

Leave May Not Always Be Required to Appeal an Arbitral Costs Award

October 14, 2022

By Dalal Hjjih

Parties to commercial transactions often choose arbitration over litigation. While litigation offers a more structured process, arbitration provides both parties with a tailored, more private, faster and often less expensive route to resolve disputes.

Recently, in *Schickedanz v Wagemas Holdings Ltd*, [2022 ONSC 5315](#) (“*Schickedanz*”), Justice A.P. Ramsay of the Ontario Superior Court of Justice weighed in on the issue of whether leave is required to appeal an arbitral costs award.

There are two competing lines of cases on the appeal of arbitral costs awards. The Court in *Flowers v Eickmeier*, [2017 ONSC 3376](#) (“*Flowers*”), was of the view that leave to appeal costs is always required and parties cannot contract out of this requirement. However, the Court in *Pagliarioli v Rite-Pak Produce Co Limited*, [2010 ONSC 3729](#) (“*Pagliarioli*”), held that leave was not always required. Recently, the Court in *Schickedanz* rejected the former approach and agreed with *Pagliarioli* that leave to appeal a costs award of an arbitrator is not required where the parties have entered into an arbitration agreement with broad appeal rights

Background

The underlying dispute in *Schickedanz* involved five siblings, an Alberta corporation (Wagemas Holdings Limited) of which the siblings were all shareholders, and the sale of real property located in Ontario. In October 2020, the Appellants (Charlotte Schickendanz and her holding company, Wagemas Holdco (CDS) ULC) commenced arbitration proceedings against several individuals, including the Respondent (Wagemas Holdings Limited). In 2021, the Appellants ultimately decided to discontinue the arbitration, but the Respondent sought costs for the arbitration. On October 8, 2021, the arbitrator awarded costs to the Respondent.

On November 8, 2021, the Appellants delivered a Notice of Appeal to the Superior Court of Justice appealing the costs award in favour of the Respondent. Subsequently, the Respondent moved to quash the appeal on the basis that the Appellants did not seek leave to appeal the arbitrator’s costs award pursuant to s. 133(b) of the *Courts of Justice Act*, RSO 1990, c C.43 (“*Courts of Justice Act*”):

Leave to appeal required

133 No appeal lies without leave of the court to which the appeal is to be taken,

- from an order made with the consent of the parties; or
- where the appeal is only as to costs that are in the discretion of the court that made the order for costs. [Emphasis added].

The Decision of the Ontario Superior Court of Justice

The Superior Court of Justice dismissed the Respondent's motion to quash the appeal and held that leave to appeal was not required.

An arbitration agreement is a contract. As such, the Court reiterated the Supreme Court of Canada's ruling in *TELUS Communications Inc v Wellman*, [2019 SCC 19](#) that parties to an arbitration are free to negotiate the arbitral process. If the parties negotiated and agreed to a broad appeal process, without regard to a leave requirement, the courts should not impose a leave requirement. To do so would "amount to judicial interference with the parties' right to contract."

Further, the Court in *Schickedanz* held that s. 133(b) of the *Courts of Justice Act* does not apply to commercial arbitrations. The Court held that the word "court" in s. 133(b) does not apply to arbitral disputes. Had the legislature intended the provision to apply to commercial arbitrations, it would have included language to that effect. For example, s. 134(1) of the *Courts of Justice Act* includes the "court or tribunal" language. Additionally, the Court found that nothing in the *Arbitration Act* suggests that the *Courts of Justice Act* applies to a private commercial arbitration.

On the facts of this case, the Court concluded that the arbitration agreement contained broad appeal rights of any final decision, without a leave to appeal requirement. Therefore, the Appellant did not need to seek leave to appeal the Arbitrator's costs award.

In the alternative, the Court considered whether it has the jurisdiction to extend the time for seeking leave. It determined that when leave to appeal an arbitral costs award is necessary, the courts have jurisdiction to consider whether an extension of time to seek leave is warranted. The Court applied the Court of Appeal's test for extending time in *Enbridge Gas Distribution Inc v Froese*, [2013 ONCA 131](#), at para 15:

The overarching principle is whether the "justice of the case" requires that an extension be given. Each case depends on its own circumstances, but the court is to take into account all relevant considerations, including

- whether the moving party formed a bona fide intention to appeal within the relevant time period;
- the length of, and explanation for, the delay in filing;
- any prejudice to the responding parties caused, perpetuated or exacerbated by the delay; and
- the merits of the proposed appeal.

In this case, the Court was not convinced that if leave to appeal was required, it would not be granted. Therefore, the Respondent's motion to quash the appeal was dismissed.

Key Takeaways

This decision affirms the ruling in *Pagliarioli* that leave to appeal the issue of costs is not always required. If the arbitration agreement includes a broad appeal process, without requiring leave to appeal, then the courts cannot impose a requirement for leave to appeal costs. Yet, that does not necessarily make *Flowers* inapplicable. Courts may still apply the principle in *Flowers*. Until an appellate court clarifies whether leave to appeal an arbitral costs award is always required, two lines of authority remain.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

For more information or inquiries:



Dalal Hjijh

Toronto
647.715.7124

Email:
dhjijh@weirfoulds.com

Dalal Hjijh is an Associate in the Commercial Litigation Practice Group at WeirFoulds LLP.

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035