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Contract Variations

What Happens if Only a Subset of Parties Agree?

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Variations to contracts are commonplace and are oft made and implemented with little controversy or need to engage in any in-depth consideration of the fundamental nature of a variation. However, in multiparty contracts, on rare occasions, a subgroup of the parties may seek to agree to variations, and for various reasons (informality, oversight, perceived irrelevance or resistance), no agreement to the variations is sought or obtained from the remaining parties. If that occurs, a question may arise as to whether the other parties can proceed notwithstanding the lack of cooperation, or a dispute could arise as to the status of the purported variation.

This issue was considered recently by the Western Australian Court of Appeal in *Mirabela Nickel Ltd (In Liquidation) (Receivers and Managers Appointed) v Mining Standards International Pty Ltd* [2025] WASCA 82 (*Mirabela*). In *Mirabela*, following an in-depth analysis as to the role of and impact on the nonconsenting parties, the court confirmed that the variation without all parties' agreement was effective. However, the court also identified scenarios where such a variation may not be possible, and factoring in the detailed analysis required a cautious approach is warranted towards variations absent all parties.

The Facts and Findings in the *Mirabela* Appeal

Contractual Background

Mirabela revolved around an asset sale agreement (Sale Agreement) under which Mining Standards International Pty Ltd (Purchaser) agreed to purchase all of the quotas (equivalent of shares) in a company (Target) from its two shareholders, Mirabela Nickel and Mirabela Investments. The Purchaser also agreed to purchase the loans owed by the Target to its shareholders. Each of Mirabela Nickel, Mirabela Investments, their receivers and managers (Shareholder Parties), the Purchaser and the Target were parties to the Sale Agreement. In terms of the role played by the Target, the recitals stated it was entering the Sale Agreement solely for the purpose of acknowledging and consenting to the transactions contemplated, and acknowledging that its obligations as a borrower under the loans would remain (albeit payable to the Purchaser).

Despite this statement, the Sale Agreement did involve the Target beyond a mere acknowledgment. There were various rights and obligations under the Sale Agreement that were said to apply "to the parties"; for example, each party was required to use all reasonable endeavours to ensure that each condition precedent is satisfied (which included an express obligation for the Target to provide all reasonable access to the business) and the termination clause provided that "a party" was entitled to terminate upon notice if the finance condition was not satisfied by the relevant date. The Sale Agreement also provided for the Shareholder Parties to release the Target upon completion (with the obligations then owed to the Purchaser). The Court of Appeal assessed that the releases were the only continuing benefit that the Target stood to obtain by completion (and noted these were conditional on completion).

The Dispute

A timing issue arose for the satisfaction of a finance condition precedent. Clause 2.5 of the Sale Agreement allowed for "a party" to terminate the Sale Agreement if finance was not obtained within "14 days of the date of the exchange of signed copies" (CP Termination Clause).

The Target had executed and exchanged its executed version later than the Purchaser and the Shareholder Parties (Target Exchange CP Date). The Shareholder Parties asserted the finance condition precedent had failed 14 days after the exchange by the Shareholder Parties and the Purchaser but before the Target Exchange CP Date (an assertion that the Court of Appeal ultimately found to be erroneous).

Following this contention, the Shareholder Parties and the Purchaser exchanged a series of emails and text messages, which the Shareholder Parties asserted amounted to a binding agreement to vary the time in the CP Termination Clause (to a specific date that was in between the 14 days from exchange by the Shareholder Parties and the 14 days of the Target Exchange CP Date) (Varied CP Date). The variation clause in the Sale Agreement provided that the agreement could only be varied by a document signed by or on behalf of each party. The Target was not involved in any of the variation communications.

Following expiry of the Varied CP Date, but before expiry of the Target Exchange Date, the Shareholder Parties issued a termination notice. The Purchaser disputed the validity of the termination notice and, as part of contesting the termination, asserted there was no legally effective variation of the Sale Agreement and that the Varied CP Date did not apply.

First Instance Decision and Shareholder Parties Arguments

At first instance, the trial judge was not perturbed by noncompliance with the requirement in the Sale Agreement that any variation be in writing and signed, and was satisfied that the Purchaser and the Shareholder Parties had agreed to vary the timeframe, but found there was no legally effective variation because the Target had not agreed.

The Shareholder Parties argued that the variation was valid notwithstanding the absence of any agreement by the Target for various reasons, including contending that, for the purpose of the CP Termination Clause, the Target was not a "party" (based on the proposition that a single document may contain multiple distinct agreements between distinct parties), or that a further contract could be entered into between a subset of parties varying the rights between them

that does not impact the rights as between the nonvarying parties, provided there is no inconsistency in the operation of the original agreement.

Court of Appeal Decision

On appeal, the Court of Appeal examined the legal concept of variations and its impact on the original agreement in some detail, and accepted that whether, by a "variation", the original contract is terminated and replaced with a new contract, or merely altered without affecting its existence, depends on the intention of the parties as disclosed by the further agreement. The variation itself is required to satisfy the rules governing contract formation, including consideration, which was recognised in some instances to be challenging if it was merely a variation of an unconditional obligation owed only by one party (commercially usually overcome by use of a deed). Provided contract formation can be established, the Court of Appeal accepted that, albeit with some limitations, a subset of the parties to a multiparty agreement are able, by further agreement, to alter the rights accruing or the obligations assumed under their contract as between themselves. Without seeking to exhaustively articulate the limitations, a purported variation cannot affect the rights or obligations of a party to the multiparty agreement, in respect of that agreement, if that person is not a party to the further agreement, and, in some cases, the structure and operation of a transaction might be such as to require each party to the original agreement to agree to a modification.

In considering the Sale Agreement as a whole and the CP Termination Clause in that context, the Court of Appeal found that the proper construction of the term "party" in the CP Termination Clause was confined to the Shareholder Parties and the Purchaser, and did not include the Target. This finding was in contrast to the court's finding that the Target was in fact a party to the Sale Agreement for the purposes of other clauses, including for ascertaining the exchange date from which the CP Termination Clause ran. The court's detailed contract analysis traversed the benefit of the condition precedent (being for the benefit of the Purchaser, who could waive it), and the termination right (being for the Shareholder Parties as sellers with an interest in prompt disposition of their assets), and the lack of a sufficient interest by the Target for a specific performance right. Given the Target had no termination rights under the condition precedent clause, it was open to the Shareholder Parties and the Purchaser acting without concurrence of the Target to agree to a variation of their rights as between themselves, and there was no scope for any problematic inconsistency.

The court did go on to indicate that even if the Target had been included in the term party for that clause and had a termination right for failure of a condition precedent, the Shareholder Parties and the Purchaser could have entered into a further agreement to vary the rights between themselves. Such agreement did not affect the Target's rights or obligations in relation to the Sale Agreement. The Target's rights and obligations were not interdependent and, at most, if the Sale Agreement was terminated early, it would render the Target's termination rights superfluous.

The court did not accept that the Target was prejudicially affected in that it had a shorter time in which to deliver performance of its obligations under the Sale Agreement, which made those obligations more onerous, as its only obligations were to use "all reasonable endeavours" and provide "all reasonable access", and what was reasonable would depend on the circumstances, including the time available.

Various other issues were raised in the case at first instance and on appeal with additional facts relevant to those issues, but they are beyond the scope of this article.

Takeaway – Approach to Variations in the Future

Following *Mirabela*, there is now clear Court of Appeal authority that a subset of parties to a multiparty contract are in some circumstances able to vary the original contract in the sense of altering it without affecting its existence, if the purported variation does not affect the rights or obligations another (nonvarying) party. However, in some instances, the structure and operation of a transaction are such as to require each party to the original agreement to agree to a modification. In looking at whether there is relevant effect on rights or obligations, how robust an approach will apply going forward remains to be tested, but *Mirabela* suggests that there may not be the relevant effect merely if the nonvarying party has a minor interest in the contract completing (due to benefits of releases) but which is not sufficient to allow that nonvarying party a right to specific performance, or if it renders a potential termination right superfluous, or if it changes a date for compliance with an obligation if the effect is not prejudicial (such as if the obligation is merely reasonable endeavours and the date alteration is minimal). Accordingly, where it is necessary, in some instances a subset of parties may choose to enter variations without all parties' consent and take some comfort from *Mirabela* that the variation may still be effective. However, a cautious approach is warranted to avoid risks of disputes, with a detailed analysis required as to whether arguments might be made that the variation nevertheless impacts the nonvarying parties.

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