Supreme Court of Western Australia on the Limits of Expert Determination vs. Arbitration

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The **judgment** in *Silverstream SEZC v Titan Minerals Ltd* from the Supreme Court of Western Australia shines a light on a vital and often misunderstood aspect of **dispute resolution**—the interaction between **expert determination** and **arbitration**. The case pivots around the **refusal of a stay of proceedings** sought by Titan Minerals Ltd ("Titan"), based on a clause in a set of **royalty agreements** that mandated disputes related to the **calculation of royalties** be referred to **expert determination**. What emerges from the court's reasoning is a nuanced understanding of the differences between these two forms of **alternative dispute resolution** (ADR) and the conditions under which courts should intervene.

At the heart of the dispute, Silverstream SEZC ("Silverstream") accused Titan of breaching several **royalty agreements** by failing to maintain mining properties in good standing, thus forfeiting the entitlements that generated the royalties. Titan responded by tendering alternative royalties and sought to stay the court proceedings, arguing that the dispute over the valuation of these substituted royalties should be determined by an expert, as stipulated in the agreements. However, Justice Solomon, presiding over the case, disagreed and dismissed the application for a stay, offering a rich commentary on the broader relationship between expert determination and arbitration.

Expert determination is a consensual process where parties agree to have an independent expert resolve specific technical issues. This process is typically informal, **speedy**, and effective for disputes requiring specialized knowledge, such as those involving **technical valuations**. However, unlike **arbitration**, which is governed by a legislative framework—such as the **Commercial Arbitration Act 2012 (WA)** in this case—expert determination does not automatically trigger a stay of proceedings. This is because expert determination, by its nature, is intended to resolve **specific, often narrow technical issues**, while arbitration can address the **entirety of a dispute**.

Justice Solomon made a critical distinction between the scope of disputes appropriate for expert determination versus those suitable for arbitration. He underscored that while **arbitration** is a comprehensive dispute resolution mechanism, designed to deal with all facets of a conflict, **expert determination** is more limited in scope, typically confined to particular **technical or factual issues**. The court emphasized that even if a dispute concerning the **valuation of royalties** might be subject to expert determination, this did not preclude the court from addressing other issues, such as **breaches of contract** and the appropriate **remedies** for such breaches.

The court’s refusal to grant the stay was rooted in its interpretation of the royalty agreements, specifically **Clause 9**, which mandated expert determination for disputes regarding the **calculation of gross revenue or royalties**. Justice Solomon noted that the current dispute was not genuinely about the **calculation** or **valuation** of the royalties—at least not yet—but rather about whether Titan had breached its obligations under the agreements by failing to maintain the mining properties in good standing. Since this issue did not fall within the scope of Clause 9, it was not appropriate to stay the proceedings in favor of expert determination.

Justice Solomon also considered the broader **principles** governing the exercise of discretion in staying proceedings. He observed that courts generally respect the **parties' agreements** to resolve disputes in a specified manner, but only when the dispute actually falls within the scope of the agreed process. Where a dispute does not lend itself to expert determination or where the dispute encompasses issues beyond the expertise of the appointed expert, a court should be cautious in granting a stay. This aligns with the principle that **parties should be held to their bargains** only when the agreed process is suitable and just for resolving the dispute.

A key takeaway from the judgment is the emphasis on the **specificity** of the issues being referred to expert determination. The court acknowledged that expert determination is designed to resolve **technical questions**—for instance, the fair market value of royalties derived from mining operations—but it is not equipped to handle broader legal questions, such as whether a party has breached its contractual obligations. As Justice Solomon noted, staying proceedings in such a scenario could result in **duplication of effort** and potentially **multiplicity of proceedings**, which runs contrary to the principles of **efficient dispute resolution**.

The judgment also illustrates the importance of **evidence** and **procedural fairness** in the context of expert determination. Silverstream had sought substantiation for the valuation of the replacement royalties tendered by Titan, which Titan had not provided. The court found that without such substantiation, it was premature to characterize the dispute as one solely about valuation and, consequently, premature to refer the matter to expert determination.

In a broader comparative perspective, this judgment serves as a reminder that while both **expert determination** and **arbitration** are valuable tools in the arsenal of ADR, they serve distinct purposes. **Arbitration** is a more formal and expansive process, suitable for resolving entire disputes,

while **expert determination** is a more limited mechanism, typically employed for resolving **specific technical issues**. Courts, therefore, play a crucial role in determining the appropriate scope and application of these processes, ensuring that disputes are resolved in a manner that is both **fair** and **efficient**.

The *Silverstream* decision reinforces the idea that not all disputes are apt for expert determination, particularly when the issues at hand extend beyond mere technical calculations and touch upon broader legal rights and obligations. In such cases, the courts retain a vital oversight function, ensuring that parties are held to their agreements only when it is just and appropriate to do so.

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