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

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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 counsel.*

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