

Kluwer Arbitration Blog

Fast-Track Solutions for Technical Disputes: The Use of Expert Determination and Accelerated Dispute Resolution in Mining Arbitration

Elizabeth Argento · Wednesday, June 19th, 2024

On 6-7 March 2024, experienced practitioners in international arbitration and mining disputes gathered at the Shangri-La in Toronto for the [2nd ITA Conference on International Arbitration in the Mining Sector](#). At the commencement of the conference, the attendees were welcomed by [Tomasz J. Sikora](#) (Exxon Mobil Corporation), the ITA Chair. In his introduction, Mr. Sikora noted that the ITA has recognized the critical nature of the mining industry and that the practice of arbitration in these mining disputes deserves special focus.

There were many insightful panels held over the two-day conference. One such panel was chaired by [Liz Snodgrass](#) (Three Crowns LLP) and composed of [Guilherme Recena Costa](#) (Barrick Gold Corporation), [Mohamed Shelbaya](#) (Gaillard Banifatemi Shelbaya Disputes), and [Lindsey Schmidt](#) (Gibson, Dunn & Crutcher LLP). The focus of this panel was on expert determination and accelerated dispute resolution.

At the outset, it was noted that mining disputes are often compatible with arbitration since the subject matter of the disputes tends to be technically complex. As such, parties may wish to select decision-makers who have the ability to understand such complex issues. This led the panel to consider whether providing a forum where technical experts could act as the decision-makers could be a useful and attractive alternative means of resolution for parties to mining disputes.

This post will begin with an overview of the panel's discussion around the use of expert determination within arbitration. Specifically, the utility of expert determination within mining disputes will be discussed including some of the advantages and limitations of the process, as well as considerations for drafting effective clauses. This post will then provide an overview of the use of accelerated dispute resolution for mining disputes, particularly in how it differs from emergency arbitration and how parties can prepare for expedited arbitrations.

Expert Determination for Mining Arbitrations

Ms. Snodgrass posed a question to the panel regarding when parties to a mining dispute may want to utilize expert determination, as opposed to traditional arbitration, to seek resolution. Ms. Schmidt noted that expert determination is a form of alternative dispute resolution that provides

parties with the opportunity to have their dispute submitted to an expert of their choosing who can render a binding decision on the parties. While this form of alternative dispute resolution provides parties with the opportunity to have an expert, as opposed to an arbitral tribunal, render a binding decision, such a decision is often limited in scope. As Ms. Schmidt noted, the issues often referred for expert determination tend to be singular, and are often technical, as opposed to legal, in nature.

Ms. Schmidt noted that the primary advantage of expert determination is that it enables the parties to have an expert directly decide these technical issues as opposed to having a tribunal consider these highly technical questions, which would likely require the assistance of experts. As such, expert determination allows for certain issues to be determined in a more expeditious and cost-effective manner. A further advantage of expert determination is that the expert is not bound by the procedural requirements that tribunals are bound by. This can allow for the issue to be heard much quicker as experts are not required to hold hearings. It was noted that the decision can be based on the expert's own expertise. As such, if the facts that relate to the issue can be ascertained from documents, and are not significantly contested, expert determination may be a good option for the parties. It was further noted that parties considering this form of dispute resolution need to be aware that decisions provided by experts are not as directly enforceable as arbitral awards are. Ms. Schmidt noted that if the expert's decision is not complied with, a party's recourse would be a claim for breach of contract.

Mr. Costa then spoke about drafting effective expert determination clauses. Mr. Costa identified a few considerations for counsel when drafting these clauses in order for them to best serve their purpose. The first consideration is to include an appointment mechanism. Mr. Costa suggested that counsel and parties avoid appointing a specific individual within the clause, as that individual may be unwilling or unable to act if they are so required. Another consideration is that there should be an appointing authority within the clause. This is a key consideration as there should be a way in which expert determination could proceed if the opposing party refuses to cooperate with the appointment of the expert. The next consideration for counsel is the procedure that should be followed by the expert. Mr. Costa suggested that it may be useful to contemplate whether an expert may deal with incidental legal issues that might arise to the extent that they are relevant to the determination of the issue that the expert is considering. Finally, Mr. Costa noted that enforcement should also be considered since a party's recourse for non-compliance with an expert's decision is a breach of contract claim. Therefore, parties may want to consider enforcement mechanisms at the drafting stage and whether expedited arbitration procedures could be used with expert determination as a way in which enforcement could be obtained.

Mr. Shelbaya then highlighted that one of the benefits of expert determination is the expertise that these decision-makers offer to the dispute. However, while there are benefits, Mr. Shelbaya identified that one of the pitfalls with this form of dispute resolution is the status of the decision itself. Parties must carefully consider what issues the expert will be asked to decide. Parties should be cautious that the expert's decision does not exceed its original scope as it may affect the binding nature of the decision. Parties will also need to consider the applicable legal system as there are different approaches to what issues experts can consider, including direct or incidental considerations of legal issues. Mr. Shelbaya noted that various institutional rules tend to permit experts to consider any issue within the scope determined by the parties. However, it was noted that problems may arise if courts in domestic legal systems, when reviewing a decision, disagree with the scope of the expert's mandate. As an example, Mr. Shelbaya noted that the English legal system would likely permit an expert to make a legal determination if it is incidental to the technical issue at hand so long as the parties provided an express mandate to the expert that such

determinations could be made. On the other hand, it was noted that French law would never uphold a decision where an expert made a determination on a legal matter. This would lead to the expert's decision being re-characterized as an award, which would then be subjected to the requirements of recognition of arbitral awards, which are not usually complied with by the expert.

Accelerated Dispute Resolution in Mining Arbitrations

The panel then shifted its focus to address how accelerated dispute resolution could be utilized for mining disputes. Mr. Shelbaya began the discussion by distinguishing emergency procedures from accelerated dispute resolution processes. In so doing, he noted that emergency arbitration serves to provide parties with provisional relief until a tribunal can be assembled. These emergency procedures prove to be useful, especially if a particular action, such as drilling, needs to occur as soon as possible and a decision is required immediately. While the usefulness of these procedures was highlighted, so were the limitations, namely that decisions rendered using emergency procedures are provisional and parties will still need the tribunal to order final relief.

Mr. Costa then addressed how parties can best prepare for expedited arbitration. Mr. Costa noted that more effort may be required to prepare for the expedited process in a short period of time, which will often require cooperation between in-house and external counsel.

It was suggested that while there are benefits to expedited and accelerated procedures, there are also pitfalls in requiring that the arbitral process be held within such a short period of time. It was also noted that parties should be cognizant of the potential issues that could arise from such abridged timelines at the drafting stage of their expedited arbitration clause to ensure that, should a dispute arise, there will be adequate procedures in place to ensure the expedited procedure can serve its purpose, while the parties are still cooperative.

Concluding Remarks

In concluding remarks, Ms. Snodgrass noted that it is encouraging to see that parties have a desire to use these expedited procedures and that the institutional frameworks that exist are useful to parties, either adopted as they are written or as inspiration for techniques that could be utilized by parties faced with a dispute.

Further information on the ITA, including upcoming events, can be found [here](#).

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

2024 Summits on Commercial Dispute Resolution in China

17 June – Madrid
20 June – Geneva

[Register Now →](#)



This entry was posted on Wednesday, June 19th, 2024 at 8:11 am and is filed under [Expedited Proceedings](#), [Expert Determination](#), [ITA](#), [Mining Sector](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.