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Appealing a Stay of Your Arbitral Award? Make Sure You're in the Right Place.



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After an arbitral award has been issued in a commercial dispute, the parties have limited rights to appeal the award or bring an application to set it aside under the Ontario *Arbitration Act, 1991*, S.O. 1991, c.17. Where such an appeal or application is pending, Ontario Courts have the jurisdiction to stay the arbitral award on a conditional basis.

A recent decision of the Ontario Court of Appeal, *DAC Group (Holdings) Ltd. v. Fuego Digital Media Inc.*, 2018 ONCA 43, per Benotto J.A., confirms that an appeal of the conditional stay of the arbitral award is interlocutory in nature. This means the appeal lies to the Divisional Court, not to the Court of Appeal.

Facts

Fuego involved a commercial dispute regarding the ownership of software between two parties. Following arbitration, the arbitrator declared that the respondent was the owner of the software. The arbitral award also included injunctive relief and a sizeable costs award.

Pursuant to section 46 of the *Arbitration Act*, *Fuego* brought an application to Court to have parts of the arbitral award set aside.

Section 46 provides for circumstances in which an arbitral award may be set aside by way of an application to the Court. This may include where a party entered into the arbitration agreement without legal capacity or where the arbitration agreement is invalid or ceases to exist.

Under section 50(5) of the *Arbitration Act*, where a party brings an application to set aside or appeal the arbitral award, the application judge has the power to stay the enforcement of the arbitral award pending the resolution of the Court proceeding:

- 50(5) If the period for commencing an appeal, application to set the award aside or application for a declaration of invalidity has not yet elapsed, or if such a proceeding is pending, the court may...

...

- (b) order, on such conditions as are just, that enforcement of the award is stayed until the period has elapsed without such a proceeding being commenced, or until the pending proceeding is finally disposed of.

In *Fuego*, the application judge stayed the enforcement of the arbitral award pending the resolution of Fuego's application to set it aside as follows:

The Court exercises its discretion under section 50(5) and 50(8) of the *Arbitration Act* to stay the enforcement of the final award and cost [*sic*] pending the disposition of Fuego's application on the condition that Fuego pay DAC the sum of \$25,000 on the 15th day of each and every month commencing on January 15, 2018 until such time as the application to be heard in April 2018 is dealt with.

The application judge's decision to stay the arbitral award was subsequently appealed.

At issue on the motion was whether the application judge's stay order was final or interlocutory in nature.

If it was interlocutory, an appeal lay to the Divisional Court. If it was final, an appeal lay to the Court of Appeal.

An appeal of a Conditional Stay Order under the Arbitration Act is Interlocutory

The Court held that the application judge's order to stay the enforcement of the arbitral award pending the application to set it aside was interlocutory.

First, the Court noted that the merits of the application to set aside the arbitral award "remain to be determined". Citing the leading decision on what distinguishes a final order from an interlocutory one, *Hendrickson v. Kallio*, [1932] O.R. 675, the Court observed that where the merits of a case have yet to be adjudicated, the Order was interlocutory in nature.

Moreover, the Court held that section 50(5) of the *Arbitration Act*, cited above, affirms that a "final order has yet to be made". That is, the application to set aside the arbitral award "remains before the court for a final determination".

Accordingly, the Court concluded that the decision to stay the arbitral award pending the application to set it aside was interlocutory. The matter was within the jurisdiction of the Divisional Court, not the Court of Appeal.

As no Notice of Appeal had been filed with the Court of Appeal, no file needed to be transferred to the Divisional Court. Moreover, the Court of Appeal declined to make an order regarding the time limits in the Divisional Court.

Fuego acts a warning to those seeking to appeal stay orders pending the resolution of an appeal or application under the *Arbitration Act*: be aware of the nature of the order you seek to appeal to make certain you are in the right court.