

DISPUTE RESOLUTION | AUGUST 2022

THE SUPREME COURT OF QUEENSLAND ENFORCES A DISPUTE RESOLUTION CLAUSE REFERRING DISPUTES TO EXPERT DETERMINATION

*In Mineralogy Pty Ltd v Adani Mining Pty Ltd,*¹ a dispute arose between Adani Mining Pty Ltd (Adani) and Mineralogy Pty Ltd (Mineralogy) in relation to a royalty deed (Royalty Deed) under which Adani had agreed to pay royalties to Mineralogy for mining a particular mining tenement.

Adani sought funding from certain financiers to assist it with the development of the tenement. Adani had agreed in the Royalty Deed not to encumber the tenement unless the financiers executed a priority deed with respect to security over the tenement. Adani requested Mineralogy to sign a priority deed (the **Priority Deed**) that had been agreed with the financiers. Mineralogy did not sign the Priority Deed and did not engage with Adani. Adani invoked the dispute resolution procedure to enforce its rights under the Royalty Deed.

Subsequently, Adani referred the dispute to an independent expert for determination under the Royalty Deed. As no agreement was reached on the appointment of an expert, the expert was appointed by the President of the Queensland Law Society in accordance with the clause and the consent of both parties. A procedural conference was arranged by the expert which was attended by both parties.

Following the procedural conference, Mineralogy applied to the court to stay the expert determination.

Did the dispute come within the dispute resolution clause?

Mineralogy argued that the dispute did not come within the terms of the dispute resolution clause in clause 8 of the Royalty Deed, and thus the dispute was not to be referred to expert determination because:

- (a) clause 8 was to be narrowly interpreted;
- (b) the dispute involved the rights of third parties; and
- (c) the dispute involved questions of fact or mixed law and fact.

Each of these arguments was rejected by the court.

First, the court emphasised that dispute resolution provisions are to be interpreted in the same manner as other clauses in a contract. The clause is to be interpreted in light of the objective intention of the parties, taking into account the context and the contract as a whole. Importantly, the court emphasised that commercial contracts are to be interpreted so as to avoid making commercial nonsense.

The court stated that it was "*difficult to see how the present dispute could possibly fall outside any reasonable commercial interpretation of clause 8.7*".² Nonetheless, it considered each of Mineralogy's arguments.

First, the court did not agree that clause 8 was to be narrowly interpreted by clause 8.3 or otherwise.

¹ [2022] QSC154.

² *Ibid* [23].

Clause 8.1 provided that "*all disputes or claims arising out of or relating to the Deed*" were to be resolved pursuant to the procedures set out in clause 8. If a dispute was not resolved by the parties, it may be referred to expert determination. The parties were to appoint the expert by agreement. If the parties did not agree on the expert then the expert was to be appointed pursuant to clause 8.6.

Clause 8.6 provided that if the parties cannot agree on the appointment of an expert, then the expert was to be appointed by one of three bodies referred to in clause 8.6, depending on whether the dispute related to a technical, financial, or legal matter. For example, the President of the Queensland Law Society was to appoint an expert in relation to a dispute relating to a legal matter. Clause 8.3 provided whether a dispute was to be considered a technical, financial or legal matter.

The court found that to read clause 8.1 confined by clause 8.3 was "*contrary to the natural and ordinary meaning of clause 8.1*"³ and that "*no reasonable businessperson would adopt such a strained interpretation*".⁴ Moreover, the "*catch-all*" phrase in clause 8.3(c) meant that "*any other matter*" was "*sufficiently wide to encompass disputes that are not strictly 'technical' or 'financial'*".⁵

Second, the court found that the dispute did not involve the rights of third parties. The dispute to be determined by the expert related to the rights of Adani and Mineralogy under the Royalty Deed and whether Mineralogy has an obligation to execute the Priority Deed. That dispute did not impact the rights of the financiers or the State of Queensland, neither of whom are parties to the Royalty Deed or to the dispute.

Third, Mineralogy argued that disputes relating to facts or mixed facts and law were not to be considered to be legal matters that could be referred to expert determination. The court rejected this argument referring to its broad interpretation of clause 8.1, noting that "*[m]ost disputes will involve some finding of fact*" and that it "*would be commercial nonsense to neuter the dispute resolution process in that way*".⁶ Also given the "*catch-all*" phrase in clause 8.3, "*there is no evident intention to exclude questions of fact or even disputes involving mixed questions of fact and law*".⁷

In short, the court found that there was no reason to qualify the disputes to be referred to expert determination pursuant to clause 8.

Further, the court rejected Mineralogy's argument that the "*justice of the case*" required that the dispute be decided by the court not by expert determination, emphasising that "*parties who have made a contract should keep it*".⁸

In addition, the court found that Mineralogy had waived its right to object, as it did not object to the process of expert determination within a reasonable time. Indeed, even though Mineralogy had not responded to Adani's notices, it had agreed to the appointment of the expert and participated in the first procedural hearing. It was only after that hearing that Mineralogy raised its objection and applied for a stay. Even if there were grounds for granting the stay, the court "*would exercise its discretion to refuse to do so on the grounds of lache and delay*".⁹

The court did not accept Adani's argument that rule 12(1) of the IAMA expert determination rules¹⁰ had the effect that Mineralogy was deemed to have waived its right to object to any irregularity because it had participated in the dispute resolution process without objection.

Was proper notice given?

Mineralogy contended that Adani had not given proper notice of dispute because: "the notice was not given in accordance with the formal notice requirements of another [d]eed; ... lacked proper particulars; ... provided an ultimatum; and ... was equivocal because it was without prejudice".¹¹

The court found that notice under the Royalty Deed did not need to comply with the formal notice requirements set out in another deed. The notice provided sufficient explanation of circumstances giving rise to the dispute. Also, "a reasonable businessperson" would take the view that it was a notice under clause 8 and also "afforded Mineralogy the last opportunity to sign".¹² Lastly, the 'without prejudice' mark was a mere reservation of rights and did not qualify the referral.

³ Ibid [41].

⁴ Ibid [42].

⁵ Ibid [45].

⁶ Ibid [52].

⁷ Ibid [53].

⁸ Ibid [58] quoting *Metropolitan Tunnel and Public Works Limited v London Electric Railway Co* [1926] Ch 371.

⁹ Ibid [63].

¹⁰ IAMA was the Institute of Arbitrators and Mediators and is now called the Resolution Institute.

¹¹ Ibid [67].

¹² Ibid [79].

Therefore, notice was effective under clause 8 of the Royalty Deed.

Not for the court to determine the merits of the dispute

Mineralogy argued that it was not obliged under the Royalty Deed to execute the Priority Deed. This argument related to the merits of the dispute that was to be determined by the expert. The issue to be determined was whether the execution of the Priority Deed was (a) reasonably requested by Adani and (b) requested to give effect to the Deed. These issues were not fully argued before the court.

The court emphasised that the parties had agreed to refer disputes to expert determination, acknowledging that there are many reasons why the parties may have made this agreement. The expert may have technical or specialist knowledge, the process is private not public, it is final and binding and the parties pay their own costs and share the costs of the expert equally.

Finally, the court stressed that parties should be bound by their contract and thus enforced the dispute resolution clause, including the reference to expert determination, noting that this was the most appropriate forum for the resolution of the dispute.

On this basis Mineralogy's application was dismissed.

Why is this decision important?

This decision is an important reminder that the courts will interpret and enforce a dispute resolution clause in the same manner as any other contractual term, thereby binding parties to the terms agreed in the contract.

It is also an important reminder for parties to carefully consider the appropriate methods or forums for resolving disputes at the time of negotiating the contract. Disputes may be referred to negotiation, mediation, expert determination, arbitration and/or litigation or a combination of these options.

Whatever method or forum is chosen, parties will be bound by that choice and the dispute resolution clause will be enforced by the courts.

For more information, please contact the author of this alert



JO DELANEY

Partner, Sydney

T +61 (0)2 9320 4621

E jo.delaney@hfw.com