

Overview Of The CAPL Operating Procedure Dispute Resolution Article

CAPL Documents And The Layered Approach To Dispute Resolution

The traditional CAPL Operating Procedure dispute resolution provision is reflected in the 1990 CAPL Operating Procedure. In essence, that document provides that a very narrow range of matters can be referred to arbitration (e.g., a dispute over right of first refusal values, some cost and allocation matters respecting minor production facilities). Other than for a comment in the annotations about the increasing use of mediation and arbitration, the document contemplates that significant disputes will ultimately be resolved through the litigation process if not otherwise resolved or abandoned.

The 1997 CAPL Farmout & Royalty Procedure introduced a layered approach to dispute resolution. This was expanded significantly in the 2000 CAPL Property Transfer Procedure with the assistance of representatives of The Calgary Chamber of Commerce Dispute Resolution Committee and The Canadian Foundation for Dispute Resolution, and a provision similar to an earlier draft of this provision was also included in the Dispute Resolution Appendix of the 1999 PJVA CO&O Agreement.

In essence, the layered approach in the Dispute Resolution Article in the new CAPL Operating Procedure contemplates a hierarchy of dispute resolution options that is consistent with the values described in the preceding portion of this report.

Negotiation is the first (and preferred) dispute resolution vehicle (Clause 21.01), with parties increasingly using a second level of negotiation potentially involving other internal representatives with decision making authority when negotiations appear to be stalled (Subclause 21.01B).

The original draft was structured so that the additional negotiation process was an invitation to involve management representatives of the respective parties, with a proviso that a party could elect not to participate in that requested process. However, this was modified so that a party in a stalled negotiation respecting a matter with a financial impact on it exceeding \$50 000 could serve notice outlining the status of the negotiations to date and the outstanding issues, and requesting that a designated representative with authority to resolve the dispute participate in further negotiations. In practice, the notice would largely be a tool that allows a party to alert the other party formally that it believes a negotiation is stalled, where the expectation is that this step would at least cause the receiving party to reassess the way it has been managing the negotiation and modify its approach, if warranted. The party receiving that notice is free to confirm that its original negotiator is its designated representative, to appoint another designated representative or to elect not to participate in that requested process.

Although not a requirement in the Article, the annotations to Clause 21.01 also encourage parties to consider using a third party facilitator to help focus (or refocus) stalled negotiations or to assist parties in determining the most appropriate process to use to attempt to resolve a particular dispute. This largely reflects the positive experiences of parties that have used the Situation

Assessment Meeting (“SAM”) or Preliminary ADR (“PADR”) Meeting as a tool to manage their disputes more effectively in the context of disputes within the purview of the Alberta Energy and Utilities Board.

If negotiations fail, a party may request that mediation be used (Clause 21.02) if it reasonably anticipates that the financial impact of the dispute on it will exceed \$50 000, with the proviso that a party may elect not to participate in a mediation process.

The focus in the negotiation and mediation provisions (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. If mediation does not proceed or fails, a party that wishes to pursue further formal proceedings will either use arbitration or litigation to resolve the dispute (Clause 21.03). This shifts the focus to a “rights based process”. This is 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. This shift also has potential costs to the parties because of the narrower range of probable outcomes and the likelihood that the dispute will become more adversarial as the parties prepare to present their respective cases.

Clause 21.03 requires arbitration to be used for certain types of disputes. These generally relate to fact based determinations, such as the calculation of a right of first refusal value or a net salvage value. Matters respecting the interpretation of the agreement, on the other hand, would need to be addressed through the traditional litigation path unless otherwise agreed by the parties for a particular dispute.

Inclusion of litigation in the list of potential dispute resolution alternatives is important. Not only is litigation on the spectrum of ADR alternatives, but it will sometimes be the best option in a particular circumstance, an approach that differs significantly from some of the paradigms traditionally associated with ADR.

The Article and a more detailed commentary on the specific components of the Article is included in Part 3 of this report.

Reinforcement of Desired Behaviors

As noted previously, the CAPL Dispute Resolution Article has been designed to emphasize relationships and to reinforce desired behaviors. Unfortunately, it is easy to lose sight of this perspective when presented with layers of processes in the Article.

The reinforcement of desired behaviors can be seen in the matrix that follows.

Concept (Reference)	Reinforced Behaviours
<ul style="list-style-type: none">• Emphasis on consultation and negotiation in good faith (Subclause 21.01A) and face to face dialogue (associated annotations).	<ul style="list-style-type: none">• Negotiator retains primary responsibility for issues and ongoing management of relationship.• Engagement with other party.• Building personal relationships early.

Concept (Reference)	Reinforced Behaviours
<ul style="list-style-type: none"> • Inclusion of notice process requesting designation of reps for continued negotiations (Subclause 21.01B). 	<ul style="list-style-type: none"> • Negotiators prone to non-response become more sensitive to the manner in which they work with other parties or face the risk of notices being sent to their organization.
<ul style="list-style-type: none"> • Use of \$50K net financial impact threshold for notice requesting additional negotiations (Subclause 21.01B) or mediation (Clause 21.02). 	<ul style="list-style-type: none"> • Not using special processes for issues that are not financially significant.
<ul style="list-style-type: none"> • Inclusion in notice requesting additional negotiations (Subclause 21.01B) or mediation (Clause 21.02) the identification of issues that remain in dispute, a synopsis of negotiations to date and the identification of perspectives of other party on issues. 	<ul style="list-style-type: none"> • Clear articulation of issues and perspectives encourages questions and facilitates dialogue. • Looking at issues more objectively from perspective of other party.

<ul style="list-style-type: none"> Ability of a receiving party to choose not to participate in additional negotiations (Subclause 21.01B) or mediation (Clause 21.02). 	<ul style="list-style-type: none"> No reward for trying to use notice process as a stalling tactic, as the receiving party can promptly reject the proposed use of the process. Participation choice demonstrates a willingness to engage in dialogue with the requesting party.
<ul style="list-style-type: none"> Use of arbitration for a broad range of mostly fact based determinations (Clause 21.03). 	<ul style="list-style-type: none"> Concern about arbitration award in relatively near term encourages a more realistic negotiating position than would typically otherwise be the case if litigation were the adjudicative process. Greater motivation to try to achieve a negotiated outcome.
<ul style="list-style-type: none"> Linkage of extension of limitation periods to mediation and arbitration processes. 	<ul style="list-style-type: none"> Parties attempt to achieve negotiated solution sooner, rather than in the late stages of the limitation period.

It's A Matter Of Choice

The Contractual Solutions Team believes that the proposed Dispute Resolution Article is an appropriate vehicle to help parties manage their disputes more effectively than is currently the case.

It was apparent from the feedback on the initial draft of the updated CAPL Operating Procedure, though, that industry's general philosophic support for an increased use of ADR does not necessarily translate into a willingness to commit to the use of the proposed CAPL Dispute Resolution Article in their agreements at this time. This is because of the potential loss of control over any individual disputes that may arise under those agreements.

Faced with this feedback, the Contractual Provisions Team basically had three major choices: (i) leave the provision largely in its initial form while making required upgrades; (ii) modify the provision to meet the current needs of a broader range of companies, recognizing that this would move significantly away from some of the preferred outcomes; or (iii) make required upgrades while structuring the provision as an optional Article.

The Contractual Provisions Team chose the third approach. This basically enables a user choosing not to apply the Article to achieve only the same outcomes as in the 1990 CAPL Operating Procedure. Arbitration under the *Arbitration Act* (Alberta) would apply to a narrow range of disputes, and there would be no other dispute resolution provisions applicable to it.

This approach would address the current stated need of a number of major users to retain maximum flexibility in the handling of individual disputes. However, it provides greater flexibility for users to evolve to the approach in the Article over time as the benefits of

the C2C Project become more apparent and the level of comfort with the Article increases.

Regardless of the degree to which the Article will be used in at least the initial period after completion of the updated CAPL Operating Procedure, the Contractual Provisions Team believes that the Article will, in the near term, help increase awareness about the C2C Project, the impact of disputes on our industry and the benefits of open, timely and constructive communication between parties. As awareness increases, it will also be a visible reference that we believe will ultimately influence significantly the manner in which individuals and organizations manage their ongoing joint venture relationships.