

## Draft CAPL Dispute Resolution Article And Associated Annotations

### 21.00 DISPUTE RESOLUTION

This optional Article will \_\_\_\_/will not \_\_\_\_ (Specify) apply herein, other than with respect to the application of the next sentence if the Parties select that this Article will not apply.

If the Parties select that this optional Article will not apply, a Party may, by notice to the other affected Parties, refer any outstanding dispute identified in Paragraphs **21.03(e)-(j)** to arbitration in accordance with the *Arbitration Act* (Alberta) for resolution. The Parties to that dispute will thereupon attempt to complete that arbitration in a timely manner.

#### 21.01 Negotiation Of Disputes

- A. The Parties will attempt to resolve any dispute between the Parties arising under this Agreement through consultation and negotiation in good faith.
- B. At any point during negotiations under Subclause **A** of this Clause, a Party may serve notice to each other Party to the applicable dispute requesting that each such Party designate a representative with knowledge and authority to discuss the issues that remain in dispute in order to conduct further negotiations respecting that dispute if that Party reasonably believes that the direct financial impact of that dispute to it exceeds \$50,000.00. That Party will include the name, position and phone number of its designated representative in that notice, and will also outline in reasonable detail therein: (i) the issues which that Party believes remain in dispute; (ii) the Parties to the dispute if more than two Parties; (iii) the basis for its belief that the direct financial impact of that dispute on it exceeds that amount; (iv) a synopsis of the status of the negotiations to date, including a summary of the respective perspectives of the Parties on those issues; and (v) the steps recommended by it to conduct negotiations under this Subclause. Within 15 Business Days after receipt of that notice (or within such other period as the applicable Parties may agree), the applicable designated representatives of those Parties will meet to consider those issues, unless, within 7 Business Days after its receipt of that notice, a Party gives notice to the other applicable Parties that it is not prepared to participate in those negotiations. If such negotiations proceed, the Parties' designated representatives will also consider, if applicable, the appropriateness of a further meeting to design a process for resolution of the particular dispute from a range of options that includes further negotiation, mediation, arbitration and litigation.
- C. Notwithstanding Subclauses **A** and **B** of this Clause and Clause **21.02**, a Party may, by notice to the other Parties to the dispute, refer a dispute described in Paragraph **21.03(j)** for resolution by arbitration at any time without first attempting or completing the negotiation and mediation processes in Subclauses **21.01A** and **B** and Clause **21.02**.



## **21.02 Referral To Mediation**

- A. Notwithstanding Subclauses **21.01A** and **B**, a Party may, by notice to the other Parties to a dispute at any time during the negotiations contemplated in Clause **21.01**, request those other Parties to attempt to resolve that dispute through mediation if that Party reasonably believes that the direct financial impact of that dispute on it exceeds \$50,000.00. That Party will provide sufficient detail in that notice to enable those other Parties to understand: (i) the issues that remain in dispute; (ii) the basis for its belief that the direct financial impact of that dispute exceeds that amount; and (iii) a synopsis of the status of negotiations to date, including a summary of the respective perspectives of the Parties on those issues.
- B. The Parties to a dispute will attempt to agree on the selection of a mediator under this Clause within 5 Business Days after receipt of a notice requesting mediation under the preceding Subclause, provided that a mediation respecting that dispute will be deemed to be terminated if a Party gives notice to the other applicable Parties within that period that it is not prepared to proceed with mediation respecting that dispute. Unless otherwise agreed, the Parties to a dispute will commence any mediation under this Clause within 15 Business Days after the selection of the mediator. The mediation process will continue until: (i) the dispute is resolved; (ii) a Party serves notice to the other Parties that it terminates the mediation; or (iii) the mediator provides the applicable Parties with a written determination that the mediation is terminated because the dispute cannot be resolved through mediation, whichever first occurs. The Parties will each bear their own costs and expenses associated with a mediation, but will share the common costs of a mediation equally (or in such other proportions as they may agree), including the cost of the mediator. For the purposes of Clause **21.04**, any such termination of a mediation will be deemed to be effective on the date the applicable notice of termination is deemed to be received by the applicable Parties under Article **22.00**.

## **21.03 Arbitration Proceedings**

Except for any civil proceedings permitted under Clause **21.04**, a Party that wishes to pursue further proceedings with respect to a dispute to which mediation under Clause **21.02** does not apply or to a dispute for which a mediation was terminated thereunder will, by notice to the other Parties to that dispute, refer that dispute to binding arbitration for final resolution if that dispute pertains solely to one or more of:

- a) the determination of Commercial Quantities or Paying Quantities;
- b) the determination of a Market Price;
- c) the settlement of unresolved audit exceptions under the Accounting Procedure or any other provision hereunder;

- d) a determination by the Operator under Subclause 5.03C that a particular Party is required to secure payment of its share of certain costs being incurred for the Joint Account;
- e) the allocation of costs between portions of a well under Subclause 10.06B or Subparagraph 10.06C(b)(i) because of differences in the percentages of participation between the respective portions of the well;
- f) the classification of a well as a Title Preserving Well or Subsequent Title Preserving Well or the determination of Preserved Lands or Common Preserved Lands under Clause 10.10;
- g) the calculation of an adjustment of accounts under Subclause **11.03B** following a surrender by fewer than all of the Parties;
- h) the calculation of an adjustment of accounts under Subclause **12.02B** following an Abandonment by fewer than all of the Parties;
- i) the determinations respecting a Production Facility contemplated in Clause **14.09**, being:
  - i) the capacity or surplus capacity available to handle any Petroleum Substances or Outside Substances under Clauses **14.03** and **14.04**;
  - ii) the approval of a fee for the use of a Production Facility under Clause **10.13** or **14.04**;
  - iii) the allocation of a fee for use of a Production Facility under Clause **14.04**;
  - iv) the allocation of Operating Costs under Clause **14.05**;
  - v) a significant variation in composition of the inlet streams of Petroleum Substances and Outside Substances under Clause **14.06**; or (vi) the allocation of products under Clause **14.06**; or
- j) the estimated cash value provided under Paragraph **24.01B(c)** with respect to a disposition to which a right of first refusal applies, subject to Subclause **21.01C**.

Unless otherwise agreed by the Parties with respect to the particular dispute, any such arbitration, and any other arbitration the Parties may agree to conduct hereunder, will be conducted in Calgary, Alberta by a single arbitrator under the “National Arbitration Rules” of the ADR Institute of Canada Inc. (or any replacement for those rules), in conjunction with the *Arbitration Act* (Alberta), provided that the provisions of that Act will prevail insofar as there is any conflict with those rules. Except as otherwise provided in **21.02** and this Clause, a Party may commence a court action with respect to any other dispute.

## 21.04 Limitation Periods and Interim Relief

For the purpose of determining any limitation periods that apply under this Agreement or the Regulations and provided that the Regulations permit the Parties to extend the applicable limitation periods, all limitation periods pertaining to a particular dispute will be suspended:

- a) in the case of a mediation, from the time that a Party issues a notice to mediate that dispute under Subclause **21.02A** until 45 days after the termination of that mediation, or such later date as may be agreed by the applicable Parties; and
- b) in the case of an arbitration, from the time that a Party issues a notice to arbitrate that dispute under Clause **21.03** if it is a matter specified in Paragraphs **(a)-(j)** of that Clause or from the time that the Parties otherwise agree in writing to arbitrate that dispute, as applicable, until 45 days after the termination of that arbitration in accordance with the Regulations and associated processes governing that arbitration, or such later date as may be agreed by the applicable Parties.

Subject to the preceding sentence, each Party waives all rights it may have to assert the expiry of any such limitation period during that time as a defence or bar in any civil proceeding respecting that dispute. Notwithstanding anything to the contrary in this Article, a Party may, at any time it believes it necessary to protect its interest during the period that it is attempting to resolve a dispute under this Article, seek interim or provisional relief, in the form of a temporary restraining order, preliminary injunction or other interim equitable relief concerning that dispute.

### Annotations

**Article 21.00:** (i) This Article has been structured as an optional Article, so that users have the flexibility to elect not to have the Article apply to their Agreement. The structure is unusual, though, as arbitration using the *Arbitration Act* (Alberta) is to be used to resolve several of the disputes listed in Clause **21.03** if the Article is not selected. This mechanism is largely designed to place those Parties in a similar position to the outcomes under the 1990 document for the items in Paragraphs **21.03(f), (i)** and **(j)**, as well as the similar fact based determinations in the other included Paragraphs.

(ii) This Article was created as one of the outputs of the “Company to Company Dispute Resolution Task Force”. This was an industry driven initiative to improve the dispute resolution processes in the oil and gas industry. Additional information about this Task Force and its report “Let’s Talk” can be found at C2C website.

**Subclause 21.01A:** (i) The foundation of Article **21.00** is the belief that the preferred outcome is for Parties to resolve their own disputes through negotiation. Successful negotiations are focused on the problem (rather than the people), and will typically see the right people communicating in the right way at the right time. Experience has shown that face to face dialogue early in the negotiating process is particularly beneficial

relative to the alternatives of phone conversations, letters or e-mails. Conversely, negotiations are more challenging and much more likely to escalate into a prolonged, adversarial process if the tone is negative, if one of the Parties refuses to engage in discussions or if either of the Parties is unwilling to listen to an alternative perspective or share information that would provide additional insights about a Party's concerns or expectations.

This emphasis on negotiations also recognizes the fact that the vast majority of disputes that escalate to litigation are eventually resolved through negotiation prior to or at trial. Given that the typical dispute can be resolved at a business level if there is a mutual will to do so and that the parties are generally motivated to develop that mutual will eventually anyway, why not fully explore negotiation approaches sooner, rather than later?

(ii) One step that a Party might consider relatively early in a negotiation that is not proceeding well is the use of an outside neutral facilitator. This can help focus (or refocus) the negotiations by: (a) framing clearly the issues that are in dispute; (b) objectively summarizing the respective perspectives of the Parties; and (c) facilitating a discussion of potential alternatives. The use of a facilitator at this stage can be relatively inexpensive, and can provide a platform for the Parties to resolve their dispute much more easily than might otherwise be the case. Outside facilitation can be particularly helpful if the difficulties in the current negotiations are a symptom of broader ongoing problems between the Parties.

(iii) Another approach that might be helpful in refocusing a stalled negotiation is a letter to the other negotiator that outlines similar information to that contemplated in a notice issued under Subclause **21.01B**.

**Subclause 21.01B:** (i) Subclause **B** includes an additional potential step in the negotiating process. A Party may issue a notice about the status of the negotiations to the other Party's "address for service" and request each other Party to the dispute to designate a representative with knowledge and authority to settle the issues in dispute to become involved directly in the negotiation process. This is subject to the requirement that the Party reasonably believes that the financial impact of the dispute on it exceeds \$50K (the permissible expenditure amount in Clause **3.01**) to ensure that this process is not used for minor disputes. (See also Subclause **21.02A**.)

It is not necessary that the Parties' management become involved in the requested negotiations. However, delivery of the notice to a Party's address for service will typically see the notice brought to the attention of other personnel in the respective organizations, particularly if the issuing Party intends to use a member of its management as its designated representative. If nothing else, the notice would typically cause the receiving Party to assess its approach to date and make any desired modifications.

(ii) This step is one that should not be taken lightly because of the potential for this notice to be received negatively by the other Party's negotiator. To mitigate this potential

outcome, a Party considering this step should alert the other Party's negotiator if this step is being considered and preferably provide the other negotiator with a draft of the notice before sending it. The ultimate objective of the Party issuing the notice is to resolve the dispute, not escalate it. That being the case, it is imperative that the information in any such notice be presented objectively without a provocative tone. This keeps the focus on the issues that remain in dispute, rather than the people who are involved in the negotiations, and best enables the Parties to keep the process moving forward instead of rehashing the past.

The issuance of the notice could, in fact, be a positive step in many cases. There is a real possibility that the Parties may have misunderstood the issues that were in dispute or the perspective of the other Party on an issue.

(iii) While not a requirement, the notice may result in the direct participation of the management personnel of the Parties. This could be beneficial in some cases because management representatives will typically have greater objectivity because of their big picture perspective and their lack of previous direct involvement in the dispute. This step works most successfully if the applicable management personnel have similar levels of responsibility and the financial authority to resolve the issue. This approach also begins to build a relationship between the Parties' senior representatives, and will often result in a clearer (and narrower) definition of the matters that are actually in dispute. (This type of process is being included in modern commercial agreements on an increasing basis (e.g., Alberta Power Purchase Arrangements).)

(iv) One of the expected consequences of the inclusion of this Subclause is the incentive it provides to front line negotiators to resolve their issues amicably.

(v) Subclause **B** is very different from the traditional approach, so the provision provides a Party with the ability to choose not to participate in this step. The Parties could then either continue to negotiate under Subclause **A** or move to the next stages of the process. The decision of the other Party not to engage in these negotiations, though, is by itself a valuable piece of information.

Although not stated in this Subclause, it is the better practice for a Party that chooses not to participate in the requested negotiations to respond to the notice by confirming the degree to which it agrees with the description of the issues and its perspective on those issues.

(vi) It is also important for the Parties to consider the process within which the dispute is most appropriately advanced before negotiations become adversarial and positional. Although further negotiation by them may be an attractive option, there will be circumstances in which a broader range of options should be considered. There will be some instances in which litigation may, in fact, ultimately be the most appropriate option. There will also be many situations in which it may be advantageous to engage a neutral expert for one of the initial meetings to help the Parties (and their legal advisors) understand more fully the options that are available to help them address their particular dispute. While the provision has been structured so that there is no requirement to involve a neutral expert at this stage, the Parties are encouraged to consider in advance if this is a path that may be attractive for their particular dispute.

In this regard, one simple solution that is proving effective in both regulatory and non-regulatory dispute resolution systems is the Preliminary ADR meeting ("PADR") (possibly also referred to as a Situation Assessment Meeting or "SAM"). This meeting is an opportunity for Parties in conflict to discuss the dynamics of their dispute and jointly design a dispute resolution process appropriate to their unique situation. In essence, this enables the Parties to build a road map for resolution of their dispute, while ensuring that they do not harm or compromise their litigation steps.

These meetings are flexible and generally: (a) are facilitated by a neutral dispute resolution expert; (b) deal with process issues, not substantive issues; (c) identify all the necessary Parties and address issues of authority; (d) address planning, preparation and logistics for the dispute resolution process; (e) enable the custom design of the appropriate dispute resolution tool (i.e. mediation, arbitration, litigation) and, if applicable, the selection of the appropriate neutral facilitator; and (f) provide the Parties with the best opportunity to make an informed decision about continued participation in a future dispute resolution process.

Experience to date with this type of meeting has been very positive for a number of reasons.

It's a safe and simple first step in stressful and conflicted situations. Most Parties agree to an invitation to a PADR/SAM meeting because they have "nothing to lose".

Parties tend to buy into and more fully commit to a dispute resolution process that they have helped to design. This has historically resulted in a higher settlement rate before litigation.

The Parties identify roadblocks and preparation issues, and plan for these effectively, enhancing the success of their process.

The Parties bring decision-makers to the meeting, which is set for a specific duration to maximize results.

An informed "no" and a decision to proceed with litigation is a perfectly acceptable outcome.

**Subclause 21.01C:** This Subclause enables a Party to “fast track” the resolution of a ROFR value, as time can be of the essence for that type of dispute. A disposing Party facing a challenge of a ROFR value would typically negotiate a deferral of the closing date or a closing in escrow with its assignee.

**Clause 21.02:** (i) This provision reflects the increased use of mediation to resolve disputes. Mediation cannot be successful if the Parties are unwilling to explore alternative ways to resolve the dispute. That being the case, any Party may terminate the mediation process by notice to the other Parties.

(ii) Costs and expenses of the mediation are to be shared equally by the affected Parties, unless they agree on a different arrangement at the time. This approach is consistent with the handling of those costs in the Dispute Resolution Appendix of the 1996 and 1999 PJVA CO&O Agreements.

(iii) Parties exploring the use of mediation through the discussions contemplated in Subclause **21.01B** or through the application of Subclause **A** of this Clause are motivated to attempt to agree on a mutually acceptable mediator in practice. One of the important questions for Parties to consider when choosing a mediator is the type of mediator they wish to use for their mediation. Do they require a mediator who tries to lead the Parties to a resolution that the mediator believes is a fair outcome based on the mediator’s experience (an “evaluative mediator”) or do they require a mediator who tries to facilitate the discussions to enable the Parties to develop a resolution that they believe is a fair outcome (a “facilitative mediator”)? If the Parties are unable to agree on the selection of a mediator, they might consider obtaining a list of potential mediators from groups such as the Alberta Arbitration and Mediation Society and the ADR Institute of Canada Inc., where the latter is also willing to select one for them. (More information about the ADR Institute of Canada Inc. is found on its website at [www.adrcanada.ca](http://www.adrcanada.ca), and more information about the Alberta Arbitration and Mediation Society is found at its website of [www.aams.ab.ca](http://www.aams.ab.ca).)

(iv) A mediator and the Parties will jointly determine the process under which they will conduct the mediation.

(v) This provision is structured as an early mediation provision. A Court Annexed Mediation Project is currently under review for implementation in Alberta in 2004 or 2005.

**Clause 21.03:** (i) The focus in Clauses **21.01** and **21.02** is an “interest based process” in which Parties attempt to resolve their dispute in a way that meets their mutual needs from a broad range of potential alternatives. The failure of the Parties to resolve their dispute under those Clauses causes the focus to shift to a “rights based process” if formal proceedings are commenced through arbitration or litigation. The “rights based” reference is used because of the potential involvement of a neutral third party to adjudicate the dispute and provide an answer based on the respective entitlements of the Parties under the Agreement in the particular circumstances.

(ii) Except for civil proceedings permitted under Clause **21.04**, a Party that wishes to pursue an issue formally after a failed mediation is required to use arbitration if the dispute is one that pertains solely to one or more of what is generally a specified list of fact based items.

The Parties are also free to agree to refer any other dispute to arbitration instead of pursuing judicial proceedings. One might argue that the inclusion of an arbitration provision might encourage disputes. However, the more likely effect of its inclusion would be to cause the Parties to negotiate contentious issues more realistically than they otherwise might.

(iii) Unless otherwise agreed by the Parties, any arbitration will be conducted in Calgary by a single arbitrator under the “National Arbitration Rules” of the ADR Institute of Canada Inc. (or any replacement therefor). The ADR Institute results from the merger of The Canadian Foundation for Dispute Resolution and the Arbitration and Mediation Institute of Canada Inc., and the CFDR remains a wholly owned subsidiary of the Institute. Those rules are substantially of a procedural nature and supplement or substitute provisions of the Arbitration Act for the applicable jurisdiction, which, in the absence of modification, will be Alberta. The handling of costs and appeals under the “National Arbitration Rules” are generally on the same basis as provided in the Arbitration Act for the applicable jurisdiction.

**Clause 21.04** (i) Provided that the Regulations permit an extension, limitation periods are suspended from a notice to mediate until 45 days after termination of the mediation (including the deemed termination contemplated in the first sentence of Subclause **21.02B**), or such later date as the applicable Parties may agree, with a similar outcome for arbitration. Notwithstanding the inclusion of this provision, the Parties’ lawyers will frequently choose to supplement this provision with separate documentation in the context of their particular dispute, particularly if the issue is significant and mediation is being attempted close to the expiry of the applicable limitation period. Parties intending to rely on the extension of the limitation period on the basis contemplated by this Clause should obtain legal advice at the time to confirm that their rights are preserved under the applicable Regulations.

(ii) The timing is linked to the mediation and arbitration processes, rather than the negotiation process. There are two reasons for this approach. The first is that the documentation for the negotiation process will typically be quite loose in practice. The second is to provide reinforcement for Parties to use negotiations to attempt to resolve their disputes much earlier than has often historically been the case.

(iii) A review of the law respecting injunctive relief can be found in Gulf Canada Resources Ltd. v. Pembina Resources Ltd. (1994), 152 A.R. 74 (Alta. Q.B.). Gulf was in the context of a dispute respecting the appointment of a new operator under a pre-CAPL Operating Procedure. On the facts, the Court found that the plaintiff did not demonstrate irreparable harm entitling it to an injunction, such that it could adequately be

compensated in damages if it suffered losses. The law associated with injunctive relief was also reviewed in Constellation Oil & Gas Ltd. v. Sunoma Energy Corp., [1999] A.J. No. 1202 (Alta. Q.B.).