

Contractual Provisions Team Report

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ADR's Place in Operating Procedure Issues

More Than Words And Processes

There are three significant tangible products that will be created in due course through this component of the project. The first, and most visible, is a Dispute Resolution Article in the anticipated 2004 CAPL Operating Procedure. Once the final version of that Article is apparent, the second will be to work with the Petroleum Joint Venture Association to explore the synergy for creation of a similar Article in select PJVA precedents. The third product will be a dispute resolution precedent that companies can use to amend existing agreements if they choose to do so. Our hope with respect to the latter, however, is that the CAPL Operating Procedure provision eventually receives a level of support sufficient to operate as a "candle in the window" that parties to existing agreements routinely use as a reference to help them resolve their disputes.

At first glance, the products created in this component of the C2C Project are a collection of words and processes.

Of much greater importance to the C2C Project and our industry's ability to generate wealth optimally, though, is the intangible product associated with this component of the C2C Project. The level of industry scrutiny that the updated CAPL Operating Procedure attracts will force users to make a visible choice that goes well beyond the general platitude that the use of "Appropriate Dispute Resolution" ("ADR") principles is somehow intrinsically good. Does an organization believe in the use of dispute resolution principles and processes sufficiently that it is prepared to step forward and embrace the use of a dispute resolution provision in its agreements?

Although the products associated with this component of the C2C Project are a collection of words and processes, they encompass much broader themes-the parties' choices, their values and the emphasis they place on relationships.

Negotiation As The Foundation Of C2C Dispute Resolution Article

What is the negotiator's objective when faced with the potential for disputes under an agreement? Is it to increase the use of dispute resolution provisions to resolve significant disputes? Is it to minimize the number of unresolved disputes and to increase the use of ADR processes to resolve significant disputes?

When the question is framed that way, most of us would agree that it is the latter and that the C2C Project would be a failure if the net result were primarily a major proliferation of mediations and arbitrations.

Just as a dentist's role has evolved from "drilling and filling" to being the provider of preventative dental care, the negotiator plays a critical ongoing role in trying to ensure that business relationships remain constructive and that projects are not disrupted by unnecessary distractions.

This is often a major challenge, and is complicated by three factors that are probably not unique to the oil and gas industry

The first is that the terms "conflict" and "dispute" have negative connotations that adversely impact the ability of parties to manage their expectations in a positive and open manner. A misalignment of expectations can, of course, take on a life of its own and easily escalate into what we traditionally regard as a conflict. Whether this occurs will be a function of a number of factors. These include: (i) the strength of the relationship of the parties and their key contact personnel; (ii) the relative importance placed on the business relationship; (iii) the willingness of the parties to communicate their needs and concerns in a timely, open and objective manner; (iv) their willingness to understand the other party's perspective; and (v) their skill in building and assessing alternatives.

The second is that parties often do not recognize that they have issues that they should be addressing on a current basis, largely because of their desire to avoid the appearance of "conflict". Failure to recognize and raise issues at an early stage is ultimately harmful to the business relationship.

The "wronged party" can easily become dissatisfied with the relationship and develop a negative attitude towards the other party and its requests, even though the other party may be oblivious to the "wronged party's" perceived dissatisfaction with the relationship. This dissatisfaction can often percolate for months before it surfaces with respect to an unconnected relatively minor issue. How is the other party likely to respond if the only behaviour it sees is an unexpected response it perceives to be unreasonable about a "non-issue"? Might the other party now see itself as the "wronged party" and take a firm position on the new issue and a harder line on future issues? Would this, in turn, reinforce to the first party why the second party is so unreasonable?

Unless the parties make the effort to understand the root cause of their issues early in this process, there is a significant risk that their relationship will be irreparably harmed. Again, the best preventative solution is for parties to understand how and when to express their concerns about needs that are not being met.

The third is the fact that relatively few unresolved oil and gas disputes escalate to formal proceedings relative to the number of transactions in our industry. The typical perspective is to assume that any dispute that does not progress to formal proceedings has somehow been resolved. This is actually a questionable assumption, though. A more prudent assumption is that many old disputes become "baggage" and suboptimize the ongoing business relationship.

This is apparent when one attempts to understand why parties often struggle resolving what appears to an outsider to be a relatively minor issue. The escalation of a relatively minor issue is often a strong signal that there are some fundamental problems with the underlying relationship that extend well beyond the issue at hand. It will usually be difficult for parties to resolve minor issues unless they understand the core issues between them and deal with some of them as part of the solution to the issue originally recognized to be in dispute.

Ultimately, the number of disputes and the probability of escalation are inversely related to the strength of the business relationship. The negotiator can add significant value by trying to help the parties build a relationship in which issues are identified and addressed in a constructive manner before they become significant. In this regard, one of the best approaches is to have the key players spend some time with each other outside of the workplace to build a foundation of a personal relationship before the parties draw lines in the sand on issues. Something as simple as a lunch or a discussion over coffee helps create a foundation that enables parties to discuss an issue very differently than would be the case if communication were solely through letters, e-mails or phone calls.

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?

It is for these reasons that the starting point in the C2C dispute resolution provision is negotiation, not mediation. It is for these reasons that the primary focus of the C2C education effort is on increasing awareness about the impact of unnecessary disputes on our industry and in helping personnel become more effective negotiators and communicators, rather than educating industry about the benefits of mediation and arbitration. And it is for these reasons that the impact of the C2C Project on our industry is ultimately in the hands of the primary users of our work, the negotiators.

It's All About Relationships

While the efficiency of the ADR processes and the delivery of appropriate business outcomes are obviously very important, it's easy not to emphasize sufficiently the importance of the ongoing relationships between both the organizations and individuals involved in a dispute.

Underestimating the importance of relationships is unfortunate, as relationships matter. They matter before there's a dispute. They matter during a dispute. And they particularly matter after a dispute.

The CAPL Dispute Resolution Article is designed to emphasize relationships by reinforcing desired behaviours in the context of three major objectives. These are:

- To encourage the right people to communicate in the right way at the right time;
- To encourage parties to solve their own disputes more effectively; and
- To mitigate the potential for disputes to impact long term business relationships adversely.

These themes are ultimately the common threads that apply throughout the work conducted under the C2C Project as a whole.