War Series: Rogue Charterers, Vessel Misappropriation, and the Illusion of “Washed” Titles – Applying the 2001 UAE Supreme Court Gulf War Precedent to GCC Maritime Logistics in the 2026 Iran War

March 31, 2026

Introduction: The Maritime Fog of War and the Weaponization of Charter Parties As the

2026 Iran War aggressively destabilizes the Middle East, the world’s most critical maritime chokepoints, the Strait of Hormuz, the Arabian Gulf, and the Gulf of Oman, have been transformed into theaters of intense logistical paralysis. With naval blockades, soaring war risk premiums, and sweeping economic sanctions dominating the operational landscape, the global shipping industry finds its standard Charter Party Agreements (CPAs) fracturing under the pressure.

While much of the industry’s focus is understandably directed toward the frustration of time charters, safe port warranties under standard BIMCO forms (such as CONWARTIME or VOYWAR), and off-hire disputes, a far more considerable legal crisis is emerging in the offshore sector: the outright misappropriation of vessels.

Operating under standard bareboat agreements (such as the

BIMCO BARECON form), certain charterers are exploiting the geopolitical chaos by invoking the 2026 war not merely to excuse operational delays, but to entirely evade their absolute obligation to redeliver the vessel. Taking advantage of the “fog of war,” these operators effectively hijack multi-million-dollar assets, sever communications, and attempt to “wash” the vessel’s title through opaque judicial sales in peripheral jurisdictions, eventually re-flagging the ship and deploying it back into lucrative trade routes under a new identity.

In standard peacetime practice, disputes arising from these CPAs are overwhelmingly directed to arbitration, most notably under the London Maritime Arbitrators Association (LMAA) Terms. However, an LMAA arbitral award is ultimately a contractual remedy; it cannot physically intercept a stolen ship. When a misappropriated vessel suddenly drops anchor in a GCC port, shipowners require immediate, coercive *in rem* action from local civil courts.

For maritime stakeholders navigating this crisis, the UAE Federal Supreme Court provides an effective blueprint for vessel recovery. By examining a landmark judgment (Federal Supreme Court Judgment No. 252 of 2001, Civil), which adjudicated a complex vessel misappropriation stemming from the Second Gulf War (the 1990 Iraq-Kuwait conflict), we can transpose these powerful jurisdictional precedents directly onto the maritime realities of the 2026 Iran War.

The Factual Matrix: Transposing the 1990 Gulf War Misappropriation

The factual matrix of UAE Supreme Court Judgment No. 252/2001 serves as a perfect analogue for the aggressive title disputes erupting today. The dispute originated in the shadows of the 1990 Gulf War and the subsequent international embargoes, mirroring the blockades and sanctions defining the 2026 conflict.

On March 27, 1990, the original shipowner (the First Respondent) leased their vessel, the *Arabian Sea* (registered in Basra), to a commercial operator (the Charterer) under a five-year bareboat charter. Shortly after the vessel was delivered, the geopolitical landscape violently collapsed. As the regional war escalated and sanctions isolated operations, the Charterer exploited the blackout. When the charter period expired, the Charterer flatly refused to redeliver the vessel to the original owner, under the cover of wartime blockade and boycott.

Years later, the original owner tracked the vessel down. It had entered the territorial waters of the UAE and docked at the Port of Sharjah, flying the flag of Belize and operating under a new name, the *Baron*. Acting swiftly, the original owner petitioned the Sharjah Court of First Instance and successfully secured a conservatory arrest order (Attachment No. 4/1997), physically trapping the ship in port and demanding its delivery free of any encumbrances.

The legal battle escalated when a foreign corporate entity, Redcap Limited (the Intervener/Appellant), intervened in the lawsuit, demanding the arrest be lifted. Redcap claimed they were the new, legitimate owner of the vessel, having purchased it in 1996 for $1,700,000 USD through a formal judicial sale executed by the High Court in Kenya.

Relying on standard international maritime principles, Redcap argued that a judicial sale at public auction physically purges a vessel of all prior liens, encumbrances, and ownership claims. They asserted that if the original owner had a grievance regarding the stolen ship, their claim must be directed exclusively against the $1.7 million sale proceeds held in Kenya, not against the physical vessel itself. Furthermore, the Intervener launched a jurisdictional challenge, arguing that the UAE courts had no authority to adjudicate the ownership of a foreign-flagged vessel, owned by a foreign entity, that was merely passing through UAE waters

“incidentally.”

Jurisdictional Supremacy: The “Asset in Port” Trap

In 2026, foreign shipowners, rogue charterers, and P&I Clubs frequently assume that because a CPA is governed by English law, or because a vessel flies a flag of convenience, GCC courts will decline jurisdiction over complex ownership disputes. The UAE Supreme Court dismantled this assumption.

The Intervener argued that under the UAE Maritime Commercial Law, the vessel’s presence in Sharjah was merely “incidental” and did not grant the civil courts substantive jurisdiction over an international ownership dispute.

The Supreme Court rejected this entirely, anchoring its ruling in the absolute sovereignty principles of the UAE Civil Procedure Code. The Court established a definitive rule: the physical presence of the asset dictates the jurisdiction.

(“The original principle is regional judicial jurisdiction, and the administration of justice is a public interest exercised by the State within the limits that achieve this interest through its national judiciary… Therefore, the international jurisdiction vested in the national judiciary is, in this capacity, a matter of public policy linked to the sovereignty of the State.”)

Applying Article 21 of the Civil Procedure Law, the Court held that UAE courts possess absolute jurisdiction over lawsuits filed against foreigners who have no domicile in the UAE, provided the lawsuit relates to “funds or property located within the State.” The Court explicitly ruled:

(“The reason for jurisdiction in that case goes back to the fact that the disputed property is located in its territory, which is an objective criterion based on the location of the property. If it is located there, jurisdiction is established for the State’s courts, even if the source of the obligation

did not arise there, or if the presence of the property was incidental.")

Furthermore, the Court harmonized this with Article 115 of the UAE Maritime Commercial Law applicable at the time, confirming that a dispute over the "ownership of a vessel" unequivocally constitutes a "maritime debt" justifying an immediate conservatory arrest. For 2026 rogue charterers hoping to use UAE ports as temporary safe havens, the precedent is clear: the moment your hull crosses into UAE territorial waters, the protective veil of foreign jurisdictions is challengeable.

Piercing the "Cleansed Title" Myth: The Burden of Proving Foreign Law

The most considerable finding by the Supreme Court, and the most critical warning for the 2026 crisis, was its treatment of the Kenyan judicial sale. The Intervener believed that presenting a foreign court's auction decree would automatically force the UAE courts to recognize their clean title.

Under the GCC civil law framework, foreign law is not treated as binding legal authority that a judge must independently research; rather, it is treated purely as a "material fact." According to strict conflict of laws principles, the party relying on a foreign legal mechanism (such as the purging effect of a Kenyan judicial sale) bears the absolute burden of conclusively proving the existence, text, and application of that foreign law.

Because the Intervener merely alleged the effect of the foreign judicial sale in their memorandums but failed to formally, procedurally prove the foreign law to the standard required by UAE evidentiary rules, the Supreme Court upheld the lower courts' dismissal of the Kenyan sale entirely.

("Foreign law is a mere fact, the burden of proving which falls on the party invoking it, and the Appellant did not

prove its existence.")

By invalidating the foreign judicial sale due to evidentiary failures, the Court retroactively erased the Intervener's title. The Supreme Court confirmed the original owner's absolute title to the vessel, solidifying the Sharjah arrest order and mandating the ship be handed over to them, completely free of any actions taken by the rogue charterer. The Intervener, despite having paid $1.7 million, lost the ship.

Strategic Playbook for Maritime Logistics in the 2026 Crisis

For international shipowners, lessors, and maritime litigators attempting to secure assets in the chaotic theater of the 2026 Iran War, the 2001 UAE Supreme Court precedent dictates a highly determined, localized strategy.

Bypass LMAA Delays for Immediate Asset Recovery: While you must commence LMAA arbitration (if not modified) to resolve the underlying BARECON or NYPE breach regarding the unpaid hire or failure to redeliver, arbitration will not physically stop the ship from trading. Shipowners must utilize maritime intelligence to track misappropriated vessels. The moment a stolen vessel enters UAE or broader GCC waters (such as Jebel Ali, Fujairah, or Sharjah), owners must immediately file an *ex parte* application under local maritime law (e.g., UAE Maritime Law Art. 115) to arrest the vessel based on the ownership dispute. The local courts may assert jurisdiction strictly based on the physical presence of the hull.

Do Not Fear "Title Washing" or Flags of Convenience: If a rogue bareboat charterer has attempted to extinguish your title by routing the vessel through a dubious judicial sale in a peripheral jurisdiction, do not assume your claim is reduced to chasing the sale proceeds. As the precedent proves, UAE courts will heavily scrutinize foreign judicial sales. If the new "owner" cannot flawlessly prove the foreign law that

allegedly purged your title, the UAE courts may disregard the foreign auction and return the physical asset to its original registered owner.

Strict Evidentiary Hygiene for Foreign Law: Conversely, if you are a legitimate buyer of a vessel that was lawfully auctioned during the 2026 conflict, and you face an arrest in the UAE from a disgruntled former owner, you cannot merely submit the foreign court judgment. You must submit legally authenticated, translated copies of the foreign maritime legislation, supported by expert legal affidavits, to prove *as a matter of fact* that the foreign judicial sale extinguished all prior encumbrances. Relying on “general principles of international maritime law” may result in a fatal loss at the local courts.

Conclusion: Territorial Reality Over Contractual Illusion

The 2026 Iran War has created a highly volatile environment for wider international commercial operations, where severe disruptions in shipping lanes, banking, and port operations have catalyzed a surge in distressed asset scenarios, complex cross-border restructuring, and, in some instances, outright maritime opportunism. As international operators, distressed stakeholders, and occasional rogue charterers navigate these disruptions, whether to resolve legitimate operational disputes, execute complex foreign sales, or obscure vessel identities, the belief that standard LMAA arbitration clauses will keep procedures safely insulated in London while the physical ships continue to trade or seek refuge in the Middle East may not be the case.

UAE Federal Supreme Court Judgment No. 252/2001 provides clarity in this sense. The GCC civil law framework is often protective of its territorial sovereignty. When a maritime asset enters domestic waters, the state’s courts possess the jurisdiction to arrest it, adjudicate its true ownership, and strip away fraudulent or unproven foreign titles. For shipowners fighting to reclaim their fleets in the 2026

crisis, the message is clear: the most powerful weapon in your arsenal is not just the arbitration clause in your charter party, but the sovereign reach of the local port state.

Wasel & Wasel demonstrates extensive expertise in navigating complex maritime disputes, admiralty matters, and vessel arrests within the UAE courts and international arbitration forums. The firm has a proven track record of representing maritime contractors in grievance proceedings before the UAE Federal Courts to challenge the precautionary seizure of vessels. Their capabilities include advising logistics companies on appealing vessel arrest orders and successfully obtaining stays of execution from the UAE Federal Supreme Court against lower court vessel seizure orders. Furthermore, Wasel & Wasel actively handles complex charter party disputes, recovers outstanding debts under SUPPLYTIME agreements , and represents international shipping companies in London-seated LMAA arbitration proceedings concerning vessel sales and management.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

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business@waselandwasel.com

War Series: The “Fix-It On-Site” Fallacy, Pre-Existing Breaches, and the Limits of

Force Majeure – Applying the Dubai Courts’ Sudan War Jurisprudence to GCC Construction Logistics in the 2026 Iran War

March 31, 2026

Introduction: The Fog of War and the Shield of Convenience

As the 2026 Iran War aggressively reverberates across the Middle East, the Gulf Cooperation Council (GCC) finds its sprawling construction, engineering, and infrastructure sectors facing an unprecedented logistical paralysis. With military exclusion zones declared across critical maritime chokepoints in the Strait of Hormuz, the Arabian Gulf, and the Gulf of Oman, commercial ocean freight has been fundamentally disrupted. Simultaneously, abrupt civil aviation closures and sudden Notices to Air Missions (NOTAMs) have grounded the global airfreight corridors that traditionally sustain the rapid pace of regional development.

The movement of vital construction materials, ranging from pre-fabricated modular units and highly specialized electromechanical equipment to bespoke structural steel, has ground to a virtual halt.

In the immediate wake of these severe geopolitical disruptions, regional engineering, procurement, and construction (EPC) main contractors, alongside project owners and developers, are being inundated with *force majeure* notices from international manufacturers and regional logistics suppliers. The narrative presented in these notices is nearly

universal: suppliers claim that the sudden, violent escalation of the 2026 Iran War constitutes an insurmountable, unforeseeable sovereign event that absolutely prevents them from fulfilling their supply chains. Consequently, they argue, this geopolitical crisis shields them from contractual liability, insulates them from delay penalties, and, most crucially, allows them to retain massive, unamortized advance payments without delivering the contracted goods.

However, a critical and highly contentious legal dilemma arises when the fog of war is utilized to mask pre-existing corporate failures. What happens when a supplier or logistics provider was already in fundamental breach of their contractual obligations, such as manufacturing defective, non-conforming materials, or missing crucial pre-war shipping deadlines, *before* the first military shot was fired? Can a supplier legitimately use an active regional war as a legal shield to excuse a failure that is entirely rooted in their own prior engineering incompetence or manufacturing negligence?

For construction executives, procurement directors, and logistics heads navigating the intense commercial complexities of the 2026 crisis, the GCC civil law framework provides a highly unforgiving answer to this question. By examining a landmark, highly detailed judgment from the Dubai Court of First Instance (Judgment No. 695/2023 Commercial Banking, issued on April 29, 2025), which adjudicated a multimillion-dollar construction supply dispute violently disrupted by the sudden outbreak of the 2023 war in Sudan, we can transpose these vital legal precedents directly onto the current logistical realities of the Iran War.

This definitive precedent establishes a foundational rule of wartime commerce across the Arabian Peninsula: *Force majeure* cannot cure a pre-existing breach, and an armed conflict cannot be weaponized to camouflage manufacturing defects.

The 2026 Construction Logistics Landscape in the GCC

To fully comprehend the gravity and utility of this judicial precedent, one must first recognize the sheer scale and vulnerability of the supply chain mechanisms currently keeping GCC gigaprojects afloat. From the colossal Vision 2030 developments in the Kingdom of Saudi Arabia (KSA), such as NEOM, the Red Sea Project, and Qiddiya, to massive infrastructure upgrades, desalination plants, and transit networks in the United Arab Emirates (UAE) and Qatar, project owners rely overwhelmingly on highly synchronized, cross-border international supply contracts.

These procurement contracts are defined by rigid technical specifications, strict Factory Acceptance Tests (FAT), mandatory third-party quality inspections (executed by global entities such as SGS, TUV, or Bureau Veritas), and massive upfront capital injections. Advance payments in the GCC construction sector frequently range from 20% to 30% of the total contract value. These multi-million-dollar transfers are systematically secured by unconditional bank guarantees (Advance Payment Bonds) and Performance Bonds, which are intended to act as liquid, on-demand safety nets for the contractor.

In the wartime reality of 2026, this logistical chain is fracturing under extreme military strain. If a supplier in Asia or Europe has manufactured flawless equipment destined for a site in Riyadh, Abu Dhabi, or Doha, and those materials are genuinely trapped in a transit port due to a naval blockade, the doctrine of *force majeure* legitimately applies. The law recognizes the impossibility of performance caused by sovereign military intervention.

However, a far more insidious and financially devastating scenario is currently playing out across the industry: suppliers who failed their FAT inspections weeks or months ago, and who were struggling to rectify profound engineering

defects, are now pointing to the Iran War as the exclusive "reason" they cannot deliver.

In peacetime, the construction industry frequently operates on a "fix-it-on-site" gentleman's agreement. When materials arrive with minor dimensional discrepancies or manufacturing flaws, the supplier promises to fly a team of specialized technicians to the GCC project site to weld extensions, modify components, or rectify the defects during the final installation phase. But in the 2026 Iran War, borders are restricted, visas are suspended, and flights are canceled. The supplier's technicians cannot travel. Consequently, suppliers are attempting to freeze the contracts in place, arguing that the war physically prevented their contractual right to cure the defects, and demanding they be allowed to keep the massive advance payments to cover their sunken manufacturing costs.

The Factual Matrix: Transposing the 2023 Sudan War Dispute

The factual matrix of Dubai Court Judgment No. 695/2023 serves as a flawless, highly granular analogue for the supply chain disputes erupting today. While the geographical focal point of the conflict in the precedent was the Republic of Sudan rather than the current theater of Iran, the legal, logistical, and contractual mechanics are absolutely identical to the 2026 crisis.

On August 10, 2022, a major regional contracting company (the "Contractor" or "Buyer", acting as the original Defendant and Counter-Claimant in the suit) entered into a high-value commercial supply contract with a UAE-based general trading and manufacturing entity (the "Supplier" or "Original Plaintiff"). The contract, valued at a substantial $4,259,400, demanded the highly specified offshore manufacture, supply, and logistical delivery of critical water infrastructure materials. Specifically, the Supplier was tasked with fabricating eighty 50-cubic-meter ($50m^3$) steel water tanks, massive supporting steel structural towers, and hundreds of

associated livestock drinking troughs. These materials were destined for an ongoing, highly sensitive 500-well infrastructure mega-project overseen by the Ministry of Irrigation and Water Resources in the Republic of Sudan.

Following standard GCC construction logistics protocols, the Contractor executed a 30% advance payment amounting to $1,277,832 on January 8, 2023. In return, the Supplier was obligated to provide unconditional bank guarantees issued by a recognized financial institution for the advance payment, alongside a 10% performance bond valued at $425,944. The contract rigorously stipulated that the materials could not be shipped until they passed an independent third-party inspection and subsequently received a formal “Shipping Release Note” directly from the end-client (the Ministry).

By early March 2023, the Supplier had fabricated the first major batch of materials in their offshore facilities, comprising 80 massive water tanks and hundreds of structural accessories, and generated a commercial freight invoice for $1,190,880. Anticipating delivery, the materials were subjected to an independent inspection by SGS on March 10, 2023.

The resulting inspection report was a failure for the Supplier. The materials materially and dangerously failed to meet the agreed-upon engineering specifications. The defects flagged by SGS were not merely cosmetic; they were highly specific to structural engineering and posed severe risks:

1. **Critical Dimensional Deficits:** The structural steel loading columns (the foundational legs supporting the massive water tanks) were contractually required by the purchase order to be exactly 6 meters long. The manufactured columns measured less than 5.5 meters, representing a massive half-meter deficit.
2. **Structural Integrity Failures:** The thickness of the internal steel supports within the tanks was

substantially less than the load-bearing thickness mandated by the contract, threatening a total structural collapse under the weight of 50 tons of water.

3. **Life Safety Hazards:** The fall-prevention safety barriers, located on service platforms at a height of over 6 meters, were severely reduced in height in violation of HSE specifications. Furthermore, the service ladders were fundamentally too short, creating what the inspection noted as severe occupational safety risks of fatal falls for future maintenance operators.

Following a rigorous review of this inspection report, the Sudanese Ministry of Irrigation and Water Resources officially and categorically rejected the materials on April 13, 2023. Exercising their contractual rights, the Contractor subsequently issued a formal Notice of Breach to the Supplier on April 20, 2023, demanding immediate rectification of the life-safety and structural defects within an aggressive 48-hour window, as per Clause 10.2 of their agreement.

The Outbreak of War and the Force Majeure Shield

Faced with a formal breach notice and fundamentally non-conforming materials, the Supplier engaged in the classic “fix-it-on-site” strategy. They argued to the Contractor that the materials were “98% compliant” and that the structural defects were minor and easily rectified. Regarding the missing half-meter on the steel columns, the Supplier proposed a radical site-based engineering workaround: they suggested simply increasing the height of the concrete foundation bases poured on-site by the Contractor to compensate for the short steel.

To execute this highly irregular compromise, which would require altering the civil works for 500 separate well foundations, the Supplier and the Contractor tentatively agreed to fly their respective executives and lead engineers to Khartoum on April 17, 2023. The goal was to meet directly

with the Ministry, inspect similar projects, and authorize the on-site structural correction.

Then, geopolitics violently intervened. On April 15, 2023, just two days before the critical site visit, the devastating Sudanese Civil War abruptly erupted. Khartoum International Airport was attacked and shut down, commercial flights were globally canceled, and a state of intense armed conflict engulfed the delivery destination.

Recognizing the contractual peril they were in, the Supplier immediately pivoted their legal strategy. They filed a preemptive lawsuit against the Contractor and the issuing Islamic bank in the Dubai Courts. The Supplier sought a judicial decree to enforce the continuation of the contract, or, in the alternative, to formally terminate the contract under the exclusive doctrine of *force majeure* (relying on Clause 7 of the contract concerning armed conflict and exceptional events).

Crucially, the Supplier argued that the sudden outbreak of war was a legally recognized “exceptional, unforeseeable event” that made it physically impossible for their engineering teams to travel to Sudan to fix the defects, negotiate the concrete workaround, or complete the final delivery. Therefore, they demanded a mutual liquidation of accounts wherein they would retain the massive $1.27 million advance payment (as it was roughly equivalent to the value of the goods they had manufactured), while simultaneously seeking a judicial injunction to block the Contractor from liquidating the $1.7 million in bank guarantees.

The Contractor filed a fierce and comprehensive Counterclaim. They argued that the contract must be terminated not out of mutual wartime sympathy or *force majeure*, but strictly because of the Supplier’s gross, pre-existing breach of contract. They demanded the full refund of their $1,277,832 advance payment, plus statutory interest and compensatory damages, noting

unequivocally that the Supplier's failure to adhere to the FAT specifications occurred entirely before the war broke out, and that proposing to pour extra concrete to cover up a manufacturing error was not a contractual right.

The Judicial Framework: UAE Civil Law on Contracts and Breach

Before dissecting the timeline of the wartime disruption, the Dubai Court of First Instance grounded its ruling in the fundamental bedrock of the UAE Civil Transactions Law (Federal Law No. 5 of 1985). For logistics managers, corporate counsel, and procurement directors operating in 2026, understanding these statutory definitions is paramount when negotiating and enforcing supply contracts.

The Court explicitly defined the absolute, uncompromising nature of contractual obligations, quoting Article 125 of the Civil Transactions Law:

("A contract is the connection of an offer issued by one of the contracting parties with the acceptance of the other, aligning in a way that establishes its effect on the subject matter, and results in the obligation of each of them to fulfill what is owed to the other.")

The Court further cemented the absolute duty of performance by citing Article 243(2) of the Civil Transactions Law, which strips away the flexibility often assumed in construction logistics:

("Each of the contracting parties must fulfill what the contract obliges them to do. The contract must be executed according to what it contains and in a manner consistent with what good faith requires.")

Focusing specifically on the logistics and manufacturing sector, the Court relied on the overarching principles established by the UAE Court of Cassation (Judgment No. 887/2022 Commercial Appeal) regarding the exact legal nature

of Supply Contracts. The Supreme Court previously ruled that in a supply contract, the manufacturer is absolutely bound to provide goods meeting exact standards:

(“A supply contract is a contract in which a merchant or manufacturer commits to supply or provide the buyer with goods or services from their production or the production of others, according to specifications agreed upon between the parties, in specified quantities, and at specified times, to be delivered to the latter at the agreed-upon location… and the buyer has no right to withhold the price under the pretext of non-conformity of some of the supplied items unless the claimed defect is proven.”)

In this case, the defect was not merely claimed by the Contractor; it was conclusively, objectively proven by the independent third-party SGS inspection report and the end-client’s formal rejection letter. This rigid legal framework establishes that a supplier’s core obligation is an “obligation of result”, they must achieve the exact, specified engineering result, defect-free. Supplying a 5.5-meter column when a 6-meter column was ordered is a fundamental failure of that result.

The Court’s Findings: Severing the Force Majeure Camouflage

The crux of the Dubai Court’s masterful judgment lies in its forensic dissection of the project timeline. The Supplier attempted to blur the lines between their manufacturing failures and the sudden outbreak of the war, utilizing the military closure of the Khartoum airport as an impenetrable excuse for their non-performance.

The Court fundamentally rejected this conflation. By appointing a specialized Tripartite Expert Committee consisting of forensic accounting and banking experts, the Court established a bright-line rule that is directly applicable to the 2026 Iran War: **A subsequent wartime *force***

***majeure* event cannot cure, excuse, or erase a pre-existing contractual breach.**

The Court found that the Supplier had already fundamentally breached the contract the moment the SGS inspection report confirmed the life-threatening deviations in the steel columns on March 10, 2023. This breach materialized fully when the end-client rejected the materials on April 13, 2023. The fact that the war broke out on April 15, physically preventing the Supplier from traveling to the site to attempt a highly irregular, ad-hoc “workaround” (altering the concrete foundations to hide the steel deficit), was legally irrelevant to the initial breach. The Supplier had no contractual right to demand that the Contractor alter civil works to accommodate a manufacturing error.

Delivering a decisive and overwhelming victory for the Contractor, the Court severed the Supplier’s *force majeure* defense from their pre-existing manufacturing failure. The Court issued a verbatim judgment that resonates powerfully for 2026 logistics disputes:

(“The matter from which the Court concludes is that the Original Claimant [The Supplier] breached its contractual obligations to supply the agreed-upon materials as they were not conforming to the specifications according to the report issued by the General Directorate of Groundwater and Wadis at the Ministry of Irrigation and Water Resources in the Republic of Sudan.

This is not negated by the Plaintiff’s defense that it was unable to take corrective measures due to the war in Sudan.

Accordingly, the Court rules that the Counter-Claimant [The Contractor] is entitled to what it demands in its counterclaim regarding the rescission of the supply contract subject to the dispute and the recovery of the value of the advance payment it had paid, by obligating the First Defendant in the

Counterclaim (the Original Claimant) to pay the Counter-Claimant the sum of 1,277,832 US Dollars (equivalent to 4,693,476.94 Dirhams).")

By isolating the Supplier's technical failure from the broader geopolitical conflict, the Court stripped away the *force majeure* camouflage. The contract was formally rescinded under Article 272(1) of the Civil Transactions Law, and the Supplier was ordered to refund the massive advance payment in full, leaving the Supplier to absorb the total financial loss of the defective steel.

Bank Guarantees, Bad Faith, and Financial Restitution

Beyond the termination of the contract, the judgment provides critical guidance on the mechanics of Bank Guarantees and financial restitution during wartime disputes. In an attempt to block the Contractor from liquidating the guarantees, the Supplier introduced a highly technical banking defense. They argued that the guarantees were never formally "activated" because the Contractor had erroneously wired the $1.27 million advance payment to the Supplier's Bank of China account, rather than the specific Abu Dhabi Islamic Bank (ADIB) account explicitly stipulated in the guarantee draft.

The Court and the appointed banking expert thoroughly rejected this deflection. The evidentiary record demonstrated that the Supplier had specifically issued an official commercial invoice requesting the funds be sent directly to their Bank of China account. The Court viewed the Supplier's attempt to use their own contradictory banking instructions to invalidate the guarantees as an act of profound "bad faith", violating the good faith mandate of Civil Code Article 243.

The Court exonerated the issuing bank, relying on Cassation No. 724/2020, which affirms the strict independence of bank guarantees:

("A bank guarantee is a pledge by the bank to pay the client's

debt to a third party according to the agreed conditions… The bank issuing the guarantee is obligated to pay its value to the beneficiary upon demand during its validity without needing the client's approval once the condition of entitlement is met.")

Because the strict condition (payment to the ADIB account) was technically not met, the Bank was cleared. However, the Court ultimately bypassed the dormant guarantee and ordered the Supplier to refund the money directly through the substantive lawsuit. For logistics managers in 2026, this serves as a dire warning: you must rigorously ensure that advance payments are routed precisely to the accounts stipulated in the Bank Guarantees. A simple administrative wiring error can leave millions of dollars unsecured, forcing a company to fight a lengthy court battle for restitution rather than simply calling the bond.

Furthermore, the Court addressed the financial penalty for withholding these funds. Historically, UAE courts awarded a 9% statutory interest rate in commercial disputes. However, referencing a landmark macroeconomic directive from the General Assembly of the Court of Cassation (Decision No. 1/2021), the Court noted that the fluctuating economic climate required a downward adjustment:

("The General Assembly of the Court of Cassation deemed it appropriate, by unanimous consensus, to reduce the interest rate in both its legal and delay forms, in the absence of an agreement thereon, to a rate of (5%) annually until full payment.")

Aligning with Articles 84 through 87 of the Commercial Transactions Law, the Court ordered the Supplier to pay a 5% annual delay interest on the $1.27 million, calculated from the date of the judicial claim until the debt is fully extinguished. For 2026 contractors seeking restitution from defaulting suppliers, this 5% metric serves as the reliable

benchmark for calculating the time-value loss of tied-up capital.

It is vital to note that the Court rejected the Contractor’s claim for *additional* unspecified damages. Citing Cassation No. 352/2015 Civil, the Court reiterated that contractual liability requires three distinct elements: fault, damage, and a causal link. Because the Contractor failed to explicitly quantify and prove the specific financial harm suffered beyond the loss of the advance payment, the additional compensation claim was dismissed, a harsh reminder for 2026 contractors that wartime damages must be meticulously documented by financial experts, not merely alleged.

Wider GCC Implications: A Unified Legal Stance

While Judgment 695/2023 originates from the Dubai Courts in the UAE, its jurisprudential DNA is universally applicable across the entire Gulf Cooperation Council. The legal doctrine preventing a defaulting party from hiding behind a subsequent *force majeure* event is deeply entrenched in the civil law systems of the region, which are heavily influenced by the Egyptian Civil Code and traditional Islamic jurisprudence.

In the Kingdom of Saudi Arabia, where gigaprojects require a continuous, uninterrupted flow of international logistics, the principles of this ruling align perfectly with the newly codified KSA Civil Transactions Law (enacted by Royal Decree M/191 in 2023). Under Saudi law, the doctrine of *force majeure* strictly requires that the event be the *sole* cause of the failure. If an international supplier ships non-conforming structural steel to Jeddah Islamic Port, and the port is subsequently closed due to the 2026 conflict, the supplier’s fault broke the chain of causation long before the military event did. The supplier may be in material breach under Article 107 of the KSA Civil Code, and the later intervention of war does not retroactively cleanse their liability.

Similarly, the Qatari Civil Code (Law No. 22 of 2004) and the Omani Civil Transactions Law (Royal Decree 29/2013) view construction supply contracts as rigid obligations of result. Across the entire GCC, courts uniformly reject the concept of "concurrent excuse" when one of the causes is a pre-existing material breach. If you failed to build the steel tower correctly in March, you cannot blame an Iranian naval blockade or airspace closure in April for your failure to deliver.

Strategic Playbook for Construction Logistics in the 2026 Crisis

For construction conglomerates, EPC contractors, offshore manufacturers, and logistics providers currently battling the commercial fallout of the 2026 Iran War, the Dubai Court precedent offers a harsh but brilliantly clear roadmap for survival and risk mitigation.

1. **Eradicate the "Fix-It On-Site" Culture During Crises:** In standard times, a supplier might manufacture a slightly defective product and promise to "send a team to fix it on-site" to save shipping costs or maintain schedules. In the 2026 wartime environment, accepting this premise is a fatal misallocation of risk. As the precedent shows, if airspace closes and the supplier's engineers cannot travel, the project is left with defective, unusable materials. Contractors must draft clauses that strictly prohibit shipping non-conforming goods under the promise of future on-site rectification. Acceptance must be explicitly tied to absolute conformity *prior* to embarkation.
2. **Elevate the Role of Factory Acceptance Testing (FAT) as Your Primary Legal Shield:** The Dubai Court's ruling hinged entirely on the independent SGS inspection report dated a month before the war broke out. In the rush of 2026 wartime logistics, contractors must never allow suppliers to ship materials blindly to beat port closures. Mandate strict Third-Party Inspections at the

point of origin (e.g., in China, India, or Europe). If the report identifies defects, the supplier is in breach at the factory level. If a war subsequently breaks out, the financial loss falls squarely on the supplier, as their prior breach legally severs their access to a *force majeure* defense.

3. **Issue Immediate Notices of Breach (The 48-Hour Rule):** Timing is the difference between a total loss and a full refund. In the precedent case, the Contractor issued an official "Notice of Breach" directly citing the owner's rejection, perfectly bracketing the outbreak of the war. In 2026, logistics managers cannot afford to be passive. If a logistical or manufacturing failure is detected, formal legal notices under Article 272 must be dispatched immediately via registered channels. Do not engage in prolonged, informal "workaround" discussions over WhatsApp while a geopolitical crisis escalates. Paper the breach before the fog of war obscures the facts.
4. **Strict Contractual Hygiene Regarding Bank Guarantees:** The massive administrative error made by the Contractor in the 2023 case, wiring funds to the Bank of China instead of ADIB, thereby failing to activate the guarantees, is a profound cautionary tale. Finance departments operating in the 2026 conflict must meticulously read the exact SWIFT text of the guarantees. If a guarantee requires funds to be deposited into a specific branch or IBAN to become effective, this must be executed flawlessly. Attempting to claw back a $5 million advance payment through a multi-year court battle during the 2026 liquidity crunch, simply because of a payment routing error, is a path to corporate insolvency.
5. **Draft "Pre-Existing Breach" Carve-Outs in Contracts:** For all new contracts being negotiated in the shadow of the ongoing 2026 conflict, legal counsels must draft explicit carve-outs in their *force majeure* clauses such

as: *“Under no circumstances shall the Supplier be entitled to invoke Force Majeure to excuse a delay, non-conformity, or breach that originated or occurred prior to the onset of the Force Majeure event. The Supplier remains strictly liable for the refund of all advance payments if the materials fail third-party inspection, regardless of subsequent sovereign or military interventions.”*

Conclusion: Absolute Performance Over Corporate Sympathy

The escalation of the 2026 Iran War has plunged the GCC construction and logistics sectors into a prolonged state of emergency. As shipping lanes are heavily militarized and flights are grounded, the temptation for failing suppliers to hide their manufacturing errors and supply chain mismanagement behind the fog of war is immense.

However, as conclusively established by the Dubai Courts, regional jurisprudence sees entirely through this illusion. The civil law framework prioritizes the absolute obligation to deliver conforming, safe, and precisely engineered materials. A war is a tragedy, but in the eyes of the law, it is not an eraser.

The judicial mandate is unrelenting: *“This is not affected by the plaintiff’s defense that it was unable to take corrective measures due to the war.”*

To survive the logistical siege of the 2026 Iran War, project owners and contractors must shift their focus from the battlefield back to the factory floor. By wielding their inspection reports, enforcing rapid default notices, and ensuring their financial guarantees are flawlessly activated, the industry can protect its capital and ensure that the ultimate financial risk of non-conformity remains exactly where it belongs: with the defaulting supplier.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
Tier-1 services since 1799.
www.waselandwasel.com
business@waselandwasel.com

War Series: Force Majeure, Civil Aviation Disruption, and the Allocation of Wartime Risk – Applying the 2017 UAE Courts Yemen War Precedents to GCC Airspace in the 2026 Iran War

March 31, 2026

The escalation of the 2026 Iran War has profoundly disrupted civil aviation and logistics networks across the Gulf Cooperation Council (GCC). As military commands issue sudden Notices to Air Missions (NOTAMs) and civil aviation authorities abruptly close air corridors to commercial traffic, aviation operators and freight forwarders find themselves trapped in a web of unfulfilled contracts.

When a chartered flight or logistics operation is abruptly grounded by military directive, a critical legal and financial dilemma arises: Who bears the cost of the canceled service? Aviation operators frequently invoke *force majeure* to shield themselves from liability, arguing that sovereign airspace closures absolve them from refunding clients, especially when

the operator has already incurred massive, non-refundable sunk costs for aircraft leasing, ground handling, and routing permits.

However, GCC civil law frameworks place strict boundaries on the use of *force majeure* during active conflicts. A landmark triad of Dubai Court judgments, Primary, Appeal, and Cassation, issued in 2017, which adjudicated a private aviation dispute stemming from the sudden closure of Saudi airspace during the Yemen War, provides definitive guidance on how regional courts allocate risk and mandate restitution during the current 2026 crisis.

The Factual Matrix: The 2015 Yemen War Airspace Closure

To understand the direct application of this precedent to the 2026 conflict, one must examine the factual matrix of the dispute, which mirrors the logistical disruptions currently plaguing operators.

In April 2015, following the outbreak of the Yemen War, a plaintiff contracted a UAE-based aviation company to charter a private jet to transport his deceased father's remains from Berlin, Germany, to Jizan, Saudi Arabia (near the Yemeni border). The plaintiff paid $88,000 upfront. To execute the mission, the aviation operator subsequently leased an aircraft from a Turkish carrier for $65,000 and paid an additional $20,000 for ground services and permits.

Mere hours before the scheduled departure, the Saudi General Authority of Civil Aviation (GACA) abruptly canceled the flight and closed Jizan's airspace based on explicit orders from the Joint Coalition Forces operating in Yemen. When the plaintiff demanded a refund, the aviation company refused. The company argued that the military airspace closure was an unforeseeable *force majeure* event, and that it had already lost its out-of-pocket expenses to the Turkish supplier who refused a refund due to the short-notice cancellation.

The Primary and Appeal Courts: “Obligations of Result” and the Foreseeability Trap

The Dubai Court of First Instance (Judgment No. 2618/2016 Commercial Partial) firmly rejected the aviation company’s defense, a ruling that was entirely upheld by the Dubai Court of Appeal (Judgment No. 442/2017 Commercial Appeal).

Rooting their decisions in the legislative basis of the UAE Civil Transactions Law (Articles 272, 273, and 274), the lower courts first clarified the contractual nature of civil aviation. The Primary Court ruled that the operator’s duty to provide the aircraft was an **“obligation to achieve a result”, not an “obligation to exercise care”.** Because the operator failed to deliver the final result, they were in breach.

Crucially, both courts dismantled the aviation company’s *force majeure* defense by focusing on the concept of “foreseeability.” For an event to qualify as a contract-nullifying *force majeure*, it must be unexpected at the time of contracting. The Primary Court held that entering into a contract *during* an active regional war severely limits this defense:

“The force majeure circumstances claimed by the Defendant, which is the war in Yemen, were present during its contracting with the Plaintiff, and the cancellation of the flight due to those circumstances was expected… The Defendant… should have studied all circumstances and expectations regarding the completion rates of the contracted mission.”

Addressing the operator’s unrecoverable sunk costs paid to third parties, the Court held that these amounts were due to the operator’s *“negligence and failure to exercise the necessary care in studying the situation, the specific circumstances of the destination airport, and the security conditions in that region, and the Plaintiff cannot bear the result of that negligence.”* Consequently, the Court ordered a

full refund of $88,000 plus a 9% statutory interest pursuant to the Commercial Transactions Law.

The Court of Cassation: Automatic Rescission and the Burden of Risk

The aviation company escalated the matter to the Dubai Court of Cassation (Judgment No. 713/2017 Commercial Cassation), arguing that the sudden sovereign military directive decisively severed the chain of liability, constituting an insurmountable "foreign cause" beyond its control.

The Court of Cassation upheld the rulings against the aviation operator but refined the legal rationale. Shifting the judicial focus away from the debate over "foreseeability" or the operator's "negligence," the Supreme Court anchored its decision entirely on the absolute doctrine of impossibility and automatic contract dissolution.

The Cassation Court established a bright-line rule for commercial contracts rendered impossible by sovereign or military intervention:

"The contract is inevitably and automatically rescinded due to the impossibility of executing the obligation of one of the contracting parties for a foreign cause, regardless of whether the impossibility is due to his fault or not. The rescission of the contract results in… the demise of the contract and the dissolution of the contractual bond with a retroactive effect to the time of its conclusion… and the contracting parties are returned to the state they were in before its existence, so each of them is obligated to return what they had received in execution of the contract."

Addressing the severe financial loss faced by the aviation company, which was legally forced to refund the client despite having irreversibly paid out $85,000, the Court of Cassation applied the strict civil law principle of risk allocation. In bilateral contracts, who bears the burden when a military

order renders performance impossible?

“The debtor of the obligation that has become impossible to execute bears the risk of the impossibility, pursuant to the principle of bearing the risk in mutually binding contracts.”

Because the aviation company was the “debtor” of the impossible flight service, it was required to bear the total financial risk of the contract’s dissolution. The Court dismissed the debate over whether the military closure technically qualified as an unforeseeable *force majeure*, deeming the argument “ineffective” since the rule of automatic dissolution mandates absolute mutual restitution regardless.

Application to Contracts in the 2026 Iran War

For airlines, charter brokers, and logistics providers navigating the 2026 Iran War, the 2017 Dubai Court trilogy delivers highly actionable, albeit sobering, precedents regarding wartime contract issues:

– **Ongoing Conflicts Negate “Surprise” Defenses:** A vital lesson from the lower courts is the treatment of foreseeability. Companies entering into new aviation or freight contracts *while* the 2026 Iran War is ongoing will find it immensely difficult to rely on *force majeure* to escape liability. Courts view wartime disruptions, such as sudden NOTAMs or airspace closures, as foreseeable operational risks that professional entities are expected to anticipate and price into their services.

– **The “Obligation of Result” Trumps Best Efforts:** In the GCC civil law framework, transportation and logistics are strictly construed as obligations to achieve a result. Procuring permits and leasing aircraft are merely preparatory steps. If military action blocks the final execution, the operator has failed its core obligation, triggering immediate restitution.

– **Sunk Costs Rest with the Service Provider:** As established by

the Cassation Court, an operator cannot pass its sunk costs onto the end-consumer under the default civil law framework simply because a military order intervened. The impossibility of performance legally and automatically dissolves the contract. The operator is legally required to return the client’s advance payments in full, absorbing any out-of-pocket upstream losses internally.

– **The Absolute Necessity of Wartime Contractual Drafting:** Because the courts place the absolute burden of impossibility on the “debtor of the obligation,” commercial entities in 2026 must proactively contract out of this default position. Providers must integrate bespoke, explicitly drafted “military disruption” clauses, expressly categorizing advance payments as non-refundable in the event of sovereign airspace closures, and explicitly shifting the financial risk of third-party sunk costs onto the client.

Conclusion

As the 2026 Iran War triggers sweeping military instructions and civil aviation closures, GCC operators must recognize that civil courts prioritize absolute performance and mutual restitution over corporate sympathy. The 2017 UAE jurisprudence establishes that when the fog of war makes commercial transport impossible, the contract is retroactively erased, and the service provider is left holding the financial burden. To survive the current geopolitical shock, aviation and logistics providers must rely not on the statutory excuse of *force majeure*, but on ironclad, crisis-specific contractual risk allocation.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
Tier-1 services since 1799.
www.waselandwasel.com
business@waselandwasel.com

War Series: Wartime Economic Hardship and Lender Liability – Applying the 2006 UAE Supreme Court Gulf War Precedent to GCC Markets in the 2026 Iran War

March 31, 2026

The ongoing 2026 Iran War has introduced significant macroeconomic disruptions across the Gulf Cooperation Council (GCC). As supply chains constrict, project timelines extend, and operational costs rise, many regional commercial entities are turning to their financial institutions for vital liquidity and forbearance. Simultaneously, banks may activate stringent risk management protocols, such as freezing credit facilities or demanding enhanced collateral.

When these financial lifelines are restricted, corporate borrowers would look to the courts. A common legal strategy in GCC civil law jurisdictions is to allege that a bank's sudden refusal to extend credit during a regional conflict constitutes an "abuse of right". Corporate plaintiffs argue that lenders have a customary duty to bear elevated risks and support long-standing clients through macroeconomic crises.

Because GCC states share highly intertwined civil law frameworks, heavily influenced by the Egyptian Sanhuri model, and frequently rely on cross-jurisdictional case law, historical jurisprudence offers critical guidance for these

current disputes. UAE Federal Supreme Court Judgment No. 377 of 2006 (Civil), which adjudicated a banking dispute shaped by the economic aftermath of the Second Gulf War, provides an authoritative and straightforward framework for balancing a bank's legal rights against a borrower's wartime distress.

The "Second Gulf War" Defense: Analyzing the Appellant's Argument

To understand the judgment's direct application to the 2026 conflict, it is necessary to examine the specific arguments advanced by the distressed borrower in 2006, as detailed in the Court's ruling.

The case involved an international commercial group whose bank halted its credit facilities after a twelve-year relationship. The lower courts ruled in favor of the bank, noting that the company suffered a structural deficit exceeding 7.1 million Dirhams (excluding over 5 million Dirhams in existing bank debt and interest), that it had closed its Abu Dhabi offices, and that the requested funds were intended for *new* projects rather than existing ones.

Seeking cassation, the appellants argued that the bank's strict adherence to formal collateral demands during a period of crisis constituted an actionable abuse of right. They attempted to use the prevailing regional instability as a legal shield. Drawing from the Supreme Court's summary of their appeal, the appellants argued that they had provided sufficient guarantees and that the closure of their offices only occurred:

"…after negotiations regarding the real estate guarantees faltered, and due to the bank's insistence on mortgaging the real estate first before considering the request for new facilities, despite the fact that the bank had previously granted it facilities exceeding the guarantees provided."

Crucially, the appellants explicitly linked their demand for

banking leniency to the geopolitical climate. They argued that the bank’s rigidity definitively proved its arbitrariness and abuse of right because it violated:

“…banking customs which require the bank to bear the risks of the profession and to stand by its clients out of concern for its funds with them so that they can continue their operations, ***especially in light of the difficult economic conditions the world went through following the events of the Second Gulf War.”***

This argument is highly analogous to the legal posture considered to be adopted by GCC companies that may be distressed today that the macroeconomic shock of the Iran War legally obligates financial institutions to demonstrate leniency, waive strict collateral prerequisites, and prioritize corporate survival over standard risk metrics.

The Court’s Rationale: Banking Custom During a Crisis

The UAE Supreme Court firmly rejected the premise that the macroeconomic hardship of the Second Gulf War compelled the bank to abandon its standard risk parameters or absorb the borrower’s commercial deficit.

Applying Articles 104 and 106 of the UAE Civil Transactions Law, the Court clarified the boundaries of an “abuse of right.” The Court acknowledged that while banking custom generally encourages assisting a client in distress, this duty is not absolute and is strictly governed by commercial viability:

“While it is established in banking customs that a bank must assist its client who is in a difficult position, considering this assistance as one of the functions of the bank, the prerequisite for this is that the goal must be to rescue the client from their crisis, ***and not to prolong their death throes or conceal their hopeless condition****. If the requested facilities, in terms of their size, nature, or duration, will*

not result in saving the client, then there is no blame on the bank if it refuses to grant them.”

Addressing the appellant’s invocation of the Second Gulf War, the Court shifted the judicial focus away from the overarching geopolitical crisis and onto the micro-economic realities of the borrower’s balance sheet and operational intent. The Court validated the lower court’s findings that the company’s financial position had “reached a critical stage,” that real estate guarantees were not practically placed at the bank’s disposal due to valuation disputes, and that the requested facilities were to finance new, unproven projects.

Dispensing with the notion that wartime conditions require banks to act as economic shock absorbers, the Court affirmed the bank’s right to prioritize its institutional stability:

“The bank, like any creditor, has the right to think of its own interest and the interest of its shareholders. ***For it is not a charitable institution*** *… What the bank undertook was to preserve its funds and the funds of its shareholders, and this does not violate or contradict banking customs, public order, or morals.”*

Application to GCC Industries in the 2026 Conflict

The legal precedent set by Judgment 377 of 2006 offers practical, immediate clarity for key industries navigating the current 2026 conflict:

1. **Collateral Negotiations and Historical Leniency:** Companies currently attempting to renegotiate credit terms must consider the 2006 authority that arguing a bank’s demand to “mortgage the real estate first” violated custom, especially during the post-Gulf War downturn. The Supreme Court had rejected this, establishing that past leniency does not legally mandate future unsecured exposure. In 2026, banks may be protected if they demand strict, perfected security

interests prior to disbursing wartime liquidity.

2. **Financing Strategic Pivots (Construction & Logistics):** As supply chains are rerouted and domestic infrastructure projects are potentially delayed by the 2026 conflict, firms may seek capital to pivot toward new ventures. The 2006 appellants similarly requested funds for "financing new projects rather than existing ones." The judgment explicitly protects banks that refuse to finance such endeavors when a client's core financial position is already deteriorating. A bank is not legally obligated to fund a corporate pivot if its feasibility is uncertain, and withholding such funds does not constitute an abuse of right.
3. **Macroeconomic Shocks Do Not Absolve Obligations:** A highly resonant lesson of the judgment is its treatment of the "Second Gulf War" defense. Regional instability does not suspend fundamental commercial obligations. The Court upheld the imposition of a 9% delay interest on the company's outstanding balances, affirming that a debtor's failure to pay a known sum obligates compensation, regardless of the overarching geopolitical difficulties.

Conclusion

As the 2026 Iran War continues to test the commercial resilience of companies, UAE Supreme Court Judgment No. 377 of 2006 serves as a stabilizing jurisprudential anchor. While the invocation of "difficult economic conditions" caused by regional conflict may frame a compelling plea for financial forbearance, regional courts apply a strict standard of commercial pragmatism. The law recognizes that a bank's primary duty is the prudential management of capital. In times of severe geopolitical crisis, civil courts will safeguard a financial institution's right to manage its risk, ensuring that the banking sector is not legally forced to absorb terminal commercial liabilities under the guise of customary

support.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile:
https://waselandwasel.com/about/mahmoud-abuwasel/

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www.waselandwasel.com
business@waselandwasel.com

War Series: The 1991 Gulf War UNCC Precedent and the Arbitration of Environmental Damage in Conflict Zones

March 31, 2026

When Iraqi forces retreated from Kuwait in 1991, they left behind an unprecedented ecological catastrophe. Over 600 oil wells were set ablaze, and millions of barrels of crude oil were intentionally released into the Persian Gulf. The sky turned black, and coastal ecosystems were devastated. Beyond the profound human and structural toll of the conflict, the international community was faced with a novel legal dilemma: How do you quantify, litigate, and arbitrate the destruction of an ecosystem in the aftermath of war?

The answer came in the form of the United Nations Compensation Commission (UNCC), a quasi-judicial, mass-claims body established by UN Security Council Resolution 687. The UNCC's handling of environmental damage claims, specifically its "F4" claims category, laid the foundational precedent for how international law and modern arbitral tribunals approach the financial liability of environmental destruction in war zones.

As contemporary conflicts in regions like Eastern Europe and the Middle East result in the destruction of dams, the targeting of chemical plants, and the scorching of agricultural land, the legacy of the UNCC remains a critical framework for states, international investors, and corporations navigating post-conflict arbitration.

The F4 Claims: Quantifying the Unquantifiable

Before the 1990s, international legal mechanisms for addressing war reparations heavily favored property damage, lost profits, and personal injury. The environment was often viewed as a silent, uncompensable casualty of armed conflict.

The UNCC revolutionized this by formally recognizing claims for "environmental damage and the depletion of natural resources." The "F4" claims category allowed governments to seek compensation not just for the loss of commercially viable resources (like oil), but for the restoration of ecosystems.

Crucially, the UNCC established that compensation could be awarded for:

- **Preventative measures:** The costs of mitigating further environmental degradation.
- **Reasonable restoration:** The expenses associated with cleaning up shorelines, remediating soil, and extinguishing oil well fires.
- **Monitoring and Assessment:** Funding to study the long-term health and ecological impacts, acknowledging that environmental damage often takes years to fully manifest.

The Commission ultimately awarded over $5.2 billion for environmental remediation and restoration, setting a towering precedent that pure ecological harm—distinct from commercial loss—has quantifiable legal standing.

From the UNCC to Modern Arbitration

While the UNCC was a specialized commission rather than a traditional commercial arbitration tribunal, its methodological framework deeply influences modern international dispute resolution. Today, when environmental disasters occur during armed conflicts, the legal mechanisms have shifted primarily toward investor-state dispute settlement (ISDS) under Bilateral Investment Treaties (BITs) and commercial arbitration.

1. The Valuation of Ecological Harm

When an international energy or mining company's assets are caught in a war zone, the resulting environmental spillover often violates host-state environmental regulations. If a host state attempts to penalize a foreign investor for war-induced environmental damage, tribunals frequently look to the UNCC's rigorous evidentiary standards. The UNCC established that claimants must prove a direct causal link between the military action and the specific environmental harm, preventing opportunistic claims.

2. Force Majeure and Environmental Liability

For multinational corporations operating in conflict zones, environmental destruction often triggers complex *force majeure* disputes. If a facility is bombed and toxic chemicals leak, who is responsible for the cleanup? Traditional contracts may excuse the failure to deliver goods during a war, but they rarely absolve a company of overarching environmental liabilities. The UNCC precedent underscores that the entity responsible for the military aggression ultimately bears the financial burden of the ecological fallout, a principle routinely debated in modern force majeure arbitrations.

3. The Rise of "Ecocide" in International Discourse

The precedents set in the early 1990s are currently being tested by the realities of modern warfare. With the destruction of critical infrastructure increasing in modern

conflicts, legal scholars and arbitrators are increasingly engaging with the concept of “ecocide.” As states and corporations prepare to arbitrate the massive costs of post-war reconstruction, the UNCC’s formula for valuing the restoration of water tables, agricultural land, and biodiversity will serve as the starting point for tribunals.

Business Considerations for the Modern Era

For businesses and investors operating in politically volatile or conflict-prone regions, the integration of environmental risk into dispute resolution strategies is no longer optional. The UNCC precedent teaches us that environmental damage in war is not legally “collateral.” It is a highly scrutinized, financially quantifiable liability.

Companies must ensure that their investment contracts and insurance policies explicitly define environmental liability in the event of armed conflict, recognizing that international tribunals now possess the historical precedents and economic methodologies to hold parties accountable for the earth they scorch.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
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www.waselandwasel.com
business@waselandwasel.com

War Series: How a U.S. Civil War Naval Doctrine Shapes

Modern High Tech Supply Chain Arbitration

March 31, 2026

In 1863, during the height of the American Civil War, the British barque *Springbok* was intercepted by the USS *Sonoma* while sailing toward Nassau, a port in the neutral British Bahamas. The vessel's manifest listed a cargo of textiles, boots, and saltpeter, goods that were commercially standard and bound for a neutral jurisdiction. Under the strict letter of maritime law at the time, trade between neutral ports was protected. Yet, the U.S. Supreme Court eventually condemned the cargo. The court reasoned that while the ship would unload in Nassau, the cargo was meant to be transshipped to a blockade-runner and smuggled into the Confederate states.

This judgment established the doctrine of "Continuous Voyage" (or "Ultimate Destination"): the principle that the legality of a shipment is determined not by the initial port of discharge, but by the ultimate intent of the goods. The voyage was deemed "continuous" despite the stopover, and the neutral port provided no sanctuary if it was merely a waypoint for contraband.

Decades later, during World War I, the British Prize Court expanded this doctrine in the case of *The Kim* (1915). Authorities seized American cargoes of lard and wheat bound for Copenhagen, a neutral port, on the statistical inference that the volume of goods vastly exceeded Danish consumption requirements. The precedent was set: the legal "voyage" ignores the physical itinerary and follows the goods to their final end-user.

Today, physical naval blockades have largely been replaced by regulatory architectures, export controls, sanctions, and

entity lists. However, the ghost of the *Springbok* haunts the modern semiconductor and high-tech supply chain. The logic of "Continuous Voyage" has been digitized, shifting the burden of enforcement from naval captains to corporate compliance officers, creating a volatile new arena for private commercial disputes.

The Modern Pivot: From Ports to Proxies

In the modern high-tech economy, the "neutral port" is no longer a physical harbor like Nassau or Rotterdam. Instead, it is a Distributor or a Trading House located in a jurisdiction that is politically non-aligned or legally distinct from sanctioned territories. The "contraband" is no longer boots or salt, but dual-use integrated circuits, semiconductor manufacturing equipment, and encryption software.

The regulatory expectation today mirrors the 19th-century doctrine: authorities disregard the invoice address. If a supplier in Country A ships advanced processors to a distributor in Country B, and those processors are likely to be re-exported to a restricted entity in Country C, the trade is viewed as a direct violation by the supplier. The voyage is continuous.

The critical difference, however, lies in execution. In 1863, the state enforced the blockade. In the 2020s, the state has deputized the private sector. Manufacturers are required to look past their contractual counterparty and assess the "ultimate destination." This deputization has sparked a wave of Business-to-Business (B2B) friction that is increasingly ending in international arbitration.

The Private Sector Conflict

The core of the modern dispute is not between a government and a company, but between a Supplier (seeking compliance) and a Distributor (seeking performance).

Consider a common scenario: A Supplier of high-tech components enters a long-term framework agreement with a Distributor in a neutral third country. Mid-contract, geopolitical tensions rise, and export controls are tightened. The Supplier's internal compliance software flags the Distributor's jurisdiction as a high-risk transshipment hub. Fearing strict liability or loss of export privileges, the Supplier suspends shipments, citing "suspected diversion."

The Distributor, however, declares a Breach of Contract. They argue that they are a legitimate business, the goods are for local civilian use, and the Supplier is reacting to paranoia rather than law. The Distributor initiates arbitration, seeking damages for lost profits and reputational harm.

Here, the Supplier is trapped in a pincer movement. If they ship, they risk existential regulatory penalties from their home government. If they refuse to ship without concrete proof of diversion, they face millions in damages for breach of contract.

Legal Analysis in Arbitration: The Burden of Proof

When these disputes reach an arbitral tribunal, the central legal battleground is the burden of proof and the definition of "Force Majeure" or "Illegality."

The Distributor typically argues that a contract can only be voided by *actual* illegality. They assert that unless the government has specifically listed them as a sanctioned entity, the Supplier has no right to withhold performance. From this perspective, the Supplier's refusal is a voluntary business decision to de-risk, not a legal necessity.

The Supplier, invoking the spirit of "Continuous Voyage," argues that the *risk* of diversion creates a constructive illegality. They assert that modern compliance standards require "Know Your Customer" (KYC) diligence that goes beyond government lists. If a Supplier ignores "Red Flags", such as a

Distributor ordering volumes inconsistent with local demand (echoing the lard statistics of *The Kim*), they can be held liable.

This creates a complex question for arbitrators: **Is reasonable suspicion enough?**

If a tribunal demands “concrete evidence” that goods will be diverted, the Supplier will almost always lose. Proving a future negative, or proving the intent of a third party three steps down the supply chain, is nearly impossible without subpoena powers the private sector lacks. However, if the tribunal accepts “reasonable suspicion” as a valid ground for Force Majeure, it grants Suppliers immense power to unilaterally void contracts based on internal risk appetites, potentially destabilizing global trade reliability.

Furthermore, the role of the End-User Certificate (EUC) is under scrutiny. Historically, an EUC signed by the buyer was a shield, a document the Supplier could rely on to prove good faith. In the modern era of “Continuous Voyage,” the EUC is increasingly viewed as a “rebuttable presumption.” Tribunals are asking whether the Supplier *should have known* the EUC was merely a paper promise. Did the Supplier conduct due diligence, or did they willfully ignore the reality of the trade route?

Conclusion: The “Reasonableness” Standard

The revival of the “Continuous Voyage” doctrine in the form of digital supply chain controls suggests that the era of simplified global trade is over. For legal practitioners and corporate officers, the takeaway is twofold.

First, standard “Force Majeure” and “Compliance with Laws” clauses are no longer sufficient. Contracts must now include specific “Sanctions and Export Control” clauses that explicitly grant the Supplier the right to suspend or terminate performance based on *reasonable internal assessment*

of risk, not just upon a final government ruling.

Second, the outcome of future arbitrations will likely hinge on the concept of "abuse of right." Tribunals will look for a balance: Did the Supplier act in good faith to comply with complex regulations, or did they use regulatory ambiguity as a convenient excuse to exit a commercially unfavorable contract?

Just as the *Springbok* case forced maritime law to look beyond the immediate horizon, modern high-tech trade requires companies to look beyond the immediate invoice. The voyage is continuous, and so is the liability.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

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www.waselandwasel.com
business@waselandwasel.com

War Series: The 1930 Lena Goldfields Precedent and the New Geopolitics of Critical Minerals

March 31, 2026

The contemporary international order is changing. As the era of globalization yields to a multipolar landscape defined by strategic competition, the control of critical mineral supply chains has emerged as a primary vector of state power. This intensifying struggle, essential for defense capabilities, the

energy transition, and technological supremacy, is triggering a sophisticated wave of resource nationalism. Host states are increasingly willing to destabilize established investments and rewrite contracts to secure strategic advantage.

While the technologies dependent on these resources (lithium, cobalt, rare earths) are modern, the political and legal tactics employed to control them are not. The 1930 ad hoc arbitration in *Lena Goldfields, Ltd. v. The Soviet Union* provides a foundational blueprint for understanding how states weaponize their regulatory and security apparatus when economic necessity yields to geopolitical imperatives. Analyzing the Lena dispute offers a crucial framework for navigating the high-stakes conflicts emerging in today's contested resource landscape.

The Concession and the Strategic Pivot

In 1925, during its New Economic Policy (NEP), a period of tactical openness to foreign capital, the Soviet government granted Lena Goldfields, a British company, an extensive concession in Siberia for gold, copper, and other minerals. It was the largest such agreement the USSR had ever entered into.

The dispute's genesis was not a mere commercial disagreement but a fundamental realignment of state strategy. In 1929, the USSR abandoned the NEP and launched the first Five Year Plan, prioritizing rapid industrialization and autarky (economic self-sufficiency). This mandated collectivized state ownership, placing the Soviet apparatus in direct conflict with the private-enterprise foundation of the Lena concession. The state's strategic objectives were now incompatible with foreign control over vital resources.

The state's subsequent actions were a campaign of what is referred to in investment treaty disputes as creeping expropriation. The company faced the withholding of contractually obligated state support, the instigation of

labor unrest framed as class warfare, and direct intervention by the state security agency (O.G.P.U.). Key personnel were arrested on charges of espionage and counter-revolutionary activity. Rendered inoperable, Lena Goldfields withdrew its personnel and initiated arbitration in 1930.

The Jurisdictional Contest and the 'Paper Victory'

The Lena case remains significant for the fundamental jurisdictional conflict it presented. The Soviet Union, asserting absolute sovereignty, boycotted the proceedings and withdrew its appointed arbitrator. The USSR argued that Lena's cessation of operations constituted a unilateral termination of the entire agreement, thereby nullifying the arbitration clause and the tribunal's competence.

The tribunal, proceeding *ex parte*, rejected this argument, implicitly affirming the principle of *Kompetenz-Kompetenz*, the power of a tribunal to determine its own jurisdiction. Finding the arbitration clause separable and operative, the tribunal then faced the question of applicable law. Recognizing the impossibility of applying Soviet domestic law, the very instrument of the policy change that caused the breach, the tribunal elevated the dispute to the international level, applying "general principles of law."

Based on the principle of unjust enrichment, the tribunal awarded Lena Goldfields approximately £13 million in compensation on September 2, 1930. Equal to almost £1.09 billion today in CPI and RPI measures. The Soviet government immediately repudiated the award as a nullity, resulting in a significant "paper victory" for the investor but a complete failure of enforcement.

The Modern Archetype: Resource Warfare in a Multipolar World

The Lena Goldfields fact pattern provides a precise historical archetype for the geopolitical strategies surrounding critical minerals today. The tactics of 1929 are mirrored, albeit often

with greater sophistication, in contemporary disputes.

The shift from the NEP to the Five Year Plan parallels the modern shift from maximizing economic efficiency to maximizing strategic control. Today, states view critical minerals not merely as commercial assets but as necessities for national security. In a multipolar environment, this drives policies aimed at forced localization, mandatory joint ventures with state champions, and the redirection of resources toward geopolitically aligned partners, a dynamic intensified by concepts like “friend-shoring” and strategic decoupling.

The Soviet strategy of rendering the investment valueless through a pattern of conduct, regulatory strangulation, police action, and withholding state performance, remains the classic model of indirect expropriation. Modern iterations involve the unilateral revision of mining codes, the imposition of windfall taxes that destroy project economics, sudden and punitive environmental audits, and seemingly discrete administrative actions that, in aggregate, amount to a constructive taking.

The O.G.P.U. raids illustrate the use of a state’s non-commercial apparatus to achieve a strategic objective. This tactic persists, with investors facing pressure through the detention of personnel, spurious criminal investigations, or the seizure of assets by security or customs agencies, actions often calibrated to force a renegotiation of terms favorable to the host state.

Offtake Agreements and the Battle for Supply Chains

A critical dimension of modern disputes, absent in the Lena era but central today, is the role of offtake agreements. These long-term contracts for the future delivery of minerals are the lifeblood of project finance, securing the massive capital expenditures required for mine development.

Host states now target these agreements as leverage points. By

imposing export bans, demanding domestic downstream processing, or introducing new royalties that challenge the viability of the offtake price, states seek to capture a greater share of the value chain. More significantly, these actions can be used to disrupt supply chains vital to rival powers. An investor may find their offtake commitment, perhaps to a European or American end-user, rendered impossible by a state mandate redirecting output to a different geopolitical bloc. This transforms a bilateral commercial dispute into a geopolitical flashpoint.

The Evolving Remedy and Persistent Risk

The primary distinction between 1930 and today lies not in the state's tactics, but in the investor's remedy, and its limitations. The Lena award proved unenforceable when repudiated by a non-participating sovereign. The modern system of international investment law, characterized by Bilateral Investment Treaties (BITs) and the framework of the International Centre for Settlement of Investment Disputes (ICSID), was designed specifically to prevent such jurisdictional boycotts and enforcement failures.

However, the landscape is shifting again. The legitimacy of the Investor-State Dispute Settlement (ISDS) system is under increasing challenge as geopolitical pressures intensify. States are withdrawing from investment treaties, challenging awards on grounds of national security, and utilizing domestic courts to counter international arbitration rulings.

For businesses navigating this complex terrain, the Lena Goldfields arbitration serves as a stark reminder that in the realm of strategic resources, investments are never purely commercial. They are, inherently, geopolitical positions subject to the shifting imperatives of state power in a contested world order.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile:
https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
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www.waselandwasel.com
business@waselandwasel.com

War Series: Arbitration Enforcement Amidst Sovereign Capital Controls

March 31, 2026

In the framework of international dispute resolution, the enforcement of arbitral awards often intersects with the sovereign economic policies of the states involved. A particularly complex issue arises when a party seeks to satisfy a monetary award within a jurisdiction where stringent capital controls are in effect, rendering the transfer of funds across borders difficult or impossible. The case of *Iraq Telecom Limited v. IBL Bank S.A.L.*, decided by the United States District Court for the Southern District of New York, provides a significant legal analysis of this very problem, examining how courts in an enforcement jurisdiction weigh the practical impact of such controls when considering a stay of proceedings.

The dispute originated from financing arrangements for Korek Telecom, an Iraqi telecommunications operator. The petitioner, Iraq Telecom, held a subordinated loan position relative to the respondent, IBL Bank of Lebanon. Following the discovery of a previously undisclosed cash collateral arrangement securing IBL's loan, Iraq Telecom initiated arbitration in

Beirut, Lebanon, pursuant to their Subordination Agreement. An arbitral tribunal ultimately found in favor of Iraq Telecom, concluding that it had been fraudulently induced to enter the agreement. The tribunal issued an award for approximately $3 million in costs and fees and declared the Subordination Agreement to be null and void.

Subsequently, the parties pursued legal action in two different countries. Iraq Telecom petitioned the court in New York to confirm and enforce the award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), seeking to attach IBL's assets in U.S. correspondent bank accounts. Concurrently, IBL initiated an action in Lebanon, the primary jurisdiction, to have the arbitral award annulled. Before the New York court, IBL requested that the confirmation proceedings be stayed pending the outcome of its annulment action in Lebanon.

The central issue for the U.S. court was how to treat IBL's attempt to settle the award within Lebanon's financial system. IBL utilized a "tender and deposit" procedure under Lebanese law, depositing a banker's check for the award amount with a notary public in Beirut. This action's practical effect was conditioned by the severe economic crisis and capital controls operative in Lebanon at the time. The court took note of this context, observing that "under the extraordinary circumstances that currently prevail in Lebanon, banker's checks denominated in foreign currency cannot be readily liquidated into cash at face value by the recipient." Citing the inability to move funds out of the country, Iraq Telecom declined to accept the deposited check as satisfaction of the award.

In deciding whether to grant IBL's request for a stay, the court applied a multi-factor analysis designed to balance the goals of the New York Convention with principles of international comity. The court considered the objective of arbitration as an "expeditious resolution of disputes" and noted the timing of IBL's annulment filing in Lebanon. A

critical component of the court’s decision was its assessment of the balance of hardships. It found that Iraq Telecom faced a significant challenge, as the capital controls meant it would “have difficulty obtaining effective payment of the Award within Lebanon and must rely on the Convention’s procedures for confirmation and enforcement outside Lebanon.” The court also considered the financial condition of IBL in its analysis. By contrast, IBL did not demonstrate a comparable hardship that would result from the immediate confirmation of the award in the United States.

Ultimately, the court denied the stay and proceeded to confirm the award. The decision did not turn on the merits of the Lebanese annulment action but rather on the practical consequences of deferring enforcement. It determined that the goals of the New York Convention, to ensure the effective and prompt enforcement of arbitral awards, would be impeded if a party could compel satisfaction in a jurisdiction where capital controls rendered the award’s monetary value inaccessible. The ruling stands as an important precedent, clarifying that courts in secondary jurisdictions may consider the real-world impact of a primary jurisdiction’s economic policies and capital controls when exercising their discretion to stay or enforce a foreign arbitral award.

As geopolitical tensions increase and sovereign states predictably implement capital control measures to manage economic stress, award-creditors will increasingly look to solutions that mitigate the risk of trapped funds. The strategic approach seen in this case is likely to become more prevalent. Commercial parties will proactively seek to confirm and enforce arbitral awards in stable financial centers where debtors hold assets, thereby using the robust framework of the New York Convention to bypass the economic barriers erected in a debtor’s home jurisdiction. The *Iraq Telecom* decision thus reinforces the Convention’s role not merely as a tool for resolving disputes, but as an essential mechanism for

navigating the financial realities of an increasingly fragmented global economy.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
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www.waselandwasel.com
business@waselandwasel.com

War Series: When Does Port Congestion Become 'Restraint of Princes'? Lessons from Sanko Steamship v. Navios 1982 Arbitration

March 31, 2026

Throughout history, maritime commerce has been as prone to the vagaries of war, political upheaval, and governmental interference as any endeavor that crosses national boundaries. For businesses operating in modern conflict zones, an enduring legal concept known as the "Restraint of Princes" doctrine highlights how governmental action can—or cannot—absolve parties from contractual liability. This article examines that doctrine by reflecting on the 1982 arbitration, **The Sanko Steamship Co., Ltd. v. Navios Corporation**, and considers what lessons it holds for present-day disputes involving the detention of private vessels during times of heightened global tension.

In **The Sanko Steamship v. Navios**, a time charter dispute arose under circumstances that might, at first glance, have suggested government interference. The vessel M/V *Golar Toko* arrived at Constanza, Romania, to discharge cargo at a time when extreme port congestion and a policy of berthing certain vessels out of turn led to extraordinary delays. Navios Corporation, the Charterers, argued that the Romanian authorities' actions amounted to "governmental interference" sufficient to trigger the mutual exceptions clause referencing "Restraint of Princes, Rulers, and People." Clause 16 of the Charter Party read: "*The act of God, enemies, fire restraint of Princes, Rulers, and People, and all dangers and accidents of the Seas…always mutually excepted.*"

In defending their position that these severe holdups should absolve them of liability, the Charterers maintained that local authorities had "unberthed and sent the Vessel to anchorage" and "berth[ed] ships out of turn," constituting a form of governmental force. However, **the panel unequivocally found that "Governmental interference in the form of Port Authorities changing berthing rotation to accommodate national flag and high demurrage vessels…should not, at least under the circumstances in this case, be construed as tantamount to a 'Restraint of Princes,' absent some direct forcible governmental action or decree of illegality preventing performance of the Charter and not just delaying it."** Specifically, the award provides:

> *"[47]… While the actions of the Port Authorities, including the Admiral of the Port, in berthing vessels out of turn for their own purposes, may be at variance with some more equitably regulated systems, the practice is certainly not unknown, where governmental receivers are involved and should not, at least under the circumstances in this case, be construed as tantamount to a 'Restraint of Princes', absent some direct forcible governmental action or decree of illegality preventing performance of the Charter and not just*

delaying it."

Crucially, the arbitrators concluded that even if such interference felt arbitrary or protectionist, it did not rise to the level of "Restraint of Princes," which under maritime law typically implies "*the use of Governmental force, per se*," as the decision put it. In other words, the Charterers could not rely on the exceptions clause to shield themselves from paying higher damages to the Owners for exceeding the stipulated maximum length of the charter. There was no evidence of "*direct forcible governmental action or decree of illegality preventing performance of the Charter.*"

This point resonates strongly in modern contexts, where events such as naval blockades, targeted sanctions, and vessel seizures appear ever more frequently in conflict zones. The **Sanko Steamship v. Navios** ruling underscores that mere inconvenience, delay, or even discriminatory port practices do not necessarily meet the "Restraint of Princes" threshold. For the doctrine to apply, governmental action must be so forceful as to prevent performance altogether, not merely impose operational or commercial hardship.

From a commercial perspective, this case also involved significant disagreement over responsibility for bunkers. Although not directly related to "Restraint of Princes," the parties' dispute about removing excess fuel while the vessel was under delay illuminates the broader risks faced by shipping interests when port authorities or governmental entities disrupt typical operations. The award noted that pumping bunkers ashore was "*probably no more dangerous and unusual than pumping bunkers aboard a vessel,*" yet the Charterers failed to secure an acceptable indemnity agreement with the Owners or to prove it was "*physically or economically feasible*" to offload. The tribunal thus ultimately supported the Owners' position, finding that the Charterers had not pursued all appropriate measures to minimize their losses.

These details highlight the delicate interplay between contractual clauses that allocate risk and real-world circumstances in ports where government involvement looms large. In conflict zones today, the same questions that underpinned **The Sanko Steamship v. Navios** continue to surface: When does state action cross the line from port inefficiency or commercial favoritism into forcible intervention so substantial that it legally excuses performance? At what point is a vessel's detention, lengthy anchorage, or berthing delay tantamount to genuine "Restraint of Princes"?

For businesses navigating commerce in modern conflict zones, two lessons are particularly crucial. First, the bar for invoking "Restraint of Princes" as a defense remains high. Government involvement that aggravates or biases commercial operations may, in many circumstances, still fall short of "the use of Governmental force, per se." Second, the impetus is on Charterers and Owners alike to document efforts to mitigate or avoid losses, whether by requesting indemnities for bunker removal or promptly raising disputes before an arbitral panel. Failing to do so may leave one party paying a steep price, both literally and figuratively.

As global conflicts continue to flare, the **Sanko Steamship v. Navios** arbitration provides a concise yet powerful reminder: not every form of government entanglement at a port, no matter how obstructive, can be labeled a "Restraint of Princes." By limiting the application of such a far-reaching defense to truly coercive scenarios, maritime law seeks to preserve certainty in an industry perpetually at risk from shifting geopolitical currents.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
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www.waselandwasel.com
business@waselandwasel.com

War Series: Trump’s Tariffs and How US Businesses Can Challenge Foreign Retaliatory Tariffs Under Bilateral Investment Treaties

March 31, 2026

In Light of the April 2, 2025, Executive Order on Reciprocal Tariffs

On April 2, 2025, President Trump signed the Executive Order titled “**Presidential Action: Regulating Imports with a Reciprocal Tariff to Rectify Trade Practices that Contribute to Large and Persistent Annual United States Goods Trade Deficits**.” This order targets countries deemed to be engaging in unfair trade practices and imposes reciprocal tariffs to counterbalance the perceived disadvantage to American goods. In turn, several trading partners—claiming that the Executive Order undermines existing market access arrangements—have swiftly introduced **retaliatory tariffs** aimed at United States exports. These foreign duties potentially affect a wide swath of American industries, including manufacturing, technology, agriculture, and other key sectors.

Amid this new climate, **US manufacturers, industrial firms, farmers, and investors with international operations** may find themselves confronting sudden and detrimental market barriers. Unexpected surcharges on goods entering foreign countries or

discriminatory policies targeting US-based enterprises can quickly erode profit margins and disrupt long-standing commercial relationships. Although these retaliatory tariffs arise in part from a broader geopolitical and trade-policy standoff, they can directly harm the bottom lines of individual American businesses.

Critical to US businesses is that **Bilateral Investment Treaties (BITs)** or similar international agreements sometimes offer a legal avenue to challenge such foreign measures. This article explores how businesses—ranging from large-scale manufacturers to family-owned farming enterprises—can potentially invoke BIT protections and **pursue arbitration** when confronted with retaliatory tariffs that unfairly or discriminatorily harm US investments abroad.

1. **Background: Retaliatory Tariffs and Their Impact on US Industries**

Retaliatory tariffs are hardly new in global commerce. Still, the **2025 Executive Order** has generated considerable turbulence because it establishes reciprocal tariffs targeted at countries the administration views as contributing to persistent US goods trade deficits. Countries subject to these reciprocal measures are employing their own instruments to counter perceived US pressure. For instance, additional duties might be levied specifically on American agricultural products, advanced machinery, or technology components—often those with significant export volume or strategic political influence.

For **US manufacturers** that depend on selling products overseas, these newly imposed foreign tariffs can disrupt supply chains, inflate operational costs, and render American goods uncompetitive in key markets. Similarly, **farmers** who have cultivated relationships with foreign buyers—often built over decades—could see the demand for US-grown commodities plummet if foreign tariffs place local producers at an advantage. In

the technology or industrial sectors, certain retaliatory measures may specifically target cutting-edge components, crippling the ability of some American firms to remain profitable in international markets.

These actions are often politically motivated: foreign nations, frustrated by the US's reciprocal tariff approach, design retaliatory tariffs to exert pressure on policymakers in Washington. However, the brunt of this pressure frequently falls on everyday American businesses—who may be singled out for punitive treatment to achieve diplomatic or economic goals.

2. **How BITs Can Offer a Path to Relief**

Bilateral Investment Treaties typically grant a private party—the investor—the right to **sue a host government** if that government's actions cause harm to the investor's business or property in the host's territory. Traditionally, these claims arise from expropriation, unfair or inequitable treatment, denial of justice, or discriminatory measures. Retaliatory tariffs can, in certain circumstances, fit within these categories if they disproportionately burden US investors compared to local or third-country businesses.

The key question for many in the US business sphere is whether their foreign presence qualifies as a protected "investment." BITs often define "investment" broadly, potentially encompassing **cross-border supply chains, distribution agreements, or minority stakes** in foreign companies—arrangements that might be significantly harmed by retaliatory duties. If the effect of a tariff is to undermine a US investor's capacity to sell goods or to operate profitably, that investor may argue that the tariff contravenes BIT standards.

This legal reasoning has gained traction in international jurisprudence. One notable reference is the **Costello judgment**

in Ireland’s Supreme Court, which, while addressing the constitutionality of the Canada-EU trade agreement, illustrates how investor-state tribunals wield authority to rule on alleged breaches of treaty obligations—even when those breaches manifest as tariff disputes (Costello v The Government of Ireland, Ireland and the Attorney General (Approved) [2022] IESC 44_5). In paragraph 127 of the Costello judgment, the Court comments on how retaliatory tariffs—adopted in response to a finding that one party had violated trade rules—spurred lawsuits from private companies suffering trade restrictions:

“[127. As it happens, the CJEU has taken a similar view with regard to liability of the Union under Article 340 TFEU (ex. Article 288 EC). Thus, for example, in FIAMM and Fedon (Joined Cases C 120 and 121/06P, EU: C: 2008: 476) two Italian companies contended that they had suffered loss when a WTO Disputes Panel had authorised the US to impose retaliatory tariffs on certain products …]”

This observation underscores that **retaliatory tariffs** can become a focal point for investor claims, especially where a measure deliberately singles out goods from a particular country. If the duties disrupt an American company’s ability to access a foreign market or fulfill contractual obligations, the possibility of a BIT-based challenge arises.

3. **Potential Grounds Under BITs: Fair Treatment and Non-Discrimination**

Many BITs contain provisions on **national treatment** (treating foreign investors no less favorably than domestic investors) and **most-favored-nation (MFN) treatment** (treating investors from one treaty partner no less favorably than investors from other countries). When a retaliatory tariff exclusively targets American goods or is intentionally calibrated to disadvantage US-produced items, it may violate one or both of these commitments.

For instance, the language in several US BITs is quite explicit. A typical article might state:

“Each Party shall accord treatment no less favorable than that it accords … to investments of its own nationals or companies (national treatment) or to investments of nationals or companies of a third country (most-favored-nation treatment).”

Should a government’s retaliatory tariff exclude local producers or third-country producers from comparable duties, US businesses could argue the measure amounts to **less favorable treatment** of American investments. When these measures carry signs of punitive or protectionist intent, the case for discrimination is further bolstered.

Additionally, many BITs oblige governments to respect **fair and equitable treatment** (FET). This standard protects investors from arbitrary, unreasonable, or unpredictable governmental conduct. A tariff that is indiscriminately aimed at harming US commercial interests—without a legitimate regulatory basis—could be cast as violating FET obligations. Although states do enjoy wide regulatory latitude, tribunals often look for objective justifications. Where purely political motives or open hostility toward American exporters are on display, an FET claim might succeed.

4. **Political Motivations and Potential Legal Vulnerabilities**

Unlike generalized tariffs that can be defended as responding to economic exigencies or trade imbalances, politically driven retaliatory tariffs often lack a clear neutral rationale. The US’s reciprocal tariff approach is justified by the President’s stated goal of **rectifying ongoing trade deficits**. By contrast, some foreign countermeasures appear more overtly aimed at harming American producers as a pressure tactic.

Recent comments by public officials highlight this dynamic. For example, on March 27, 2025, Ontario Premier Doug Ford

declared:

"…we're going to make sure that we inflict as much pain as possible … to the American people…"

Such statements suggest a motive less about fair trade policies and more about **punishment or leveraging political outcomes**. Although rhetorical flourishes are common in trade standoffs, they can serve as corroborating evidence that measures are discriminatory in nature.

This recalls the scenario in **LG&E v. Argentina**, where the tribunal considered whether the Argentine government, under the strain of economic crisis, used foreign-owned utility companies to bear a disproportionate burden (LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1). In that dispute, the claimants argued that the government singled out their sector for unfavorable treatment, effectively transferring wealth from foreign investors to local consumers. The tribunal recognized that such intent—coupled with tangible economic harm—could give rise to liability under the applicable treaty.

If a foreign state's retaliatory tariff policy is similarly **selective** or accompanied by aggressive rhetoric targeting American interests, a US business might argue that the measure constitutes unfair or inequitable treatment, discrimination, or even a form of indirect expropriation if it deprives the investor of substantially all economic benefit.

5. **Determining Damages: Insights from the Costello Judgment**

Returning to the **Costello** decision, the Irish Supreme Court notes that investor-state arbitration can impose significant damages on a host State if its regulations breach treaty standards. In paragraph 129, the Court points out that:

"[129. … at least at a theoretical level – CETA represents a potentially significant extension of the non-contractual

liability of the State. … the State would be exposed to strict liability claims for damages arising from mere legislative non-compliance with CETA, even if the measures were not in themselves unconstitutional … or even if the State had acted in perfect good faith … .]”

Substitute “CETA” with any relevant BIT or investment agreement, and the principle remains the same: if a state’s measure, including a retaliatory tariff, **contravenes treaty commitments**, the state could face substantial compensation claims—even if it believed it was acting lawfully or in the national interest.

For US businesses, this underscores the viability of seeking monetary redress. Suppose a foreign government’s retaliatory tariffs result in immediate and severe losses—by blocking key markets or imposing prohibitively high duties. In that case, an investor-state tribunal might award damages reflecting lost revenue or the diminution in the value of the investor’s enterprise abroad. Consequently, these potential liabilities can act as a deterrent for host states contemplating retaliatory measures.

6. **Establishing Jurisdiction: Framing Exports as an Investment**

One common misconception among **US exporters, manufacturers, and agricultural producers** is that BIT protections only apply to large, capital-intensive projects, such as major infrastructure or significant equity stakes in a foreign subsidiary. While it is true that some BITs require a direct or indirect ownership interest in the host country, many treaties adopt **broad definitions** of “investment,” potentially including long-term distribution agreements, supply chain contracts, or intangible rights crucial to a business’s presence in the foreign market.

To access these protections, a US entity must demonstrate that

it holds a protected investment under the treaty's definition. Even an export-oriented business might qualify if it has structured operations in the host country—such as local partnerships, a distribution network, or commercial activities that go beyond one-off sales. Retaliatory tariffs that cripple these operations could be challenged as a violation of the treaty.

Typically, the procedural steps to initiate investor-state arbitration under a BIT involve:

1. **Notice of Dispute:** The US investor notifies the host State of the alleged treaty breach.
2. **Cooling-Off Period:** Many BITs mandate a waiting period (commonly 3–6 months) for parties to attempt amicable resolution.
3. **Arbitration Filing:** If no settlement is reached, the claimant can file its case under the agreed-upon rules (often ICSID or UNCITRAL).

This mechanism is reminiscent of the principle in **Banco Nacional de Cuba v. Sabbatino**, recognizing that extraterritorial judicial or arbitral review of governmental actions can occur if provided for by treaty. BIT arbitration stands out precisely because it bypasses local courts and places the dispute before an international forum empowered to render enforceable awards.

7. **The Political and Economic Stakes for Foreign States**

From a policy perspective, states that impose retaliatory tariffs in response to the **April 2, 2025, Executive Order** risk opening themselves to significant liability if they fail to calibrate these measures consistently with their BIT obligations. While officials may view "reciprocal" or retaliatory tariffs as a strategic tool to extract concessions from the US, they must consider the potential for major arbitral awards.

In recent years, tribunals have demonstrated a willingness to scrutinize **politically charged actions** that discriminate against foreign investors. If a tariff is accompanied by public statements urging punitive action against Americans—rather than citing neutral economic considerations—it may be easier for investors to show the measure is arbitrary, lacking legitimate justification.

Indeed, the line between permissible countermeasures under international trade law and impermissible conduct under investment treaties can be fine. Even if a host state believes it is responding to the US's reciprocal tariff regime, it still has a duty not to violate the fair and equitable treatment or national treatment rights guaranteed to US companies. Put differently, states cannot simply invoke reciprocal trade retaliation as a shield if the measure in question breaches investor protections enshrined in a BIT.

8. **Practical Considerations for US Manufacturers, Farmers, and Investors**

For **US-based manufacturers**, the immediate concern is calculating the financial impact of retaliatory tariffs on existing foreign contracts. If a contract becomes unprofitable or impossible to fulfill due to extreme tariff hikes, businesses should examine their relevant BIT coverage. Where coverage exists, the next step is documenting the nature of the investment, the timeline of the tariff, any discriminatory language used by foreign officials, and the loss incurred.

Agricultural producers may likewise consider how their supply chain agreements and distribution networks abroad are structured. Even small or medium-sized farming operations, if integrated into a larger export system, might have enough of a "footprint" in a foreign country to assert BIT rights. Detailed record-keeping—especially regarding changes in market access, lost sales, and local competitor advantage—can bolster claims of discriminatory treatment.

Meanwhile, **foreign investors** from the US (for instance, those who have established local facilities or partnerships abroad) should review their corporate structure. Some businesses maintain complex global footprints, with intermediate holding companies or subsidiaries in multiple jurisdictions. Determining which BIT is most advantageous—and whether the relevant entity qualifies as an "investor" under that treaty—can be crucial in selecting the optimal route for arbitration.

9. **Conclusion: Turning the Tables on Retaliatory Tariffs**

The **2025 Executive Order on Reciprocal Tariffs** has intensified tensions in global trade, spurring certain nations to respond with measures aimed squarely at US businesses. Although these moves are often framed as legitimate countermeasures, they may expose foreign governments to **significant legal and financial consequences** under the network of BITs that protect American investments.

For **US manufacturers, agricultural producers, technology exporters, and other industries** bearing the brunt of retaliatory duties, BIT arbitration represents a tangible opportunity to challenge measures that appear discriminatory or punitive. As the **Costello** judgment illustrates, tribunals can award substantial damages if they conclude that a host State has breached treaty obligations, particularly when the action was politically motivated.

From a US business perspective, the **practical takeaway** is clear: While trade wars can be fought on the global stage through diplomacy and reciprocal measures, there is also an **individualized legal recourse** if retaliatory tariffs infringe on internationally guaranteed protections. By methodically documenting losses, verifying treaty coverage, and pursuing investor-state arbitration where applicable, American enterprises have a powerful tool to seek relief.

Thus, in a climate of escalating **reciprocal tariffs and retaliatory measures**, American businesses need not assume that absorbing losses is the only path. BIT protections offer a channel for redress. While mounting such a claim requires careful analysis and legal support, successful arbitration can offset financial harm, reaffirm the value of treaty-based rights, and—ideally—encourage more balanced and equitable trade practices in the long run.

In sum, as the United States implements its April 2, 2025, Executive Order to address large and persistent trade deficits by regulating imports through reciprocal tariffs, foreign governments have launched retaliatory duties that could devastate certain segments of the US economy. However, those burdens need not be passively endured. Through the framework of BITs, US manufacturers, farmers, and other investors possess a significant legal mechanism to challenge unjust or discriminatory retaliatory tariffs. By understanding the scope of BIT protections, documenting the real-world impact, and considering prompt recourse to investor-state arbitration, American businesses can assert their rights in what has become a complex and high-stakes global trade landscape.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
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www.waselandwasel.com
business@waselandwasel.com