

Arbitrations and P3 Projects: Unique Considerations

*Ontario Bar Association: The Unique World of Construction
Law Arbitrations and Mediations*

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Unique Features of Public-Private Partnership (P3) Structure

- Public Nature of Projects
 - transportation
 - social
 - utilities
 - energy

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Unique Features of Public-Private Partnership (P3) Structure

- Complexity of Relationships
 - Concessionaire (i.e. Project Company or “Project Co”)
 - Public Authority
 - Equity Investors
 - Lenders
 - Design Build Contractor
 - Subcontractors
 - Operating (and Maintenance) Entity

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Unique Features of Public-Private Partnership (P3) Structure

- Intertwined Interests
 - equivalent project relief
 - drop-down provisions
 - “no better or worse” provisions for Project Co
 - contractual delay damage provisions (akin to liquidated damages)
 - unique terminology that passes up and down the project structure: *compensation events, relief events, supervening events*

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Unique Features of Public-Private Partnership (P3) Structure

- Long-Term Nature of Relationship
 - limited sources of P3 work
 - joint venture relationships and partnerships among contractors with capacity to take on P3 projects
 - multiyear design and construction phase
 - mutual interest in project's success - not just through construction phase
 - operation and maintenance contracts
 - “scorched earth” approach to litigation must be weighed carefully in this context!!!

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P3 Dispute Resolution Procedures

- Unique Features
 - complex (typically 15-20 pages, independent of procedural rules)
 - standardized (but updated from time to time)
 - contingent upon nature and quantum of dispute
 - tiered

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P3 Dispute Resolution Procedures

Typical Dispute Resolution Routes

- Amicable Resolution
 - first step will be a prescribed and specific requirement for delivery of a written notice of dispute
 - *Practice Tip:* Don't let complexity of contract detract from paying careful attention to notice requirements. Case law contemplates strict enforcement of notice requirements (*Corpex* and *Technicore* decisions would presumably apply to P3 contracts)
 - “frank, candid and timely disclosure” for discussions:
 - first among party representatives
 - next among senior officers
 - discussions governed by prescribed timelines
 - if discussions fail, next step may depend upon nature of dispute

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P3 Dispute Resolution Procedures

Typical Dispute Resolution Routes

- Independent Certifier
 - applies to prescribed scope of disputes
 - examples include:
 - determination of “Substantial Completion”
 - issues arising from “Minor Deficiencies”
 - Variations (i.e. changes)
 - parties required to cooperate with Independent Certifier
 - decision generally not binding other than as prescribed (e.g. determination of Substantial Completion)

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P3 Dispute Resolution Procedures

Typical Dispute Resolution Routes

- Expert Determination
 - prescribed timelines and process for appointment of expert who satisfies requisite qualifications
 - can apply to court for appointment if no agreement
 - applies to prescribed scope of disputes
 - examples include tender and estimate issues
 - expert determines process, with wide discretion on formalities, including taking of evidence
 - expert required to give reasons for decision
 - decision of expert is “final and binding”, but subject to arbitration and or litigation rights

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P3 Dispute Resolution Procedures

Typical Dispute Resolution Routes

- Adjudication*
 - *not necessarily the same as new recommendations for statutory adjudication in Ontario
 - for disputes not captured by Independent Certifier or Expert Determination provisions and not referred to arbitration or litigation
 - either party may refer applicable dispute to adjudication
 - adjudicator to be nominated and then agreed by parties or otherwise determined by court
 - adjudicator to follow UK *Model Adjudication Procedure* as revised
 - process not subject to *Arbitration Act*
 - adjudicator can revisit opinions, certificates, instructions and other decisions other than as prescribed (e.g. decision by Independent Certifier on Substantial Completion is exempt)
 - parties generally immediately bound by ruling pending reversal in a court proceeding
 - rulings final and binding, subject to arbitration and litigation rights

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P3 Dispute Resolution Procedures

Typical Dispute Resolution Routes

- **Arbitration**
 - disputes that meet certain monetary or other prescribed criteria (review provisions carefully) may be referred to arbitration by either party
 - strict procedural requirements for timing and form of notice
 - documents and information submitted for Expert or Adjudication processes not admissible in arbitration (or litigation)
 - *Arbitration Act* applies other than as otherwise set out in agreement
 - arbitration panel determines procedural rules
 - discretion to award costs
 - decision final and binding

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P3 Dispute Resolution Procedures

Typical Dispute Resolution Routes

- **Arbitration**
 - *Unique Considerations for P3 Projects*
 - all parties often involved
 - otherwise aligned interests can start to diverge
 - complex project structure can lead to complex proceeding
 - important to ensure arbitrator has appropriate expertise (i.e. taking both relationships and nature of project into consideration)
 - more controlled process than litigation for discrete technical disputes?
 - confidentiality a key feature given sensitive nature of projects
 - discussion of advantages of arbitration vs. litigation on P3 projects

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P3 Dispute Resolution Procedures

Typical Dispute Resolution Routes

- **Litigation**

- *Unique Considerations for P3 Projects*
 - either party may elect litigation provided the nature of the dispute meets certain prescribed criteria (monetary or as otherwise prescribed)
 - agreement will dictate when dispute defaults to arbitration, litigation or other proceeding
 - rare to see full P3 disputes in litigation - disadvantages can include:
 - slower process when quick decisions are likely required
 - proceeding and appeals can carry on as distraction to long-term project, thereby impacting continuing and critical relationships
 - not confidential

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P3 Dispute Resolution Procedures

- **Other Factors to Consider**

- agreement may require consolidation of adjudication, arbitral and litigation proceedings into single proceeding
- consolidation with third party disputes, including arbitrations
- creative dispute resolution mechanisms facilitated by various procedural options:
 - appointment of subject matter experts as neutral
 - evidence in writing
 - hot-tubbing of experts or even joint retainer of experts
 - limiting scope of productions to control both cost and duration of proceedings
- discussion:
 - Are P3 Dispute Resolution Proceedings Really Different?

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•QUESTIONS?

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