The Cost of Construction Expedience: Undocumented Variations and Arbitral Jurisdiction in Miller v Monaghan

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In the physical execution of capital projects, there is a persistent friction between the rigid administrative mechanics of a written contract and the urgent, on-the-ground necessity to maintain operational momentum. When site conditions evolve or project scopes expand, the formal machinery of written notices, cost estimates, and countersignatures is frequently abandoned in favor of verbal approvals. It is a pragmatic, operational shortcut designed to save time, but one that almost inevitably invites a legal reckoning when the final invoices are issued. When a dispute arises over these undocumented variations, a critical jurisdictional question frequently emerges: If the parties completely ignored the strict variation procedures mandated by their contract, does the dispute over that "off-the-books" work still fall under the contract's arbitration agreement? Or does the procedural failure sever the dispute from the contract entirely, stripping the arbitrator of jurisdiction? This precise tension was recently adjudicated by the Supreme Court of Western Australia in *Miller v Monaghan* [2026] WASC 441. The judgment provides an instructive framework for capital allocators, general counsel, and construction professionals regarding the breadth of standard arbitration clauses and the limits of contractual non-compliance in establishing arbitral jurisdiction. **The Factual Matrix: Expedience Over**

Procedure The dispute in *Miller* centered on a standard form residential building contract executed in April 2024 for a sum of $675,910. The contract contained a highly prescriptive mechanism for variations under cl 12, requiring a written request from the owner, the preparation of a formal variation document by the builder detailing the cost, and the explicit, signed agreement of the owner before the work commenced. As is common in the industry, the paperwork fell behind the physical reality of the build. The plaintiff builder issued an invoice for $106,773.52 for additional work carried out on a "cost-plus" basis. The builder openly conceded that the formal variation procedure in cl 12 was not followed for every item of additional work. Instead, the builder justified the departure through an alleged verbal agreement driven by timeline pressures. As Justice Lundberg noted in the judgment, the plaintiff deposed:

> *"[45] In that context, to keep the Works progressing and to allow Mr and Mrs Monaghan to have their variations, I said to Mr Monaghan, at a meeting at 10 Sabina Drive in late-September 2025, 'All these changes are getting too complicated to keep up with the paperwork with, so all these additional works will need to be carried out at cost plus a reasonable margin and reconciled as we go, if we 're to get you in before Christmas'. Mr Monaghan said to me: 'That's fine'."*

When the defendant owner disputed the invoice, citing the absence of signed variations alongside invoicing errors, the builder sought to invoke the contract's arbitration clause (cl 18). Following a refusal by the contractual appointing authority (the Housing Industry Association) to appoint an arbitrator, the builder applied to the Supreme Court under s 11(4) of the *Commercial Arbitration Act 2012* (WA) to force the appointment. **The Jurisdictional Question: Are Non-Compliant Variations Arbitral?** For the Court to exercise its power to appoint an arbitrator, it first had to be satisfied that the

dispute actually fell within the parameters of the arbitration agreement. This raised a formidable jurisdictional argument: if the builder completely bypassed the mandatory contractual procedure for raising variations, is the resulting dispute still subject to the contract's arbitration clause? The vulnerability of this position was addressed by Justice Lundberg:

> *"[26] The questions of whether the Variations were carried out, the value of the Variations and Mr Miller's entitlement are all matters falling for determination within the scope of the foreshadowed arbitration proceedings. It would not be appropriate to determine such matters in the context of the current hearing.*
>
> *[27] There is an argument potentially available as to whether the Variations-dispute falls within the ambit of the arbitration agreement because the Parties do not appear to have complied with the procedure for the raising of variations under cl. 12 of the Contract. Whilst it is accepted that neither party complied, that does not preclude the dispute from being arbitral."*

The Determination: The "Widest Import" of the Bargain

The Court rejected the premise that procedural non-compliance negates arbitral jurisdiction, relying heavily on the broad drafting of the arbitration clause itself. Clause 18 of the Building Contract dictated that "any dispute, disagreement or difference… relating to this Contract" must be referred to arbitration.

Applying established principles of commercial construction, the Court noted that phrases such as "relating to" are heavily favored by the judiciary to capture precisely this kind of administrative deviation. Quoting the precedent set by Martin

CJ in *Fitzpatrick v Emerald Grain Pty Ltd*, the Court reaffirmed that the phrase is "properly construed as a term of the widest import which should not, in the absence of compelling reasons, be read down."

Justice Lundberg concurred with the plaintiff's submission, determining verbatim:

> *"I respectfully agree, bearing in mind the breadth of the arbitration agreement in this case, as objectively assessed.*
>
> *That is, the court can be presently satisfied that, subject to the findings which might be made on the evidence, the subject matter of the variations claimed by the plaintiff is a dispute relating to the Building Contract and capable of being referred to arbitration."*

Crucially, the Court recognized that while the paperwork was flawed, the legal remedies to rectify that flaw, such as relying on the owner's verbal consent, are inherently tied to the contract's execution and remain the exclusive domain of the arbitrator:

> *"It is at least arguable that, although there was non-compliance with the variation procedure in cl 12 of the Building Contract, the plaintiff may be able to rely on the conduct of the parties to make good his contentions, relaying on some species of estoppel. Whether that will be the case requires a trier of fact to assess the competing evidence and credibility of the witnesses, which is beyond the scope of this application. It is enough to say that the plaintiff's claims for payment of the works undertaken as variations, which form the basis of the dispute between the parties, are matters relating to the Building Contract."*

Finding that the dispute squarely fit within the arbitration

agreement, the Court exercised its statutory power to formally appoint the arbitrator. Furthermore, the Court ordered the defendant to pay the plaintiff's legal costs for the application on a party/party basis, noting that the plaintiff's conduct "involved nothing more than an adherence to the parties' bargain" and that the application "was necessary and appropriate in order to overcome the stalemate in the arbitral process." **Pragmatic Imperatives for the Construction Sector** The *Miller v Monaghan* decision offers stark, practical guidance for stakeholders in the construction industry. Courts will read phrases like "relating to this Contract" with a broad and flexible approach. A mutual or unilateral failure to comply with the administrative mechanics of a variation clause will unlikely sever the dispute from the arbitral tribunal. Skipping the paperwork may prejudice a party's chances of actually winning the arbitration on the merits, forcing them to rely on complex, evidence-heavy arguments like estoppel. However, as the Supreme Court of Western Australia has clearly signaled, that arduous evidentiary battle will unequivocally be fought in arbitration, exactly as the contract originally intended.

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The Right of Angary in Low Earth Orbit – Requisitioning

Commercial Space Assets in Contemporary Armed Conflict

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Capital is relentlessly pragmatic. It flows toward predictable legal frameworks and flees unquantifiable risk. For the past decade, the consensus narrative surrounding the commercialization of Low Earth Orbit (LEO) was remarkably straightforward: driven by plummeting launch costs and rapid advancements in commercial off-the-shelf technology, private enterprise would seamlessly expand the global economy into space. With institutions projecting the orbital economy to approach $1.8 trillion over the next decade, institutional capital poured billions into commercial satellite constellations. The fundamental premise was that these assets would operate much like terrestrial fiber-optic networks; as neutral, sovereign-agnostic infrastructure, safely insulated from geopolitical friction.

That premise has violently collided with reality. As active international conflicts vividly demonstrate, modern military operations are now irrevocably dependent on private space infrastructure. From high-resolution synthetic aperture radar (SAR) to decentralized broadband communications, commercial LEO assets are actively functioning as the nervous system for tactical battlefield logistics. This dual-use reality introduces a profound, largely unpriced risk for space-focused capital: the threat of sovereign requisitioning, wartime expropriation, and direct orbital interference. For the legal counsel and capital allocators underwriting this new frontier, the governing legal frameworks will not be found in utopian space treaties. They will be dictated by ancient maritime doctrines of warfare, modern orbital tracking data, and the fierce arenas of international commercial arbitration.

The Erasure of Orbital Neutrality

The theoretical risk of dual-use infrastructure has definitively transitioned into observable reality. In October 2026, an unprecedented event fundamentally altered the risk

profile of commercial space operators. Independent orbital trackers suggest that *Cosmos 2612*, a Russian military satellite, executed a highly deliberate series of fuel-intensive maneuvers to rendezvous within a few hundred meters of *ICEYE-X36*, a U.S.-registered commercial SAR satellite operated by the Finnish firm ICEYE.

This maneuver was not a random convergence. It was the culmination of weeks of precise orbital repositioning. According to independent aerospace analyses, the Russian spacecraft altered its orbit by nearly 47 kilometers to match the commercial satellite's orbital plane, utilizing approximately 57 meters per second of velocity change to sustain unapproved close proximity with the 90-kilogram commercial payload. According to veteran orbital trackers, this incident represents the first known rendezvous between two active satellites in low Earth orbit without mutual owner approval.

The strategic context of this encounter is critical. Under an agreement formalized in 2022 and expanded in 2026, ICEYE provides dedicated SAR imagery and constellation access directly to Ukraine for military reconnaissance, leveraging the technology's unique ability to pierce cloud cover and operate at night. While it remains publicly unconfirmed whether the *ICEYE-X36* payload specifically services those operations, the geopolitical message was absolute. Sovereign adversaries are aggressively targeting Western commercial space assets utilized for military support.

This fulfills the stark warnings previously issued by the Russian defense apparatus: commercial satellites utilized to assist military operations in armed conflicts constitute "indirect participation" and are therefore "legitimate targets for retaliation." Whether the *Cosmos 2612* approach was an act of electronic espionage, a kinetic threat simulation, or a hostile inspection, the financial implications are immediate. When a sovereign military physically intercepts a commercial asset and paints it as a legitimate target, traditional "war exclusion" clauses in property insurance predictably void

coverage. This leaves private operators and their financial backers exposed to total systemic loss, confirming that the neutrality of commercial space hardware has functionally evaporated.

The Ghost of *The Zamora* and Orbital Angary

If adversaries are willing to actively target commercial infrastructure, host nations will be equally willing to forcibly commandeer it. In the brutal calculus of geopolitics, when national survival is threatened, the sanctity of private commerce is routinely subordinated to military necessity.

To understand how states will legally justify this requisitioning, international litigators must look backward. Customary international law has long recognized the "Right of Angary" (*ius angariae*); a sovereign prerogative allowing a belligerent state, in times of urgent public necessity, to lawfully requisition, commandeer, or destroy neutral foreign commercial property located within its jurisdiction, provided adequate compensation is ultimately paid.

This principle was definitively stress-tested during World War I in the landmark Privy Council Prize Court case, *The Zamora* (1916). The English court affirmed that the Crown possessed the prerogative right to requisition neutral cargo, in that instance, a shipment of copper, provided the seizure was absolutely necessary for the defense of the realm. Today, that copper is encrypted SAR data, and the cargo ship is a commercial LEO constellation. Under Article VIII of the 1967 Outer Space Treaty, a state retains jurisdiction and control over any space object on its registry. If a geopolitical flashpoint escalates and a host state urgently requires exclusive bandwidth, immediate geospatial intelligence, or the denial of that intelligence to an adversary, the Right of Angary provides a viable legal mechanism to simply commandeer a private commercial network.

The military establishment is actively pricing in this reality. The U.S. Space Force has formally detailed the

Commercial Augmentation Space Reserve (CASR), a framework designed to seamlessly scale military access to private space bandwidth and imagery during wartime. While CASR is currently framed as a voluntary peacetime contractual arrangement, voluntary frameworks are a luxury of peace. If a commercial operator attempts to geofence its network to preserve its civilian neutrality during a hot war, host states will inevitably bypass commercial contract law and invoke emergency national security statutes to seize operational control.

The Arbitration Battlefield: *CC/Devas* and the National Security Exception

When a sovereign state commandeers, nullifies, or inadvertently triggers the destruction of a commercial space asset, the ensuing financial fallout bypasses domestic courts and flows directly into Investor-State Dispute Settlement (ISDS). In these arbitral tribunals, aggrieved foreign investors collide with the most formidable defense in international law: the National Security Exception.

The arbitration saga of *CC/Devas (Mauritius) Ltd. v. Republic of India* (PCA Case No. 2013-09) serves as the definitive structural precedent for space-bound capital. In 2011, the Government of India abruptly annulled a highly lucrative S-band satellite spectrum lease held by private firm Devas Multimedia. India's justification was rooted entirely in sovereign prerogative: the state declared the orbital spectrum was urgently required for "strategic national security use."

The Mauritian investors brought claims under the Mauritius-India Bilateral Investment Treaty (BIT), arguing unlawful expropriation. An international arbitral tribunal ultimately ruled against India, concluding that while a state possesses the sovereign right to protect its essential security interests, it cannot utilize the cloak of national security to arbitrarily expropriate commercial rights without executing full reparations. The resulting awards, ordering India to pay in excess of $1.1 billion in damages, established a vital

precedent: international tribunals will aggressively scrutinize a blanket “national security” defense in space-related expropriations to ensure capital is adequately compensated.

Pragmatic Imperatives for Capital Allocators

Hope is not a viable legal strategy, and proceeding into the modern space economy with commercial contracts drafted for a benign, purely civilian operational environment is a severe dereliction of fiduciary duty. As the ongoing shadowing of the *ICEYE-X36* satellite unequivocally demonstrates, the commercialization of space has functionally privatized military logistics, dissolving the traditional boundaries between commercial hardware and sovereign weaponry. Adversarial nations possess both the capacity and the intent to contest this infrastructure physically. For legal counsel and executives structuring orbital investments, managing this unprecedented sovereign risk requires ruthless contractual mechanics executed long before launch.

The immediate priority for capital allocators is pricing the requisition risk directly into the foundational legal framework. When commercial payload and service contracts are signed with sovereign or quasi-sovereign entities, the agreements must mathematically quantify the state’s absolute financial liability. If a host state triggers an emergency seizure, commandeers satellite bandwidth under the Right of Angary, or invites hostile orbital harassment by utilizing the commercial asset for active military operations, there must be no ambiguity regarding who assumes the financial loss. This operational reality simultaneously demands a structural evolution in corporate design. Operators can no longer comfortably commingle neutral commercial logistics data with wartime intelligence on the same physical satellite bus. Blending these services severely compromises the asset’s neutral status under the laws of armed conflict, effectively turning the entire platform into a legitimate military target

and guaranteeing the voiding of commercial insurance policies. The technical and legal bifurcation of civilian and military services is a necessary market response to ring-fence civilian liability.

Ultimately, the deployment of capital for space infrastructure must be subjected to intense geopolitical scrutiny regarding treaty routing. Capital must be rigidly channeled through jurisdictions with robust Bilateral Investment Treaties that provide actual mechanisms for international arbitration. Investors must analyze the specific language of a treaty's essential security interests clause. Treaties featuring self-judging national security exceptions offer commercial operators virtually zero legal protection against arbitrary state expropriation. In an orbital economy where military payloads actively stalk commercial satellites, the strength of the underlying investment treaty is the only viable firewall between commercial survival and total, uncompensated loss.

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War Series: The Cyber-Kinetic Blur – 27+ Data Center Strikes in Active Conflicts, the NotPetya Precedent, and

“Acts of War” in Arbitration

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In the architecture of global commerce, risk is fundamentally priced against historical precedent. For decades, that precedent dictated a clearly defined paradigm: warfare was kinetic, geographic, and overt. Standard *force majeure* provisions and property insurance “war exclusions” were meticulously calibrated for a world of naval blockades, physical destruction, and formal declarations of hostility. If a sovereign state committed an act of war, the evidentiary threshold was unmistakable, and the contractual remedies were clear. That framework is now structurally obsolete. As highlighted by a recent *NBC News* analysis documenting at least 27 direct attacks on data centers across active global conflicts, the civilian digital infrastructure that underpins the global economy is no longer merely collateral damage; it has become a primary military target. This escalation signals a definitive new front in modern warfare, where state-sponsored operations, whether kinetic strikes on centralized data nodes or the deployment of weaponized malware, routinely serve as the vanguard of geopolitical friction. This reality erases sovereign borders, transforms neutral corporate supply chains into active conflict zones, and exposes how systematically the broader market is mispricing the associated legal risk.

For multinational capital and the legal counsel tasked with its preservation, the 2017 *NotPetya* cyberattack remains the definitive baseline. Generating an estimated $10 billion in total global economic damage according to U.S. White House assessments, the event exposed a critical vulnerability: commercial contracts drafted for twentieth-century physical hostilities are highly susceptible to twenty-first-century digital contagion.

The Second-Order Effects of Insurance Risk Transfer

NotPetya was initially deployed against Ukrainian tax software, but the malware rapidly broke containment, paralyzing the operations of non-combatant commercial entities globally. When pharmaceutical conglomerate Merck & Co. suffered severe operational downtime, it sought relief under its "all-risk" property insurance policies. Underwriters denied the claim, invoking standard "war exclusion" clauses on the grounds that *NotPetya,* widely attributed to Russian military intelligence, was an uninsurable act of war.

The resulting litigation, *Merck & Co., Inc. v. Ace American Insurance Co.* (N.J. Super. Ct. App. Div., 2023), culminated in a ruling that standard "hostile action" exclusions applied exclusively to traditional, kinetic warfare. Merck and its insurers ultimately reached a confidential settlement in early 2024, reportedly resolving the $1.4 billion claim. Similarly, food and beverage giant Mondelez International settled a high-profile $100 million claim with Zurich Insurance in late 2022 following a comparable dispute.

However, viewing these settlements as definitive corporate victories ignores the second-order effects on the market. Recognizing the existential threat to systemic capital, the London insurance market, the historical epicenter of global risk allocation, fundamentally re-engineered its exposure. Effective March 31, 2023, the Lloyd's Market Association (LMA) issued Bulletin Y5381, mandating that all standalone cyber policies explicitly exclude liability for state-backed cyberattacks that "significantly impair the ability of a state to function" (standardized under the LMA5564 series of clauses).

With insurers successfully transferring the liability of digital warfare back onto corporate balance sheets, the legal battleground has permanently migrated. Disputes over supply chain failures, data center outages, and operational downtime have shifted from insurance subrogation into the realm of business-to-business breach-of-contract and *force majeure*

arbitrations.

A Seamless Global Contagion, Localized Liability

The primary danger for the modern enterprise is that digital supply chains and data center networks are hyper-integrated, yet the legal mechanisms to defend them remain fiercely localized. A single piece of malicious code, or a kinetic strike on a regional data center, can ripple across the global economy, intersecting with fundamentally different statutory frameworks in real time. Instead of neatly separated jurisdictions, legal departments must now navigate a seamless global threat vector that cascades across regional legal doctrines.

Consider the lifecycle of a modern digital disruption. If a state actor breaches an EU-based logistics network, the commercial dispute instantly morphs into a regulatory crisis. Authorities evaluate the breach against the stringent strictures of the NIS2 Directive (Directive (EU) 2022/2555). It is insufficient to merely claim geopolitical *force majeure* to excuse non-performance; if a corporate victim failed to implement baseline cybersecurity risk-management measures, they face regulatory fines of up to €10 million or 2% of their global annual turnover. Domestically, European tribunals may reasonably conclude that this prior compliance negligence renders any contractual *force majeure* defense void, as the disruption could have been prevented or mitigated.

Tracing those supply arteries further east, the hardware powering this global system is manufactured by the highly integrated tech conglomerates of Japan and South Korea. According to IBM’s 2024 X-Force Threat Intelligence Index, the Asia-Pacific region remains one of the most heavily targeted geographic areas globally. When commercial entities are disrupted by regional Advanced Persistent Threats (APTs), they confront rigid domestic civil codes. Seeking relief under the strict unforeseeability requirements of the Japanese Civil Code or the South Korean Civil Act is legally complex. In

these jurisdictions, state-sponsored cyber hostility is increasingly scrutinized not as an unforeseeable act of war, but as a quantifiable, baseline operational risk that should have been priced into the contract.

This commercial vulnerability is accelerating rapidly in the Middle East. As the Gulf Cooperation Council (GCC), a regional cybersecurity market projected to exceed $13 billion by 2027, executes some of the most digitally integrated infrastructure megaprojects in history, legacy energy grids are evolving into hyper-connected smart cities. If state-sponsored malware targets a regional desalination plant or paralyzes automated port logistics, developers and sovereign wealth funds face immediate contractual deadlock. They must litigate whether the disruption constitutes a valid "extraneous cause" (*cause étrangère*) under statutes such as Articles 273 and 287 of the UAE Civil Transactions Law, or a fundamental failure of the contractor to secure the digital perimeter.

When these high-stakes, cross-border disputes inevitably rupture, they frequently flow into premier neutral arbitration hubs like Singapore. Institutions such as the Singapore International Arbitration Centre (SIAC) are increasingly tasked with adjudicating massive supply chain defaults caused by digital sabotage. Concurrently, Singapore's Cybersecurity (Amendment) Bill 2024 has expanded regulatory oversight to cover entities of "special cybersecurity interest," demonstrating how intimately commercial arbitration is becoming entangled with national security statutes. The traditional boundaries between private commercial disputes and sovereign regulatory regimes have vanished.

The Evidentiary Abyss of Attribution

Whether seated in Singapore, London, or Dubai, arbitral tribunals handling these disputes face a singular, paralyzing hurdle: the legal standard of attribution.

In kinetic warfare, attributing a physical strike on a facility to a sovereign state relies on observable fact.

Cyberspace operates through proxies, criminal syndicates, and false-flag code. If a data center provider or logistics firm defaults on a major GCC infrastructure contract and invokes an "act of war" clause following a cyber event, establishing definitive state sponsorship before a private commercial tribunal is an immense evidentiary burden.

The *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* outlines strict thresholds for attributing cyber operations to a state, but private commercial tribunals lack the investigative authority of sovereign intelligence agencies. Arbitrators must distinguish between a state military operation and financially motivated cybercrime on a balance of probabilities. Parties often attempt to introduce unclassified intelligence from national cyber authorities to bridge this gap. However, under frameworks like the IBA Rules on the Taking of Evidence, relying on classified or highly redacted state intelligence within private commercial disputes introduces significant procedural complexities and questions of geopolitical bias.

Pragmatic Imperatives for Capital Protection

As the recent targeting of data centers illustrates, the intersection of military strategy and civilian data infrastructure is no longer a theoretical risk; it is an active operational reality. Relying on century-old boilerplate language for modern infrastructure and supply chain agreements presents a severe fiduciary vulnerability. In an environment where code deployed in one hemisphere can trigger a multi-billion-dollar default in another before the market opens, commercial structures must adapt.

For legal counsel and executives structuring multi-jurisdictional agreements, risk mitigation requires precise contractual mechanics:

- **Decouple Cyber from Kinetic Warfare:** Contracts should identify whether state-sponsored cyberattacks, physical strikes on data centers, and ransomware constitute a

distinct *force majeure* event, rather than relying on legacy “war, hostilities, or acts of foreign enemies” clauses. The contractual language must be as specific as the threat vector.

- **Price the Collateral Damage:** Supply chain agreements should mathematically quantify liability and delay damages for instances where a party is not the primary target of a cyber-hostility but suffers operational paralysis due to global digital contagion.
- **Hardwire Attribution Mechanisms:** To prevent evidentiary stalemates in arbitration, contracts should establish a pre-agreed standard for attribution. For example, parties may stipulate that a formal, public declaration from a recognized national authority (such as the U.S. CISA, the UK NCSC, or the Cyber Security Agency of Singapore) serves as *prima facie* evidence of a state-backed attack for the purposes of the agreement.

Geopolitical conflicts are increasingly executed across the physical and digital assets of private enterprises. Until the mechanics of international commercial law fully adapt to the realities of asymmetric warfare, the imperative lies with the private sector to strictly define, price, and contractually ring-fence its digital liabilities. In the modern commercial theater, an ambiguous contract is a quantifiable liability.

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Arbitration Standing for Non-Controlling Shareholders: Lessons from 1171757 Ontario v. 1171758 Ontario with Global Perspectives

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Introduction

In complex corporate structures involving holding companies, trusts, and family-owned enterprises, identifying precisely who is bound by, and who is entitled to invoke, an arbitration agreement remains a persistent source of jurisdictional friction. When a dispute arises, can a minority shareholder of a corporate partner, bereft of management control over that partner, qualify as a "party" to the underlying partnership agreement and initiate arbitration?

The Ontario Superior Court of Justice recently addressed this critical issue in *1171757 Ontario Limited et al v. 1171758 Ontario Limited et al*, 2026 ONSC 4414. Ruling that a non-controlling shareholder of a corporate partner did indeed possess standing to arbitrate, the Court delivered a compelling decision on contractual interpretation and commercial reasonableness.

For international practitioners and stakeholders across common law jurisdictions, from the United Kingdom to the United States, this judgment offers a robust blueprint for how courts balance strict privity of contract with the economic realities of indirect stakeholders.

The Factual Matrix: A Family Enterprise Divided

The dispute centered on a family-owned enterprise holding two hotels and a fitness centre in trust for a partnership. The partnership units were divided between corporate partners, including a company named 1171757 Ontario Limited ("757").

The partnership agreement relied on distinct defined terms: "Partner" (the corporate entities) and "Principal" (the natural persons with the ultimate right to direct and control a corporate partner). Crucially, the arbitration clause mandated that any dispute "between the parties hereto" must be resolved by arbitration, yet the term "party" was left undefined.

Following the death of the family patriarch, his shares in 757 were bequeathed equally to his two grandsons, Jason and Jonathan. The bequest, however, required Jonathan to execute a Power of Attorney ("POA") granting Jason absolute authority to vote Jonathan's shares and manage 757. Consequently, Jason became a "Principal" of 757, while Jonathan remained a 50% shareholder devoid of control rights.

When Jason initiated an arbitration to adjust compensation for a management company he controlled, Jonathan subsequently sought to participate to protect his own service contract with the enterprise and to request dissolution of the partnership. Jason challenged Jonathan's participation, arguing that because Jonathan was neither a "Partner" nor a "Principal," he was not a "party" to the agreement, meaning the arbitrator lacked jurisdiction over his claims.

The Court's Reasoning: Text, Context, and Commercial Logic

Justice E. Iacobucci of the Ontario Superior Court of Justice reviewed the arbitrator's preliminary jurisdictional ruling *de novo*. The Court rejected the argument that "parties" must be strictly limited to Partners and Principals, anchoring Jonathan's status in the agreement's recitals and enurement clause, guided by commercial logic.

1. Standard of Review: De Novo

Establishing the standard of review under the Ontario *Arbitration Act, 1991*, the Court confirmed its mandate to evaluate the jurisdictional question without deference to the arbitrator:

"This application is a hearing de novo, not a review of or an appeal from the arbitrator's decision. The principle of competence-competence does not require that any deference be paid to an arbitrator's determination of her own jurisdiction… I am simply to 'decide the matter'…" (para. 51).

2. Distinguishing Partners, Principals, and Parties

The Court found the agreement deliberately used the terms distinctly. While certain restrictive covenants applied exclusively to Principals and Partners (aligning with their managerial control), the arbitration clause did not contain such a restriction:

"The arbitration clause requires disputes between 'parties' to be decided in arbitration. It does not restrict the operation of the clause to 'partners' or 'principals'… Nothing in the wording of Article 18.1, or other clauses that use principals, partners and parties, detracts from the conclusion that a 'party' may be neither a principal nor a partner." (paras. 66, 74).

The Court found Jonathan's status anchored in the agreement's recitals and enurement clause. The original patriarch signed the agreement in his individual capacity, identified in the recitals expressly as a *"beneficial and registered shareholder."* Because the enurement clause bound and benefited his heirs, Jonathan inherited this "party" status alongside his equity.

3. Commercial Sensibility

Underlining the commercial pragmatism of the decision, the Court observed that granting a shareholder party status makes inherent business sense:

"A shareholder in a partner has a financial interest in the operations of the partnership. Including that shareholder as a party to the partnership agreement provides the shareholder with protection of that financial interest… Just as non-voting shareholders do not have control rights over the corporation, yet have standing to seek corporate law remedies, the partnership agreement in this case confers on non-principal, non-partner parties standing to participate in arbitration protecting their rights and interests." (para. 80).

4. The Power of Attorney Did Not Extinguish Standing

Jason argued that the POA stripped Jonathan of party status by transferring all governance rights. The Court wholly rejected this, holding that the loss of operational control does not extinguish underlying contractual rights tied to beneficial ownership:

"That Jonathan has no control rights in 757 does not affect the implications of the wording of the agreement, nor the commercial logic of allowing shareholders without control rights to protect their financial interests in the partnership through party status (and rights to arbitrate) pursuant to the agreement." (para. 93).

Comparative Global Perspectives: UK, US, and Beyond

The Ontario Court resolved this issue through direct textual interpretation; finding the shareholder was an actual "party" to the contract based on inherited shares and enurement clauses. How do other major common law jurisdictions approach minority shareholders and non-signatories seeking to invoke an arbitration clause?

United Kingdom: Statutory Gateways and Third-Party Rights

In England and Wales, the strict doctrine of privity of contract traditionally poses a high hurdle for non-signatories. However, Section 82(2) of the English *Arbitration Act 1996* provides that a party to an arbitration agreement includes any person *"claiming under or through a party to the agreement."* Furthermore, under Section 8 of the *Contracts (Rights of Third Parties) Act 1999*, a third-party beneficiary (such as a shareholder explicitly granted rights or protections in an agreement) can enforce an arbitration clause. Much like the Ontario court's reliance on the enurement clause to recognize Jonathan's inherited status, English courts will allow stakeholders to arbitrate if the contractual machinery clearly intended to benefit them or if their claims are entirely derivative of a signatory's rights.

United States: Equitable Doctrines and Pro-Arbitration Policy

The United States operates under the Federal Arbitration Act (FAA), embodying a strong national policy favoring arbitration. Rather than strictly interpreting the word "party," US federal and state courts frequently allow non-signatories to invoke arbitration clauses using common law equitable doctrines (*e.g., Arthur Andersen LLP v. Carlisle*, 556 U.S. 624). Doctrines such as *third-party beneficiary*, *alter ego/veil-piercing*, and *equitable estoppel* are routinely deployed. Had this case been litigated in New York or Delaware, Jonathan might have successfully compelled arbitration by arguing that his claims were heavily "intertwined" with the underlying partnership agreement, and that as an equity holder, he was an intended third-party beneficiary of the enterprise structure.

Other Common Law Hubs (Singapore, Australia, DIFC)

Courts in leading global arbitration hubs have adopted highly commercial, purposive approaches to arbitration clauses. Like the Ontario Court's emphasis on the "commercial logic" of allowing stakeholders to protect their financial interests,

jurisdictions like Singapore and Australia frequently look at the substantive economic reality of corporate structures. They are reluctant to elevate strict corporate formalism over practical business sense, especially if a restrictive interpretation leads to a commercial absurdity where a beneficial owner is left without an arbitral remedy despite having a clear, contractually recognized financial stake.

Key Takeaways for International Practitioners

The Ontario judgment in *1171757 Ontario Limited et al v. 1171758 Ontario Limited et al* serves as a powerful reminder that "control" and "standing" are distinct concepts in dispute resolution. For corporate drafters and commercial litigators globally, the takeaways are clear:

Define "Party" Explicitly: The entire jurisdictional battle in this case stemmed from defining "Partner" and "Principal" but leaving "Party" undefined. If the intention is to limit dispute resolution mechanisms strictly to controlling principals or specific corporate signatories, the arbitration clause and the definitions section should state this unambiguously.

Beware Recitals and Enurement Clauses: "Boilerplate" clauses enuring benefits to heirs and successors, combined with recitals identifying stakeholders as beneficial owners, can act as a backdoor entry into an arbitration agreement, unintentionally widening the pool of individuals with standing to arbitrate.

Control Does Not Equal Standing: Divesting a shareholder of voting or management control (e.g., via a proxy or POA) prevents them from directing the company, but it does *not* automatically strip them of their underlying contractual rights to seek arbitral remedies to protect their economic interests.

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The Seven-Day Trap: Dubai Courts Impose Strict Liability on Non-Debtor Third Parties – A Comparative Warning for Global Crypto Exchanges

October 19, 2026

Introduction: The Historical Opacity of Onshore Asset Tracing

In traditional commercial disputes, pre-execution asset tracing in onshore jurisdictions has long been hindered by structural opacity. Outside of public shareholding disclosures, corporate registries for mainland and free zone limited liability companies do not publicly disclose banking relationships, intercompany receivables, or granular asset holdings. Strictly enforced banking secrecy laws prevent judgment creditors from independently identifying where a debtor holds accounts or receivables prior to opening an execution file. Consequently, creditors historically relied on broad, court-driven inquiries routed through the UAE Central Bank, land departments, and licensing authorities, rarely possessing independent proof of assets held by private non-bank third parties.

Faced with these onshore hurdles, creditors navigating complex fraud or asset recovery cases frequently looked toward the Dubai International Financial Centre (DIFC) Courts. In that offshore jurisdiction, common law tools like *Norwich Pharmacal* and *Bankers Trust* disclosure orders are readily available and historically favored. These orders are highly effective largely because they carry the severe and coercive threat of contempt of court proceedings for non-compliance.

However, a profound shift in UAE mainland jurisprudence has fundamentally altered the asset recovery paradigm. The Dubai Court of Cassation, in a series of recent landmark judgments, including Cassation No. 1665/2025 and combined appeals No. 1773 & 1826 of 2025, has established a stringent interpretation of the UAE Civil Procedures Law. The newly affirmed standard is absolute: non-debtor third parties ordered to disclose a debtor's assets who fail to formally respond within exactly **seven days** can be held personally and directly liable for the entirety of the original judgment debt.

While this use of disclosure orders provides a powerful theoretical tool for creditors, it creates a formidable compliance challenge for third parties. This is particularly true for cryptocurrency exchanges and Virtual Asset Service Providers (VASPs) operating in the UAE, whose operations could face severe financial exposure under these newly established procedures.

The UAE Framework: From Procedural Default to Substantive Liability

The recent Dubai Court of Cassation judgments clarify the strict application of Articles 255, 256, and 259 of the UAE Civil Procedures Law (Federal Decree-Law No. 42 of 2022).

Under these procedures, when a creditor executes a judgment, the execution judge can issue a garnishee or attachment order

directing a third party to disclose any funds or assets it holds belonging to the debtor. Under Article 256, the third party has exactly seven days from the date of notification to formally declare what it holds. Crucially, the law explicitly dictates that a third party is *not exempt* from the duty to report even if they do not hold any assets for the judgment debtor; they must still formally submit a negative declaration.

As affirmed by the General Assembly of the Dubai Court of Cassation (Decision No. 10 of 2025) and applied in the recent Cassation judgments, if the third party ignores the notice, refuses to accept it, provides insufficient information, or conceals documents, their inaction constitutes a severe procedural fault. Under Article 259, this procedural failure allows the creditor to file a substantive civil claim directly against the third party.

The Court of Cassation decisively clarified that this is not a mere execution dispute under the purview of an execution judge. Instead, the failure to submit the report transforms the execution claim into a direct, personal, and substantive civil lawsuit against the third party for the full value of the original debt. By missing the court’s deadline, the third party effectively assumes the debtor’s liability.

The Virtual Asset Context: Transparency Meets Strict Liability

This development is of acute importance to the digital asset sector. While a debtor could traditionally hide fiat currency or private shares behind structural opacity, cryptocurrency fundamentally changes the investigative reality. Because blockchains function as public ledgers, forensic investigators can trace diverted funds directly to deposit wallets hosted by centralized cryptocurrency exchanges.

Armed with a blockchain tracing report, a creditor could bypass the reliance on broad Central Bank inquiries and

present independent proof of digital asset locations directly to a UAE execution judge. Under the newly established procedures, a creditor could then obtain a targeted disclosure and attachment order against the local offices of a global crypto exchange. This potentiality presents significant operational and legal risks for international VASPs, particularly where internal compliance protocols are modeled on the more extended response timelines typical of other jurisdictions:

Jurisdictional Friction (ADGM/DIFC vs. Onshore Dubai): Many crypto exchanges operating in the UAE are licensed within financial free zones, such as the Abu Dhabi Global Market (ADGM) or the DIFC. If an onshore Dubai Court execution order is served on a free-zone domiciled entity, there may be a legal question regarding whether the mainland execution judge holds direct jurisdiction over the offshore-licensed entity. Even if the mainland court lacks jurisdiction, under the new Cassation precedent, a failure to formally submit this jurisdictional defense to the ordering court within the seven-day window could allow the creditor to invoke Article 259 and pursue the local exchange for the entire crypto-traced debt.

Fragmented Corporate Structuring (The Sister Entity Defense): Global crypto exchanges frequently utilize highly fragmented corporate structures. A localized UAE entity might operate solely as a marketing, support, or advisory branch, while the actual user wallets, customer funds, and private keys are custodied by a sister entity in another jurisdiction. If a mainland court’s seven-day disclosure notice is received by the local branch, the fact that the UAE entity does not technically hold the funds does not negate the reporting obligation. Under Article 256, the entity must still formally reply to the execution court, detailing its corporate structure and clarifying its non-custodial status. Failing to legally articulate this reality within the tight statutory timeframe could result in the onshore entity absorbing the

debtor’s financial liability.

A Striking Divergence: Comparing Global Crypto Hubs

To fully appreciate the gravity of the UAE’s approach, it is vital to contrast it with how third-party disclosure is enforced in other major jurisdictions favored by the crypto industry.

United Kingdom, Singapore, Hong Kong & DIFC (The Contempt Paradigm): In traditional common law hubs, tracing digital assets typically relies on *Norwich Pharmacal* Orders (NPOs) or *Bankers Trust* Orders (BTOs). Courts in the UK (e.g., *Fetch.ai Ltd v Persons Unknown*), Singapore (e.g., *CLM v CLN*), and Hong Kong routinely issue these orders to major VASPs. If an exchange fails to comply, much like in the offshore DIFC Courts, the remedy is typically **Contempt of Court**. While contempt is highly coercive, risking asset sequestration, heavy fines, or the committal of corporate directors, it does not automatically mutate the underlying commercial debt onto the exchange’s balance sheet simply for a missed administrative deadline. Historically, DIFC disclosure orders have been favored because this threat of penal sanctions ensures swift compliance, but they operate fundamentally differently from the UAE mainland’s strict financial liability mechanism.

United States (The Garnishment Default Parallel): Interestingly, the UAE’s Article 259 mirrors some of the strictest elements of US post-judgment enforcement. Under US Federal Rule of Civil Procedure 69, which defers to state law for execution, creditors may serve writs of garnishment on banks and VASPs. In certain strict state jurisdictions, if a garnishee fails to file a timely answer, the court may enter a default judgment against the garnishee for the *full amount of the underlying judgment*, regardless of how much crypto the exchange actually held. The UAE Court of Cassation has effectively solidified this similarly unforgiving standard

onshore.

Conclusion

The Dubai Court of Cassation has sent a definitive message: mainland disclosure orders are strict legal mandates bounded by rigid statutory deadlines. While common law crypto hubs rely on the coercive power of contempt to enforce third-party disclosure, the UAE mainland leverages the threat of immediate, substantive financial liability.

For crypto exchanges, financial institutions, and major commercial entities operating in the UAE, internal compliance protocols must be urgently reviewed to account for what could occur under these newly established procedures. Any notification from a UAE court regarding a third-party attachment should trigger an immediate, formal legal response. The seven-day clock is absolute. Jurisdictional objections, corporate veil defenses, or factual denials must be actively pleaded before the Execution Judge within this critical window. In the modern landscape of UAE litigation, a failure to respond is no longer just a procedural misstep, it could act as a total assumption of liability.

We invite corporate leadership, in-house counsel, and VASP compliance departments to engage with our specialist dispute resolution team at Wasel & Wasel to audit, strengthen, and, where necessary, systematically defend their positions in this exacting regulatory environment.

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Code and Copyright: The UAE’s First NFT Judgment

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As the digital asset economy matures, the legal infrastructure governing it is inevitably tested. Commercial disputes in the Web3 space, spanning breach of contract, intellectual property, and licensing, are transitioning from theoretical debates to practical litigation.

In a recent sequence of rulings, the Dubai Courts issued what is understood to be the first judgment in the United Arab Emirates, and potentially the wider MENA region, addressing the application of copyright law to Non-Fungible Tokens (NFTs). Our firm acted for the plaintiff in this matter. The resulting judgments across the Court of First Instance, the Court of Appeal, and the Court of Cassation provide a structural framework for how work-for-hire agreements, the transfer of economic rights, minting rights, and joint authorship operate within the digital asset sector.

The Factual Baseline

A work for hire agreement had been entered into between a digital artist (the plaintiff) and a Web3 enterprise (the defendant). The objective of the project was accurately defined by the courts, demonstrating judicial recognition of generative NFT mechanics as:

“…designing tens of thousands of digital artistic elements, including three-dimensional characters for different creatures…in addition to background designs, bodies, faces, and accessories, to be used cumulatively in the project, and the creation of a massive library of elements that provide the required diversity for more than ten thousand digital

editions.”

The contract stipulated a six-figure amount for the transfer of the financial rights to the artworks, structured with an upfront payment and the balance due upon the public launch of the project.

The plaintiff delivered the digital assets, and the project launched. However, citing liquidity constraints, the defendant failed to remit the remaining balance. Despite the lack of full payment, the enterprise proceeded to mint the NFTs and commercialize the digital characters.

The plaintiff initiated litigation to recover the unpaid balance and requested an injunction to halt further commercial use and minting of the digital works until the financial obligations were settled.

Copyright Application and Digital Delivery

A threshold issue was whether the digital files and generative elements qualified as protected works. The courts did not treat the assets as a legal anomaly, firmly situating them within the ambit of UAE copyright law, specifically Federal Decree-Law No. 38 of 2021 on Copyrights and Neighboring Rights.

The courts also addressed the mechanics of digital delivery. To prove fulfillment of the contract, the Court of Cassation evaluated electronic evidence and validated cloud storage transfers as a completed handover, stating:

“…the respondent delivered the digital artistic works subject of the agreement, and notified the company of the readiness of the final high-resolution copies, and requested the provision of storage space to upload approximately 70 gigabytes of files, and the company replied confirming the granting of access permissions… which makes it clear that the respondent uploaded and delivered the works and their possession

transferred to the company…”

Specific Performance and Injunctions

A primary legal tension revolved around the status of the economic and minting rights, given the defendant’s failure to complete payment. The plaintiff sought to halt the ongoing use and minting of the artwork.

Establishing the baseline mechanics of the IP transfer, the court-appointed intellectual property expert concluded that the enterprise did not inherently secure the copyright merely by possessing the digital files. The expert report, cited by the courts, explicitly stated:

“…the transfer of intellectual property rights to the first defendant is linked to the payment of the full agreed fees to the plaintiff.”

However, the courts identified a structural contradiction in the plaintiff’s approach to enforcing this default rule.

By suing for the remaining payment, the plaintiff was fundamentally demanding the specific performance of the contract. Under contract law, a party cannot enforce a contract’s payment terms while simultaneously attempting to enjoin the transfer of the very rights that the payment purchases.

The Court of First Instance articulated this clearly, ruling:

“The court points out that this request contradicts the claim for the outstanding balance under the contract, as that request is a demand for the validity and enforceability of the contract, and therefore, by granting that request, the rights to the works and drawings transfer to the first defendant, and it has the right to use them.”

The Court of Appeal noted:

"…the latter has become the owner of the rights to those drawings sold to it by the appellant, and the intellectual property rights to those drawings transfer to it upon the payment of the appellant's dues."

This logic also addressed the plaintiff's attempts to claim moral damages for the unauthorized tokenization of the art. Because the plaintiff elected to pursue the financial balance, the Court of Appeal ruled that the enterprise's subsequent minting of the NFTs could not be considered an abusive exploitation or a breach of the artist's moral rights, stating:

"…the appellant, by obtaining the consideration for his sale of those drawings to the first respondent, which necessarily leads to the latter having the right to use those drawings in the manner it sees fit."

In the context of Web3, this confirms that once economic rights transfer under an enforced agreement, the creator cannot rely on moral rights to dictate or restrict the buyer's choice to mint the assets on a blockchain.

The Court of Cassation finalized this framework regarding the transfer of intellectual property under a work-for-hire agreement, stating:

"…the financial and intellectual property rights for the artistic works subject of the contract transferred to it considering them as completed works within the framework of a work for hire agreement."

A Procedural Note: To legal practitioners accustomed to other litigation hubs in Asia and Europe, such as Singapore, Hong Kong, London, Germany, or Paris, this finding may require procedural contextualization. In those jurisdictions, courts issue interim injunctive orders to temporarily freeze the minting or commercialization of a disputed digital asset while a substantive payment claim proceeds to trial. However, in the

UAE, substantive trial courts generally do not issue interim injunctive relief within the primary merits claim itself; such interim relief is the purview of separate, urgent applications. Consequently, the UAE trial court consolidated the issues, ruling on the matter definitively in a single, final judgment. Because the court was adjudicating the final merits, its simultaneous confirmation of the debt owed and denial of the injunction were intrinsically linked. The court recognized that it could not finalize the financial execution of the contract while simultaneously blocking the transfer of the very commercial rights that the payment purchased.

The Adverse Position: Securing an Injunction Against Minting

The court's observation that a claim for the outstanding balance contradicts a request for an injunction provides a clear roadmap for future Web3 litigation. By dictating that enforcing payment perfects the transfer of minting rights, the judgment identifies the specific legal posture required to successfully halt an unauthorized mint.

To secure an injunction against a Web3 enterprise, a creator must adopt the adverse position. Rather than suing for specific performance (the unpaid balance), the plaintiff must seek the rescission or termination of the contract due to a material breach, such as non-payment.

By petitioning the court to dissolve the agreement, the transfer of economic rights is nullified. The copyright reverts to or remains entirely with the creator. In this posture, any subsequent minting of the digital assets by the enterprise transforms into an actionable copyright infringement under UAE law, potentially satisfying the prerequisites for injunctive relief.

Global Jurisdictional Comparatives

This ruling places the UAE in direct dialogue with other major litigation hubs actively defining the intersection of

copyright and digital assets.

In the United States, federal courts would look to 17 U.S.C. § 204(a) of the US Copyright Act, requiring a signed written instrument to transfer exclusive rights. US litigation frequently turns on contractual scope. In *Miramax v. Tarantino*, the core issue was whether legacy rights transfers implicitly included the right to exploit derivative works via NFTs. The UAE judgment bypasses medium-specific debates by recognizing that where a contract's factual purpose is the creation of an NFT collection, the general transfer of "economic rights" under Article 28 of the UAE Copyright Law inherently encompasses blockchain exploitation and minting, provided the financial terms are enforced.

In common law hubs like London, Singapore, and Hong Kong, courts have issued landmark rulings recognizing NFTs as legal property capable of being subject to proprietary injunctions. Cases such as *Osbourne v. Persons Unknown* in the UK and *Janesh s/o Rajkumar v. Unknown Person* in Singapore largely focused on the theft of the tokens themselves. These courts draw a strict distinction between the token as personal property and the underlying copyright, which is governed by statutes like the UK's Copyright, Designs and Patents Act 1988 or Singapore's Copyright Act 2021. The UAE judgment complements this global consensus by directly addressing the contractual transfer of the underlying generative art layers *before* they are minted onto the blockchain.

Joint Authorship in Decentralized Teams

The creation of the digital assets involved a co-creator who was not a named plaintiff in the lawsuit. Consequently, the Court of First Instance initially reduced the awarded payment.

The Court of Appeal overturned this reduction by applying Article 26 of the UAE Copyright Law, which governs joint works. The court relied on the statute, quoting:

“If several persons participate in the authorship of a work in such a way that the share of any of them cannot be separated from the other, all partners shall be considered equal authors of the work, unless otherwise agreed in writing… and each of them has the right to file lawsuits when an infringement occurs on any of the copyright rights protected by this Decree-Law.”

This confirmed the NFT assets as an inseparable joint work and validated the plaintiff’s standing to claim the entire financial balance on behalf of both authors, accommodating the decentralized reality of Web3 collaborations.

Furthermore, the litigation addressed a critical procedural hurdle common to Web3: the informal, cross-border nature of decentralized collaborations. The defendants challenged the plaintiff’s standing to claim his global co-creator’s share, arguing that the written authorization between different artists was executed abroad and lacked official diplomatic legalization or state notarization, a traditional requirement in UAE litigation.

Recognizing the borderless reality of digital asset creation, the Court of Cassation dismissed this defense. Distinguishing between official state documents and private contracts, the court established a highly Web3-friendly precedent:

“…customary documents drawn up by individuals among themselves outside the State do not require authentication by official authorities in the country where they were issued to be accepted as evidence before the State’s courts.”

This vital procedural clarification ensures that international Web3 teams are not barred from enforcing their joint IP rights in the UAE merely because their internal governance agreements lack traditional, paper-based consular notarizations.

The Legal Reality

The sequence of judgments establishes a definitive baseline for the digital asset sector in the UAE. The rulings confirm that decentralized assets operate predictably within the established boundaries of copyright and contract law. The transfer of economic and minting rights in a work-for-hire context is directly linked to the remedy pursued by the claimant. Seeking the monetary enforcement of an agreement effectively validates the transfer of the underlying digital intellectual property. For developers, investors, and creators, the legal mechanics governing Web3 are proving to be just as critical as the underlying code.

Wasel & Wasel advises on complex commercial disputes, international arbitration, and digital asset litigation. The firm possesses deep expertise in navigating cross-border fraud, tracing misappropriated funds, and securing interim equitable relief such as worldwide freezing injunctions and disclosure orders. By bridging the gap between local procedural frameworks and global common-law standards, Wasel & Wasel provides robust representation for corporate entities, tech developers, and international investors operating within the digital economy.

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War Series: Paper Barrels and Physical Constraints – The

Limits of Force Majeure in the 2026 GCC Energy Shock

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“In the inevitable collision between paper contracts and physical supply chains, physical reality ultimately dictates the terms.”

The Divergence of Paper and Physical Energy A recurring theme in macroeconomic and energy analysis is the fundamental disconnect between financial abstractions and physical reality. The modern economy operates on the assumption of uninterrupted primary energy flows. As the 2026 Iran War destabilizes the Arabian Gulf, the region is experiencing a severe, real-world stress test of that assumption.

While the Gulf Cooperation Council (GCC) remains the undisputed epicenter of global hydrocarbon production, the intense militarization of shipping lanes and sudden refining bottlenecks have severely constrained the downstream supply of refined products. Diesel and bunker fuel are the master resources of the physical economy. Without them, the sprawling infrastructure pipelines in Saudi Arabia, the logistics hubs in the UAE, and the massive backup generators required for the region’s data centers simply grind to a halt.

For years, procurement teams at major regional contractors managed their energy exposure through long-term, fixed-price diesel supply agreements. These contracts were viewed as ironclad hedges against market volatility. However, this strategy relied on the flawed premise that a paper contract can indefinitely command physical delivery, regardless of macroeconomic or geopolitical conditions. Paper barrels do not power generators.

Today, those fixed-price contracts are deeply out of the money. Spot prices for refined products have spiked dramatically, and commercial fuel suppliers are operating at

severe losses with every truck they dispatch. Predictably, these suppliers are issuing sweeping “Force Majeure” notices, unilaterally suspending deliveries, and demanding immediate price renegotiations.

Within the region’s commercial sectors, there is a growing misconception that extreme market volatility automatically excuses contractual performance. It is critical to examine this through the lens of established GCC civil law, which takes a highly structured, unsentimental approach to separating economic friction from true contractual impossibility.

The Unified GCC Legal Framework: Impossibility vs. Hardship When a fuel supplier unilaterally halts deliveries during a regional conflict, their primary defense is Force Majeure. However, the civil codes across the entire GCC, which share a deeply intertwined jurisprudential DNA heavily influenced by the Sanhuri model, draw a strict, unforgiving line between *absolute impossibility* and *extreme financial hardship*.

Across the region, Force Majeure requires an unforeseeable event that renders the performance of a contract physically or legally impossible. Only then is the obligation extinguished. Conversely, the doctrine of *Exceptional Circumstances* (or Hardship) applies when an unforeseeable public event occurs and performance remains physically possible, but has become so economically burdensome that it threatens the supplier with “grave loss.” Crucially, this doctrine does *not* allow the supplier to unilaterally terminate the agreement.

This vital duality is explicitly codified across the major Gulf jurisdictions:

- **The United Arab Emirates:** Article 273 of the Civil Transactions Law governs Force Majeure (impossibility), while Article 249 governs Exceptional Circumstances (hardship).
- **Kingdom of Saudi Arabia (KSA):** Under the recently enacted KSA Civil Transactions Law (Royal Decree M/191

of 2023), Article 125 dictates Force Majeure, whereas Article 97 provides for judicial intervention when unforeseeable circumstances make performance "oppressive" to the debtor.

- **Qatar:** The Qatari Civil Code (Law No. 22 of 2004) mirrors this structure precisely in Articles 258 and 171.
- **Oman and Kuwait:** Similar structural divides exist in the Omani Civil Transactions Law (Arts. 172 and 159) and the Kuwaiti Civil Code (Arts. 215 and 198).

Price Shocks Are Not Force Majeure To understand how regional courts apply these codes during commodity shocks, we can look to historical precedents. Following the 2008 global financial crisis and subsequent commodity supercycles, suppliers of highly volatile industrial materials faced catastrophic price spikes. Bound by fixed-price contracts, many claimed Force Majeure and halted deliveries.

The regional courts, setting a jurisprudential standard widely respected and cited across the GCC, have generally established a definitive rule: **A massive, unexpected increase in procurement costs, even if triggered by an unforeseeable geopolitical black swan, does not render a contract "impossible" to perform.**

If the physical molecules of diesel exist in the spot market, the supplier can technically procure and deliver them. The fact that doing so erodes profit margins and threatens the supplier's balance sheet constitutes a *relative* impossibility (hardship), not an *absolute* one (Force Majeure). Therefore, any supplier who unilaterally halts fuel deliveries based solely on market price surges is in material breach of contract.

The Judicial Pressure Valve The legal system, however, recognizes that rigidly enforcing economically ruinous contracts can trigger systemic cascading defaults across the supply chain. Bankrupting regional logistics providers serves neither the project owners nor the broader economy.

This is where the doctrine of Exceptional Circumstances acts as a vital pressure valve. It grants the presiding judge or arbitral tribunal the exclusive authority to intervene. By reviewing forensic financial data, a tribunal can equitably distribute the "grave loss." The judge may force the buyer to absorb a calculated percentage of the price surge, while mandating that the supplier continues deliveries at a newly adjusted rate.

The key legal distinction is procedural: the supplier cannot simply stop pumping fuel while demanding higher rates. They must maintain physical performance while formally petitioning the court to restore the economic balance of the contract.

When Sovereign Rationing Intervenes While market price surges do not trigger Force Majeure, the 2026 Iran War introduces a variable that absolutely does: Sovereign Energy Rationing.

If a GCC Ministry of Energy, national oil company, or sovereign military command issues a formal decree limiting commercial diesel allocations, perhaps capping them at 40% of pre-war volumes to preserve strategic reserves, the legal paradigm immediately shifts.

A direct sovereign rationing order is a true "foreign cause." It creates an absolute legal impossibility. If a supplier fails to deliver the remaining 60% of the contracted fuel because the state redirected the refinery output, they are completely shielded under the Force Majeure provisions across all GCC civil codes. The buyer cannot claim delay damages or demand the supplier procure fuel on the grey market to circumvent a sovereign mandate. When physical constraints are enforced by state power, the commercial contract must yield.

The Wartime Playbook for Energy Logistics For EPC contractors, heavy logistics operators, and energy suppliers navigating the supply constraints of the 2026 conflict, adhering strictly to regional legal frameworks is essential for mitigating risk:

- **For the Buyers – Audit the Notices:** Do not accept blanket Force Majeure notices at face value. If the supplier's inability to deliver stems entirely from

spot-market price inflation, issue a formal Notice of Breach. Regional jurisprudence makes it clear that market volatility is not a valid basis for unilateral termination.

- **For the Suppliers – Maintain Supply While Seeking Relief:** Unilaterally suspending fuel deliveries is a critical error that exposes the firm to substantial delay damages. Suppliers must continue physical performance while simultaneously invoking the Exceptional Circumstances provisions in local courts or tribunals to seek a formal, judicially mandated price adaptation.
- **For All Parties – Document Sovereign Intervention:** If fuel deliveries are halted due to state-imposed rationing, informal communications from downstream distributors are legally insufficient. To successfully invoke Force Majeure, the impacted party must formally serve the counterparty with the published government decrees, ministry circulars, or military orders demonstrating that the shortfall was dictated by sovereign mandate rather than commercial preference.

Takeaway The 2026 Iran War has profoundly disrupted the fundamental inputs of regional commerce. Businesses find themselves navigating a narrow corridor between severe price surges and the reality of state-level resource rationing. The assumption that fiat agreements can entirely insulate operations from physical supply chain shocks is no longer viable.

The GCC civil law frameworks provide a pragmatic, structured mechanism for managing this disruption. The law rigorously protects the sanctity of contracts against mere market panic, while allowing for judicial intervention to prevent systemic economic collapse. Companies cannot use geopolitical volatility to unilaterally walk away from unprofitable agreements, but they can leverage statutory doctrines to ensure an equitable sharing of the wartime burden. Ultimately,

success requires aligning legal strategy with physical market realities.

Wasel & Wasel advises on complex commercial disputes, international arbitration, and cross-border financial litigation. The firm represents major corporate entities, regional contractors, and energy suppliers in high-stakes proceedings before various courts and tribunals across the GCC. Our practice includes navigating complex force majeure claims, litigating the application of exceptional circumstances and contract adaptation, managing multi-jurisdictional supply chain disputes, and enforcing contractual rights amidst geopolitical crises and sovereign interventions.

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Secondary Market Misrepresentation in Crypto: Insights from the Ontario Superior Court of Justice

October 19, 2026

A recent decision by the Ontario Superior Court of Justice in *Banach v. Galaxy Digital Holdings Ltd., 2026 ONSC 4534* is emerging as a critical reference point for digital asset investors, class actions, and corporate disclosure obligations. The judgment establishes decisive principles

regarding secondary market misrepresentations, the assessment of materiality for cryptocurrency disclosures, and the liability associated with the promotion of algorithmic stablecoins. The ruling also sheds light on the broader implications for the permissibility and opportunity of class action crypto disputes globally. **Background**The precedent case arose from a class action against Galaxy Digital Holdings Ltd. ("Galaxy"), an investment company heavily engaged in the digital asset industry, and its senior management. The plaintiff alleged that Galaxy failed to disclose material risks associated with its core digital asset holdings, specifically Luna and its associated algorithmic stablecoin, TerraUSD. Between May 2021 and May 2022, Galaxy's CEO heavily promoted Luna. However, in May 2022, Luna and TerraUSD entered a "death spiral," wiping out $40 billion in market value globally, which resulted in a 42.9% drop in Galaxy's share price and a $300 million quarter-to-date loss.

The plaintiff claimed that Galaxy's public disclosures during the class period contained misleading omissions regarding the operation and inherent risks of the Terra blockchain and algorithmic stablecoins, particularly the risk of a "death spiral," whilst simultaneously selling their Luna holdings.

The Court's Key Findings The Ontario Superior Court granted the plaintiff leave to proceed under the Ontario Securities Act and certified the action as a class proceeding. The Court's detailed judgment provided several critical findings:

- **Materiality Exceeds Strict Percentages:** The defendants argued that Luna was a relatively small portion of Galaxy's total portfolio during most of the class period and was therefore not legally material. The Court rejected this quantitative defense in full. It held that the test for materiality is whether the omitted information would significantly alter the "total mix of information" available to a reasonable investor. The intense promotional campaign by Galaxy's CEO made Luna fundamentally material to the company's valuation in the

eyes of the market, demonstrating that risks cannot be ignored based on percentage alone.

- **Public Corrections:** Following the collapse of Luna, the CEO issued public statements acknowledging the risks of algorithmic stablecoins and the resulting losses. The defendants dismissed these as *ex post facto* musings. However, the Court categorized these statements as actionable "public corrections," revealing to the market the material facts and risks that Galaxy was obligated to disclose all along.

Comparing Permissibility of Class Action Crypto Disputes in Global Jurisdictions The *Banach* decision highlights Canada's permissive "opt-out" class action regime, which seamlessly aggregates massive retail investor claims. For digital asset issuers and exchanges operating globally, the permissibility of class action crypto disputes varies drastically across other major jurisdictions:

- **London (England & Wales):** The English legal system does not possess a direct equivalent to the North American opt-out class action for securities fraud. Claimants generally rely on Group Litigation Orders (GLOs) under the Financial Services and Markets Act (FSMA) or representative actions. GLOs operate on an "opt-in" basis, requiring upfront funding from each claimant. Representative actions require all claimants to share the "same interest," making it exceedingly difficult to aggregate the claims of retail investors who purchased digital assets at varying times and prices.
- **Hong Kong & Singapore:** Neither Hong Kong nor Singapore currently supports a statutory class-action regime. Mass claims are limited to traditional representative proceedings, which mandate a rigid "same interest" test. Consequently, mass retail actions over crypto market misrepresentations face significant procedural hurdles. These jurisdictions heavily favor bilateral commercial

litigation and institutional arbitration for digital asset disputes, limiting the threat of plaintiff-driven mass securities torts.

- **DIFC (Dubai) & ADGM (Abu Dhabi):** As leading offshore common law jurisdictions in the Middle East, the DIFC and ADGM provide highly sophisticated courts capable of handling complex digital asset disputes. While they offer mechanisms for group litigation, these operate on an opt-in basis. Neither jurisdiction permits the sweeping, opt-out class actions seen in Ontario, thereby providing an efficient venue for organized institutional investors but inherently shielding token issuers from the asymmetric exposure of North American retail class actions.

Looking Ahead The Ontario Court's decision serves as a definitive warning that generic risk disclosures are insufficient for complex digital assets and that public promotional activities can elevate an asset's legal materiality. Categorizing bespoke digital assets under generic umbrellas constitutes a material misrepresentation if unique structural risks are omitted. For global practitioners and stakeholders operating in this space, navigating the distinct procedural realities of global financial hubs will be essential for effective collective redress and mitigating exposure to class actions.

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Enforcing Third-Party Subpoenas in Arbitration: Supreme Court of Western Australia Rejects Oppression and Discovery Objections

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The intersection of private commercial arbitration and judicial intervention frequently generates procedural friction, particularly concerning the compulsion of third-party evidence. In the recent decision of *Brackenridge -v- A.T. Brine & Sons Pty Ltd* [2026] WASC 338, the Supreme Court of Western Australia provided significant judicial insight into the legal principles and evidentiary thresholds required to set aside a subpoena issued in support of arbitral proceedings.

This ruling offers a critical reference point for the enforcement of subpoenas against non-parties, clarifying the principles governing legitimate forensic purpose, the intersection with arbitral discovery regimes, and the evidentiary burden required to establish "oppression."

The Context of the Dispute

The precedent case arose from a consolidated arbitration between plaintiff homeowners and a defendant builder concerning a lump-sum residential building contract in Cottesloe. During the arbitration, the appointed Arbitrator directed by consent that there would be no general discovery. However, the parties were permitted to apply for the production of specific documents relevant to the issues in

dispute.

With the permission of the Arbitrator, the plaintiffs obtained an *ex parte* subpoena from the Supreme Court pursuant to section 27A of the *Commercial Arbitration Act 2012* (WA). The subpoena compelled a third party, the project's architect, who was also the authorized agent of the homeowners and a relative of the plaintiffs, to produce several categories of documents, including architectural drawings, correspondence, and variation approvals.

The architect applied to the court to set aside the subpoena, arguing that it lacked a legitimate forensic purpose, circumvented the agreed discovery process, and was oppressively broad.

The Court's Key Findings

Relevance and Legitimate Forensic Purpose

In addressing the objection that the requested documents lacked relevance, the Court applied the established principle that a subpoena possesses a legitimate forensic purpose if it is "on the cards" that the documents sought will materially assist a party's case.

Crucially, Justice Lundberg afforded a degree of judicial deference to the Arbitrator's initial assessment that the documents were material to the issues in dispute. Because the architect acted as the owners' authorized agent under the building contract, his drawings, site instructions, and handling of extensions of time were foundational to the core issues of the arbitration, which included defective work, delays, and variations. The judgment reinforces that a third party cannot rely on an unduly narrow conception of relevance when the arbitral pleadings clearly implicate their professional involvement.

The Discovery Objection

The applicant further argued that the subpoena was an abuse of process designed to bypass standard discovery, given that the arbitrating parties themselves likely possessed many of the requested documents.

The Court rejected this premise. While acknowledging that deploying a subpoena merely to bypass general discovery can constitute an abuse of process, the Court clarified that the mere potential for overlap does not, of itself, invalidate the subpoena. “Something more than this is required,” the Court noted.

The Court highlighted three factors validating the subpoena:

1. The arbitrating parties had expressly consented to forego general discovery, allowing instead for specific document production.

2. The Arbitrator had granted explicit permission for the subpoena, and the defendant builder did not oppose it, demonstrating it was not an attempt to circumvent or undermine the arbitral process.

3. The production of documents directly from the third party’s possession could be independently probative of the existence, content, and context of those records.

The Threshold for Oppression

Perhaps the most instructive aspect of the judgment is the Court’s treatment of the “oppression” objection. The architect contended that compliance would be “significant and onerous,” estimating that thousands of documents generated over a four-year period would need to be reviewed from unsegregated electronic folders and personal devices.

The Court dismissed this contention as “little more than conjecture,” establishing a clear evidentiary standard: assertions of oppression must be supported by cogent evidence

rather than mere estimates. Justice Lundberg noted that a subpoena recipient is expected to undertake good faith efforts to assess the compliance task, such as deploying appropriate electronic search terms, to provide the court with a more granular assessment of the work and cost involved. Blanket assertions regarding the volume of emails or the duration of a project are insufficient to demonstrate an unreasonable burden.

Furthermore, the architect expressed concern that the requested documents might be used by the plaintiffs to mount a subsequent professional liability claim against him. The Court held that the evident relevance of the materials to the current arbitration outweighed this risk. Any potential misuse is robustly mitigated by the implied undertaking, which strictly restricts the use of compulsorily produced documents to the proceedings for which they were sought.

Implications and Key Takeaways

The Supreme Court's decision provides clear, direct guidance for legal practitioners, contractors, and project owners navigating arbitral disputes and third-party evidence. The message is uncompromising: general claims of burden are insufficient to avoid compliance.

For stakeholders operating in this space, the key takeaways are:

- **Arbitral Deference:** Courts are highly inclined to respect an arbitral tribunal's determination regarding the relevance of third-party documents. Securing the arbitrator's explicit permission heavily insulates the subsequent court subpoena from relevance-based challenges.
- **Overlap with Discovery is Permissible:** Utilizing a subpoena to obtain targeted documents that might otherwise be discoverable is not automatically an abuse

of process, particularly where the tribunal has actively managed the discovery regime and consented to the subpoena process.

- **Evidentiary Precision for Oppression:** Non-parties seeking to challenge a subpoena on the grounds of oppression cannot rely on theoretical estimates of burden. Detailed, empirical evidence demonstrating good faith efforts to limit the scope (e.g., through targeted technology searches) is an absolute prerequisite.

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Aerospace Exports to Russia Through a UAE Company: U.S. Export Controls in Practice

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On 14 September 2026, a Russian national pleaded guilty to conspiring to violate the Export Control Reform Act ("ECRA") through the unlawful supply of U.S.-origin aviation and aerospace components to Russia. According to the U.S. Department of Justice, the scheme involved ITC Middle East FZ-LLC, a company he co-founded in the UAE in March 2022 ("ITC"). Nearly USD 2 million in primarily export-controlled aerospace goods were supplied to ITC and ultimately reexported to Russia without the required authorization.

ITC's location gives the case particular relevance to regional aerospace firms. ITC is a Ras Al Khaimah entity, with a registered address at RAKEZ Amenity Center in the UAE. That corporate presence illustrates a legal issue for international distribution: receiving American goods through a company established outside the U.S. does not necessarily remove those goods from U.S. export control.

Under 15 C.F.R. § 734.3(a)(2), U.S.-origin items generally remain subject to the Export Administration Regulations ("EAR") wherever located in the world, subject to specified exclusions. Consequently, an onward shipment by a UAE company can require U.S. authorization even where the transaction occurs entirely outside the U.S. A company's place of incorporation and the regulatory status of its inventory are separate questions. Free-zone establishment does not itself create an exemption from these controls.

As in this case, Russia-specific restrictions can further complicate transactions. Section 746.8 of the EAR imposes, *inter alia*, licensing requirements on exports, reexports and transfers to or within Russia of items specified on the Commerce Control List, which is maintained by the Bureau of Industry and Security ("BIS"). Applicable exceptions and exclusions require separate examination. For aerospace suppliers, the relevant assessment therefore includes product classification, ultimate destination, end user and intended use. Thus, an intermediate delivery to the UAE cannot resolve whether a subsequent Russian delivery is permissible. Criminal consequences arise under 50 U.S.C. § 4819 which prohibits violations, attempts, conspiracies and conduct causing violations.

Importantly, the criminal provisions of the ECRA address willful conduct and there are distinct forms of exposure; a compliance failure should not automatically be equated with the willful conspiracy admitted in this case. The geographical connection is another layer that should be discussed

precisely. The case in question is an individual’s guilty plea involving a particular company. It does not establish wrongdoing by UAE authorities or the wider UAE aerospace sector. Equally, it does not identify every supplier as a knowing participant. No charges against ITC as an entity have been announced thus far.

For the aerospace industry, the practical implication is that compliance must extend beyond the immediate purchaser. Manufacturers, distributors and maintenance providers should establish who will ultimately receive controlled components, verify the commercial explanation for intermediaries and investigate any inconsistent shipping instructions. As per BIS guidance, when transactional circumstances raise red flags, exporters have a duty to conduct an inquiry. Commercially, this incident demonstrates the need for detailed end-use documentation, contractual controls on onward transfers and procedures for suspending deliveries when material questions remain unresolved. For aerospace firms in the UAE and elsewhere, demonstrable control over distribution can help preserve access to U.S. suppliers and reduce disruption to legitimate trade.

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