War Series: How a U.S. Civil War Naval Doctrine Shapes Modern High Tech Supply Chain Arbitration

January 27, 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Today, physical naval blockades have largely been replaced by regulatory architectures, export controls, sanctions, and entity lists.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.

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

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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.

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War Series: Arbitration Enforcement Amidst Sovereign Capital Controls

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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.

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

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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.

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

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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.

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War Series: Recent Submarine Cable Attacks, the 1923 Cuba Submarine Arbitration, and Business Considerations

January 27, 2026

The global digital infrastructure relies heavily on a vast network of submarine cables, which carry approximately **95% of international data traffic**. These undersea cables are the lifelines of modern communications, finance, and commerce. However, escalating geopolitical tensions in regions such as the Red Sea, the Hormuz Strait, and the larger Indo-Pacific have exposed these critical infrastructures to increasing risks. Recent incidents have highlighted not only their vulnerability but also the complex legal challenges that private companies face when seeking remedies for disruptions.

Recent Incidents Underscoring Vulnerabilities

In March 2024, amid intensifying conflicts near Yemen, three submarine cables were damaged in the Red Sea. The causes—whether deliberate attacks or collateral damage from naval confrontations—remain unclear. The impact was immediate and significant. **HGC Global Communications reported a 25 percent reduction in data traffic across the Red Sea**, necessitating urgent rerouting to alternative networks. Major cables such as the **Europe India Gateway (EIG)** and the **Asia-Africa-Europe 1 (AAE-1)** network, which are crucial for connecting economies across continents, were affected.

Similar events have occurred elsewhere. In 2023, Taiwan faced the severing of two fiber-optic cables linking it to the Matsu

islands, leaving thousands of residents with minimal internet access for months. In the Arctic, Norway discovered in 2021 that 4.2 km of submarine cables had vanished, disrupting essential oceanographic monitoring and satellite communications. Despite investigations, conclusive evidence of intentional damage or attribution of responsibility remained elusive in both cases.

These incidents underscore the profound vulnerability of submarine cables to geopolitical conflicts and raise pressing questions about the legal remedies available to affected private entities.

Historical Legal Precedent: The Cuba Submarine Telegraph Company Case

To navigate the legal complexities surrounding undersea cable disruptions, it is instructive to examine historical precedents, notably the **Cuba Submarine Telegraph Company, Ltd. (Great Britain) v. United States** arbitration of 1923.

During the Spanish-American War of 1898, U.S. naval forces severed submarine telegraph cables operated by the Cuba Submarine Telegraph Company, a British entity. The action aimed to disrupt Spanish communications and was carried out within enemy territorial waters. The company sought compensation for the repair costs, arguing that their property had been unlawfully destroyed.

The tribunal disallowed the claim, offering reasoning that remains pertinent today. It recognized the United States' right to undertake necessary military measures, stating: *"In these circumstances the right of the United States to take measures of admittedly legitimate defense against these means of enemy communication was fully justified."* The company's operations were deeply intertwined with Spanish military interests. The concessions granted by Spain required the company to transmit official correspondence and prohibited any

inspection of such communications. The tribunal observed: *"The transmission of the official correspondence of the Spanish Government was obligatory and gratuitous, the managers and directors being appointed by that Government."* Concluding that there were no equitable grounds for awarding compensation, the tribunal emphasized: *"Not only is there no ground of equity upon which an award should be made against the United States, but equity appears to us to be on the side of the United States in their refusal to pay the damages claimed."*

This case establishes a pivotal principle: during armed conflicts, actions taken by a state as legitimate acts of war may override private property rights without an obligation to compensate affected entities, especially when those entities are engaged in activities that support enemy military operations.

Navigating the Complex Liability Landscape

In the context of modern submarine cable operations, determining who owes obligations of compensation when cables are disrupted due to conflicts requires a nuanced understanding of international law and the various legal regimes governing the seas.

Submarine cables traverse multiple maritime zones, each with specific legal provisions under international law. The primary legal instruments include the **1884 Convention for the Protection of Submarine Telegraph Cables** and the **United Nations Convention on the Law of the Sea (UNCLOS)** of 1982. UNCLOS delineates the rights and responsibilities of states in maritime zones such as territorial seas, exclusive economic zones (EEZs), continental shelves, and the high seas.

In **territorial seas**, coastal states have sovereignty and extensive regulatory authority over activities, including submarine cable operations. Companies must comply with national laws, which may require permits and adherence to

environmental regulations. In the **EEZ and continental shelf**, while coastal states have sovereign rights over natural resources, UNCLOS affirms that all states have the freedom to lay and maintain submarine cables, provided they respect the rights and duties of the coastal state.

However, when disruptions occur due to conflicts, especially in areas beyond national jurisdiction—the **high seas**—the question of liability becomes more intricate. The exclusive jurisdiction of flag states over their vessels on the high seas complicates enforcement measures against entities suspected of intentional damage to submarine cables. UNCLOS Article 97 restricts the arrest or detention of ships to the authorities of the flag state, particularly concerning incidents of navigation involving penal or disciplinary responsibility.

The **Enrica Lexie** arbitration provides valuable insight. The tribunal held that "incident of navigation" refers to events related to the movement or maneuvering of a ship causing serious damage or harm. Intentional acts causing damage, such as deliberately cutting undersea cables, may not be protected under the provisions limiting enforcement to flag states. This opens the possibility, albeit limited, for other states to take action against offending vessels, but practical challenges persist.

Practical Steps for Companies to Seek Recourse

Faced with these complexities, private companies need to explore all available avenues to protect their interests and seek remedies when undersea cables are disrupted due to conflicts.

One critical approach is to **review international investment treaties**. These treaties often contain provisions that protect investments against expropriation and unfair treatment, and they provide mechanisms for dispute resolution between

investors and states. Companies should assess whether their investments in submarine cables qualify for protection under such treaties and whether the treaties cover the territories where disruptions have occurred.

In assessing the applicability of investment treaty protections, companies must determine whether the treaty applies to the maritime zones where the damage occurred. Some treaties explicitly include protections in EEZs and continental shelves. It is essential to confirm that submarine cable assets are considered investments under the treaty's definitions. Moreover, companies should evaluate if the state's actions or omissions can be attributed to it under international law, potentially giving rise to a claim.

Another vital step is to **leverage insurance protections**. Companies should thoroughly review their insurance policies to ensure coverage of damages resulting from conflicts. This includes policies that specifically cover losses due to acts of war or terrorism, known as war risk coverage. Business interruption insurance can also provide coverage for financial losses resulting from operational disruptions. Scrutinizing policy terms, exclusions, and conditions is essential to ascertain the extent of coverage and any obligations required to maintain it.

Companies should also **strengthen contractual protections** with partners, suppliers, and customers to mitigate risks associated with undersea cable disruptions. This involves examining and enhancing contractual provisions such as force majeure clauses, which clearly define events that constitute force majeure and the consequences for contractual obligations. Establishing indemnification agreements can set terms where parties agree to compensate each other for specific losses or damages. Additionally, setting caps on liabilities and outlining procedures for dispute resolution can help manage potential disputes and financial exposures arising from disruptions. By proactively addressing these

issues in contracts, companies can better safeguard their interests.

Takeaway

The disruption of undersea cables in conflict zones presents complex legal challenges for private companies. Historical precedents like the **Cuba Submarine Telegraph Company** case highlight the difficulties in seeking compensation when state actions during armed conflicts are deemed legitimate military measures. The intricate web of international law governing maritime zones adds further complexity, especially concerning enforcement in areas beyond national jurisdiction.

However, companies are not without recourse. By thoroughly reviewing investment treaties, ensuring comprehensive insurance coverage, and strengthening contractual agreements, they can identify potential avenues for compensation and risk mitigation. Proactive engagement with international legal mechanisms and collaborative advocacy can also contribute to enhancing protections for these critical infrastructures.

Understanding the legal landscape and taking strategic actions are essential for companies seeking to navigate the uncertainties associated with undersea cable disruptions. While challenges persist, informed and proactive approaches can help safeguard interests and support the resilience of the global digital infrastructure.

By integrating these considerations into their strategic planning, companies can better position themselves to respond effectively to undersea cable disruptions and contribute to the stability and security of global communications networks.

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War Series: Investment Protection Treaties in War for Investors in the Middle East (GÜRİŞ v. Syria)

January 27, 2026

The recent arbitration award in the case of **GÜRİŞ and others v. Syria** (ICC, Final Award, 31 August 2020) offers a timely reminder of the complexities businesses face when operating in conflict zones. As tensions rise in parts of the Middle East, understanding the obligations of host states under investment treaties becomes ever more crucial.

In this case, Turkish investors found themselves embroiled in a dispute after their investments in Syria suffered losses due to the ongoing conflict. The investors turned to the **Syria-Turkey Bilateral Investment Treaty (BIT) of 2004**, seeking compensation for their losses.

Key Takeaways from the Arbitration

One of the central issues was whether the Syrian government had breached its obligations under the BIT, particularly concerning the **"full protection at all times"** standard and the provisions related to losses due to war or civil disturbances.

The tribunal highlighted that the existence of an armed conflict does not automatically suspend a state's obligations under international treaties. Referring to the **2011**

International Law Commission (ILC) Articles on the Effect of Armed Conflict on Treaties, the tribunal noted that treaties continue to operate unless specific provisions state otherwise.

The War-Losses Clause and Its Implications

A significant point of contention was **Article IV(3) of the Syria-Turkey BIT**, known as the "war-losses" clause. This provision ensures that investors are accorded treatment no less favorable than that given to the host state's own investors or those of any third country concerning measures adopted in relation to losses suffered due to war or similar events.

The tribunal determined that this clause did not exclude the application of other protections under the BIT. Instead, it provided an additional layer of security for investors during times of conflict. This interpretation aligns with previous arbitral decisions, reinforcing that **war-losses clauses are additive, not exclusionary**.

Most-Favored-Nation Treatment Extends Protections

The investors also invoked the **Most-Favored-Nation (MFN) clause** in the BIT, seeking to benefit from more favorable provisions in Syria's investment treaty with Italy. The tribunal agreed that the MFN clause allowed the investors to access these enhanced protections, particularly the obligation to offer adequate compensation for losses, as stipulated in the **Syria-Italy BIT**.

This decision underscores the importance of MFN clauses in investment treaties, enabling investors to benefit from the best available standards of protection, even during armed conflicts.

Force Majeure and Necessity Defenses Rejected

Syria attempted to defend its position by invoking **force majeure** and **necessity**, arguing that the conflict excused any breaches of its treaty obligations. However, the tribunal rejected these defenses, emphasizing that such exceptions are not applicable when the obligation in question is to provide compensation for losses already incurred.

The tribunal noted that the obligation to offer compensation is a financial one and that war or armed conflict does not make it materially impossible to fulfill this duty. By undertaking to compensate for losses due to war or similar events, the state cannot later claim that the very occurrence of these events absolves it of its obligations.

Implications for Middle Eastern Businesses

For businesses operating in the Middle East, the GÜRİŞ v. Syria award serves as a crucial precedent. It highlights that:

- **Investment treaties remain in force during conflicts**, and host states are still bound by their obligations.
- **War-losses clauses provide additional protections** but do not negate other treaty rights.
- **MFN clauses can be powerful tools** for investors to access the most favorable treatment available.
- **States cannot easily evade their compensation obligations** by citing conflict-related defenses.

As regional tensions escalate, companies must be vigilant in understanding their rights under international law. Investment treaties can offer significant protections, but navigating them requires expertise.

Moving Forward: Strategic Considerations

Businesses should:

- **Review existing investment treaties** relevant to their operations to understand the full spectrum of

protections available.
- **Consider the inclusion of robust dispute resolution mechanisms** in contracts, ensuring access to international arbitration if disputes arise.
- **Stay informed about geopolitical developments** that may impact their investments and adjust strategies accordingly.

Conclusion

The GÜRİŞ v. Syria case reinforces the notion that even in the face of war, investment protections endure. Host states have clear obligations, and investors have avenues to seek redress when those obligations are not met.

In these uncertain times, it’s more important than ever for businesses to be proactive in safeguarding their interests. Understanding the nuances of investment treaties and the protections they offer can make all the difference.

For those seeking guidance on navigating these complex legal landscapes, expertise in international arbitration and investment law is invaluable. As the Middle East continues to evolve, staying ahead of the curve is not just advantageous—it’s essential.

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War Series: Sports

(Basketball) Contracts and War as Force Majeure in Arbitration

January 27, 2026

The case **Jarrell Isaiah Brantley v. Basketball Club Unics (BAT 1813/22)** was an **international sports arbitration** introduced on **April 19, 2022** and has since been **concluded**. The dispute was adjudicated under the **Basketball Arbitral Tribunal (BAT)**, using the **BAT Arbitration Rules 2022**, with the **seat of arbitration** in **Geneva**. The claimant, **Jarrell Isaiah Brantley**, a professional basketball player from the **United States**, brought the case against **Basketball Club Unics**, based in **Russia**, following a contractual disagreement arising during the 2021-2022 season amid the geopolitical tensions caused by Russia's invasion of Ukraine. The arbitration proceedings examined issues related to the player's departure from the team and whether the war constituted a **force majeure** event excusing his performance under the contract.

In **Jarrell Isaiah Brantley v. BC Unics**, we confront a fascinating convergence of sports arbitration and the broader impact of **war on the sporting industry**. This case revolves around Brantley, an American professional basketball player, and the Russian club BC Unics. The crux of the dispute lies in whether Brantley was justified in terminating his contract due to Russia's invasion of Ukraine, and if such a **force majeure** event can relieve athletes of their contractual obligations.

Brantley, contracted to BC Unics for the 2021-2022 season, found himself in an escalating geopolitical crisis. The Russian invasion of Ukraine on **February 24, 2022**, led to a

swift series of sanctions, airspace closures, and public advisories urging U.S. citizens to leave Russia. Against this backdrop, Brantley, concerned for his safety and that of his family, left Russia, despite Unics' insistence that the situation was "normal."

One of the **key legal issues** here is the interpretation of the **force majeure clause** in the player contract. Typically, a **force majeure** clause excuses non-performance when unforeseen and uncontrollable events render contract fulfillment impossible. The contract in question defined force majeure to include events such as war or hostilities. Given the nature of the Russian military actions, Brantley's departure appears justified on its face. After all, no one could predict how the conflict would evolve.

However, the club argued that since the conflict was not on Russian soil and Brantley's personal safety was not immediately jeopardized, he breached the contract by leaving. They claimed that his real reason for leaving was dissatisfaction with his playing time—an old grievance that predated the war. This sets up a classic clash between **contractual obligations** and the broader context of **human safety and ethics**.

The **Basketball Arbitral Tribunal (BAT)** ultimately sided with Brantley. It ruled that the **war constituted a force majeure** event, excusing him from fulfilling the remainder of his contractual duties. This decision underscores the significant effects that global conflicts can have on **professional sports**, a sector often seen as detached from such worldly concerns.

One of the **broader implications** of this ruling is the message it sends to international athletes: in times of war or global crisis, personal safety supersedes contractual commitments. This case establishes a **precedent** where athletes can lawfully exit contracts if they are directly affected by large-scale events like war. With more **international sports leagues**

becoming hubs for global talent, especially in geopolitically tense regions, this decision will undoubtedly echo far and wide.

From a sports management perspective, it's clear that **force majeure clauses** in contracts need careful drafting. What constitutes a **force majeure** event must be explicitly defined. Can a player claim force majeure if their home country issues a travel advisory? What if sanctions disrupt payment systems, effectively cutting off their income? Clubs must now grapple with these questions as geopolitical risks are no longer abstract concerns but real threats to business continuity.

The **economic impact** of war on sports is another layer of this case. By suspending Russian teams from the **EuroLeague**, the ripple effect cascaded down to individual players like Brantley, who found themselves in untenable situations. The decision to pause EuroLeague games involving Russian clubs not only denied these athletes the opportunity to compete on a European stage, but it also raised questions about whether clubs should be held accountable for compensating players in such crises. If you're a player, does your **salary freeze** the moment the games stop? Or are you still entitled to your full pay?

For BC Unics, the ruling was a bitter pill. The club argued that Brantley breached his contract by leaving without permission, but the BAT recognized that **Brantley acted reasonably** under the circumstances. **War is unpredictable**, and it is unreasonable to expect an athlete to prioritize a game over the safety of their family.

This judgment also shines a light on the **business of sports during war**. For Russian clubs, this war has not only led to the loss of top-tier players like Brantley but has also placed them in a precarious financial position. Sponsorship deals, ticket sales, and broadcast revenues are all likely to take a hit when **foreign talent** opts to leave, and **international**

tournaments pull the plug on Russian participation.

In conclusion, **Jarrell Isaiah Brantley v. BC Unics** demonstrates the profound impact that geopolitical events can have on the sports industry. Beyond the field, pitch, or court, athletes must weigh their obligations against the safety of themselves and their families. In the end, **force majeure clauses** may offer some respite, but the evolving world of **international sports arbitration** will need to continue addressing the balance between athletic contracts and **global instability**. War is not just a tragedy for nations—it disrupts everything, including the games we play.

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War Series: Defining ‘War’ in Arbitration Awards and NATO Operations (Kosovo)

January 27, 2026

The arbitration award referenced in the UK Court of Appeal judgment [2002] EWCA 1878 delves deeply into the meaning of ‘war’ as interpreted by arbitration tribunals and its implications for contractual obligations. This award, rendered by a distinguished panel of arbitrators, underscores the nuanced approach that arbitration tribunals take in defining

what constitutes a ‘war’ under commercial contracts, particularly in the context of **NATO operations**.

The arbitration at the heart of this judgment concerned the **New York Produce Exchange (NYPE) form of charter**, specifically the invocation of a **War Cancellation Clause** by charterers. The clause allowed for the cancellation of the charter in the event of the outbreak of war involving the nation under whose flag the vessel sailed. The dispute arose when Germany, as a member of NATO, participated in military operations in Kosovo and Yugoslavia in 1999. The charterers sought to cancel their obligations under the charter, claiming that Germany’s involvement in the conflict constituted ‘war’ as envisaged by the clause.

The core issue before the arbitration tribunal was whether the military operations in Kosovo, involving NATO and Germany, could be considered a ‘war’ within the meaning of the War Cancellation Clause. The tribunal’s majority found that the operations in Kosovo did not constitute ‘war’ as contemplated by the contract. This decision was based on a common-sense interpretation of the term ‘war,’ which the majority arbitrators held should be understood as a conflict between nation-states, not merely military activities or hostilities that fall short of war. The tribunal majority reasoned that while the conflict in Kosovo was indeed intense and involved significant military engagement, it did not rise to the level of ‘war’ as defined by the contract.

This interpretation aligns with the approach taken by the courts in earlier cases, such as **KKKK v Belships Co (1939)**, where Branson J emphasized that the term ‘war’ must be construed based on the reasonable expectations of businesspersons, taking into account the nature of the conflict and the specific contractual context. The majority’s view was further supported by the distinction between ‘war’ and ‘warlike activities or hostilities short of war’ as explicitly drawn in the NYPE charter form.

The dissenting view by Sir Christopher Staughton, however, highlights the inherent ambiguity in the term ‘war’ and the potential for differing interpretations. Sir Christopher argued that a reasonable businessman would have considered the Kosovo conflict to be a ‘war,’ given the scale and intensity of the operations and Germany’s involvement. This dissent raises critical questions about the flexibility and adaptability of contractual terms in light of evolving international conflict scenarios.

The relationship between the judgment and the arbitration award is significant in that the Court of Appeal ultimately upheld the arbitration tribunal’s decision, despite recognizing the serious legal questions it raised. The court acknowledged that the arbitrators had applied a common-sense approach to the interpretation of the War Cancellation Clause, consistent with established legal principles. However, the court also noted the practical implications of the decision, particularly the emphasis on the timing of the cancellation notice, which played a crucial role in the outcome.

The broader implications of this award for **NATO operations today** are profound. The tribunal’s decision reflects a conservative approach to defining ‘war’ in the context of contractual obligations, one that emphasizes the traditional understanding of war as a conflict between nation-states. This interpretation has significant consequences for parties to contracts involving NATO member states, as it suggests that not all military engagements, even those involving substantial force and participation by multiple nations, will be considered ‘war’ for the purposes of war cancellation clauses.

In the current geopolitical climate, where NATO operations are increasingly characterized by coalition-based engagements and multilateral military actions that may not involve formal declarations of war, the need for clarity in contractual language has never been more pressing. Parties drafting contracts that include war cancellation clauses must carefully

consider the scope and definition of ‘war,’ ensuring that the terms are explicit and aligned with the parties’ intentions.

The tribunal’s decision in this case also underscores the importance of **timeliness in exercising cancellation rights**. The charterers’ failure to provide timely notice of cancellation was ultimately fatal to their claim, highlighting the need for parties to act swiftly and decisively when invoking such clauses.

In conclusion, the arbitration award referenced in [2002] EWCA 1878 offers valuable insights into the interpretation of ‘war’ in commercial contracts, particularly in the context of NATO operations. The decision reflects a cautious approach, favoring a traditional understanding of war that may not always align with the realities of modern military engagements. For parties involved in contracts with NATO member states, the key takeaway is the importance of clear, precise language and the need for prompt action when invoking war-related contractual provisions. This award serves as a reminder that while the nature of conflict may evolve, the principles of contract interpretation remain rooted in the reasonable expectations of the parties and the common-sense application of contractual terms.

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War Series: Civil War and

Force Majeure in Global Construction

January 27, 2026

The arbitration between Ermir İnşaat Sanayi ve Ticaret A.Ş. and Biwater Construction Ltd., adjudicated by a sole arbitrator under the ICC Arbitration Rules, offers several critical lessons for construction companies operating in regions vulnerable to civil unrest. This case, which revolved around a construction project in Libya that was interrupted by the First Libyan Civil War, underscores the complexities and risks associated with working in conflict zones.

Lesson 1: Force Majeure in the Context of Civil War

One of the key lessons from this arbitration is the interpretation of force majeure clauses when civil war interrupts a construction project. The sole arbitrator, Tobias H. Zuberbühler, meticulously examined whether the Respondent, Biwater Construction Ltd., could have reasonably been expected to resume the project after the cessation of the First Libyan Civil War. The arbitrator determined that the **“ongoing force majeure situation”** justified the Respondent’s decision not to resume the project, highlighting that **“Libya was and has been a dangerous country since 2011”** (para. 155).

This case illustrates that civil war, as a force majeure event, can extend beyond the immediate conflict period. The arbitrator accepted that the dangers in Libya persisted long after active hostilities ceased, making it unreasonable to expect project resumption. The lesson here is clear: construction companies must recognize that the effects of

civil wars are prolonged and can render contract performance impossible for extended periods.

Lesson 2: The Interplay Between Security and Financial Risks

Another significant takeaway from this arbitration is the intricate relationship between security risks and financial considerations in post-conflict environments. The sole arbitrator acknowledged that Biwater's decision not to resume the project was influenced by both **"substantial security concerns"** and the financial risks associated with non-payment by the Libyan client, HIB (para. 154). This dual consideration emphasizes that in conflict zones, security and financial stability are deeply intertwined.

Companies must therefore conduct thorough risk assessments that consider both factors equally. This lesson is particularly relevant for projects in regions where the local government or clients may be financially unstable or unable to fulfill payment obligations, as seen in Libya during the post-war period.

Lesson 3: The Limits of Claims for Lost Profits

The denial of Ermir İnşaat's claim for lost profits is another crucial lesson from this case. The Claimant sought compensation under Clause 3.7 of the Agreement and Article 378 of the Swiss Code of Obligations (CO), arguing that Biwater's failure to resume the project led to lost profits. The arbitrator, however, rejected this claim, stating that the **"ongoing force majeure situation"** made it impossible for the Respondent to resume the project and that Biwater was not at fault (para. 280).

This lesson underscores the difficulty of substantiating

claims for lost profits in situations where force majeure is involved. When a civil war or similar event disrupts a project, proving that one party is at fault for non-performance becomes challenging. Construction companies must be cautious when drafting contracts to ensure that lost profit claims are clearly defined and that force majeure events are appropriately addressed.

Lesson 4: The Importance of Clear Settlement Agreements

The arbitration also highlights the importance of drafting clear and comprehensive settlement agreements in the aftermath of a conflict. The December 2015 Agreement between the parties was intended to resolve certain outstanding issues, but the arbitration revealed that ambiguities in the agreement led to further disputes. For instance, the arbitration had to interpret various clauses of the December 2015 Agreement, particularly those related to payments and legal disputes in Turkey (para. 88-90).

This lesson teaches that settlement agreements must be carefully negotiated and drafted to prevent future litigation. Ambiguities can lead to prolonged disputes and additional arbitration, as seen in this case.

Lesson 5: Documentation and Evidence in Conflict Zones

Finally, this arbitration underscores the challenges of gathering documentation and evidence in conflict zones. The arbitrator acknowledged that the Claimant faced difficulties in providing documentation for its site clearance costs due to the chaotic circumstances of evacuating personnel from Libya. The arbitrator allowed for a relaxation of the substantiation requirements, recognizing that **“under these circumstances, the requirement of substantiation can be alleviated”** (para. 263).

This lesson is particularly important for companies operating in similar environments today. It emphasizes the need for flexible evidentiary standards in arbitration when the usual documentation is not available due to war or other emergencies. Companies should ensure that their contracts allow for such flexibility, anticipating the possibility that certain records may be lost or unobtainable in the event of a conflict.

Conclusion

The Ermir İnşaat Sanayi ve Ticaret A.Ş. v. Biwater Construction Ltd. arbitration provides essential lessons for construction companies and arbitrators alike. It highlights the extended impact of civil wars on construction projects, the intertwined nature of security and financial risks, the challenges of substantiating claims for lost profits, the importance of clear settlement agreements, and the need for flexible evidentiary standards in conflict zones.

These lessons are particularly relevant in today's global construction industry, where projects frequently intersect with geopolitical instability. As this case demonstrates, the aftermath of civil wars continues to shape the legal landscape, requiring companies and arbitrators to navigate these challenges with foresight and adaptability.

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