UAE Cassation Court finds arbitration agreement waived if parties engage in court proceedings

March 21, 2021

In a recent judgment by the Abu Dhabi Cassation Court, the Cassation Court found that the engagement of parties in the court and expert procedures – even whilst challenging the jurisdiction of the courts due to an arbitration agreement – should be considered by the courts in determining whether the party challenging jurisdiction has waived their right to rely on the arbitration agreement.

Facts

A subcontractor sued the main contractor in a construction dispute for AED 75 million before the Abu Dhabi Primary Court in 2019.

The main contractor challenged the jurisdiction of the courts to hear the dispute from the initiation of the trial proceedings until reservation for judgment on the grounds that the contract was subject to an arbitration agreement between the parties.

The Primary Court ultimately found it had no jurisdiction over the dispute as the underlying contract contained an arbitration agreement, however, the Primary Court had appointed an expert to review the contract, powers of attorney, and other matters related to the merits of the dispute.

The subcontractor appealed the judgement before the Abu Dhabi Appeals Court in April of 2020.

In June of 2020, the Appeals Court dismissed the appeal and upheld the verdict of the Primary Court.

Thus, the subcontractor took the matter to the Abu Dhabi Cassation Court (the highest court in the Emirate of Abu Dhabi).

Issues

The Abu Dhabi Cassation Court determined that the courts had jurisdiction to hear the case for two reasons; the first being that the subcontractor's signatory to the contract did not have authority to bind the subcontractor to an arbitration agreement.

The second – and more significant – reasoning by the Cassation Court was that the engagement of the parties with the court and expert procedures must be considered in deciding whether the party challenging the jurisdiction of the court had waived their right to do so by engaging substantively in the merits of the dispute during proceedings.

In this, the Abu Dhabi Cassation Court stated that:

"In addition to that, the expert procedures took a prolonged period of time, during which the two parties reached joint consensus on many of the detailed matters of expertise and on the terms of entitlements for the appellant with the respondent, and that the respondent had been researching the subject matter of the lawsuit, which concluded that the respondent had waived its argument in respect of the arbitration agreement and non-jurisdiction of the courts, and the appellant insisted on this before the two trial courts [Primary and Appeals], but neither of the courts investigated and researched this issue, which is considered denial of the right of defense, and when the contested judgment ended with

its reasons and verdict – in support of the first-degree ruling – contrary to what preceded, which indicates that the two courts have not properly applied the law and did not understand the facts of the case, and turned away from addressing the appellant's defense on aspects that deserved a response, and that is what defects the appealed judgment and requires its revocation."

(The appellant being the subcontractor and the respondent being the main contractor.)

Deductively and arguably, the Cassation Court put forth a three-prong test to determine whether a litigant would be deemed to have waived their jurisdictional arguments that are reliant on an arbitration agreement.

The three prongs may be considered as follows:

1. The extent that the party challenging jurisdiction becomes engaged in the merits of the dispute during court proceedings notwithstanding any primary jurisdictional challenge.

2. The extent that the party challenging jurisdiction becomes engaged in the court expert procedures.

3. Whether any consensus was made by the party contesting jurisdiction with the counter litigants as part of the court or expert proceedings.

Also notable is Cassation Court's finding that the parties engaged in the court expert proceedings for a "prolonged period of time" even though the trial before the Primary Court took about one year which is a relatively average length of time for a complex construction dispute at the first level of court.

Significance

This judgment by the Abu Dhabi Cassation Court presents a novel but substantial consideration when challenging

jurisdiction of the courts in the UAE on the grounds that an arbitration agreement governs the dispute between the parties.

And likewise, the judgment presents a critical question; to what degree can a party challenging jurisdiction engaged in the merits of a dispute before the courts?

Litigants that challenge the jurisdiction of the courts – on grounds that an arbitration agreement exists – must make significant choices in how and when to argue the merits of the dispute as opposed to choosing to only challenge jurisdiction without arguing on merits.

Engagement with the court expert procedures must also be carefully conducted as any verbal or written disclosure, comment, or decision may be construed to be consenting to court or expert procedure related matters that would be deemed waiver of the jurisdictional challenge.

And parties must also be diligent in how they (or their counsel) review and critique any case management session minutes, expert hearing transcripts and reports, and hearing minutes for trial sessions before the court, to ensure that no explicit or implied jurisdictional waiver is made.

Author: Mahmoud Abuwasel

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