operational Rules; and Compliance), separating application requirements from operating obligations and enforcement.

Modular applications and “presumed acceptable” criteria. The assembly line moves applications through three phases: a modular application phase, a processing phase, and a decision phase. Applicants would complete only the modules relevant to their request. For space stations, the FCC proposed condensing requirements into three areas (general applicant information, orbital information, and frequency information) and replacing the current Schedule S with a new Schedule O for orbital data and Schedule F for frequency data on FCC Form 312. The framework shifts from prescriptive design mandates and narrative demonstrations toward standardized, performance-based certifications. Applications certifying compliance with bright-line criteria would be “presumed acceptable,” meaning presumed to serve the public interest, and routed for expedited processing, with defined exceptions reserved for targeted review.

Timelines, conditional grants, and processing rounds. Part 100 would establish review timelines, shorten public notice periods, and permit certain conditional grants so applicants can begin planning earlier. For NGSO systems, the FCC proposed restructuring processing rounds into annual, band-specific rounds in which co-filers share equal spectrum priority (subject to a sunset), and expanding eligibility for first-come, first-served treatment.

Milestones, bonds, and license terms. The proposal would eliminate milestone requirements for GSO systems and align NGSO milestones with International Telecommunication Union benchmarks, including a first-satellite milestone followed by staged deployment obligations. Surety bonds would be removed for GSO stations and certain NGSO stations, and milestones simplified. License terms for most space and earth stations would extend to 20 years, and the list of modifications permitted without prior approval would expand.

Earth stations. The framework would shift predominantly to nationwide, non-site-based blanket licensing and introduce a new "[i]mmovable" earth station category modeled on the 70/80/90 GHz site-registration regime, available to fixed stations that certify compliance with bright-line criteria.

Space safety. In exchange for streamlined entry, operators would take on affirmative safety obligations, including sharing ephemeris data with approved space situational awareness services and filing periodic space safety reports.

Implications for Industry

The FCC has openly positioned the reform as a competitiveness strategy, aiming to make the US the destination of choice for licensing and operating space systems as other nations compete for the same investment. The certification-and-presumption model rewards applicants who can map their systems onto bright-line criteria with fast, predictable grants, an advantage for well-advised operators and a meaningful reduction in regulatory latency across the ecosystem.

With that said, the trade-offs merit close attention. A move from discretionary review to bright-line certification shifts risk onto the applicant: certifications carry compliance and enforcement exposure, and the FCC has signaled a robust back end, including automatic termination for failure to meet operational deadlines or milestones, revocation, forfeitures, and penalties for materially false statements. The reform effectively trades front-loaded scrutiny for back-loaded accountability.

The impact is broad, reaching operators, service providers, and manufacturers, and, because it governs US market access, foreign entities seeking to serve or partner in the US. Several issues remain genuinely contested and will shape how favorable the final rules prove in practice. On transition, the FCC proposed applying Part 100’s procedural rules prospectively to all licensees, including existing ones, while preserving the substantive obligations embedded in current authorizations, and it sought comment on how pending applications would be handled at the effective date. Existing licensees should not assume their current authorizations are fully insulated from the new regime.

What’s Next

The 22 July meeting is a consideration date rather than a foregone conclusion; the draft text remains subject to change, and the Report and Order may adopt the NPRM’s proposals with modifications informed by the comment record. If adopted, the new rules would take effect following Federal Register publication, with the revised Form 312 schedules also subject to Paperwork Reduction Act review before they can be required. The accompanying Further Notice would open a fresh comment cycle on further refinements built on Part 100, so the proceeding will continue well past July.

For anyone active in, or seeking to enter, the US space sector, the practical steps are assessing how current and planned systems would map onto the presumed-acceptable criteria and modular application structure, evaluating the compliance exposure that comes with a certification-based regime, and monitoring the Further Notice for the next round of proposed changes.

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After Almost Three Decades of Strictly Upholding "Back-to-Back" Clauses, the Abu Dhabi Court of Cassation Provides a Reprieve

September 3, 2026

For nearly thirty years, the "back-to-back" or "pay-when-paid" clause has been a standard method for allocating risk in UAE construction contracts. Historically, UAE courts have upheld these provisions as binding conditional obligations, protecting main contractors but often leaving subcontractors with limited legal options during upstream insolvency. However, a recent ruling by the Abu Dhabi Court of Cassation, **Judgment No. 386 of 2026 (Commercial),** issued on 18 June 2026, has shifted this approach, providing subcontractors with a notable reprieve.

By establishing a clear legal framework that allows subcontractors to bypass back-to-back clauses when upstream payment becomes demonstrably impossible, the Court has offered a practical solution for parties facing indefinite payment delays. At **Wasel & Wasel**, we analyze the implications of this judgment, tracing its historical context, examining the Court's precise legal reasoning, and detailing the new standards that construction professionals should consider.

The Historic Approach of UAE Courts

Over the past three decades, UAE courts have generally declined to bypass back-to-back clauses. Under the UAE Civil Transactions Law (the “Civil Code”), specifically Articles 420 to 427, contractual obligations can be made subject to a “suspensive condition” (*Shart Waqif*).

Relying on the legal principle that agreements must be honored (*pacta sunt servanda*), courts consistently interpreted “pay-when-paid” clauses as valid suspensive conditions. Consequently, if a subcontractor filed a claim for payment before the upstream entity had paid the main contractor, UAE courts would routinely dismiss the lawsuit for being filed “prematurely.”

Courts rarely inquired into whether the upstream payment would ever actually materialize. This strict adherence meant subcontractors often faced indefinite delays, bearing the credit risk of a project’s failure without a clear path to recover their dues.

The Factual Background of Judgment No. 386 of 2026

The dispute involved a subcontractor (the Respondent) seeking to recover a 10% retention sum, amounting to AED 2,078,742.93, from a main contractor (the Appellant).

Clause 11 of their subcontract contained an explicit back-to-back provision. It stated that the release of the retention monies was contingent upon the Appellant receiving its own retention funds from the principal contractor.

The project eventually encountered severe financial issues. The principal contractor was terminated and later entered formal bankruptcy proceedings in Dubai. The subcontractor had previously filed a lawsuit in 2024 to recover its dues, but the court applied traditional precedent and dismissed the claim as "premature" because the back-to-back condition remained unfulfilled.

The situation changed when the bankruptcy trustee issued the final, consolidated list of commercial creditors for the principal contractor. Crucially, the Appellant was **not** included on this list. Recognizing that the Appellant would not receive the upstream funds, the subcontractor refiled its lawsuit.

The Legal Development: The "Impossibility Test"

The Abu Dhabi Court of Cassation ruled in favor of the subcontractor. In its reasoning, the Court established what can be termed an "impossibility test" for bypassing back-to-back clauses.

The Court held that while a back-to-back clause is a valid suspensive condition, it cannot delay payment indefinitely if the condition becomes factually or legally impossible to fulfill. Establishing this legal boundary, the Court noted:

> *"However, in the event it is proven that the suspensive condition is incapable of being fulfilled, the effect of the suspension lapses, and the creditor is entitled to demand immediate payment from the debtor, as long as the debtor did not stipulate to the creditor that it would not lapse, and the debt remains an obligation owed by them, rendering the condition impossible to occur due to the expiration and cessation of the suspended obligation owed by the owner in favor of the debtor."*

Applying this principle directly to the facts of the case, the

Court reasoned that the finalization of the principal contractor's bankruptcy proceedings, without the Appellant listed as a recognized creditor, created this legal impossibility:

> *"Consequently, it has become impossible for the employer […] to pay the Appellant's dues, as the creditors to whom the funds […] are to be distributed have been confined under the proceedings of that lawsuit, which renders the suspensive condition relied upon by the Appellant incapable of being fulfilled. Thus, the effect of the suspension lapses, and the Respondent is entitled to demand immediate payment from the Appellant in the present."*

Clarifying Procedural Rules: Addressing *Res Judicata*

The judgment also provided practical procedural clarity. The Appellant attempted to block the lawsuit by arguing *res judicata,* the principle that a matter has already been judged. They claimed that because the subcontractor's identical lawsuit was dismissed in 2024, the matter was legally settled and could not be litigated again.

The Court of Cassation addressed this defense by explaining the legal nature of a "premature" dismissal under UAE procedural law:

> *"Ruling that a claim is inadmissible for being filed prematurely means that the claimed right has not fulfilled a specific condition, or that the time for claiming it has not yet arrived. Therefore, the reality of a judgment of inadmissibility is merely a postponement of filing the lawsuit until its conditions are complete. Once those conditions are fulfilled, the claimant has the right to file the lawsuit anew and claim the very right that was never substantively adjudicated."*

Because the first judgment did not rule on the underlying debt itself, but merely paused the claim while the suspensive condition was still theoretically possible, the subcontractor retained the right to refile once the condition became legally impossible to fulfill.

Strategic Takeaways for the Construction Sector

Judgment No. 386 of 2026 represents a significant development in UAE construction law, balancing freedom of contract with commercial realities after a three-decade precedent.

- **For Subcontractors:** You are not necessarily expected to wait indefinitely for upstream solvency. If you can gather concrete evidence that the upstream flow of funds has been permanently cut off (such as through finalized insolvency proceedings or definitive exclusion from official creditor lists), the courts may set aside the back-to-back condition and enforce your right to payment.
- **For Main Contractors:** A back-to-back clause should not be treated as a passive defense. If an upstream party goes bankrupt, you have a proactive legal duty to pursue your claims and register your debts. In this case, the Appellant's failure to secure its status on the final bankruptcy creditor list was the key factor the Court used to declare the condition "impossible." Failing to preserve your upstream rights may result in you having to pay your downstream supply chain from your own funds.

*At **Wasel & Wasel**, our construction and dispute resolution practices remain at the forefront of the UAE's evolving legal landscape. Whether you are managing supply chain disputes, navigating insolvency proceedings, or assessing conditional payment clauses, our team provides practical, precedent-backed*

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Arbitrability, Corporate Insolvency, and Fractured Disputes: The NSW Court of Appeal’s Approach in Clough v Elecnor and the Lex Domicilii vs. Lex Arbitri Divide

September 3, 2026

Introduction: The Collision of Party Autonomy and Public Policy

The intersection of international commercial arbitration and corporate insolvency consistently generates profound jurisdictional friction. While arbitration is a private, consensual mechanism governed by party autonomy, corporate insolvency is a collective, statutory procedure rooted in public policy and designed to bind third parties.

When a commercial dispute triggers corporate restructuring mechanisms, courts face a critical question: is the dispute still “capable of settlement by arbitration,” or must it be resolved by national courts? The New South Wales Court of

Appeal (NSWCA) recently addressed this tension in *Clough Projects Australia Pty Ltd v Elecnor Australia Pty Ltd* [2026] NSWCA 111.

By dissecting the arbitrability of corporate matters and addressing the procedural fracturing of disputes, highlighted prominently in Ground 5 of the appeal, the NSWCA delivered a judgment that mirrors global approaches to the conflict between the law of the arbitral seat (*lex arbitri*) and the law of the corporate domicile (*lex domicilii*).

The Factual Matrix: *Clough v Elecnor*

The dispute arose from an unincorporated joint venture between Elecnor and Clough to deliver a major energy infrastructure project in Australia. The Joint Venture Deed contained a broad arbitration clause designating Singapore as the arbitral seat under ICC Rules.

In late 2022, Clough entered voluntary administration and subsequently executed a Deed of Company Arrangement (DOCA) under Part 5.3A of the Australian *Corporations Act 2001* (Cth). Under the DOCA, specified assets were transferred to a Creditors' Trust. Following this insolvency event, Elecnor sought to exercise a compulsory acquisition clause to buy out Clough's participating interest in the joint venture for a nominal $1.00. The DOCA trustees resisted, arguing that the DOCA had already transferred Clough's interest to the trust, thereby altering or extinguishing Elecnor's contractual buyout rights.

Elecnor commenced litigation in the NSW Supreme Court seeking specific performance of the buyout (the "Clause 21.3 Matter"). In response, Clough and the trustees filed a cross-claim seeking $55 million in commercial contribution for called bank guarantees (the "Call Contribution Matter"). Elecnor subsequently applied to stay the cross-claim and refer it to arbitration in Singapore, prompting Clough to argue that the entire dispute should be heard together in court, or alternatively, that Elecnor's primary claim should be temporarily stayed pending the arbitration.

The Arbitrability of Corporate Matters: The Statutory Shield

Central to the appellate review was determining which matters were "capable of settlement by arbitration" under the Australian *International Arbitration Act 1974* (Cth). The NSWCA affirmed the primary judge's ruling that the dispute must be fractured into two distinct matters.

The Call Contribution Matter was identified as a discrete, purely contractual controversy and was stayed and referred to arbitration in Singapore. However, the Court held that the Clause 21.3 buyout dispute was **non-arbitrable**.

The Court's reasoning hinged on the statutory nature of the DOCA. Resolving Elecnor's buyout rights required construing the DOCA and the operation of the *Corporations Act* in a manner that would inherently affect the rights of third-party creditors. The Court noted that a DOCA is not merely a private agreement; it is a statutory instrument that effects a change in the company's legal status and binds all creditors by operation of law. Consequently, there is a "legitimate public interest in seeing that disputes of the type in question are resolved by public institutions… rather than institutions and structures established by the parties."

Ground 5 and the Reality of Fractured Proceedings

Because the corporate buyout matter was non-arbitrable, it remained within the jurisdiction of the NSW courts, while the financial contribution claim was sent to arbitration. This bifurcation formed the basis of Ground 5 of the appeal, wherein Clough challenged the primary judge's refusal to temporarily stay the non-arbitrable court proceedings pending the determination of the Singapore arbitration.

The NSWCA dismissed Ground 5, affirming that the decision not to stay the Clause 21.3 Matter was a valid exercise of discretionary case management. The Court held that the resolution of the corporate acquisition dispute did not depend on the outcome of the arbitrated contribution claim. The dismissal of Ground 5 underscores a harsh procedural reality: when an arbitration agreement collides with a non-arbitrable statutory regime, the fracturing of the dispute across dual forums is often an inevitable consequence of enforcing the arbitration agreement to the extent permissible by law.

Global Reflections: *Lex Domicilii* vs. *Lex Arbitri*

The *Clough* judgment reflects a universal paradigm in cross-border dispute resolution: the supremacy of the *lex domicilii* over the *lex arbitri* in matters of corporate status and insolvency.

In international arbitration, parties select a seat (e.g., Singapore) whose laws, the *lex arbitri*, govern the procedural framework of the arbitration and typically determine objective arbitrability. However, the legal personality, restructuring, and insolvency of a corporation are governed exclusively by its *lex domicilii* or *lex concursus* (e.g., Australia).

Globally, courts align with the NSWCA’s approach. Purely *in personam* commercial claims, such as quantifying a debt, can be arbitrated. But *in rem* claims, or disputes that strike at the core mechanics of an insolvency proceeding and affect the collective rights of the creditor pool, are universally guarded by the domestic courts of the corporate domicile. The public policy underlying the *lex domicilii* acts as a firm boundary that private arbitral tribunals cannot cross.

Strategic Takeaways for International Commercial Disputes

For corporate entities managing cross-border agreements, the *Clough v Elecnor* decision offers several practical, jurisdiction-neutral insights:

- **Evaluate the Scope of Arbitrability:** When disputes involve distressed counterparties, parties should recognize that arbitration clauses may not cover issues that invoke statutory restructuring regimes or impact the collective rights of third-party creditors.
- **Prepare for Parallel Proceedings:** As demonstrated by the NSWCA's dismissal of Ground 5, courts are willing to fracture disputes, retaining jurisdiction over corporate status issues while sending discrete commercial claims to arbitration.
- **Assess the Interplay of Governing Laws:** During the drafting and enforcement phases, it is essential to analyze how the procedural laws of the chosen arbitral seat (*lex arbitri*) will interact with the mandatory corporate and insolvency laws of the counterparties' home jurisdictions (*lex domicilii*), anticipating that local courts will intervene to protect statutory frameworks.

Conclusion

The NSW Court of Appeal's judgment in *Clough v Elecnor* is a definitive modern precedent on the limits of arbitrability. It illustrates that while international commercial arbitration remains the preferred mechanism for resolving cross-border contractual disputes, the statutory gravity of corporate restructuring and insolvency remains firmly within the domain of domestic courts. Navigating the resultant procedural fractures requires a sophisticated understanding of both the procedural flexibility of the *lex arbitri* and the mandatory public policy of the *lex domicilii*.

Wasel & Wasel advises on complex commercial disputes, international arbitration, and cross-border corporate litigation. The firm possesses extensive experience navigating multi-jurisdictional matters, addressing the intricate conflicts of law between arbitral seats and corporate domiciles, and managing parallel proceedings involving *statutory insolvency regimes and commercial arbitration across global jurisdictions.*

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