Asia-Pacific
Economic Cooperation

APECTEL REGULATORY TRAINING PROGRAM

Program Resource

MODULE FIVE

DISPUTE RESOLUTION

APEC Telecommunications & Information Working Group

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MODULE SPECIFICATIONS

MODULE CODE AND TITLE

05 Dispute Resolution

MODULE DESCRIPTION

This module will provide an appreciation of dispute resolution in the Telecommunications Industry. It summarises recent thinking and suggests steps that Regulators and others can take to reduce disputes. The module also provides a detailed treatment of Mediation.

MODULE OBJECTIVES

For participants to be able to:

Objective 1 – Explain the risks associated with ineffective dispute resolution and the different kinds of disputes that can arise.

Objective 2 – Explain legal and cultural aspects of the Region that are relevant to disputes

Objective 3 – Give examples of proactive approaches that Regulators and the business community can take to help prevent and reduce the incidence of disputes.

Objective 4 – Describe the main features and steps of Mediation.

PRE-REQUISITES

Introduction Module 01.

SUGGESTED REFERENCES

http://www.acdcltd.com.au Guidelines for Commercial Mediation

http://www.itu.int/ITU-D/treg/publications/ITU_WB_Dispute_Res-E.pdf

http://www.uncritral.org/en-index.htm.

http://www.itu.int/ITU-D/treg/publications/ITU_WB_Dispute_Res-E.pdf

(Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions, ITU Publications, October 2004).

CEPT, ECC Report 43, (2003)

Pryles M, *Dispute Resolution in Asia*, The Hague, Kluwer Law International, 2002

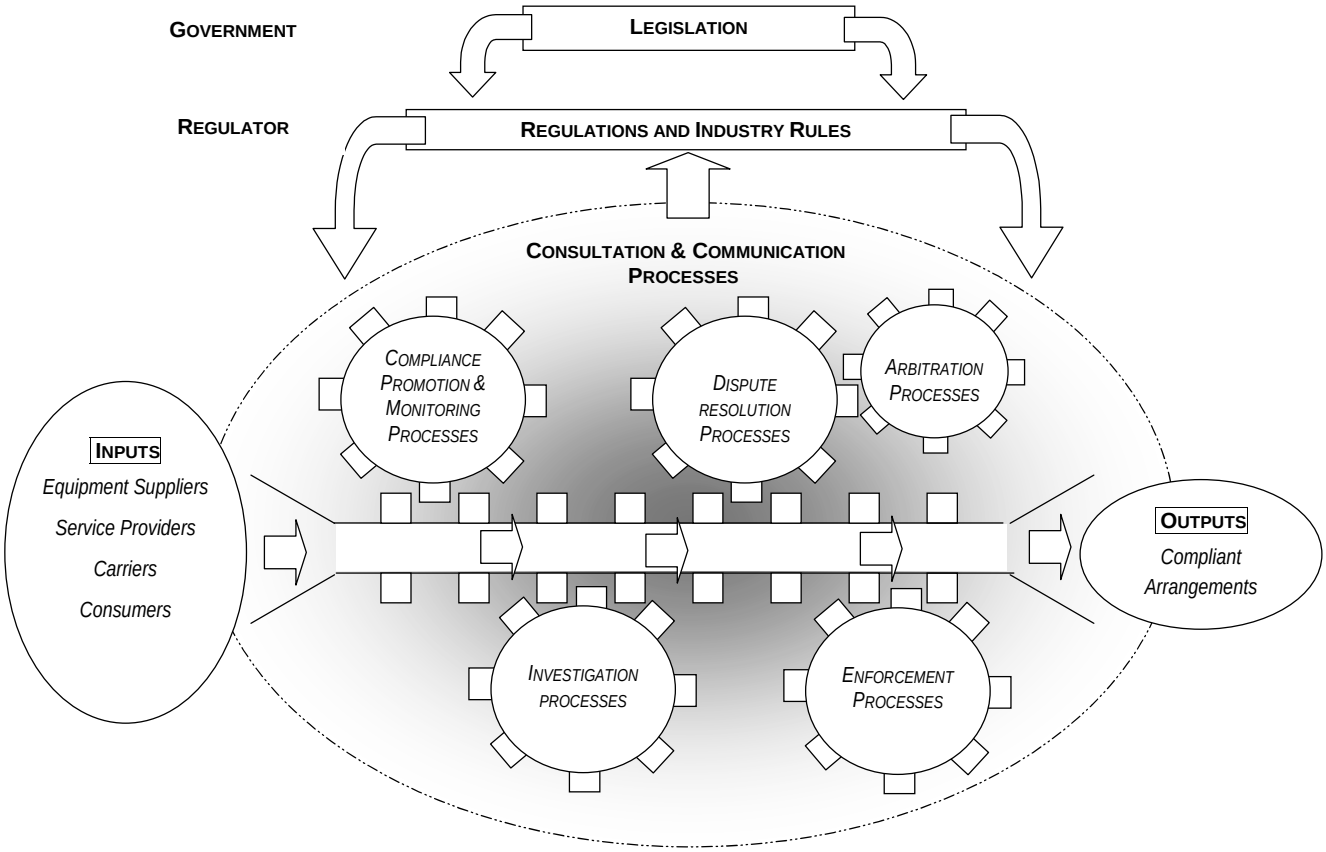
Stitt, Allan, *Mediation: a practical guide*, London; Portland, Or. Cavendish, 2004.

USING THIS GUIDE

The presenters, facilitator or workshop coordinator will present and discuss most of the content in this module. They will also advise you on the learning activities to undertake. Where there are blank boxes the presenters may ask questions or facilitate feedback from workshop participants.

You will have this guide as a reference over the duration of the workshop and when you have completed the workshop.

There are some built in guidelines to help you use this resource after the completion of the workshop.



MODULE OVERVIEW

This module is made up of six topics:

TOPIC 1 – ABOUT DISPUTES

This Topic provides an introduction to dispute prevention and resolution. The overview covers the forces driving disputes, the benefits of efficient dispute resolution processes and examples of different kinds of disputes that can arise.

TOPIC 2 – THE REGIONAL CONTEXT

This Topic provides a brief historical overview of the diversity of the Region in terms of cultural history and legal systems. It establishes links to the practice of dispute resolution and the forces that are moving the different APEC economies forward.

TOPIC 3 – IMPROVING THE ENVIRONMENT

This topic develops the idea that environments can be harnessed to create change in chosen directions. It indicates opportunities for both Regulators and industry participants to progressively shape an environment that is less prone to disputation. Some ideas from various places around the world are drawn together to provide examples of what can be done.

TOPIC 4 – DISPUTE RESOLUTION TECHNIQUES

This Topic provides an overview of commonly used dispute resolution techniques and includes observations on the way disputes can follow different pathways to a resolution.

TOPIC 5 – MEDIATION

This topic develops a practical understanding of the principles of mediation and the steps involved in conducting a successful mediation in a business environment. It encourages local adaptation so that participants can apply it in appropriate ways in their home economy.

TOPIC 6 – APPLICATION ACTIVITIES

There are three exercises for participants to practice and apply some of the content of this module

This Module will require 4-6 hours to complete.

TOPIC 1 - ABOUT DISPUTES

INTRODUCTION

The Telecommunications industry is a dynamic industry undergoing both liberalisation and privatisation on a global scale. It has growing markets, a stream of new and novel service concepts, competing providers who are jostling for competitive advantage, and it is subject to the impact of technological change at almost every level. Disputes are inevitable in such an environment and their effective resolution is vital to investment and growth within each economy.

THE NEED

Failure to resolve disputes effectively and in a timely way can

- Delay the introduction of new services and infrastructure
- Block or reduce the flow of new capital, as the unreliability of dispute resolution procedures translates into a higher premium for risk and a consequent reluctance to invest
- Limit competition, leading to higher prices and lower service quality
- Retard liberalisation, and add large and often hidden opportunity costs to other sectors of the economy and to society in general

From the Regulators point of view, and for recently formed Regulators in particular, the number and complexity of disputes translates into an acute shortage of skilled, experienced people, imperfect decisions and costly delays. A sound understanding of Alternative Dispute Resolution and more widespread use will go some way to alleviating these problems.

DISPUTE DRIVERS

Disputes arise in the global telecommunications industry for many reasons.

- Failure to negotiate fair, reasonable and comprehensive contractual arrangements
- Vital business interests are at stake
- Liberalisation means a more competitive environment

- Uncertainties and complexities relating to new technology and new markets
- Introducing competition undermines the established interests

It is important to understand that the underlying dynamics driving change in the telecommunications industry are essentially similar around the world, and that similar disputes have been observed in many countries.

As an example, dominant carriers enjoy a significant power imbalance and capacity to resist. It is usually the case that change has to be "pushed" by law, by the Regulator and by economic policy in order to create a more productive telecommunications industry that can maximise its contribution to economic growth. On the other hand, new entrants may have other advantages, such as the ability to build new generation networks or introduce new services very quickly, and thus threaten incumbents.

BENEFITS OF DISPUTE RESOLUTION

Studies carried out in countries outside of APEC have indicated that

- Investment opportunities are perceived more favourably when there is a fair, efficient and transparent approach to dispute resolution
- Inefficient dispute resolution has a negative impact on capital investment in the telecommunication sector

There are important benefits for the economy as a whole when disputes are effectively resolved. These include

- Faster rates of growth in the telecommunications sector
- Favourable impacts on overall economic growth as people make better use of information at a lower average cost
- Social and educational benefits resulting from improved access to information
- Lower costs for business and consumers

DISCUSSION POINT

Can you identify an important dispute that was effectively resolved? What were some of the benefits?

HOW DISPUTES DIFFER

Disputes differ in terms of the parties, their power balance and the nature and significance of the issue.

THE PARTIES

Disputes can arise between

- Carrier – carrier: e.g. interconnection, pricing, portability
- Carrier – consumer: consumer complaints
- International disputes: e.g. interconnection, pricing, standards, spectrum

NATURE AND SIGNIFICANCE OF THE ISSUE

IMPORTANCE

Issues vary in importance to the goals and plans of the parties. If the issue impacts on a vital interest, the dispute is much more likely to either resolve early if both parties have a common interest, or be fought out if vital interests oppose.

COMPLEXITY

Issues can vary in complexity. Complex issues pose a number of problems for the dispute resolution process. Complexity means more grounds for the dispute, added time, more uncertainty and added cost. In terms of dispute resolution, complex disputes require multi-disciplined teams of advisers, and the need to take an adaptive approach. This can mean that the overall process is broken up by hiving off some issues and using different dispute resolution approaches within a single overall framework.

POLICY IMPLICATIONS.

When the outcomes from privately arbitrated or mediated disputes can impact on policy, it is important for the Regulator to either call the dispute in, or exercise close supervision. This is done to ensure the final outcome is consistent with the home economy's policies.

APEC POSITION

We will conclude with a few comments on the APEC position. APEC governments and their trade ministers have made it clear that they support strengthening commitment to WTO Agreements on Basic Telecommunications including the WTO Reference Paper. APEC regards the timely resolution of disputes as a matter of policy.

With regard to international disputes, most APEC countries are also signatories to the New York Convention of 1958. This Treaty means that governments agree to enforce arbitrated decisions or "awards" relating to international commercial disputes.

A growing number are also signatories to the Washington Agreement. This is an agreement that relates to the settlement of capital investment disputes involving governments and business entities as the disputants. These developments are important and will bring long-term benefits.

In order to appreciate the achievements and progress to date, we will next briefly look at dispute resolution in the context of the history and culture of the APEC economies and their legal systems. This may help you to better understand the complexities that APEC Regulators and industry stakeholders encounter when resolving disputes across borders. The same applies when working with new entrants to local markets.

TOPIC 2 - THE REGIONAL CONTEXT

INTRODUCTION

APEC has identified effective dispute resolution in the Telecommunications industries as vital to long-term economic growth. Dispute resolution in commercial environments combines elements of law, government policy, regulatory regimes and the culture and traditions of each home economy. This Topic provides a brief overview of trends that have shaped the way disputes are settled today and that will have a continuing influence into the future.

CULTURES AND LEGAL SYSTEMS

APEC and Asia in general contain a mix cultures, political systems, ideologies, legal systems and both traditional and modern ways of dealing with disputes.

It is important to make some allowance for the cultural and legal differences that exist, and their impact on attempts to implement “best practice” ideas from elsewhere in the world.

While Regulators work within their own borders, the regional differences may not come into play, but when disputes cross borders, or transnational companies enter the local economy, the issues become relevant.

CULTURAL INFLUENCES ON DISPUTE RESOLUTION

Historically, there has not been a strong tradition of using the law to resolve business disputes and by implication, this includes Regulators. In contrast, there has been a long history of more consensual, mediated approaches to dispute resolution. There are three recorded instances of the Buddha mediating disputes, and a history of mediated solution seeking in Thailand that reflects Buddhist heritage. In Indonesia and other Islamic countries, religious leaders played important roles in the mediation of disputes. China and Japan also have histories that reflect a preference for mediated approaches.

DIFFERENT LEGAL SYSTEMS

Law is made and administered in different ways from one country to the next within APEC. Sometimes it can be difficult to identify actual sources of law because it is embedded in the way a government or a public official might work. In some jurisdictions, decisions made by officials can carry the force of law.

> *"We cannot point to unifying systemic characteristics of law in Asia (and by implication in APEC) today because there is no organic relationship linking the cultural and legal histories of all the countries loosely identified as "Asia." Pryles, p 6.*

Each APEC country has an historical and locally derived system of laws that has in turn been influenced by religious systems, a colonial overlay, and in some cases by recent ideologies.

Recognising the differences may help disputants to better understand the thinking and sensibilities of the other party in the case of cross-border disputes. It may also help in local disputes involving companies from other APEC economies.

To highlight the diversity, Pryles offers the following classifications of APEC legal systems.

CIVIL LAW SYSTEMS

- Japan (Germany and French influence)
- Korea (German and Japanese influence)
- Indonesia (Netherlands)
- Chinese Taipei (Japan)
- The Philippines (Spain, US)

COMMON LAW SYSTEMS

Common Law Systems draw on British Law: Malaysia, Brunei, Singapore, Philippines, Hong Kong, Australia, Canada, New Zealand

ISLAMIC LEGAL INFLUENCE

Malaysia, Indonesia, Brunei

SOCIALIST LEGAL SYSTEMS

Vietnam, People's Republic of China

HINDU, BUDDHIST INFLUENCE

Indonesia, Malaysia, Thailand, Brunei, Vietnam, Singapore

CONFUCIAN INFLUENCE

China and Singapore

DEMOCRATIC INFLUENCE.

Either in the form of a constitutional or republican model:

Japan, Thailand, Malaysia, Brunei, Philippines, Singapore, Indonesia

South Korea, Chinese Taipei.

DECOLONISATION

Part of the legal inheritance in APEC economies has been the reaction to decolonisation. Once the colonial administration was gone, every country asserted its identity and independence by rejecting their colonial inheritance and enacting new laws based on the local culture. This is reflected in current legislation in many economies. Regulatory staff involved in dispute resolution will need to make themselves familiar with the way the law works in their economy, and where it might be improved so that it can better support processes of dispute resolution.

NON-LEGAL APPROACH TO BUSINESS DISPUTES

In past years, most lawyers in APEC and Asia were used for criminal law cases. There was not a strong tradition of commercial law. Disputes were settled more by negotiation or arbitration, and in some cases, by suitable elders or religious leaders, e.g. in Islamic APEC countries.

> *"Until the most recent phase of development in Asia, law was generally not perceived by either the ordinary person or by political elites in the region as a necessary precondition or helpful adjunct to commercial activity.*
>
> *Pryles P 13.*

For these reasons, **Alternative Dispute Resolution** or **ADR** techniques such as negotiation, mediation and arbitration have a positive role to play in the region.

SCARCITY OF LEGAL SKILLS

The economies of the region have grown faster than their legal infrastructure and, as we have seen, the legal system is complex and at times difficult to manage because it combines diverse historical influences. As a consequence, there is a scarcity of qualified, experienced commercial lawyers. This may change over time, but at present it provides an incentive for businesses and Regulators to make increased use of mediation and arbitration.

FORCES FOR CONVERGENCE

Having outlined the divergences, it may be helpful to look at the forces working towards convergence and harmonisation. These include APEC, the WTO, the ITU and the growing consensus within APEC itself that member economies will benefit from harmonizing, aligning and generally improving their legal systems and approaches to dispute resolution, the better to attract investment capital and accelerate economic growth. To this we can add the growing number of graduates returning from overseas, and their desire to put their knowledge and skills to work in their home economy.

RECENT TRENDS

There has been a rapid growth in the use of commercial and international arbitration in particular. In 1983, only 3.1% of parties to the International Chamber of Commerce (ICC) arbitrations were Asian, by 2000, the figure was 15%. (Pryles p19.)

Several countries have enacted laws based on the United Nations Commission on International Trade Law or the UNCRITRAL model. The UNCRITRAL model was endorsed by a United Nations General Assembly resolution in 2002. It encourages all member states to consider its adoption. These countries include Hong Kong, Thailand, Singapore, Australia and New Zealand

There are more signatories to the NY Convention 1958, for the settlement of international trade disputes. In 2002, the list includes many APEC countries: Australia, Brunei, China, Hong Kong, Indonesia, Japan, Malaysia, New Zealand, Philippines, Korea, Singapore, Thailand and Vietnam.

DISCUSSION POINTS

What do you see as three key strengths in an economy that you are familiar with that will contribute to a steady reduction in disputes?

1

2

3

Name one or two key areas for improvement?

TOPIC 3 - IMPROVING THE ENVIRONMENT

INTRODUCTION

Disputes are embedded in complex streams of events that both help and hinder the process of resolution. One of the consistent findings in change management, world-wide, is that when there is chance to alter the environment in which whole industries, businesses or teams work, it is possible to achieve gains that once appeared distant or even impossible to attain.

This topic seeks to raise awareness of the opportunities that both regulators and industry parties have to progressively, step by step, re-shape the environment in which they do business, and at times, engage in disputes.

PREVENTION

Adopting policies and approaches that tend to prevent disputes from arising in the first place is the ultimate strategy for dispute management, but it is a long term, industry-wide approach. The goal is to create an environment and culture that favours co-operation rather than conflict.

Effective negotiation of original arrangements using well established fair and reasonable practices will minimise the likelihood of disputes arising.

Over time, it is possible to anticipate avoidable disputes and take steps that will reduce their frequency of occurrence. While it is not possible to create a dispute-free environment, sustained movement in the right direction will confer many benefits on the industry and the home economy. These improvements are worth having.

HOW MIGHT IT BE DONE?

There are a number of possible avenues, but two approaches stand out.

IMPROVE THE REGULATORY ENVIRONMENT

One approach is to examine the overall regulatory environment, devise ways to involve participants in industry decision making, and steadily design “out” avoidable risks or uncertainties through limited transparency that tend to give rise to disputes.

Where the nature of issues makes these impossible, then effective and efficient approaches to dispute resolution will play their part.

IMPROVE THE INDUSTRY CULTURE

A second way is to work on attitudes and stimulate steady movement towards an industry culture that:

- Has an environment of willingness to cooperate;
- Promotes the concept of pre-competition cooperation;
- Consistently takes decisions and implements actions that serve the best interests of customers and the economy;
- Favours co-operative problem solving ahead of disputation; and
- Takes notice of good practice ideas that may be relevant and useful.

The concept of dispute prevention has a number of layers and levels. The paragraphs that follow indicate some ideas that have been tried within APEC and elsewhere. They are ideas that can be actively promoted by Regulators as part of a long-term strategy.

GOVERNMENT ROLE

Governments contribute to prevention through passing effective legislation and policy. In relation to dispute management, one important area that can be included in legislation are provisions to allow for local mediation and arbitrated awards, and in the case of international disputes, to provide a means of enforcement.

In a larger context, Governments have challenging and creative roles to play as stimulators of productive change that is consistent with the country's heritage and sensibilities and at the same time aligned to the future.

OPPORTUNITIES FOR REGULATORS

Regulators around the world have tried a number of initiatives that have contributed to dispute prevention and improved dispute resolution practices in their sector. Some of the more interesting approaches include:

NEGOTIATION

A requirement for prior negotiation and mediation by the disputing parties before accepting a dispute for adjudication.

A number of economies have adopted this approach. The benefit is that it often leads to a better understanding of each party's position, and the early resolution of a dispute that would otherwise add to the Regulator's workload.

CONSULTATIVE FORUMS

Consultative forums are committees, steering groups or task groups that involve skilled and experienced personnel drawn directly from the industry. They provide analysis and recommendations to the Regulator and to the industry on complex issues. They may address matters such as industry direction, technical and equipment standards, spectrum management, consumer protection and so on.

APEC economies that have experienced benefits from this approach include Canada and Australia.

Consultative forums tend to prevent disputes because they impact on the climate of relationships between competitors:

- All interested parties have an opportunity to participate
- People start to think in industry terms and not narrow self interest
- People are working on agreed common-ground issues
- Analysis is more informed and comprehensive
- Interrelationships between complex issues are more clearly seen
- More common ground is discovered
- Consensus positions emerge, rivals find themselves in agreement
- There are fewer surprises when the final decision is made
- A more transparent process results

PUBLICISING INNOVATIVE APPROACHES TO DISPUTE RESOLUTION

There are innovative solutions and precedents available from many countries around the world, and the possibility of local solutions that may not be widely appreciated in the home economy.

SHARING PROCEDURAL PRECEDENTS

An important aspect of the above approach is to publicise procedural precedents as well as the actual solutions. If a dispute resolution process is flexible and saves the Regulator and the parties time and expense, a more detailed record and description of the overall process may be of value to many others.

The ITU has developed the Global Regulators Exchange (G-REX) as an online resource for the exchange of information and opinion amongst Regulators.

BUILDING LOCAL RESOURCES

The scarcity of skilled human resources is a major constraint on improved dispute resolution. Useful initiatives include:

- Supporting local mediation and arbitration institutions
- Establishing panels of trained arbitrators and mediators
- Investing in the development of in-house resources
- Encouraging wider use of alternative dispute resolution. The requirement for prior mediation before submitting a dispute to the Regulator creates a demand or market for scarce skills, and this should attract resources into the economy.

SECTOR REVIEWS

This is another instance of a consultative forum where the Regulator and other relevant agencies focus on governance of the sector. The review process calls for submissions from industry and others, and may include the use of external consultants.

A Sector Review by the National IT and Telecom Agency (NITA) in Denmark led to increased use of consultative processes to resolve ongoing disputes and focus participants on a more preventive approach. The Agency adopted a comprehensive, or inclusive review rather than a narrow issue based focus. The goal was to alter the climate and culture from one of disputation to a more co-operative approach.

The points made above have potential as avenues where Regulators can play a creative and dynamic role. The list is by no means exhaustive,

See Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions, October 2004, p93.

OPPORTUNITIES FOR INDUSTRY PARTICIPANTS

Industry participants also need to contribute to a preventive environment and the early and effective resolution of disputes. Some of the ideas that are gaining widespread acceptance include:

NEGOTIATION

Where industry participants commit substantial effort to negotiating a fair and reasonable contract at the begging of a relationship the likelihood of a dispute arising is minimised.

DISPUTE CLAUSES IN CONTRACTS

There are many standard dispute resolution clauses that companies can choose to insert in contracts. They have the effect of prescribing the way disputes are to be handled should they arise during the life of the contract.

The effect of such clauses is to preclude court action until an agreed process of alternative dispute resolution has been exhausted. The principal advantage is greater control over the dispute resolution process.

An important point about such clauses is that they are regarded as a separate agreement, distinct and different from the Contact and are enforceable in their own right.

This means that even in cases where a contract is not legally valid or has been terminated, the clause retains its legal force as a binding agreement governing disputes relating to the contract.

Here is an example of such a Clause taken from the ICC (International Chamber of Commerce) ADR Rules. It nominates the ICC Arbitration process.

Example of a Standard ICC Arbitration Clause:

"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of The International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules."

Clauses that may suit each APEC economy would substitute the name of their local ADR Institution as the mediating or arbitrating body.

A PARTNERING APPROACH TO CONTRACT DECISION MAKING

Partnering is a dispute prevention procedure where the contracting parties choose to work as a team on those parts of the contract that can have an impact on the other party.

This is an approach that requires joint planning and review to identify decisions by one party that could impact on the other, and to agree to consult and find a mutually acceptable decision, rather than work solely towards their own separate interests. It is a widely accepted approach.

In telecommunications contracts, the potential for adverse impacts can take many forms, e.g. decisions made by one party could impact on the other party's ability to provide adequate service, or cause unacceptable increases in operating costs, create equipment compatibility and performance problems, or force unplanned capital outlays.

DISCUSSION POINT

Compare and contrast the preventive approaches in an economy you know about with the approaches outlined above, and indicate which ones are working most effectively.

Preventive Approaches that are currently in an economy you know	**How effective is each approach at reducing disputes?**

TOPIC 4 - DISPUTE RESOLUTION TECHNIQUES

INTRODUCTION

This Topic provides a brief overview of a number of dispute resolution techniques. It also makes observations on the many different paths a dispute can take on its way to a resolution. The Topic provides a context or background for the more detailed treatments that follow in relation to Mediation, and Arbitration, which is the focus of the next Module.

THE TECHNIQUES

This section provides a brief summary of commonly used dispute resolution techniques.

MEDIATION AND NEGOTIATION

Both are flexible, consensual processes where the aim is to build on common ground and create a "win-win" solution that both parties can live with. Some Regulators require the parties to attempt resolution through these means prior to submitting the matter to the Regulator for adjudication. When mediation or negotiation fails, arbitration is often the next step.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

ADR methods are regarded as "private" techniques because the parties largely control the proceedings and the basis for the resolution of the dispute remains confidential to the parties.

REGULATORY ARBITRATION

This is a special form of arbitration where the Regulator may intervene to take over the procedure. This usually happens when disputes bear on policy-related issues and decisions need to be aligned to policy objectives.

REGULATORY ADJUDICATION

Regulatory adjudication is a formal process where the Regulator hears the parties and decides the outcome within the framework of applicable law and regulations. This is the most common form of dispute resolution in the Telecommunications industry, and it can generate heavy workloads.

ARBITRATION

Arbitration may be defined as an agreed process of adjudication in which the disputing parties appoint a tribunal, usually from one to three

arbitrators, who make findings and determine the outcome. The parties both agree upon and retain control over the process and the rules that will apply. The findings remain confidential to the parties and the final decision or Award is enforceable at law in most jurisdictions.

COURT ADJUDICATION

The courts provide the last avenue of appeal and they have the capacity to finalise the dispute and enforce settlements.

The benefits of arbitration are greater efficiency in terms of time to reach a resolution and reduced costs when compared to court proceedings.

THE LIFE CYCLE OF A DISPUTE

Before going into detail on dispute resolution techniques, it may be important to form a picture of the many different ways a dispute can unfold over time.

THE "INVISIBLE STEP"

It is a fact of life that some parties may use a dispute as a delaying tactic, to apply pressure by rapid escalation or to gather intelligence by adroit questioning during a mediation or other private process. When used to delay, the motive might be to impede reform or the progress of new entrants in the market place. Like any other management technique, dispute resolution can be manipulated. There are examples of such conduct in many telecommunications sectors around the world, so it is appropriate to mention it here as an "invisible step."

NEGATIVE IMPACTS

- Industry development is retarded
- Relationships are damaged
- Large costs to the economy and end users

POSSIBLE COUNTER MEASURES

- One way to counter people who use tactics in disputes is to adopt flexible resolution procedures. For example, it is possible to plan the overall process so that some aspects proceed quickly, according to agreed time lines and milestones, with an option to use alternative courses of action if timelines are not kept. The idea is to retain a good measure of control by securing agreements right at the very beginning proceed in a flexible way and to have options as an integral part of the process. This makes it much harder for parties to stall for time or try other tactics.

- Regulators and courts can allocate a greater proportion of costs of adjudicated or arbitrated awards to the party that used inappropriate tactics.
- Another concept might be to consider using a disputes scorecard, and make results known.
- Long-term, the surest way is to steadily build a co-operative industry culture.

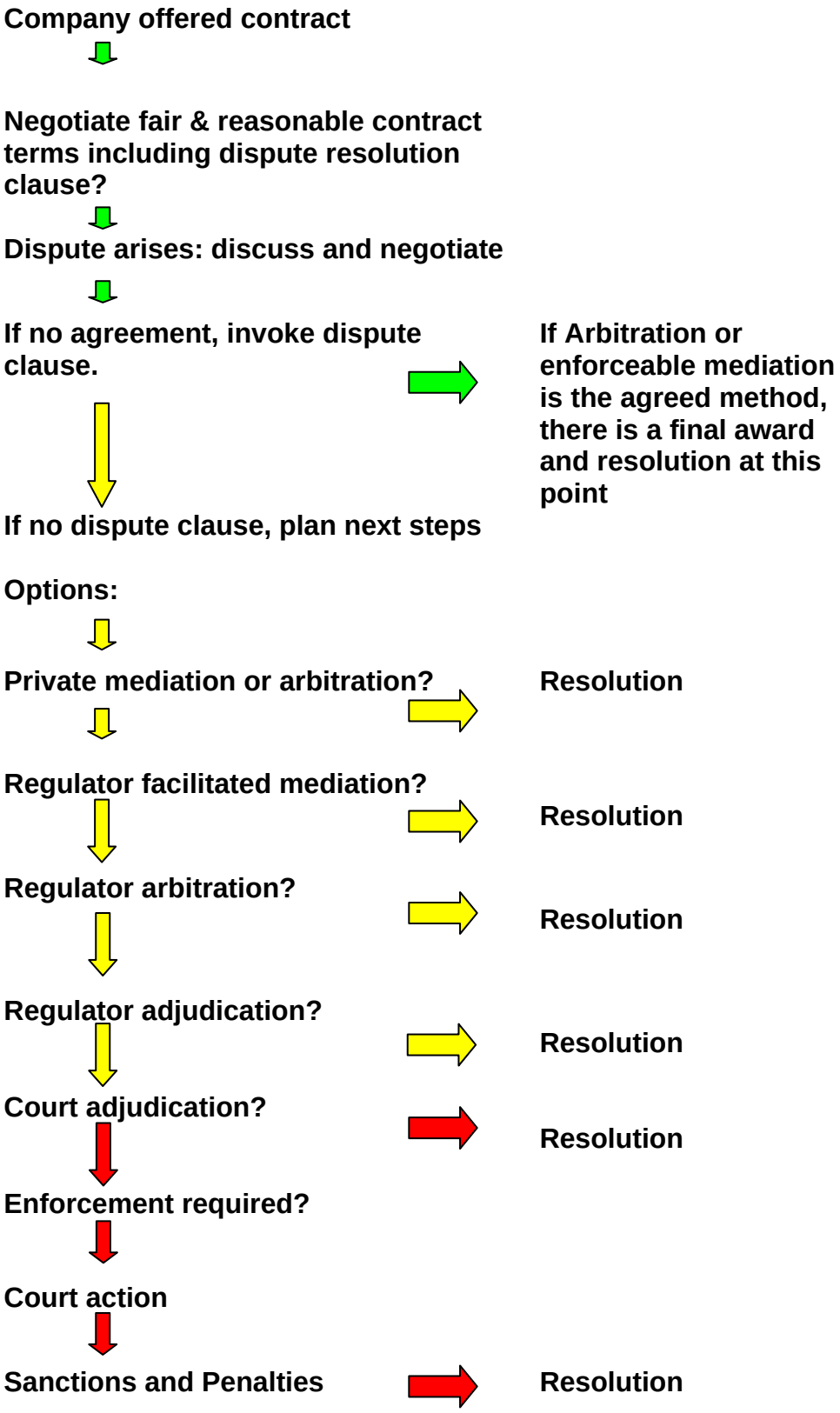
Having said that, Table 11.1 on the next page indicates the many steps and alternatives that may come into play over the course of a dispute. The Table is purely illustrative, please examine and discuss it and then return to the Discussion Points below.

DISCUSSION POINTS

Compare and contrast the dispute resolution mechanisms listed above with the practices in an economy you are familiar with. How many of these approaches are used by the Regulator?

Can you describe a recent "success story" in the area of dispute resolution in the Telecommunications sector? What features of the dispute resolution process contributed most to the successful outcome?

Table 11.1 LIFE CYCLE OF A DISPUTE



TOPIC 5 - MEDIATION

INTRODUCTION

Mediation is a proven dispute resolution technique. It has been used around the world in one form or another for thousands of years and across many different cultures and geographic regions. In this Topic we will look at the steps involved in a rather formal style of mediation, as would be used to settle a commercial dispute. The purpose of doing this is to provide a sound foundation, so that you will have sufficient understanding to modify this procedure and use it in your home economy. There is an activity at the end of the Topic that will get you started.

DEFINITION

Mediation is a process where the parties settle their own dispute with the help of a third party, the mediator.

ADVANTAGES OF MEDIATION

SAVES TIME AND COST

The main reason for choosing mediation is that, in most instances, it is less costly than formal arbitration or court procedures and usually leads to a speedy resolution.

THE PARTIES CONTROL THE PROCESS

The parties are free to choose most aspects of the process: the jurisdiction, the venue, the governing rules and the mediator. In fact, they can agree to any set of mediation rules they like, and if they are unhappy with progress, they can walk out at any time and take another course of action.

PRIVACY

The results of mediation are not made public.

ENFORCEABILITY

A mediated solution is not legally enforceable, but if the parties agree, they can make the outcome a binding resolution that can be enforced at law.

RIGHT TO FURTHER LEGAL ACTION

Mediation does not preclude subsequent legal action. For example to sue for damages or recover property.

MORE LIKELY TO PRESERVE THE RELATIONSHIP

Mediation seeks a common ground solution, it is not an adversarial process.

CONDITIONS FOR SUCCESS

MEDIATION IS MORE LIKELY TO WORK WHEN

- The parties are willing to cooperate and preserve their relationship
- Few parties are involved
- There are only a few issues all of which are clearly identified
- There is an approximate balance of power
- The issues are not of critical importance to the business

MEDIATION IS LESS LIKELY TO SUCCEED WHEN

- There is a high level of mistrust or open hostility
- There are many parties and complex issues
- The issues relate to legal rights and their enforcement
- It is in the interests of one party to prolong the dispute
- Public interest is at stake
- There is a major power imbalance

MEDIATION PROCEDURES

INTRODUCTION

In the case of a dispute involving business parties, they are likely to make use of a professional mediation institution within the home economy. In this case, a procedure similar to the following will apply. If the Regulator acts as the mediator, and has suitable trained staff, the same general procedure would also apply. After we have reviewed commercial mediation procedure, we will invite you to design a simpler approach that you might be able to use in regulatory work.

The procedure outlined here has six steps. Before we begin, it is helpful to keep in mind that in a commercial or regulatory mediation, the process is governed by documents, this is to create certainty and transparency:

The key documents are: the **Mediation Rules**, a letter or **Notice of Dispute**, an **Agreement to Mediate** and a **Settlement Agreement**. These are explained below.

1 NOTIFY THE OTHER PARTY OF A DISPUTE

This is done in the form of a written letter called a **Notice of Dispute** that identifies the parties and the issues in dispute and proposes mediation as the method of resolution. Mediation Institutions require the disputants to meet within a time limit, (e.g. 7 days) in an attempt to resolve the issues. If the issues are not resolved at the meeting, the matter proceeds to mediation and the parties would pay a deposit at this point.

If the parties have a dispute clause in their contract, the Mediation Institute nominated in the clause would arrange the mediation and the **Rules of Mediation** of that Institute would apply.

2 SELECT AN IMPARTIAL MEDIATOR

Usually several names are proposed by the Mediation Institute and the parties choose. If there is no agreement, the Institute will appoint a mediator. Any conflicts of interest or risk of bias on the part of the mediator are resolved during this process.

The mediator is required to remain neutral. If a conflict of interest arises during the course of the mediation, he or she is obliged to notify the parties. At their discretion, a replacement mediator would take over.

The mediator cannot subsequently act for either or any party or be involved in any arbitral, court or expert determination relating to the dispute.

3 APPOINT MEDIATOR AND AGREE TERMS

Appointment of the mediator takes place when the parties sign a document called an **Agreement to Mediate**. It sets out the terms and conditions on which the mediator accepts the work, including such matters as:

- The parties will comply with the rules at all times
- Confidentiality and restrictions on subsequent legal actions. This means that the mediator or institute cannot be called to take part in subsequent arbitration or litigation.
- The confidentiality and restrictions requirement also means that any statements, admissions made by parties, or evidence and documents submitted in the mediation are excluded from use in subsequent litigation unless they could be discovered by other means
- Conditions for termination of the mediation
- Release or legal indemnity for the mediator, regardless of the outcome.
- Fees and costs

4 SET DATE, TIME AND PLACE FOR MEDIATION

5 ATTEND MEDIATION SESSIONS

5.1 THE FIRST SESSION

The mediator manages or supervises all meetings.

The first meeting usually begins with an **Opening Statement** by the mediator that names the parties and defines the issues that are subject to mediation

The Mediator reviews the rules and conditions governing the process, and the proposed schedule of meetings. Important points relating to the rules are:

- The parties present must have sufficient authority to settle the dispute
- All parties and any specialist advisers sign a confidentiality agreement
- The parties agree to identify clearly and share all issues comprising the dispute
- Every aspect of every communication within the mediation process is “without prejudice”. This means that the legal rights of the parties are unaffected by involvement in a mediation procedure.

- The mediator's role is to facilitate, question, clarify issues and help the parties to explore options and find a solution, but has no power to impose a solution
- The parties work to an agreed schedule
- There may be joint and separate sessions, as required
- Information provided in separate sessions remains confidential from the other party, unless agreed otherwise
- There is no transcript kept of any Mediation meetings.
- The mediator and the parties can call in specialists
- The mediation ends either in a settlement, or by termination according to the Rules or the Agreement to Negotiate.

The mediator would then explore the issues with the parties and facilitate a clear understanding of each party's position

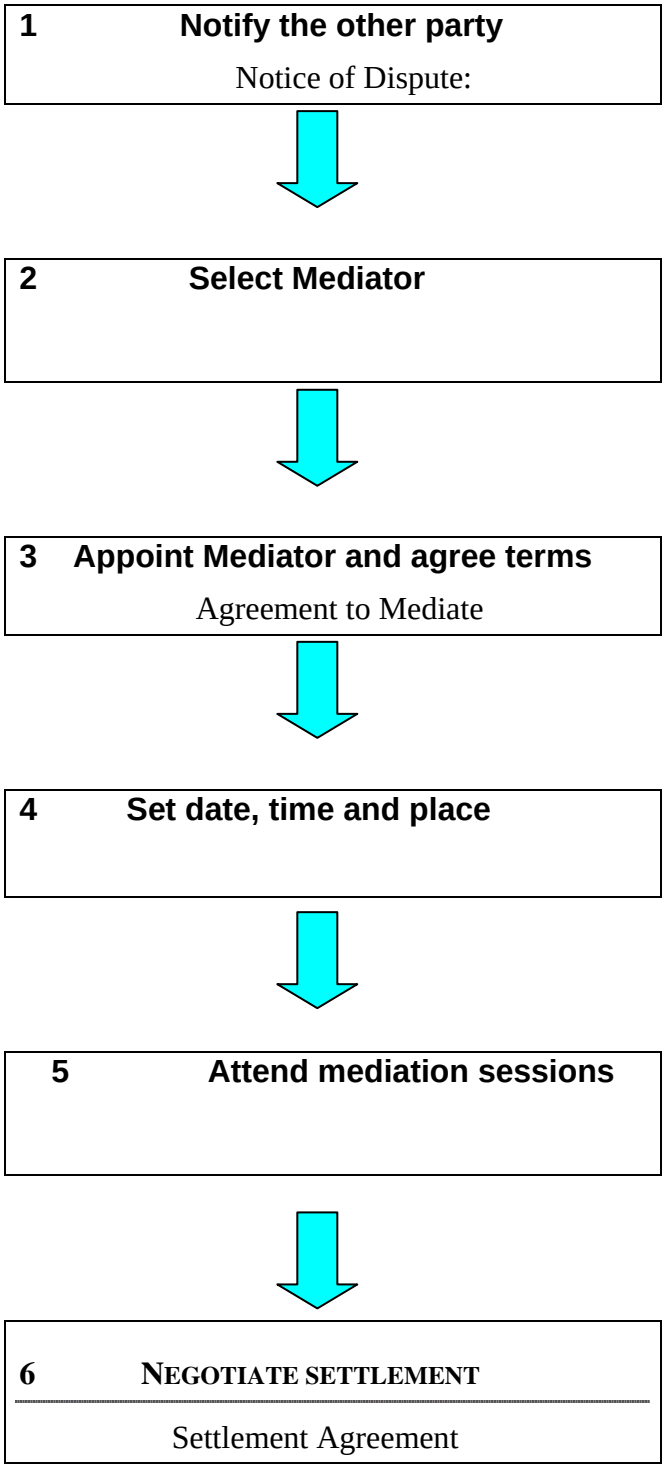
5.2 SUBSEQUENT SESSIONS

Additional sessions proceed to a flexible agenda, including separate meetings as required

6 SETTLEMENT

If the mediation is successful, it results in a **Settlement Agreement.** As mentioned, this can become an enforceable document.

Table 5.1 MEDIATION PROCEDURE



TOPIC 6 - APPLICATION ACTIVITIES

ACTIVITY 1 - DESIGN A MEDIATION PROCEDURE

SITUATION

Your Manager informs you of a dispute between a recent entrant into the telecommunications market and a mid-sized service provider. Both companies need to maintain their relationship as they co-operate on some services and compete on others. Your manager thinks they might respond to an offer to help them mediate the dispute.

There are only two issues that are currently in dispute and they are not too complex. However, both sides have a strong position and are unwilling to back down. If they can reach an agreement, they want it to be binding.

Your manager thinks that you are the right person to act as the mediator. .

THERE ARE THREE PARTS TO THE ACTIVITY

First, your manager needs you to design a simple mediation procedure, based on the commercial model we have just examined. Your procedure needs to cover the main points only, plus a few sub-points to help you explain your answer.

Second, draft an Agenda for the first meeting of the Mediation. What items would you cover and why?

Finally, your manager has asked you to list the key success factors for a successful mediation. What is your answer?

Please work in small teams

TIME

You will need around 30-35 minutes to work on the above three tasks, please use flip chart sheets to summaries your answer.

At the end of that time, be prepared to present your answer and discuss it for about 5 minutes.

ACTIVITY 2 - CODE OF CONDUCT FOR MEDIATORS

If you were writing a Code of Conduct for Mediators, what would be your top five points? Please discuss in pairs and make a list of 5 key points. Be ready to explain your points and the reasons for each.

Time: 5 minutes to make a list, then there will be a 10-15 minute discussion to agree on a final list representing a consensus view from all participants.

1. _____

2. _____

3. _____

4. _____

5. _____

Notes._____

_____

_____

_____

ACTIVITY 2 - SUGGESTED ANSWER

CODE OF CONDUCT

(THIS LIST IS NOT COMPLETE)

- Integrity and honesty in all dealings
- To remain neutral and impartial to the parties
- Avoid conflicts of interest or the risk of bias, and to immediately declare any potential conflict of interest that may arise during the course of a mediation
- To ensure that the process is fair and in accord with the principles of natural justice
- To ensure the parties are adequately informed about the process and that they understand their rights and obligations. This includes taking additional care to inform less experienced parties, especially when there is a marked power imbalance.
- To protect confidentiality
- To ensure that the proceedings are conducted in a professional and orderly way
- To maintain knowledge and skill through professional development

ACTIVITY 3 - MEDIATOR SKILLS

QUESTION: WHAT SKILLS ARE IMPORTANT FOR MEDIATORS? PLEASE DISCUSS IN PAIRS AND MAKE A LIST.

Time 10 minutes to prepare a list. When you are finished, there will be around 15 minutes to share answers and agree on a "Top 10" list.

ACTIVITY 3 - SUGGESTED ANSWER

CONCEPTUAL SKILLS

Analyse and evaluate issues and arguments

COMMUNICATION AND RAPPORT BUILDING SKILLS

Put people at ease and create a positive environment

Speak clearly, observe and listen attentively

Gain and hold the attention of the parties as needed

Check understandings and ensure that the parties are hearing each other

Be politely assertive when the rules are broken or decorum is at risk

Summarise discussion

FACILITATION SKILLS

Create and maintain a courteous and productive working environment

Frame issues and structure the discussion

Help the parties to listen and understand each other

To bring people back to the topic when the conversation diverges

Guide processes of problem solving and decision-making

Encourage negotiations, and help parties identify their options

Help the parties make decisions and reach final settlement

PROCEDURAL MANAGEMENT SKILLS

Open and chair meetings, set the agenda and work to the rules

Give concise briefings, e.g. on the rules, the rights of the parties

Keep the parties working to the agenda and timetable

Manage the process in a flexible manner, consistent with the rules

Perceptive thinking. To think and respond to the totality of the situation: the history of the dispute, power of the parties, likely motives and the extent to which the parties are genuinely interested in settling the dispute.

Asia-Pacific
Economic Cooperation

Telecommunications & Information Working Group

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