

**DISPUTE AVOIDANCE AND RESOLUTION
BEST PRACTICES FOR THE
APPLICATION SERVICE PROVIDER INDUSTRY**

Prepared By:

ASP Industry Consortium

and

WIPO Arbitration and Mediation Center

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USER'S GUIDE

User	Section/Appendix
Judges, Arbitrators, ADR Neutrals, Outside Counsel	I, II, III, IV, V, A, B, C, D
In-house Counsel, Contract Managers	II, III, IV, V, A, B, C, D
Senior Management, Business Development, Strategic Planning, Operations	II, III, V, C, D
Customer Service, Helpdesk and Technical Support	II, III, V, C, D
Marketing and Sales	II, III, V, C, D
Technical and Engineering	II, V, C

EXECUTIVE SUMMARY

The growth of the Application Service Provider (ASP) industry is predicated on a number of interrelated factors, technical and non-technical. Among the technical factors are sufficient bandwidth, connectivity and other factors affecting reliability, availability and security. Paramount among the non-technical factors (and very much dependent on the technical success of the ASP model) is end-user confidence.

The challenge of how to increase consumer or end-user confidence in the on-line world is by no means exclusive to the ASP industry. It is one that also confronts retail businesses and other service providers seeking to exploit the economic potential of the Internet, consumer groups, trade associations and public sector regulators. Particularly in cross-border settings, where the contracting parties are unlikely to share commonalities of geography, culture and/or legal regimes, the challenges regarding raising on-line confidence are considerably greater than those faced within a single country.

Balanced, impartial, expeditious and cost-effective problem and dispute resolution procedures are fundamental to creating a more confident consumer/end-user environment. Notwithstanding the many “front-end” measures that businesses can try to implement, in large part, customer confidence is based on the belief that disputes will be settled quickly and fairly either by the business or service provider directly or through some other means. In both the traditional and on-line worlds, when disputes cannot be resolved directly between the consumer and the business, the merchant or service provider and consumer must resort to other means. These often include appeals to consumer protection agencies, recourse to the courts, or use of alternative dispute resolution systems.

The main objectives of the whitepaper prepared by the ASP Industry Consortium (ASPIC)¹ and the WIPO Arbitration and Mediation Center (WIPO Center)² are to provide:

- All of the stakeholders in the ASP industry with an insight into the use and possible benefits of conflict management procedures.

¹ Founded in May of 1999, the ASP Industry Consortium (<http://www.allaboutasp.com>) is an international advocacy group of more than 1000 companies formed to promote the application service provider industry by sponsoring research, promoting best practices, and articulating the measurable benefits of the ASP delivery model. Its goals include educating the marketplace, developing common definitions for the industry, as well as serving as a forum for discussion and sponsoring research. Among the technology sectors represented among the ASP Industry Consortium membership are Independent Software Vendors (ISVs), Network Service Providers (NSPs), Application Service Providers (ASPs), as well as emerging business models and other sectors supporting the industry.

² The WIPO Arbitration and Mediation Center (<http://arbitrator.wipo.int>) is a leading dispute resolution service provider offering arbitration and mediation services for the resolution of international commercial disputes between private parties. Developed by leading experts in cross-border dispute settlement, the Center's dispute resolution procedures are considered to be particularly appropriate for technology, entertainment and other disputes involving intellectual property. The Center has focused significant resources on establishing an operational and legal framework for the administration of disputes relating to the Internet and electronic commerce and is frequently consulted on issues relating to intellectual property dispute resolution and the Internet. The Center also provides dispute resolution advisory services and has worked with a variety of organizations to develop dispute resolution schemes tailored to meet their specific requirements. An independent and impartial body, the Center is administratively part of the International Bureau of the World Intellectual Property Organization. It is based in Geneva, Switzerland.

- ASPs and their partners with practical and applicable information that will enable them to introduce conflict management procedures within their organizations and into their contracts, and to take advantage of conflict management processes when disputes arise.
- Lawyers, judges, arbitrators and other “alternative dispute resolution” experts not familiar with the ASP industry with an insight into the structure, relationships and likely areas of dispute in the ASP supply chain.

I. Background and Context

As yet, there have not been a significant number of reported disputes in the ASP space. The main reasons for this situation include the following:

- The ASP business model is still new and the market for ASP services is still in an embryonic stage.
- Small and medium enterprises that may have faced difficulties with their ASP services may not have had the resources (financial or otherwise) to pursue a dispute.
- Larger enterprises have a higher threshold of tolerance for technology underperformance. Also, they currently are less dependent on ASP services for mission-critical functions.
- The financial loss suffered by customers/end users that have had problems with their ASPs has not been sufficient to justify pursuing formal dispute resolution, regardless of the forum.
- ASPs and their customers have sought to avoid dispute resolution processes because of the cloud this may cast on the prospects of future funding, and because of the general adverse effects on business and marketing activities.
- Many ASPs are taking additional precautions and measures in service delivery and customer care, which at a later stage may become cost-prohibitive.

However, as the ASP market grows, the number of disputes is expected to rise as a result of the failure of providers to meet service-level commitments to end-user satisfaction. In addition, if analysts’ predictions that the ASP industry will experience significant short-term consolidation are correct, disputes over issues such as data ownership, data transfer or software ownership could well materialize.

ASP supply chain disputes are likely to display some or all of the following characteristics:³

- **One-to-Many.** The critical distinguishing characteristic of ASP supply chain disputes is a consequence of the “one-to-many” delivery model. Thus, a single technical problem affecting an ASP service delivery, regardless of the source of that problem, could have widespread ramifications. This gives rise to the possibility of multiple claims (potentially by all the ASP’s customers/end users) in a chain reaction as a result of claims that may then be made against the ASP’s customers.

³ An appendix to the white paper provides a list of the types of disputes that persons interviewed by the ASPIC Best Practice Committee’s Dispute Avoidance and Resolution Team (DART) or who submitted comments separately, indicated they (a) have faced in the past, (b) are presently trying to resolve, or (c) believe could be flashpoints in the future.

- **Multi-jurisdictional.** The ASP delivery model may involve multiple partners, some or all of whom may be located in different places. An ASP's customers may also be located in different geographic areas. Thus ASP supply-chain disputes may implicate the laws of multiple jurisdictions, as well as different business and legal cultures. In addition, an ASP may be subject to suit in multiple jurisdictions, possibly at the same time.
- **Problem-Sourcing Complexities.** Because of the multi-layered partnering relationships and technical complexities involved in the ASP delivery model, it will be very difficult to identify, isolate and understand the source or multiple sources of a technical problem – whether software, hardware or connectivity-related. It could take considerable time and resources to determine legal liability. In addition, although the commercial and legal issues to be decided in a dispute may be relatively simple, the related technology and technical issues may involve significant complexity.
- **Cutting-Edge Legal and Business Issues.** With the ASP delivery model still in its infancy, the pricing, contracting and business models are still evolving. ASP supply-chain disputes are likely to raise novel legal (procedural and substantive) and liability issues, which the existing legal framework may not adequately address. The delivery of software over the Internet also raises a plethora of complex intellectual property issues that are still being debated in national and international forums.
- **Symbiotic Relationships.** As noted, the ASP delivery model can involve multiple partnering relationships where each of the partners is mutually interdependent. A dispute that arises could therefore involve parties who have a very important vested interest in a continued and harmonious relationship with the other. The time and financial resources required to establish a new partnering relationship to fulfill the role of a ruptured relationship may be prohibitively high.
- **Unique Characteristics of the Parties.** Many ASPs, their partners and customers are young companies or newly formed divisions of established firms seeking scale in the ASP space. They will have a particularly strong interest in the expeditious resolution of any disputes so that important and possibly scarce resources are not diverted away from other areas of activity. There will also be great interest in preserving the confidentiality of the dispute, in order to minimize bad publicity about their emerging businesses.
- **Wide Value Range.** While little data is currently available, it is likely that the value of ASP supply chain disputes will range widely. For example, the losses suffered by a small e-tailer as result of a two-hour downtime of its web site may amount to only a few thousand dollars, whereas the same downtime may result in a loss of several hundreds of thousands of dollars for a large enterprise involved in business-to-business e-commerce. Similarly, there will be a higher level of responsibility regarding a human resource application than for a rudimentary word processing program. Accidental disclosure of the HR application could result in damage amounts that far exceed the damage associated with accidental disclosure of the word processing application.

The various stakeholders in the ASP supply chain know and accept that there will be many difficult challenges as the ASP business model continues to evolve. At the same time, they acknowledge that for the ASP model to succeed, those companies that pioneer the ASP model must not let these challenges stand in their way. Instead, they must address these challenges quickly, efficiently and in a manner that maximizes the likelihood of preserving the underlying business relationship while minimizing business disruption.

II. Recommended Best Practices

It would be optimal to avoid disputes from materializing in the first place. Although directed primarily at ASPs, the following “dispute avoidance” best practices are also relevant for other stakeholders in the ASP supply chain.

Dispute Avoidance Best Practices
Adopt and promote operational best practices in the following general areas: infrastructure planning and management; connectivity planning and management; security planning and management; applications planning and management; implementation planning and management; and support planning and management. ⁴
Be proactive in determining service-level compliance problems by deploying systems that can isolate the cause of a problem and the associated vendor that owns the problem component, and through comprehensive and meaningful reporting of service level compliance issues to customers.
Provide timely and responsive problem resolution, proactive support services, and efficient information management by establishing customer-care policies and comprehensive help desk facilities.
Negotiate and implement fair, balanced, comprehensive and clearly drafted service level agreements, which set out the respective rights and obligations of the parties and ensure that each party fully comprehends, at an operational level, the legal and technical implications of the contractual commitments. ⁵
Implement technical, administrative and operational mechanisms that enable proactive relationship management.
Acquire proper insurance coverage as part of an overall risk reduction plan and work with experienced professionals to obtain the best, most efficient insurance protection available.

⁴ The white paper provides a checklist of items that should be considered under each of the items listed and cross-references to the ASP Industry Consortium’s *A Guide to the ASP Delivery Model*.

⁵ The white paper provides a checklist of some of the most common service level agreement clauses and cross-references to the ASP Industry Consortium’s *A Guide to Service Level Agreements*.

III. Formal Dispute Resolution Mechanisms

Dispute Resolution Best Practice
ASPs should promote and rely upon alternatives to court litigation for resolving disputes that may arise with their vendors, partners and customers. Alternative dispute resolution procedures provide a confidential, neutral, quick and cost-effective means to resolve disputes, give the parties significant control over the process and allow for the involvement of specialist neutrals with relevant experience. The earlier on such procedures are invoked, the greater the likelihood of a prompt disposition of the dispute.

Even with the most comprehensive and well-conceived risk management and dispute avoidance measures, there will be always unforeseen circumstances where the parties genuinely will not be able to agree and internal problem resolution procedures will prove to be inadequate. In such instances, the parties will need to resort to a formal dispute resolution mechanism. Accordingly, summarized below are various dispute resolution options that ASPs and their partners should consider using.

A. Litigation

Litigation is the formal, public process for resolving disputes before national courts. While litigation may be the most appropriate, or only available, method of dispute resolution in certain circumstances, it is generally accepted to be a slow, disruptive, resource-draining, expensive and time-consuming way of resolving conflicts. Litigation also involves considerable uncertainty as to the final outcome of the process, can jeopardize crucial business and investment plans, place valuable corporate assets at risk and result in the breakdown of long-standing business relationships.

In addition, in the context of disputes arising out of an international relationship, the non-local party required to prosecute its claims before a foreign court may find itself in a position of considerable disadvantage when faced with foreign laws, unfamiliar procedural and evidentiary rules and language differences. Even if a party is ultimately successful, because the network of treaties for the recognition of national court judgments is not extensive, a judgment obtained before the national courts of one country may be difficult to enforce in another country.

B. Alternatives to Litigation

Because of the limitations of litigation as a dispute resolution technique, contracting parties in the ASP supply chain should rely upon dispute resolution alternatives to litigation or "alternative dispute resolution" (*ADR*). ADR encompasses a range of techniques for resolving disputes between two or more parties outside of formal court processes. These techniques, sometimes referred to as "dispute management" techniques, are not necessarily mutually exclusive in any particular conflict, but can be and often are used sequentially or in a customized combination. They may also be used as an adjunct to litigation.

The main advantages of ADR procedures, which make them particularly suitable for resolving ASP supply chain disputes, include:

- **Speed.** Parties to a contract will disagree at some point. It is the length and level of that disagreement that drives a wedge in the relationship. Disputes distract from core

business operations and the costs of a protracted dispute are typically high, both in terms of human and financial resources. Important business plans and objectives, as well as financing, can be jeopardized by the cloud of an outstanding claim. For young companies, in particular, a speedy resolution of a dispute may be critical as they may not survive the time it takes for a dispute to be resolved through litigation. Even in jurisdictions with expedited dockets, ADR is almost always quicker than court litigation. The possibility of an expeditious outcome is due not only to the general informality of the ADR procedures but, also to the fact that the neutral or panels of neutrals are focused on managing a continuous dispute resolution process and reaching a prompt disposition. The fact that they may have substantive expertise in the subject matter of the dispute is also a contributing factor. In addition, certain ADR procedures are based on the premise of party cooperation and implemented to facilitate such cooperation.

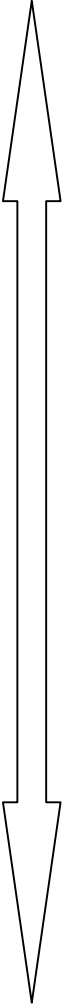
- **Substantial Cost Savings.** An early settlement or disposition of the parties' dispute, normally, will result in substantial cost-savings. Even where non-consensual procedures, such as arbitration, are used, the costs associated with resolving the dispute will be less in the majority of cases than if the dispute had been litigated in court.
- **Privacy and Confidentiality.** For many companies, especially small and medium enterprises, it may be of vital importance that the dispute between the company and a vendor or customer does not become public. A public dispute may have severe consequences for future funding and other business and marketing activities. Moreover, the lower the profile of the dispute, the greater the likelihood that the parties involved will be able to resume normal business operations and work together towards a win/win outcome. ADR is, in its essence, a private procedure. As such, ADR allows for privacy to resolve a dispute, avoid a public record and judgment, and minimize the potential impact on other future disputes. The appropriate ADR procedure can also allow for confidential and proprietary business information to be disclosed. These features of ADR can often be the critical impetus for settlement.
- **Expert Decision Makers.** The issues surrounding an ASP supply chain dispute may involve technology and technical issues that are difficult for a layperson to visualize and comprehend. Moreover, because the ASP industry is still developing, the commercial models tend not to follow standard formats. They, too, are still evolving. ADR procedures allow for the possibility of party participation in the nomination and appointment of the neutral(s). The parties consequently have the option of having an expert neutral who is knowledgeable about the business, technical and legal issues that may be involved in the dispute, which can lead to valuable savings of time and money.
- **Preservation of Business Relationships.** As described above, certain ASP delivery models are predicated on sound partner relationships that are fundamental to enabling the delivery of services. Accordingly, the parties to an ASP dispute will have a very important vested interest in a continued and harmonious relationship with the other. Where ADR procedures such as mediation are used, the lines of communication between the parties can remain open, and the parties assisted to balance their interests in pursuing the dispute against the value of preserving their commercial relationship.

- **Predictability of Outcome.** The outcome of litigation is often characterized as an “all-or-nothing” result. Arbitration has sometimes been criticized for the “solomonic” nature of arbitral awards. In ADR procedures, such as mediation, the outcome is based on the extent of the parties’ willingness to compromise, rather than being imposed on them. The final settlement, as a reflection of each party’s respective business interests, thus has a much more predictable quality.
- **Creative Business-driven Solutions.** In non-adjudicative ADR, such as mediation, the parties have the ability to fashion win-win resolutions reflecting business objectives and priorities, which might not be available from a court or arbitral tribunal where the decision will typically be based on more technical or narrow issues. Once ADR has opened up the lines of communication, parties can, and often do, go beyond the particular dispute at issue to resolve broader concerns. Moreover, ADR allows for greater involvement of the principals, which can be a big benefit in encouraging business-based rather than legalistic resolutions.
- **Procedural Flexibility and Party Control.** The parties and their lawyers are free to choose an ADR procedure that they agree is most suitable for the circumstances underlying their dispute, their respective business objectives, timeframe and corporate mindset. Moreover, the parties and their counsel then have the ability to tailor and refine the chosen procedure to fit their needs and preferences. This includes not only mechanical and evidentiary aspects of the process but substantive aspects as well, including narrowing the factual and legal issues at hand.
- **Business Disruption.** While ADR does require management resources upfront, the amount of time expended typically pales in comparison to the disruption litigation causes, including significant burdens on business and operational personnel, as well as in-house counsel. Moreover, a longstanding contingent liability or pending challenge to valuable assets can have a major adverse impact on financing, marketing activities and business expansion plans.
- **Reservation of Rights.** When parties decide to deal with their issues through a binding adjudicatory process such as arbitration, they do so on the basis of waiving their right to have these issues determined by a court by way of litigation. They may still go to court for the purposes of obtaining interim relief or in aid of the arbitral process. However, where the parties use a non-binding, consensual form of ADR such as mediation, there is an implicit (and sometimes contractually explicit) reservation of their rights to have the matter resolved by adjudication, whether litigation or arbitration, in the event that no agreement is reached in the non-binding process. Pursuing non-adjudicatory ADR is thus largely without risk.
- **Jurisdictional Issues.** Because ADR is a private process, based on party agreement, it eliminates one of the most significant problems likely to emerge in ASP supply chain disputes – that of jurisdiction. Issues relating to the law to be applied to the substance of the dispute may still have to be resolved. But the parties’ agreement to use an ADR procedure, such as arbitration, eliminates the need for a claiming party to prosecute its claims in potentially multiple jurisdictions that may be implicated by the underlying commercial relationship giving rise to the dispute. It also eliminates the possibility that the party against whom the claim is brought will have to defend its interests in several potentially inconvenient and unfavorable forums.

The main disadvantage of ADR for resolving ASP supply chain disputes is that the dispute may involve more than two parties, who most likely will not have a contractual relationship. This poses a significant, although not insurmountable, challenge for private dispute resolution mechanisms, such as arbitration and mediation, as it generally is not possible to force a third party -- by definition not a party to the contract out of which the dispute arises -- to participate in the proceedings without its agreement. The above complications are minimized in proceedings before national courts, which generally have the power to order parties subject to their jurisdiction to be joined in court proceedings when it is thought to be necessary or even convenient.

The table below identifies some of the most commonly used ADR techniques, each of which differs in terms of the level of formality and, hence, the level of party control, expense and finality of outcome.

COMMONLY USED ADR TECHNIQUES

	Least Formal	<p>Negotiation</p> <p>An informal, typically unstructured, process, where the parties attempt to resolve their differences through direct interaction. A third party may be appointed by the parties to facilitate the negotiations.</p>
	<p>Settlement Counsel</p> <p>A relatively new ADR technique where the disputing parties retain counsel who are given the specific mandate of settling the dispute. The settlement counsel normally are not permitted to participate in any subsequent proceedings, in any capacity, if the attempts at settlement fail.</p>	
	<p>Mediation</p> <p>A private, voluntary, non-binding, confidential and flexible procedure in which a neutral intermediary endeavors, at the request of the parties to a dispute, to assist them in reaching a mutually satisfactory settlement of their dispute. Or, if requested, provide a neutral evaluation of the parties' respective positions and the final outcome.</p>	
	<p>Mini-Trial</p> <p>A private, voluntary, non-binding, and confidential procedure that takes the form of a "mock trial" in which the parties make submissions to a panel comprised of senior executives of the disputing parties and a third-party neutral.</p>	
	<p>Early Neutral Evaluation</p> <p>A private, voluntary, non-binding and confidential procedure involving the referral of a dispute by the parties to a third party for non-binding evaluation, in which the evaluator applies all of the principles that would be used in the event of formal adjudication.</p>	
	<p>Neutral Fact-Finding Expert</p> <p>A private, voluntary, non-binding and confidential procedure in which the parties submit specialized issues (e.g., technical, scientific, accounting, economic) to an expert for a neutral evaluation of the facts, typically invoked in aid of a parallel dispute resolution process.</p>	
	<p>Ombudsperson</p> <p>A particular kind of fact finder used by many corporations, educational institutions, government agencies, trade groups and consumer agencies to investigate and assist in resolving grievances and complaints. Generally, ombudspersons make non-binding advisory reports and recommendations to the responsible manager about how to resolve a dispute, but can also issue decisions that are binding.</p>	
	<p>Dispute Review Board</p> <p>A private, voluntary and confidential procedure commonly used in the context of an ongoing long-term relationship, which consists of an informed standing group of experts who can quickly deal with disputes as they arise. This is commonly used in the construction industry and in high-value outsourcing contracts. Determinations may be binding or advisory.</p>	
	<p>Arbitration</p> <p>A private, voluntary and confidential procedure involving the adjudication of rights, in accordance with the applicable law, by a tribunal of one or more arbitrators that has the power to render a decision that is final and binding on the parties. Arbitration can also be non-binding.</p>	
	Most Formal	<p>Litigation</p> <p>Formal, public process for resolving disputes before national courts.</p>

IV. Model Dispute Resolution Clauses and Drafting Guidelines

Generally speaking, it is advisable to include a dispute resolution clause (i.e., a clause dealing with the process or procedures by which disputes arising out of, or relating to, the parties' contractual relationship can be resolved) at the time of negotiating the other terms and conditions of the agreement. Once a dispute has arisen, it may be impossible for the parties to agree about anything, let alone the procedures about which to resolve their dispute. Moreover, a pre-dispute clause provides both parties with a degree of certainty regarding how problems will be resolved and can expedite the dispute resolution process. It is, however, possible to decide on a dispute resolution process after a dispute has arisen, particularly if the parties' relationship is such that an agreement on the process could be achieved without significant delay, expense or acrimony.

Once the parties have decided on a dispute resolution process, that process needs to be memorialized in the form of a written agreement. Accordingly, the white paper provides examples of dispute resolution clauses developed by the WIPO Center that contracting parties in the ASP supply chain should consider including in their contracts, as well as commentary on the clauses and possible variants.

A dispute resolution process may be conducted ad hoc (i.e., the parties decide, possibly with the help of a neutral, on the procedures according to which the dispute will be decided). It may also be conducted according to set of rules made available by an institutional dispute resolution service provider (e.g., the WIPO Arbitration and Mediation Center, the American Arbitration Association, the London Court of International Arbitration, the International Chamber of Commerce), which are typically incorporated by reference in to the dispute resolution clause. The model clauses refer to the WIPO Arbitration and Mediation Rules, as a particularly appropriate set of rules for resolving ASP supply chain disputes, and the WIPO Rules are annexed to the white paper. Guidelines are also provided to enable parties to decide whether to proceed ad hoc or in accordance with institutional dispute resolution rules.

V. Process and Methodology

From the very outset ASPIC and the WIPO Center considered it vitally important that the recommended best practices and guidelines should be the result of a process involving extensive research, consultations with stakeholders in the ASP supply chain, and independent review and validation by experts. Hence, the recommendations reflected in the white paper are a reflection of the following:

- Interviews of senior personnel representing a cross-section of the ASP supply chain.
- Comments submitted through a web-based comment filing system made available via the WIPO Center's web site.
- Contacts with experts in alternative dispute resolution knowledgeable about the ASP industry.
- Results of a survey on SLAs conducted under the auspices of ASPIC's Research Committee, in which several questions were included on alternative dispute resolution.
- Information provided by ASPIC members and other interested parties regarding ASP supply chain dispute models.
- Research regarding disputes that have arisen in connection with traditional outsourcing contracts and systems integration projects.

- Other bibliographic research, including legal databases, current press reports and Internet searches.
- Comments submitted by a specially formed international group of experts in law, business and policy, known as the WIPO-ASPIC Dispute Avoidance and Resolution Experts Group.

* * * *

INTRODUCTION

The growth of the Application Service Provider (ASP) industry is predicated on a number of interrelated factors, technical and non-technical. Among the technical factors are sufficient bandwidth, connectivity and other factors affecting reliability, availability and security. Paramount among the non-technical factors (and very much dependent on the technical success of the ASP model) is end-user confidence.

The challenge of how to increase consumer or end-user confidence in the on-line world is by no means exclusive to the ASP industry. It is a challenge that also confronts retail businesses and other service providers seeking to exploit the economic potential of the Internet, consumer groups, trade associations and public sector regulators. Particularly in cross-border settings, where the contracting parties are unlikely to share commonalities of geography, culture and/or legal regimes, the challenges regarding raising on-line confidence are viewed as considerably greater than those faced within a single country.

Four areas, in particular, have been recognized as providing the foundation for creating a more confident consumer environment:

- The promulgation by governments of laws and regulations concerning on-line commercial activities that reflect a proper balance between the rights of consumers and the concerns of service providers and on-line merchants.
- The development, implementation and public dissemination by individual corporations and business associations of codes of conduct, guidelines and best practices regarding on-line commercial activities. Such instruments are seen as not only increasing consumer or end-user confidence by setting out the sponsor's obligations and commitment to doing good business, but also as achieving that objective by serving as an educational tool.
- The use of some form of third party validation, as reflected through a "trustmark" or similar "seal of approval". Businesses displaying a trustmark represent that they are subject to external oversight and that they are operating in a manner consistent with

the charter (whether their own or that of a third party) underlying the trustmark as determined by an independent and neutral certifying authority.

- Balanced, impartial, expeditious and cost-effective problem and dispute resolution procedures. Notwithstanding the many “front-end” measures that businesses can try to implement, in large part, consumer confidence is based on the belief that any disputes will be settled quickly and fairly either by the business or service provider directly or through some other means. In both the traditional and on-line world, when disputes cannot be resolved directly between the consumer and the business, the merchant or service provider and consumer must resort to other means. These often include appeals to consumer protection agencies, recourse to the courts, or use of alternative dispute resolution systems.

Recognizing that growth in the provisioning of ASP services, both locally and across international borders, will depend on how confident end-users feel about their rights of redress if a service problem cannot be resolved expeditiously and fairly, the focus of this document is on the last of the above-mentioned “confidence-building” tools – dispute avoidance and resolution.⁶ Its aim is to provide:

- All of the stakeholders in the ASP industry with an insight into the use and possible benefits of conflict management procedures.

¹ The importance of effective dispute resolution in the Digital World is evidenced by the number of public and private initiatives in this area. For example, the European Union has concluded several initiatives in the areas of e-commerce (Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, OJ EU 2000 No L 178/1), jurisdiction (Regulation on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters, COM (1999) 348 final), and consumer protection (Directive on the Protection of Consumers in Respect of Distance Contracts, OJ EU 1997 No L 144/19); Commission Communication: Out of Court Settlement of Consumer Disputes, COM (1998) 198 final). The European Commission has also published minimum quality requirements applicable to out-of-court dispute settlement bodies for consumer disputes (Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes, 98/257/EC). The Organization for Economic Cooperation and Development (OECD) has issued Guidelines for Consumer Protection in the Context of Electronic Commerce (OECD, December 1999), discussing and encouraging the deployment of on-line dispute settlement and consumer redress mechanisms. There are also private initiatives such as the Global Business Dialogue and the Global Consumer Protection Dialogue that have set up working groups on the issue. In the United States of America, the Electronic Commerce and Consumer Protection Group, composed of leading companies in the Internet, online and electronic commerce industries, has issued Guidelines for Merchant-to-Consumer Transactions and a Statement on Jurisdiction (June 2000).

- ASPs and their partners with practical and applicable information that will enable them to introduce conflict management procedures within their organizations and into their contracts, and to take advantage of conflict management processes when disputes arise.
- Lawyers, judges, arbitrators and other “alternative dispute resolution” experts not familiar with the ASP industry with an insight into the structure, relationships and likely areas of dispute in the ASP supply chain.

* * * *

**SECTION I:
AN ASP INDUSTRY PRIMER**

The purpose of this section is to provide those new to the ASP industry with a basic understanding of the structure of and functions required to complete typical ASP business models.

ASP Supply Chain Stakeholders

Stakeholder	Description
Customer	The customer is a business or domestic user that has subscribed to a service provided by an ASP across the public Internet, or across a managed business Internet Protocol (IP) network. Typically, the business customer's objective is to resolve a business problem requiring a service, tool or application which the business either does not own but is prepared to rent, or owns but does not wish to support with in-house IT staff.
Application Service Provider (ASP)	Broadly speaking, an ASP is a service provider that deploys, hosts, manages and rents access to one or more software applications via the Internet directly to an end-user. It is the provisioning and management of application services over the Internet as a core competency that distinguishes the ASP from other types of outsourcing services. ² An ASP's role can be wide-ranging, including: <ul style="list-style-type: none"> • Customization services – the initial application design, configuration, customization and integration services required for implementation of the customer's business model;

² Ovum differentiates the ASP model from two other common IT services models in the following terms:

“An ASP is different from an application hosting service because, to host an application is simply to remove the hardware infrastructure from the customer's site, it is not to take responsibility for the design, implementation, operation or on-going maintenance and management of the application. Rather, these application services remain the responsibility of the customer, who may choose to use internal staff to deliver those services or may outsource the provision of those services. The source of confusion between an ASP business and an application hosting business lies in the fact that the one-to-many business model of the ASP dictates that application services are enabled by the hosting of the application in an off-site data center or server farm.”

“An ASP is also delivering different kinds of services from the facilities management services with which IT outsourcing is widely associated. An ASP's mode of operation is quite different to the facilities management model, as it does not takeover the client's existing IT infrastructure, it remotely provides the client with access to the ASP's IT infrastructure. Nor does it ever operate locally on the client's premises; services are provided remotely and accessed on-line.”

Ring, K., Hope, M. and Leston, J., Application Service Providers: Opportunities and Risks (Ovum Ltd, 2000) (the “Ovum Report”), pp. 165-167.

	<ul style="list-style-type: none"> • Change management services – the ongoing changes to the application and its interfaces required post production; • Application support services – the support and training services relating to the use of the application(s); • Application management services – the daily administrative tasks associated with running applications, including testing and monitoring the applications and managing upgrades. <p>Full Service ASPs offer the customer a single contract point with the entire value chain. They directly manage and deliver all of the ASP services required to support the application, including supplying bandwidth, providing hardware/software, hosting data, and offering 24 x 7 technical and application specific support. An ASP may also have particular subject matter expertise that it provides to its customers as a service – for example, managing human resource data, managing treasury functions for banks or delivering online training.</p>
Independent Software Vendor (ISV)	<p>The ISV is an owner, provider, publisher or rights holder in the software or content that an ASP customer/end-user wishes to access and use to be more efficient or effective or to reduce time to market. Typically, ISVs have written software applications that can be licensed through retail outlets, value-added resellers, original equipment manufacturers, electronic software delivery or direct sales. To make the ISV content, service or application available to a business user, the ISV's solution must be hosted at a data center and delivered to the end-user via a network using Internet Protocol. Although the ISV is the originator of the software, in the emerging ASP market models, it is possible for the software to be: owned by the ISV and hosted for customers' use; owned under license by the customer, but hosted by an ASP; or licensed and hosted by the ASP.</p>
Application Infrastructure Provider (AIP)	<p>An AIP is a company with expertise in managing very large, highly capital-intensive data centers. Having invested in the creation and management of high quality information technology resources in their data centers, AIPs lease this hosting infrastructure to companies that focus on managing content and services for their customers. An AIP focuses on issues such as data center security, location redundancy and contingency planning to ensure that the data center infrastructure is always available to its customers. In addition to data centers, AIPs may also own certain network connections.</p>
Network Service Provider (NSP)	<p>A NSP is a company that manages network resources. Traditional NSPs are phone companies, although network connections are also provided by Internet Service Providers (<i>ISPs</i>). The network connections provided by NSPs not only make up the phone network, but also make up the public Internet. In the least sophisticated versions of the ASP model, delivery of services occurs over the Internet. Although this makes services very easy to access, the performance of those services is subject to the performance of the Internet links between the ASP and the customer and is therefore unpredictable. For companies seeking to ensure that they have a secure, reliable connection to their ASP services, NSPs can provide dedicated links between the data center and the customer site through "virtual private networks".</p>
Service Portal (SP)	<p>A SP is a function that is only just beginning to emerge. The core competence of a SP is the management and retention of customers for the ASP value chain. SP functions are currently being provided at a number of points in the value chain. The SP provides a one-stop shop for: (i) finding out which services are available and how much they cost; (ii) subscribing to those services; (iii) providing a customer care and troubleshooting help desk; (iv) providing a single, itemized bill for the services consumed; (v) managing the customer interface for the other functions in the value chain; and (vi) presenting and managing the brands of the value chain to the customer.</p>
Service Aggregator (SA)	<p>In the emerging ASP market, a common variant of the SP concept is the idea of a SA. The SA provides links to other application providers and/or acts as a reseller, combining multiple applications into a single service or service bundle. The SA may</p>

	be compensated as a percentage of the amounts spent by customers directed through the SA's site (based on usage data which must be collected at an appropriate point in the value chain) or may be compensated on the type of usage rather than a metered usage amount.
Value Added Reseller (VAR)	A VAR is a reseller of software, which also provides software training and integration services. For a complex business application such as enterprise resource planning, a VAR's role is essential in bringing a practical understanding of the application and marrying that knowledge with the details of the customer's business processes and business needs.
Systems Integrator (SI)	A SI carries out technical integration work to ensure that new software solutions integrate seamlessly with a customer's existing information systems. In addition to working with ASP customers, SIs also play a role in integrating the business solutions of actors in the ASP value chain.
Back Office Providers	Back office companies provide specialist solutions such as performance monitoring, billing and customer care help desk functions to actors in the ASP value chain. These solutions may not be visible to the customer, but form an important part of seamless service delivery.
Hardware Vendors	Hardware vendors provide the computing and networking hardware that resides in the data center. They also often provide consulting and support services associated with the hardware platform.

Note: The classification of ASP supply chain "stakeholders" in the table above is intended to provide the uninformed reader with a guide to the terminology used in discussing ASP business models. It is to be noted that the stakeholders involved in these business models, the terms used to discuss the models and the stakeholders involved are rapidly evolving.

The entities identified in the table above represent functions, and not necessarily organizations that may be involved in delivering ASP services to a customer.

Organizationally, these functions may be combined in any number of different ways, depending on each particular ASP's delivery model. Indeed, beyond the contract concluded directly with the customer, practically everything else that the ASP delivers to the customer may be sub-contracted to other suppliers. Some common ASP supply chain permutations are set out below:

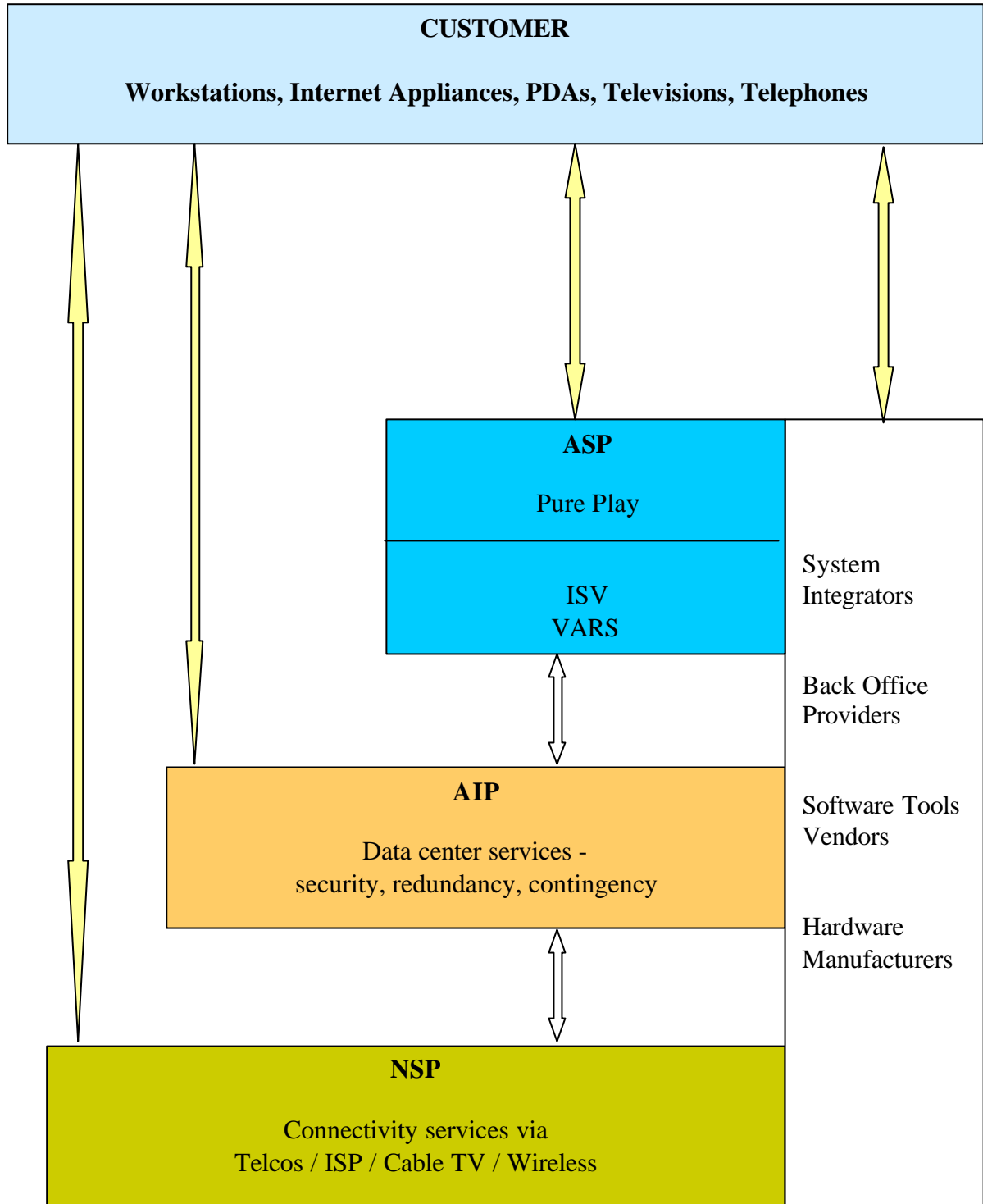
- The ASP may provide application customization, integration and change management services directly or may outsource these activities to service organizations.
- The ASP may develop and own the application software or it may license the required applications from an ISV.
- The ASP may provide the application support services directly or it may outsource those services to an ISV or systems integrator.

- The data center itself may be owned by the ASP or outsourced to another supplier.
- An ASP may own and provide the connectivity services directly or may outsource this to NSPs and ISPs.
- The connectivity services may be the responsibility of the ASP's data center provider, which, in turn, may outsource these services to NSPs and ISPs.
- The required software infrastructure and tools may be developed and owned by the ASP or purchased from ISVs by the ASP or data center.
- An NSP may set up and manage its own data centers and its own service portal, partnering only for ISV content expertise, VAR services and systems integration.
- A software company, wishing to maintain control over its own brand may choose to combine its ISV and ASP expertise, leasing data center infrastructure from an AIP and outsourcing its network connectivity to an NSP.

The initial ASP offerings consist of applications that would previously have been purchased directly by a business, installed and managed on a server on that business' premises. Other early services include the outsourcing of specialist applications, such as on-line travel services and outsourcing of human resource management functions to a specialist ASP. As the ASP model matures, the range of services offered is expected to expand to include high-bandwidth, time-sensitive applications. Moreover, as the comfort level with the consistency of service provided by ASPs increases, service purchases will likely be extended to supplement monthly flat rate billing for business tools, such as customer relationship management and enterprise resource planning to on-demand, pay-as-you-go, sporadic rental of services, such as document sharing or virtual team rooms for one-off projects.

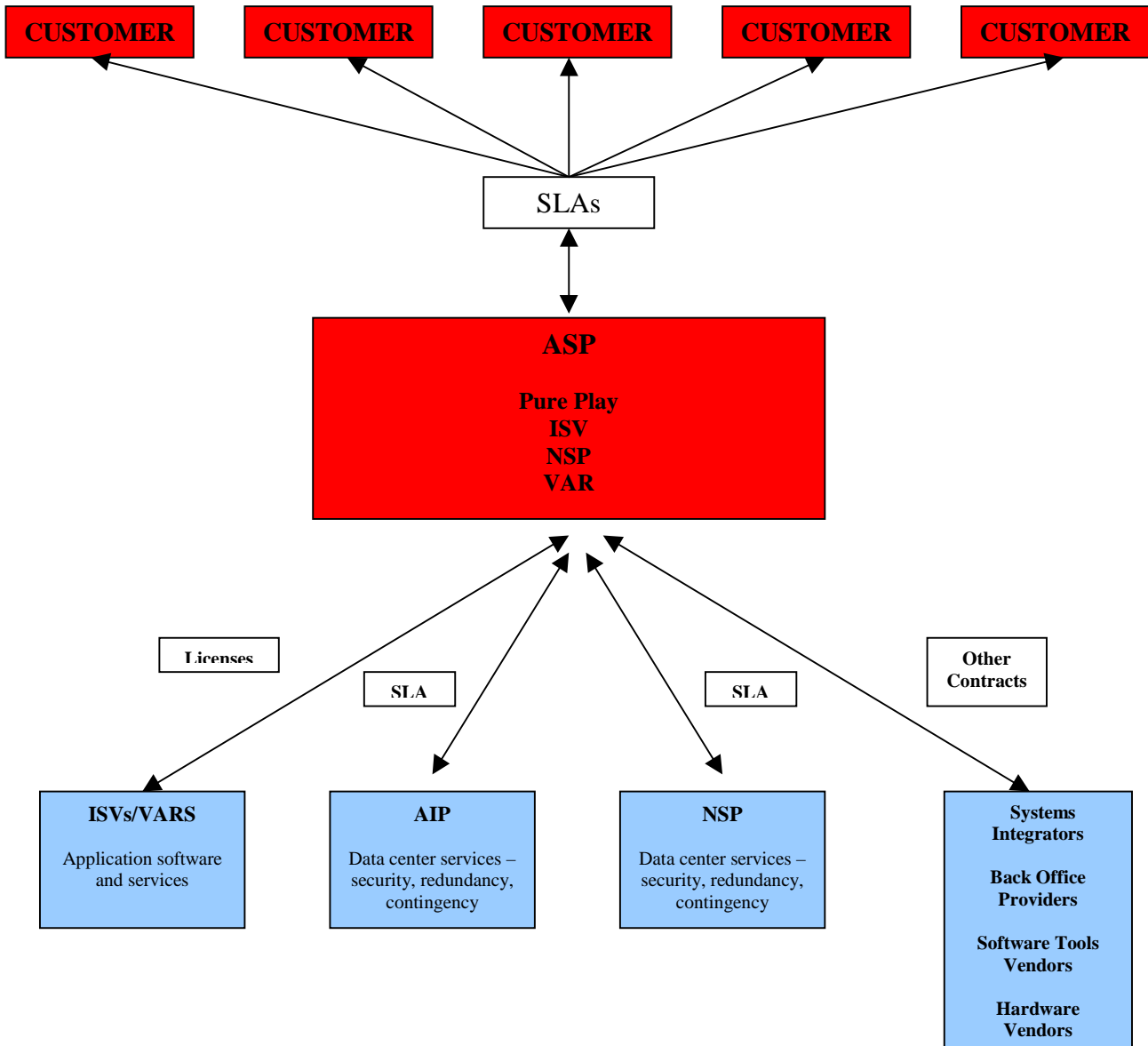
The diagrams on the pages that follow are based on the ASP as the lead supplier in terms of its relationship with the customer. They are provided to illustrate graphically the enabling products and sub-contracting relationships that an ASP may require to deliver the services.

THE ASP DELIVERY MODEL



Note: The arrows are intended to designate, generally, the possible connectivity relationships in the ASP delivery model and do not necessarily represent contractual relationships.

ASP CONTRACTUAL RELATIONSHIPS



The table below provides various analysts' projections of the size of the ASP market.

Revenues Generated by Application Services Providers

Source	Market	1998 (\$ M)	1999 (\$ M)	2001 (\$ M)	2004 (\$ B)
Forrester	ASP Worldwide			6,400	
Durlacher	ASP Europe		140.0	340.0	1.5
Ovum	Total ASP Worldwide				43.0
Cherry Tree Co.	Enterprise ASP US	150.0			2.0
IDC	Total ASP Worldwide		296.0		7.8
IDC	Enterprise ASP US		84.0	310.0	2.2
Gartner	ASP Worldwide		2,700		22.7

Initially, the principal high growth area is expected to be the United States of America. By 2001 predictions are that conditions in the European market space will also be ripe for increased acceptance of the ASP delivery model. The Asian-Pacific region, particularly Australia, New Zealand and Japan, is also likely to witness an increasing adoption of the ASP model, albeit at a much slower rate.⁸

* * * *

³ See, Ovum Report, pp. 165-167.

SECTION II: ASP SUPPLY CHAIN DISPUTES

To date there have not been a significant number of reported disputes⁹ in the ASP space. Based on DART's information-gathering activities,¹⁰ this situation can be principally attributed to the following factors:

- The ASP business model is still new and the market for ASP services is still in an embryonic stage.
- Small- and medium-sized enterprises that may have faced difficulties with their ASP services may not have had the resources (financial or otherwise) to pursue a dispute.
- Larger enterprises have a higher threshold of tolerance for technology underperformance and, currently, are less dependent on ASP services for mission critical functions.

⁴ The types of "disputes" that may arise include but are not limited to:

- (1) factual – disagreement about events;
- (2) legal – disagreements over contractual terms and conditions and interpretation thereof;
- (3) technical – disagreement about features or expected features or results performance;
- (4) interpersonal – personality conflict;
- (5) miscommunication;
- (6) differences of opinion.

In the context of its various information-gathering efforts, DART did not focus on non-contractual disputes and inter-personal disputes. The focus of its efforts was solely on contractually-based and technical disputes.

⁵ The following information gathering initiatives were coordinated by the WIPO Arbitration and Mediation Center (*WIPO Center*) working with the ASPIC Dispute Avoidance and Resolution Team (*DART*), including:

- (i) Interviews of senior personnel representing a cross-section of the ASP supply chain, based on an interview checklist. As the majority of the participants agreed to be interviewed only on a confidential basis, DART has not included a list of the companies and individuals interviewed;
- (ii) Comments submitted through a Web-based comment filing system made available via the WIPO Center's Web site;
- (iii) Contacts with experts in alternative dispute resolution knowledgeable about the ASP industry;
- (iv) Results of a survey regarding service level agreements conducted under the auspices of ASPIC's Research Committee, in which several questions were included on alternative dispute resolution;
- (v) Information provided by ASPIC members and other interested parties regarding ASP supply chain dispute models in response to a memorandum from DART;
- (vi) Research regarding disputes that have arisen in connection with traditional outsourcing contracts and systems integration projects; and
- (vii) Other bibliographic research, including legal databases, current press reports and Internet searches.

- The financial loss suffered by customers or end-users that have had problems with their ASPs has not been sufficient to justify pursuing formal dispute resolution, regardless of the forum.
- ASPs and their customers have sought to avoid dispute resolution processes because of the cloud this may cast on the prospects of future funding, and because of the general adverse effects on business and marketing activities.
- Many ASPs are taking additional precautions and measures in service delivery and customer care, which at a later stage may become cost-prohibitive.

However, as the market for an ASP services grows, it is to be expected that the number of disputes will rise as a result of ASPs' failure to meet service-level commitments to end-user satisfaction. In addition, if analysts' predictions that the ASP industry will experience significant short-term consolidation are correct, disputes over such issues as data ownership, data transfer, or software ownership could well materialize. A compilation of problem areas that persons interviewed by the WIPO Center and DART, or those who submitted comments separately, indicated they (a) have faced in the past, (b) are presently trying to resolve, or (c) believe could be flashpoints in the future, is provided in Annex G.

The salient characteristics of ASP supply-chain disputes are summarized below.

- **One-to-Many.** The critical distinguishing characteristic of ASP supply chain disputes is a consequence of the "one-to-many" delivery model. Thus, a single technical problem affecting an ASP's service delivery, regardless of the source of that problem, could have widespread ramifications, giving rise to the possibility of multiple claims (potentially by all of the ASP's customers/end-users) in chain reaction (as a result of the claims that may then be made against the ASP's customers).¹¹

⁶ For example, according to a Computerworld news story dated June 28, 2000 ("Router Problems at Verio Waylay Web Sites"), some 1,200 companies experienced slow performance and other problems with their Web sites apparently due to difficulties experienced by Colorado-based ASP, Verio, Inc., with a router at its data center in Vienna, Virginia. The problems reported by customers included slow download times, delayed e-mail performance and total access loss. According to Verio, contributing to the router problem, were faulty hardware and flawed software that affected back-up capabilities.

- **Multi-jurisdictional.** The ASP delivery model may involve multiple partners, some or all of which may be located in different places. An ASP's customers may also be located in different geographic areas. Thus, ASP supply chain disputes may implicate the laws of multiple jurisdictions, as well as different business and legal cultures. In addition, an ASP may be subject to suit in multiple jurisdictions, thus facing the prospect of being hailed in to court in several different locations, possibly at the same time.
- **Problem-Sourcing Complexities.** Because of the multi-layered partnering relationships and technical complexities involved in the ASP delivery model, it may be very difficult to identify, isolate and understand the source or multiple sources of a technical problem – whether software, hardware or connectivity-related – potentially giving rise to legal liability. In many instances, it may take considerable time and resources to determine legal liability. In addition, although the commercial and legal issues to be resolved in a dispute may be relatively simple, the related technology and technical issues may involve significant complexity.¹²
- **Cutting-Edge Legal and Business Issues.** The ASP delivery model is still in its infancy, and the pricing, contracting and business models are still evolving. ASP supply chain disputes are thus likely to raise novel legal (procedural and substantive) and liability issues, which the existing legal framework may not adequately address. The delivery of software over the Internet also raises a plethora of complex intellectual property issues that are still being debated in national and international forums.
- **Symbiotic Relationships.** As noted, the ASP delivery model can involve multiple partnering relationships, where each of the partners is mutually interdependent. A dispute that arises could therefore involve parties who have a very important vested

⁷ For example, no matter where a server-based application is hosted (i.e., in-house or by an ASP), access to the application requires some form of network connectivity to the application. The connection from an ASP to an end-user of an application contains several components and usually employs multiple providers. Thus, an ASP may be dependent upon its data center provider for long-range transport of the data to the local loop provider, the local loop provider for getting the data to the customer's LAN, and the customer's IT/LAN manager for upkeep of the connectivity to the desktops. If any one of these components is down, the end-user has no access to the applications. While the problem may ultimately lie somewhere in the network stack, the customer will look to the ASP for the damages suffered, while the ASP will, no doubt, seek to place responsibility elsewhere.

interest in a continued and harmonious relationship with the other. The time and financial resources required to establish a new partnering relationship to fulfill the role of a relationship ruptured as a result of a dispute may be prohibitively high.

- **Unique Characteristics of the Parties.** Many ASPs, their partners and customers are young companies or newly formed divisions of established firms seeking to scale their operations in the ASP space. As such, they will have a particularly strong interest in the expeditious resolution of any disputes, so that important and possibly scarce resources are not diverted away from other areas of activity. There will also be great interest in preserving the confidentiality of the dispute, in order to minimize bad publicity about their emerging businesses.
- **Wide Value Range.** While little data is currently available, it is likely that the value of ASP supply chain disputes will range widely. For example, the losses suffered by a small e-tailer as a result of a two-hour downtime of its Web site may amount to only a few thousand dollars, whereas the same downtime may result in a loss of several hundreds of thousands of dollars for a large enterprise involved in business-to-business e-commerce. Similarly, a higher level of responsibility and liability will likely attach to a human resource type application than a rudimentary word processing program. Accidental disclosure of the human resource application could result in damage amounts that far exceed the damage associated with accidental disclosure of the word processing application.

In view of the foregoing, what is required for the cost-effective and quick resolution of ASP supply chain disputes are procedures for dealing with multiple disputes, involving multiple parties, some or all of which may be located in different legal jurisdictions. In addition, because no direct contractual relationship relating to the application services that may be the source of the dispute will normally exist between an ASP's partner and its customer, procedures and contractual mechanisms are required through which this lack of contractual privity can be overcome. It will be important for the decision-makers to understand the underlying technology and business models. And it will also be fundamental that the resolution processes maximize the likelihood that the parties' relationship will be preserved.

* * * *

SECTION III:

DISPUTE RESOLUTION BEST PRACTICES AND GUIDELINES

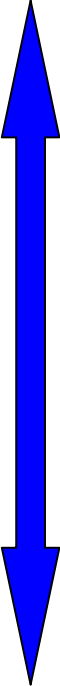
<i>Best Practice</i>
<i>ASPs should promote and rely upon alternatives to court litigation for resolving disputes that may arise with their vendors, partners and customers. Alternative dispute resolution procedures provide a confidential, neutral, quick and cost-effective means to resolve disputes, give the parties significant control over the process and allow for the involvement of specialist neutrals with relevant experience. The earlier on such procedures are invoked, the greater the likelihood of a prompt disposition of the dispute.</i>

At the outset of a business relationship, characterized by optimism and the promise of commercial reward, the possibility of future conflict typically is farthest from the parties' minds. Even the most carefully drafted contract, however, cannot prevent a dispute from arising. There will always be unforeseen circumstances or matters where the parties genuinely will not be able to agree and where internal problem resolution procedures will prove to be inadequate. In such instances, the parties will need to resort to a formal dispute resolution mechanism to facilitate the settlement of their differences.

This section discusses several alternatives for managing and resolving ASP supply chain disputes and provides general guidelines for selecting the most appropriate dispute resolution methods. These guidelines should not be relied upon as a substitute for specialist professional advice regarding the appropriate method of dispute resolution in the particular circumstances of any individual business relationship.

A. Dispute Resolution Methods

As shown by the diagram below, the various dispute resolution techniques that are available to resolve ASP supply chain disputes differ in terms of their level of formality and, hence, the level of party control, expense and finality of outcome.

Level of Formality	ADR Mechanisms
<p style="text-align: center;">Least Formal</p>  <p style="text-align: center;">Most Formal</p>	<p>Negotiation</p> <p>Settlement Counsel</p> <p>Mediation</p> <p>Mini-Trial</p> <p>Early Neutral Evaluation</p> <p>Neutral Fact Finding Expert</p> <p>Ombudsperson</p> <p>Mediation-Arbitration</p> <p>Dispute Review Board</p> <p>Expert Determination</p> <p>Arbitration</p> <p>Litigation</p>

1. Litigation

Litigation is the formal, public process for resolving disputes before national courts. While litigation may be the most appropriate, or only available, method of dispute resolution in certain circumstances, it is generally accepted to be a slow, disruptive, resource-draining, expensive and time-consuming way of resolving conflicts, whether commercial or non-commercial. Indeed, the costs and delays involved in litigation, particularly for non-enterprise consumers and SMEs, may be prohibitive and soon eclipse the value of the services underlying the dispute.

Litigation also involves considerable uncertainty as to the final outcome, can jeopardize crucial business and investment plans, place valuable corporate assets at risk and result in the rupture of long-standing business relationships. Moreover, with litigation the parties have very little control over the dispute resolution process and outcome. This is because the court retains the ultimate authority to interpret and apply the rules of litigation. The court sets the procedural schedule (e.g., for discovery, conference and trial dates). The judge (i.e., decision maker) is determined by the court, usually on an arbitrary basis. The rules of trial practice and evidence in the presentation of the case must be followed. And only narrow forms of remedies are available.

There is no “international court” for the resolution of trans-border commercial disputes between private parties. Accordingly, unless other arrangements have been agreed between the parties, the normal forum for the resolution of their dispute will be the domestic courts of one of the parties; however, there may be others.¹³ As a result, the non-local party required to prosecute its claims before a foreign court may find itself in a position of considerable disadvantage when faced with foreign laws, unfamiliar procedural and evidentiary rules and language differences. Even if a party is ultimately successful, because the network of treaties for the recognition of national court judgments is not extensive, a judgment obtained before the national courts of one country may be difficult to enforce in another country.

The most obvious advantage of litigation is that it does not require an agreement between the parties. It may be invoked unilaterally and, while notice of the litigation proceedings usually must be given to the other side, it may be prosecuted to final resolution without the adverse party’s active participation. Litigation is appropriate where one of the parties wishes to establish a precedent to dissuade other parties from engaging in conduct similar to that underlying the dispute that is being litigated; or where preserving the confidentiality of the dispute itself or information disclosed in the proceedings is not critical; or if interim relief is

¹³ The issue of court jurisdiction in “cyberspace” is a complicated one, with respect to which there are many views and no one correct answer. By virtue of the fact that certain ASP delivery models leverage the Internet, an ASP transaction may implicate several additional jurisdictions. Thus, in addition to the domestic courts of the parties, the courts of several other countries may be competent to decide their dispute, including the courts of those countries in which the application services are provided, where the AIP is located, or where the software was developed. Whether a court will exercise its jurisdiction over the parties or the subject matter of their dispute will depend on such factors as the existence (or not) of an agreement between the parties submitting to the court’s jurisdiction, the jurisdictional laws of the country and of the court, and the relationship between the parties, the services and performance obligations underlying their agreement and the territory in which the court is located.

necessary; or where the court’s powers to compel are required (e.g., to enforce a request for discovery, to join third parties, enforce an order or judgment).

Litigation Suitability Screening Matrix

MAIN ADVANTAGES	MAIN DISADVANTAGES
<ul style="list-style-type: none"> • Does not require party agreement and can be instituted unilaterally • Public forum that allows for a full airing of grievances • Public infrastructure of procedural safeguards • Interim measures of protection available • Binding outcome • Enforceability of court’s decision • Possibility of appeal • The application and establishment of precedent • Accountability of the decision-maker • Publicly funded decision-maker and facilities • Neutralizes power imbalances • Broad discovery often available • Parties subject to court’s jurisdiction can be compelled to appear 	<ul style="list-style-type: none"> • No control over selection of decision-maker • Decision-maker typically lacks the required technical expertise • Not confidential • Lengthy delays • Time consuming • Expensive • Formal, inflexible and complex procedures • Limited range of remedies • Broad discovery possibilities • Possibility of appeal • Polarizing and can destroy business relationships • In an international cross-border dispute, foreign laws, procedural and evidentiary rules, language differences and possible local bias • International enforcement limitations
Generally appropriate where:	Generally not appropriate where:
<ul style="list-style-type: none"> • No negotiated settlement is realistically possible • A binding precedent is desired to dissuade against similar conduct in the future • There may be difficulties in the enforcement of the outcome, thus requiring public assistance • Preliminary injunctive relief is desired • There are significant power imbalances between the parties • Multiple parties are involved • Broad discovery is required • Party credibility is in issue and must be tested via cross-examination 	<ul style="list-style-type: none"> • Dispute can be resolved by negotiation or other non-adjudicatory form of ADR • The parties have a desire to preserve an on-going relationship • A speedy resolution is desired • Preserving the confidentiality of the fact of the dispute is important • Setting a precedent is not required • The parties to the dispute are from different countries • Issues are of a technical nature • Broad discovery is not required • Party credibility is not in issue

2. Alternatives to Litigation

The term "alternative dispute resolution" (*ADR*) encompasses a range of different and distinct techniques¹⁴ for resolving disputes between two or more parties outside of formal court

⁹ Although, technically speaking, arbitration is an alternative to recourse to the courts, according to one school of thought, because arbitration is intended to lead to a binding and enforceable determination of a dispute, it should not be classified together with such alternative dispute resolution methods as mediation or mini-trial, but rather as a separate and distinct dispute resolution procedure. For the purposes of this report, no distinction is made between non-adjudicatory ADR processes, such as mediation, and adjudicatory processes, such as arbitration.

processes.¹⁵ These techniques, sometimes referred to as "dispute management" techniques, are not necessarily mutually exclusive in any particular conflict, but can be and often are used sequentially or in a customized combination. They may also be and often are used as an adjunct to litigation.

a. Advantages

The main advantages of ADR procedures, which make them particularly suitable for resolving ASP supply chain disputes, are set out below:

- **Speed.** Parties to a contract will disagree at some point. It is the length and level of that disagreement that drives a wedge in the relationship. Disputes distract from core business operations and the costs of a protracted dispute are typically high, both in terms of human and financial resources. For young companies, in particular, a speedy resolution of a dispute may be critical, as they may not survive the time it takes for a dispute to be resolved through litigation. Even in jurisdictions with expedited court dockets, typically ADR leads to a more expeditious outcome than litigation. This is due not only to the general informality of ADR procedures but, also due to the fact that the decision makers are focused on managing a continuous dispute resolution process and reaching a prompt disposition. The fact that they may have substantive expertise in the subject matter of the dispute is also a contributing factor. In addition, certain ADR procedures are based on the premise of party cooperation and implemented to facilitate such cooperation.
- **Substantial Cost Savings.** An early settlement or disposition of the parties' dispute, normally, will result in substantial cost-savings. Even where non-consensual procedures, such as arbitration, are used, in the vast majority of cases, the costs associated with resolving the dispute normally will be less than if the dispute had been litigated in court.¹⁶

¹⁰ Faced with huge backlogs, court systems in certain countries have started introducing alternative dispute resolution programs. Court-annexed ADR refers to an ADR program or practice that is authorized, mandated and used by a court. Private ADR is voluntary in nature, based as it is on the premise of party autonomy and consent. This report deals only with private ADR.

¹⁶ Non-adjudicatory ADR techniques will normally be cheaper than either arbitration or litigation, if they yield an outcome. If no result (i.e., settlement) is reached, the total cost to the parties of getting to an outcome may

- **Privacy and Confidentiality.** For many companies, especially small- and medium-sized enterprises, it may be of vital importance that the fact of a dispute between the company and a vendor or customer does not become public. A public dispute may have severe consequences for future funding and other business and marketing activities. Moreover, the lower the profile of the dispute, the greater the likelihood that the parties involved will be able to resume normal business operations and work together toward a win-win outcome. ADR is, in its essence, a private procedure. As such, ADR allows for privacy to resolve a dispute, avoid a public record and judgment, and minimize the potential impact on other future disputes. The appropriate ADR procedure can also allow for confidential and proprietary business information to be disclosed safely. These features of ADR can often be the critical impetus for settlement.¹⁷
- **Jurisdictional Issues.** Because ADR is a private process, based on party agreement, it eliminates one of the most significant problems likely to emerge in ASP supply chain disputes – that of jurisdiction. While issues relating to the law to be applied to the substance of the dispute may still have to be resolved, the parties’ agreement to use an ADR procedure, such as arbitration, eliminates the need for a claiming party to prosecute its claims in potentially multiple jurisdictions that may be implicated by the underlying commercial relationship giving rise to the dispute. It also eliminates the possibility that the party against whom the claim is brought having to defend its interests in several potentially inconvenient and unfavorable forums.
- **Neutrality.** While national judges and forums are expected to be and generally are impartial, there will inevitably be a bias, perceived or real, in favor of the local party. More often than not the judge will share the same nationality as one of the parties and is likely to be more familiar with the business operations or other characteristics of the local party potentially having a bearing on the parties’ dispute. The procedural rules and formal and informal legal norms will be more familiar to one party than to the

well be higher, as they may then have to incur the costs associated with the chosen form of binding dispute resolution.

other. The court will work in a language that will be more familiar to one party than to the other. And the support infrastructure and resources required in the litigation will be more readily available to the local party. With ADR, the parties are placed on an equal footing, as they may choose the place or venue of the procedure in a neutral country, the language of the proceedings, the procedural rules and the decision-makers.

- **Expert Decision-makers.** The issues surrounding an ASP supply chain dispute may involve technology and technical issues that are hard for a layperson to visualize and comprehend. Moreover, because the ASP industry is still developing, the commercial models tend not to follow standard formats. They, too, are still evolving. Even if an initial level of understanding exists, lack of experience in the technical subject matter may result in the decision-maker failing to appreciate fully all of the technical issues or to consider all of the consequences of a particular determination. ADR procedures allow for the possibility of party participation in the nomination and appointment of the decision maker(s).¹⁸ The parties consequently have the option of having an expert decision-maker who is knowledgeable about the business, technical and legal issues that may be involved in the dispute, which can lead to savings of valuable time and money.
- **Preservation of Business Relationships.** As described above, certain ASP delivery models are predicated on partnering relationships that are fundamental to enabling the delivery of services. Accordingly, the parties to an ASP supply chain dispute will have a very important vested interest in a continued and harmonious relationship with the other. Where ADR procedures such as mediation are used, the lines of communication between the parties can remain open, and the parties assisted to balance their interests in pursuing the dispute against the value of preserving their commercial relationship.

¹² However, it is to be noted that the confidentiality of ADR should not be taken for granted in all jurisdictions. For example, in Germany, express confidentiality agreements are required to protect all settlement discussions. The enforceability of such agreements in the context of mediation remains uncertain.

¹³ For example, in the arbitration rules of virtually all of the major dispute resolution service providers, the parties are empowered to appoint jointly the sole arbitrator or, if the panel is to consist of three arbitrators, each party is given the opportunity to appoint one of the arbitrators, with the third (presiding) arbitrator being chosen by the two that have already been appointed. Moreover, most rules also allow the parties considerable flexibility in terms of who may be appointed.

- **Predictability of Outcome.** The outcome of litigation is often characterized as an “all-or-nothing” result. Arbitration has sometimes been criticized for the “solomonic” nature of arbitral awards. In ADR procedures, such as mediation, by contrast, the outcome is based on the extent of the parties’ willingness to compromise, rather than being imposed on them. The final settlement, as a reflection of each party’s respective business interests and a consensus reached, thus has a much more predictable quality.
- **Creative Business-driven Solutions.** In non-adjudicative ADR, such as mediation, the parties have the ability to fashion win-win resolutions reflecting business objectives and priorities, which might not be available from a court or arbitral tribunal where the decision will typically be based on more technical or narrow issues. Once the ADR process has opened up the lines of communication, parties can, and often do, go beyond the particular dispute at issue to resolve broader concerns. Moreover, ADR allows for greater involvement of the principals, which can be a big benefit in encouraging business-based rather than legalistic resolutions.
- **Procedural Flexibility and Party Control.** National courts are strictly bound by their national rules of procedure. With ADR, the parties and their lawyers are free to choose an ADR procedure that they agree is most suitable for the circumstances underlying their dispute, their respective business objectives, timeframe and corporate mindset. Moreover, the parties and their counsel then have the ability to tailor and refine the chosen procedure to fit their needs and preferences. This includes not only mechanical and evidentiary aspects of the process but substantive aspects as well, including narrowing the factual and legal issues at hand. Most arbitral rules allow for considerable flexibility in defining the arbitral procedure, hearings, timeframe, location of hearings, location for arbitrator’s meetings, gathering of evidence.
- **Business Disruption.** While ADR does require management resources up front, the amount of time expended typically pales in comparison to the disruption occasioned by full-blown litigation or arbitration in the parties’ day-to-day business activities. Litigation places significant burdens on business and operational personnel, as well as in-house counsel. Moreover, a longstanding contingent liability or pending challenge

to valuable assets can have a major adverse impact on financing, marketing activities and business expansion plans.

- **Reservation of Rights.** Where parties decide to deal with their issues through a binding adjudicatory process such as arbitration, they do so on the basis of waiving their right to have these issues determined by a court by way of litigation. They may still go to court for the purposes of obtaining interim relief or in aid of the arbitral process. However, where the parties use a non-binding, consensual form of ADR such as mediation, there is an implicit (and sometimes contractually explicit) reservation of their rights to have the matter resolved by adjudication, whether litigation or arbitration, in the event that no agreement is reached in the non-binding process. Pursuing non-adjudicatory ADR is thus largely without risk.

b. Disadvantages

Of the most frequently cited disadvantages of ADR, two deserve particular mention, in view of their relevance to ASP supply chain disputes: limited procedural options in the context of multi-party disputes and limited availability of interim relief.¹⁹

As mentioned, ASP supply chain disputes may often involve more than two parties. This poses a significant, although not insurmountable, challenge for private dispute resolution mechanisms, such as arbitration and mediation. Generally, it is not possible for a mediator or arbitral tribunal to force a third-party that, by definition, is not a party to the contract out of which the dispute arises, to participate in the proceedings without its agreement. It is also not possible for an arbitrator to merge two or more arbitrations without the consent of all parties, even where common questions of law or fact arise affecting all of the parties, or where the arbitration clauses in separate and distinct contracts are similar (e.g., same procedural rules, place of arbitration, number of arbitrators, procedures for constituting the arbitral tribunal, language of proceedings).

¹⁴ Other possible disadvantages that are mentioned, include (1) the non-binding nature of certain ADR methods, with the exception of arbitration; (2) the fact that the result has no or limited precedential effect; (3) limited avenues and rights of appeal; and (4) significantly circumscribed scope for discovery, where the procedural system allows for the possibility of discovery (although this is also cited as one of ADR's main advantages).

A typical situation in which the “joinder” of parties or the “consolidation” of proceedings may be called for is in the context of a dispute where the ASP relies on a number of other parties to deliver the contracted for services. In the event of a complaint by the ASP’s customers, the ASP may not be able to bring the parties that it considers responsible (e.g., NSP, ISV, AIP) for the problems complained of by the customer into an ADR proceeding commenced by any one customer. Nor may it be able to bring all of the complainants against whom it has to defend itself into a common proceeding. The ASP will thus have to proceed against its vendor or vendors in separate proceedings and defend itself separately in yet other proceedings. In such situations, it may appear desirable for all parties to be brought into the same proceeding, in order to save time and expense and avoid the risk of inconsistent outcomes. While this would certainly be in the best interests of the ASP, the customers may not be interested in becoming involved in a complicated dispute between the ASP and ISV, for example, but will simply be looking for redress against the ASP.²⁰ The ASP’s partners, whom the ASP considers to be responsible for the problem, will almost certainly resist being brought into any proceedings with the customers.

The above complications are minimized in proceedings before national courts, which generally have the power to order parties subject to their jurisdiction to be joined in court proceedings when it is thought to be necessary or even convenient.

Another potential disadvantage of ADR is the limited availability of emergency or interim relief during the early stages of a dispute. A party exceeding its licensed rights in a specified

¹⁵ According to Intermedia Group, which conducted an end-user survey commissioned by the ASP Industry Consortium’s Research Committee:

“Respondent organizations expect the primary solution provider to manage all of their partners and subcontractors to meet the requirements of Service Level Agreements. In a similar vein, companies hold the primary ASP or service provider accountable for keeping a host system up and running. No other response... should be expected given that one of the key value propositions of hosted solutions is that organizations do not have to deal with the multiple vendor constituencies to employ a given piece of software or service.”

“Survey respondents were almost unanimous in their belief that it is the responsibility of the primary ASP to keep systems up and running. Hosting customers generally do not care about any particular component of the service, merely that the application or services itself continues to operate... It is clear... that respondent organizations expect to deal with a single solution provider, employing a single trouble ticket, to handle all problems associated with a hosted solution regardless of actual source of the problem.”

ASP Industry Consortium and Intermedia Group, “ASP Industry Consortium Service Level Agreement End User Study” (September 2000) (the “Intermedia Survey”).

technology, for example, may inflict serious and possibly irreparable harm that may be difficult to quantify and remedy with money damages. In such circumstances, the party that considers that it will be irreparably harmed may want to try to stop the offending conduct through some form of legal mechanism. There will also be circumstances in which a party will want to compel the other party to continue performing to prevent irreparable harm.

Although ADR presents the possibility that the parties will arrive at an earlier resolution of their differences than through litigation, it does not offer the possibility of well-developed procedural mechanisms for obtaining quick interim relief. In contrast, many national court systems allow for *ex parte* applications for interim relief (i.e., the proceeding takes place without notice to or contestation by the parties adversely affected and only the applicant party is heard), accelerated schedules for gathering proof and hearing such applications, and for a quick yet decisive interim determination, possibly subject to the posting of security by the party applying for the order. In addition, the coercive powers of the court will be available to ensure compliance with any such order in that jurisdiction.

c. Commonly Used ADR Techniques

The three most commonly used dispute resolution alternatives to litigation are direct negotiation, mediation and arbitration. Several other ADR techniques, such as mini-trial, early neutral evaluation and expert determination also have been developed in recent years and are being used increasingly in the United States of America and the United Kingdom.²¹ Elsewhere in the world, however, these techniques have yet to gain widespread acceptance.

(i) Negotiation

Direct negotiation (as opposed to third-party facilitated negotiation), where the disputing parties to resolve their differences or work out a compromise themselves, is the most common form of dispute resolution. In direct negotiation the parties retain complete control

¹⁶ A description of these other ADR techniques is provided in Annex H.

over the process and the outcome, including the ground rules and the agenda, the venue, whether to seek third-party assistance, the decision to end the process at any time, the ability to focus on issues and examine solutions directly relating to the underlying problem, and whether to accept the final outcome.²² Generally, a negotiated solution will also be less costly in terms of human and financial resources than any form of third-party procedure. It also allows for the possibility that the parties will agree a solution that improves their working relationship and lowers the risk of a recurrence of the dispute.

While the main advantage of negotiation is that it is an informal and unstructured process, thus facilitating the objective of quick and cost-effective settlement, its lack of structure is also the major cause of failure. Other causes of failure include intractable negotiating positions, incompatible negotiating style and cultural differences.

Negotiation Suitability Screening Matrix

MAIN ADVANTAGES	MAIN DISADVANTAGES
<ul style="list-style-type: none"> • Maximizes possibility of an early resolution • Cost savings • Privacy and confidentiality • Business relationships can be preserved • Can help to narrow differences • No waiver of right to go to court or use other binding or non-binding dispute resolution procedure • Non-prejudicial to parties’ position in subsequent proceedings • Natural progression of problem escalation procedures 	<ul style="list-style-type: none"> • May not yield an outcome
Generally appropriate:	Generally not appropriate where:
<ul style="list-style-type: none"> • In virtually all conflict situations • Before and during third-party dispute resolution processes 	<ul style="list-style-type: none"> • There is absolutely no likelihood of a negotiated settlement

(ii) Mediation

Mediation (sometimes referred to as conciliation) is a voluntary, non-binding, confidential and flexible dispute resolution procedure in which a neutral intermediary, the mediator,

¹⁷ While negotiation is a voluntary process, courts in certain countries may require the parties to discuss the issues that separate them. Furthermore, dispute resolution clauses frequently contain language requiring the parties to attempt to negotiate in good faith prior to commencing arbitral proceedings.

endeavors to assist the parties to reach a mutually satisfactory settlement of their dispute. Typically, mediation is concluded expeditiously and at a moderate cost.²³

Mediation can cover a large and complex range of issues or can be used to resolve one of several issues in dispute. The number of parties that can participate in a mediation is not limited. In fact, the procedure can be particularly useful when there are multiple parties involved, in which case it may often be difficult to achieve an agreement by direct negotiations.

Mediation is especially suitable where the dispute occurs between parties to a continuing business relationship. First, because mediation is far less adversarial than litigation or arbitration, it is more likely that a working relationship will survive a mediation than it will litigation or arbitration. Second, mediation provides an opportunity for finding a solution by reference to the parties' business interests and not just their strict legal rights and obligations. In fact a hallmark of mediation is its capacity to expand the traditional settlement discussions and broaden resolution options, often by going beyond the narrow legal issues in controversy. Unlike the remedies that may be available through court processes or arbitration, mediation allows for the possibility of innovation on the part of the parties and the mediator in crafting a solution that not only addresses the parties' respective claims, but also restores a measure of health and stability to the environment that engendered the dispute. Experience has shown that, with the assistance of a skillful and knowledgeable mediator, parties are able to bridge wide gaps in their positions and have often developed mutually advantageous business solutions through the process. A mediator can also assist the parties in identifying the critical implementation paths for the resolutions achieved through the mediation.

Mediation is not a suitable procedure for settling disputes in all cases. For example, where deliberate, bad-faith counterfeiting or software piracy is involved, mediation, which requires the cooperation of both sides, is unlikely to be appropriate. Similarly, where a party is certain that it has a clear-cut case, or where the objective of the parties or one of them is to obtain a

²³ It is debateable whether a mediated solution is more or less expensive than a negotiated one. While mediation will involve additional costs relating to the mediator (e.g., fees, travel expenses, accommodation) and possibly also lawyer's fees, if counsel is used, as well as administration fees, if an institutional dispute resolution service provider is used, the intervention of a neutral third party may well lead to a quicker outcome than if the parties are left to reach a negotiated settlement themselves. In such circumstances, the additional expenses relating to

neutral opinion on a question of genuine difference, to establish a precedent or to be vindicated publicly on an issue in dispute, mediation may also not be the appropriate procedure. Mediation will also be inappropriate where the parties' views on the merits, legal or technical, are very different.

As mediation is a voluntary and non-binding procedure, the mediator does not have any power to impose a settlement on the parties and any party may, if it so chooses, abandon the mediation at any stage prior to the signing of an agreed settlement. This means that, even though parties have agreed to submit a dispute to mediation, they are not obliged to continue with the mediation process after the first meeting. In this sense, the parties always remain in control of a mediation: the commencement of the process depends on their agreement to use it; its continuation, on their continuing acceptance and participation.

Because mediation is a confidential procedure, it encourages frankness and openness in the process by assuring the parties that any admissions, proposals or offers for settlement will not have any consequences beyond the mediation process. They cannot, as a general rule, be used in subsequent litigation or arbitration. Depending on the rules applicable to the mediation, the confidentiality of the existence and outcome of the mediation can also be preserved.

There are two main ways in which mediators can assist parties in reaching their own decision, which correspond to two types or models of mediation practiced throughout the world; although, in practice, the distinction is not so stark, depending on the mediator's mandate, personal style and the circumstances of the mediation. It is up to the parties to decide which of the two models of mediation they wish to follow.

Under the first model, "facilitative mediation", the mediator endeavors to restore and then facilitate communication between the parties and to help each side to understand the other's perspective, position and interests in relation to the dispute. The mediator and the parties then explore opportunities for a creative "win-win" solution, such as a mutually advantageous new business arrangement. The mediator ordinarily will not offer opinions on the merits of the case or the positions of the parties.

mediation could well be lower than those associated with the negotiations (e.g., negotiating team travel and living costs, opportunity cost). Mediation will almost always be cheaper than arbitration.

Under the second model, "evaluative mediation", the focus is on the parties' legal rights and obligations, the strengths and weaknesses of their positions, the likely outcome if the case were tried in court, and what represents a fair settlement. The mediator provides a non-binding assessment or evaluation of the dispute, which the parties are then free to accept or reject as the outcome of the dispute.

Unlike a judge or an arbitrator, whose mandate is to issue a binding decision or award, the mediator is not a decision-maker. The role of the mediator is rather to serve as a catalyst for negotiations and to assist the parties to reach their own decision on a settlement of the dispute. The mediator works to improve communication between the parties; helps the parties clarify their understanding of their mutual interests and concerns; probes the strengths and weaknesses of each party's legal positions; explores the consequences of not settling; and helps generate options for mutually agreeable resolutions of the dispute.

Unless or until encapsulated in a formal agreement, a mediated settlement is non-binding. Once the case is settled in a way that is agreeable to all sides, the mediator and/or the parties will draft a document specifying their agreement and stipulating how it will be implemented. The settlement agreement is a contract and an action for breach of contract may be brought if it is not performed on either side.

Mediation can be used at any stage. It can be used effectively during the parties' contract negotiations to help overcome a negotiating impasse. It can also be invoked during litigation or arbitration where the parties wish to explore the possibility of settlement. Regardless of when it is used, mediation has enjoyed high rates of success in achieving a result acceptable to the parties involved. Because other dispute resolution options are not foreclosed if mediation fails, entering into a mediation process is essentially without risk.

Mediation Suitability Screening Matrix

ADVANTAGES	DISADVANTAGES
<ul style="list-style-type: none"> • Based on party agreement • Maximizes probability of an early resolution • Non-binding • Business relationships can be preserved • Substantial cost-savings relative to adjudicatory ADR 	<ul style="list-style-type: none"> • Requires party agreement • Third party neutral lacks power to impose settlement • Neutral lacks authority to compel participation • No application or establishment of precedent • No due process safeguards

<ul style="list-style-type: none"> • Privacy and confidentiality • Procedural flexibility • Flexible and creative solutions • Parties select neutral(s) • Neutrals with expertise can be appointed • No waiver of right to have the dispute resolved by litigation or arbitration if mediation fails • Non-prejudicial to parties' positions in subsequent dispute resolution proceedings 	<ul style="list-style-type: none"> • Lacks enforceability • Outcome not binding unless parties sign settlement agreement
Generally appropriate where:	Generally not appropriate where:
<ul style="list-style-type: none"> • The parties share a genuine desire to resolve their dispute promptly and equitably • The parties have an on-going business relationship which they wish to preserve or develop • A speedy resolution is important • Maintaining the confidentiality of the fact of the dispute is important • The parties wish to minimize the cost-exposure entailed in settling the dispute • Setting a legal precedent is not required • Technical issues are involved requiring expertise on the part of the neutral • Multiple parties are involved • The contracting parties are from different countries 	<ul style="list-style-type: none"> • A negotiated settlement is not realistically possible • A binding precedent is desired to dissuade against similar conduct in the future • There may be difficulties in the enforcement of the outcome, thus requiring public assistance • There are significant power imbalances between the parties • Party credibility is in issue and must be tested via cross-examination • Dispute involves issues of bad faith

(iii) Arbitration

Arbitration involves the adjudication of rights by a tribunal composed of one or several arbitrators, who have the power to render a decision that is binding on the parties.²⁴ As with other ADR processes, for an arbitration to take place there must be an agreement between the parties evidencing their intention to submit their dispute to arbitration. Unlike litigation, arbitration can neither be commenced against nor initiated by a person that is not a party to the arbitration agreement. However, similar to litigation and in contrast to mediation or other forms of non-adjudicatory ADR, arbitration does not always require the active participation of all of the parties to the arbitration agreement in order for a binding decision to be issued.

While arbitration and mediation share a number of characteristics, there are critical differences between the two procedures. First and foremost is the fact that while mediation is non-binding (at least not until there is a signed settlement agreement), the decision rendered by an arbitral tribunal in the form of an award is final and binding on the parties. Although

¹⁹ There is also a non-binding variant of arbitration. In non-binding arbitration, the procedures are conducted just as in binding arbitration. However, the outcome is a non-binding advisory opinion.

subject to challenge on limited grounds, the award is rarely subject to an appeal on the merits to a court of law.

In mediation the parties retain responsibility for and control over the dispute and do not transfer decision-making power to the mediator. In arbitration, the authority to issue a final and binding decision is delegated to the arbitrator.

In arbitration, the outcome (of which there typically is one) is determined in accordance with an objective standard, the applicable law. In mediation, the outcome (of which there is no guarantee that there will be one) is determined by the will of the parties. Thus, it is often said that arbitration is a "rights-based" procedure, whereas mediation is an "interest-based" procedure.

In arbitration, a party's task is to persuade the arbitral tribunal of its case. It addresses its arguments to the tribunal and not to the other side. In mediation, since the outcome must be accepted by both parties and is not decided by the mediator, a party's task is to convince, or to negotiate with, the other side. It addresses the other side and not the mediator, even though the mediator may be the conduit for communications from one side to the other.

Arbitration procedures are thus much more formal and rigid than mediation procedures.

In addition to the generally accepted benefits of ADR (e.g., confidentiality, freedom to select decision makers with expertise in the subject matter of the dispute, party participation in choosing the decision makers, procedural flexibility, time and cost savings²⁵), arbitration is a particularly appropriate form of dispute resolution for commercial disputes arising out of international relationships:

²⁰ The time and cost involved will depend on the procedures agreed for the arbitration, the degree of co-operation between the parties, the availability of the arbitrators, and the fees charged by them. It should be noted that, increasingly, a common complaint heard about arbitration is that it has become almost as expensive as litigation in view of the fact that, in addition to lawyer's fees, the parties must pay the fees of the arbitral tribunal, the costs of the arbitral facilities (e.g., hotel conference rooms, transcripts, audio facilities) and possibly the fees of an administering entity. In contrast, the parties will not be required to pay for the fees of the judge or the court reporters and courtroom facilities. It should also be noted that, as in litigation, absent an agreement between the parties, it is common for the arbitral tribunal to apportion the costs of the arbitration between the parties, with the lion's share allocated to the losing party.

- (1) For several years there has been a general trend worldwide for courts to recognize the validity of and enforce parties' agreements to arbitrate and, as such, typically courts will not entertain a dispute that is to be referred to arbitration and will stay concurrent court proceedings to enable the arbitral process to function.
- (2) Arbitration avoids the uncertainties and complexities that may be involved in litigating before a foreign court or courts, including whether a foreign court will assume jurisdiction to hear the case; the necessity for advice and representation by local lawyers; the necessity to have documents translated and for interpreters; and exposure to technical and formal rules of procedure and evidence.
- (3) The arbitral tribunal and the procedure for the arbitration can be chosen so as to have a non-national character, acceptable to the parties, their representatives and arbitrators from different legal and cultural backgrounds.
- (4) As a result of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which obliges contracting States to recognize and enforce foreign arbitral awards, international arbitral awards are enforceable in more than 126 countries. Because of such conventions (and the principle of comity²⁶), it is often easier to enforce an arbitral award given in one country in the courts of another than it is to enforce court decisions across national boundaries. Many domestic regimes permit the registration and enforcement of arbitral awards as court judgments. In countries where arbitration is favored, including those that have ratified the New York Convention, court review of an arbitral award is extremely limited. An award will not be disturbed merely because the court may consider that the arbitrators reached the wrong conclusion on a question of fact or law. Instead, the award will normally be enforced unless there are specific reasons, such as those set out in Article V of the Convention.²⁷

²¹ In general, the principle of "comity" provides that courts of one state or jurisdiction will recognize and give effect to the laws and judicial decisions of another state or jurisdiction, not as a matter of obligation, but out of deference and mutual respect.

²² Under Article V of the New York Convention, a foreign award may be denied enforcement if a party furnishes proof that: (i) the parties lacked capacity; (ii) the arbitration agreement is invalid; (iii) there was inadequate notice; (iii) the matter arbitrated was outside of the scope of the arbitration agreement or was otherwise not arbitrable; (v) the arbitral tribunal was not properly constituted in accordance with the parties' agreement or the

There are two variations on the traditional arbitration procedures that are worthy of mention. The first is “expedited arbitration”, a form of arbitration in which certain procedural modifications are introduced in order to ensure that the arbitration can be conducted and an award rendered in a shortened time frame and, consequently, at a reduced cost. Typically, under expedited arbitration procedures, a sole arbitrator is appointed, the timeframes for the procedures are shortened and rounds of written submissions or pleadings minimized.

The second is “med-arb”, in which mediation is combined with arbitration. In med-arb, the dispute is submitted first to mediation. If a settlement is not reached within a defined period of time (for example, 60 or 90 days), or if a party refuses to participate or to continue to participate in the mediation, the dispute is referred for a binding decision through arbitration (or, if the parties so agree, through expedited arbitration). An often-mentioned advantage of the combined procedure is the incentive that it offers for a good faith commitment by both parties to the mediation process, since the consequence of a failure to reach an agreed settlement will be more tangibly measurable in terms of the financial and management commitment that would need to be incurred in the subsequent arbitration procedure. However, a potential downside of the med-arb procedure is that the presence of assured third-party resolution following the mediation might diminish the incentive for the parties to resolve the dispute through mediation.

Arbitration Suitability Screening Matrix

MAIN ADVANTAGES	MAIN DISADVANTAGES
<ul style="list-style-type: none"> • Based on party agreement • Privacy and confidentiality • Party participation in selection of decision-makers • Neutrals with expertise can be appointed • Flexible procedures • Binding outcome • Generally faster than litigation • Generally less expensive than litigation • Scope of discovery is limited • Limits option of going to court • Grounds to challenge or vacate award limited • Overcomes cross-border jurisdictional issues • Ease of enforcement, particularly in an international setting 	<ul style="list-style-type: none"> • Requires party agreement • Lack of 3rd party neutral accountability • Limited precedential value • Non-appealable decision • Procedures and conduct increasingly becoming more “legalized” • Limits option of going to court • Limited discovery possibilities • Limitations relating to availability of interim relief measures

law of the place of arbitration; (vi) the award is not binding or has been set aside by the courts where it was rendered; or (vii) the award is against public policy.

Generally appropriate where:	Generally not appropriate where:
<ul style="list-style-type: none"> • Maintaining the confidentiality of the fact of the dispute is important • The parties wish to minimize the cost-exposure entailed in settling the dispute • Setting a legal precedent is not required • Technical issues are involved requiring expertise on the part of the neutral • The contracting parties are from different countries 	<ul style="list-style-type: none"> • Dispute can be resolved by negotiation or other non-adjudicatory form of ADR • The parties have a desire to preserve an on-going relationship • Setting a precedent to dissuade future conduct is a priority • A speedy resolution is desired • Broad discovery is required • Multiple parties are involved

The results of an end-user survey commissioned by the ASPIC Research Committee and conducted by Intermedia Group show that, in general, end-users prefer less rigorous methods of conflict resolution over arbitration and litigation. Speed and confidentiality were cited as important factors, as was relationship preservation. According to the Intermedia Group's analysis of the results of an end-user survey conducted for ASPIC in September 2000:

“It is easy to see why. In the Internet Age, when time-to-market imperatives and the ability to respond quickly to changing market conditions dominate over all other concerns, conflicts, especially if they have the potential to hinder business, must be resolved quickly. To prevent damage to brand equity, as well as consumer and trading partner confidence, confidentiality too, is extremely important. Finally organizations spend a great deal of time, money and effort selecting and screening hosting and e-service suppliers, and it is in their interest to preserve relationships.”

While ADR processes can be used at virtually any stage of a dispute, parties to a dispute should invoke an ADR process as early as possible to maximize the likelihood of an early resolution of their differences. Experience has shown that when a dispute has just begun, typically the parties are more flexible and often more willing to consider various proposals to resolve the matter. As a dispute progresses, the parties become entrenched in their positions and are less open to compromise. An early resolution of the dispute also minimizes business disruption and can result in a significant savings on legal costs.

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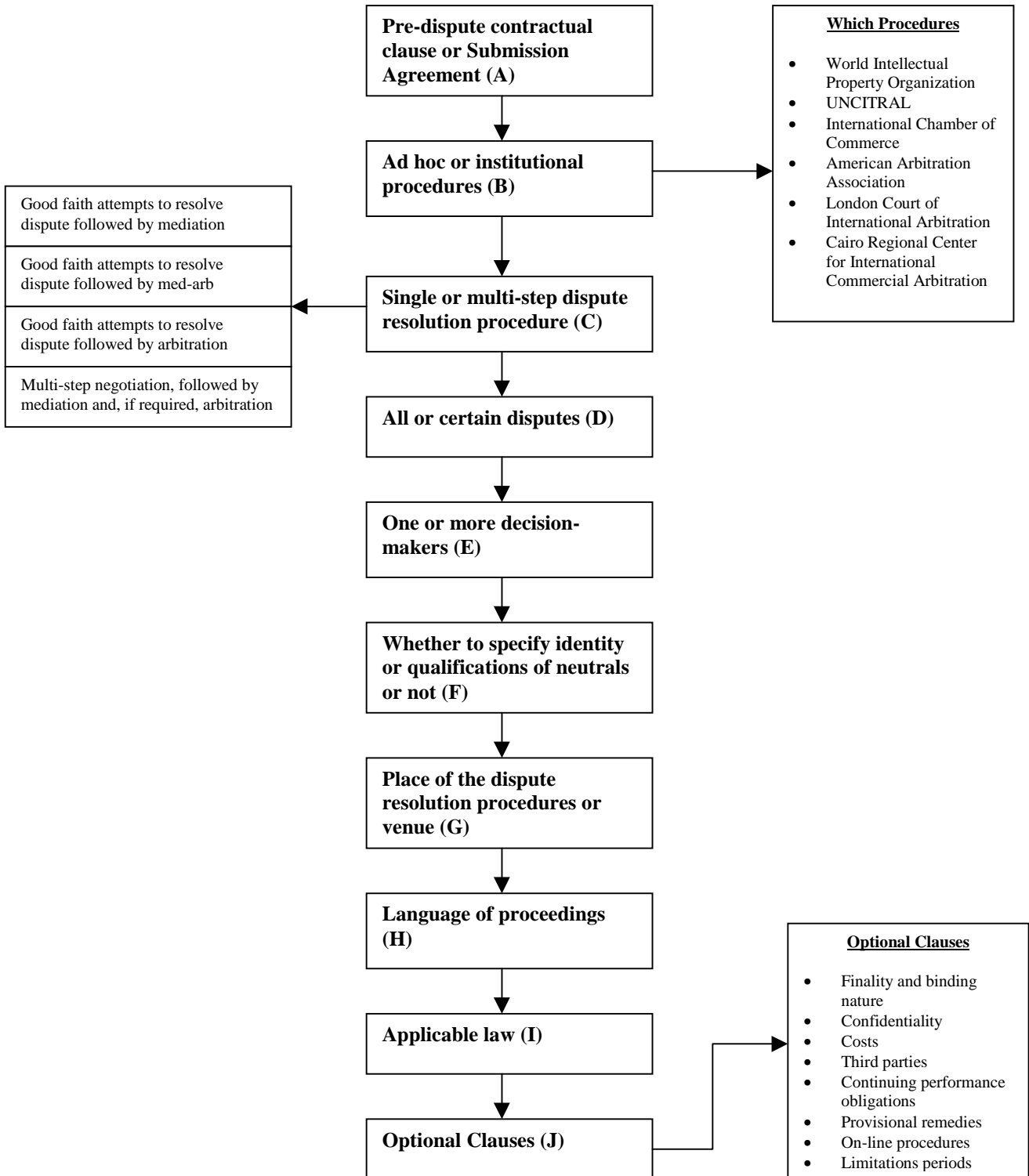
SECTION IV:
DRAFTING GUIDELINES FOR
DISPUTE RESOLUTION CLAUSES
IN ASP SUPPLY CHAIN CONTRACTS

Whether at the time of negotiating their agreement or after a dispute has arisen, the resolution procedure agreed by the parties, in light of the circumstances underlying their contractual relationship (e.g., value of the contract, local versus cross-border) or the dispute between them (e.g., issues in dispute, amount in controversy, number and identity of parties), must be recorded in a written agreement.

The importance of a properly drafted *dispute resolution clause* (i.e., a clause in the parties' contract regarding the process or procedures by which future disputes arising out of, or relating to, their contractual relationship will be submitted for resolution) or *submission agreement* (i.e., a separate contract between the parties recording their agreement on the dispute resolution procedure to which they will submit a dispute that has arisen out of their contractual relationship) should not be underestimated. Where insufficient attention is paid to the drafting of such provisions, more often than not the parties will find themselves fighting over the clause itself or the resolution procedure that is to be followed before even getting to the merits of their dispute. On the other hand, although there is much merit in attempting to draft for all contingencies and to clarify as much as possible the necessary procedures, by doing so, the parties run the risk that with each additional condition or requirement, there may be yet another issue to argue about or potential hurdle to overcome in getting to a final disposition of the dispute.

Set out below are some of the more important elements that should be considered when drafting, adopting or recommending a dispute resolution clause or submission agreement, especially in the context of an international relationship; in domestic contracts, specific local requirements regarding the form or content of the clause may have to be taken into account. The interrelationship of these issues is reflected in the decision tree on the page that follows. (The characters appearing in parentheses refer to the section sub-paragraphs following the diagram.) Several model dispute resolution clauses are provided in Annex A.

Decision Tree for Drafting a Dispute Resolution Clause



A. Pre-Dispute or Submission Clause

The first issue to be addressed is whether or not to include a clause in the contract dealing with the ADR procedures through which the parties' future disputes will be resolved, or to wait until the disputes have arisen to agree on a resolution procedure.

Generally speaking, subject to consumer protection restrictions,²⁸ it is preferable to include a dispute resolution clause at the time of concluding the parties' agreement. Once a dispute has arisen, it may be impossible for the parties to agree about anything, let alone the procedures about which to resolve their dispute. Moreover, a pre-dispute clause provides both parties with a degree of certainty regarding how problems will be resolved and can expedite the dispute resolution process.²⁹

It is also possible to decide on a dispute resolution process after a dispute has arisen and to reflect the parties' agreement on that process in a separate contract, particularly if their relationship is such that an agreement could be achieved without significant delay, expense or acrimony. One of the most often cited benefits of this approach is that it allows the parties to agree on a dispute resolution procedure that best suits the nature of their dispute. While this may be true, the fact that the parties may have previously agreed on a dispute resolution procedure would not preclude their subsequently agreeing on a different procedure in light of the circumstances of their dispute, if they considered this to be in their mutual best interest.

It should be noted that, in the absence of a clause or agreement submitting the parties' disputes to an ADR procedure, their disputes would have to be resolved by litigation in the courts.

B. Ad Hoc or Institutional Procedures

²³ Under the consumer protection laws of certain countries (e.g., Germany), standard form dispute resolution clauses submitting the parties' disputes to arbitration proceedings are impermissible and may be unenforceable. Often a specific agreement, in writing, to submit the dispute for resolution by arbitration is required, after the dispute has arisen.

²⁴ According to the results of the Intermedia Survey, the absence of a defined mechanism for resolving problems was rated by respondent organizations as one of the main obstacles/disadvantages to implementing an SLA with service providers.

ADR procedures may be conducted pursuant to a set of procedural rules developed and sponsored by an institutional dispute resolution service provider (e.g., WIPO Arbitration and Mediation Center, International Chamber of Commerce, American Arbitration Association, Cairo Regional Center for International Commercial Arbitration, Hong Kong International Arbitration Center) and incorporated by reference in to the parties' agreement,³⁰ or according to procedures developed and agreed to by the parties themselves on the basis of their perception of their specific circumstances; that is, as specified in an *ad hoc* dispute resolution clause. A second issue to be decided, therefore, is whether to proceed on the basis of a set of institutional rules or to proceed *ad hoc*.

Generally, the negotiation and drafting of an *ad hoc* dispute resolution clause is time-consuming and difficult and should not be undertaken without specialist advice. Whatever may be the perceived advantages of tailoring the procedures to the parties' specific circumstances, typically, these are far outweighed by the potential pitfalls of undertaking such an exercise.

A dispute resolution procedure administered by a dispute resolution service provider, in accordance with its institutional rules, has many advantages and is generally the preferred form.³¹ Although this entails additional administrative costs attributable to the fees charged by the provider, the benefits received in return are considerable. These include an administrative and supervisory infrastructure; a trained staff focusing on the efficient administration of the dispute resolution procedure; and an independent framework for resolving difficult issues that might arise in the course of the proceedings.³² Another very important benefit of institutional

²⁵ See, e.g., WIPO Mediation Rules, Article 2.

²⁶ In addition to their own rules, several dispute resolution service providers also act as the administering authority for arbitrations pursuant to the UNCITRAL Arbitration Rules.

²⁷ For example, based in Geneva, Switzerland, the WIPO Arbitration and Mediation Center is one of the main dispute resolution service providers in the world. The Center, which is a unit of the International Bureau of the World Intellectual Property Organization, is assisted in its policy-making activities by the WIPO Arbitration and Mediation Council, comprised of external experts in international dispute resolution. The Center has also established an Arbitration Consultative Commission consisting of arbitration experts independent of WIPO, whose role it is to deal with non-routine issues that may arise under the WIPO Arbitration and Expedited Arbitration Rules (e.g., removal of arbitrators). The Center provides the following dispute administration services:

- Guidance regarding the interpretation and application of the relevant procedural rules.
- Assistance to the parties in selecting and appointing the mediator(s) or arbitrator(s), if necessary, with reference to the Center's database of more than 1000 neutrals from more than 100 countries with

ADR is the availability of a tried and tested set of procedural rules providing a known and predictable structure.

The WIPO dispute resolution system comprises three sets of procedural rules,³³ namely, the WIPO Mediation Rules (Annex C; <http://arbitrator.wipo.int/mediation/mediation-rules/index.html>), the WIPO Arbitration Rules (Annex D; <http://arbitrator.wipo.int/arbitration/arbitration-rules/index.html>) and the WIPO Expedited Arbitration Rules (Annex E; <http://arbitrator.wipo.int/arbitration/expedited-rules/index.html>).³⁴ Developed by leading experts in cross-border dispute settlement, the Center's rules are widely recognized as particularly appropriate for information technology, intellectual property, electronic commerce and other disputes arising out of use of the Internet. They are available in the following languages: English, Arabic, French, German, Japanese and Spanish.

expertise in commercial, intellectual property and information and communications technology dispute resolution.

- Fixing the fees of the neutrals, in consultation with parties and the neutrals.
- Administering the financial aspects of the proceedings by obtaining a deposit from each party of the estimated costs and paying out of the deposit the fees of the neutrals and any other support services or facilities, such as fees for interpreters, where they are required.
- Where the proceedings take place at WIPO in Geneva, providing a meeting room and party retiring rooms free of charge.
- Where the proceedings take place outside Geneva, assisting the parties in organizing appropriate meeting rooms and other required facilities.
- Assisting the parties in organizing any other support services that may be needed, such as translation, interpretation or secretarial services.
- Providing such other services or functions as may be required to ensure that the arbitration or mediation procedures are conducted efficiently and expeditiously.

²⁸ The WIPO Center also provides administration services in connection with disputes involving the alleged abusive registration and use of an Internet domain name (e.g., the Internet Corporation for Assigned Names and Numbers' Uniform Domain Name Dispute Resolution Policy; <http://arbitrator.wipo.int/domains/index.html>).

²⁹ The WIPO Expedited Arbitration Rules consist of the WIPO Arbitration Rules modified in certain respects to ensure that the arbitration can be conducted in a shortened timeframe and at reduced cost. For example, the Statement of Claim must accompany the Request for Arbitration (Article 10) and the Statement of Defense must accompany the Answer to the Request (Article 12); there is always a sole arbitrator (Article 14(a)); the sole arbitrator must be appointed within 15 days after the commencement of the arbitration (Article 14(b)); any hearings must be convened within 30 days after the Claimant's receipt of the Answer to the Request and the Statement of Defense (Article 53(b)); the hearings cannot exceed 3 days, save in exceptional circumstances (Article 53(b)); whenever reasonably possible, the proceedings must be declared closed within 3 months (as opposed to 9 months under the WIPO Arbitration Rules) of either the delivery of the Statement of Defense or the establishment of the Tribunal, whichever event occurs later (Article 63); whenever reasonably possible, the final award should be made within one month thereafter (as opposed to 3 months under the WIPO Arbitration Rules) (Article 63).

There are several features of the various WIPO procedures that make them a particularly appropriate choice for resolving ASP supply chain disputes. The most important of these features are summarized in the table below.

Confidentiality
<p>The WIPO Arbitration, Expedited Arbitration and Mediation Rules contain comprehensive provisions dealing with confidentiality. Articles 73-76 of the Arbitration and Expedited Arbitration Rules deal with the maintenance of confidentiality in relation to the existence of the arbitration, the disclosures made within the arbitration, and the award itself; they specify the confidentiality obligations on the part of the parties (including their witnesses), the arbitrators and the Center; and they identify the limitations on the confidentiality requirements, such as when disclosure is required by law or by a competent body. Both sets of Rules allow a party to invoke the confidentiality of a special class of information it may wish to submit. Article 52 contains elaborate provisions allowing an arbitral tribunal to make protective orders in respect of trade secrets and other confidential information that one party wishes to have specially protected. To assist its determination as to whether and to whom the information may be disclosed, in exceptional circumstances, the tribunal is authorized to designate a confidentiality advisor.</p> <p>Articles 11 and 12(b) of the WIPO Mediation Rules clarify that the mediator cannot disclose information received from one party to the other party, without express authorization. Article 14 prohibits any sort of record to be made of meetings of the parties and the mediator. Article 15 prohibits all persons involved in the mediation (the mediator, the parties, party representatives and advisors, independent experts, other persons present at the meetings) from using or disclosing information concerning or obtained in the course of the mediation. Following the termination of the mediation, Article 16 requires the return of written pleadings and other documents and materials received by all persons involved in the mediation to the submitting party and the destruction of notes relating to meetings with the mediator. Article 17 prohibits the introduction into evidence during any subsequent judicial or arbitration proceeding any views expressed by a party in the mediation regarding settlement; party admissions made in the course of the mediation; proposals made or views expressed by the mediator; or a party’s unwillingness to accept a particular settlement proposal.</p>
Speed
<p>Bearing in mind the typical need of parties to an ASP supply chain dispute for speedy dispute resolution, the WIPO dispute resolution scheme is especially notable for the emphasis placed on the expeditious resolution of disputes. This is evidenced not only by the WIPO Expedited Arbitration Rules, but also in the WIPO Arbitration Rules. The latter contain numerous provisions drafted with the objective of eliminating causes of unnecessary and avoidable delay. <i>See, e.g.</i>, Article 13 (exhorting each party to ensure that its representatives “have sufficient time available” to enable the arbitration to proceed expeditiously); Article 18 (requiring in cases involving multiple claimants or respondents, where three arbitrators are to be appointed, that unless each set of claimants or respondents makes a joint nomination, neither side will be allowed to make an appointment); Article 23 (requiring an arbitrator’s commitment “to make available sufficient time to enable the arbitration to be concluded and completed expeditiously”); Article 33, (stating that the Center has the discretion not to allow a party to make a new appointment after the replacement of its previous nominee); Article 34 (providing that a replacement arbitrator is not entitled to a repetition of prior hearings except by decision of the arbitral tribunal); Article 35 (permitting two arbitrators to proceed with the case notwithstanding the non-participation of the third arbitrator); Article 38 (instructing the tribunal to ensure that the arbitration takes place “with due expedition”); Article 54 (empowering the arbitral tribunal to limit the presentation of irrelevant or redundant witness testimony); Article 61 (providing that, in the absence of a majority, the presiding arbitrator may decide as if acting as a sole arbitrator); Article 63 (obliging the tribunal to inform the WIPO Center about delays in closing the proceedings and in making the award); Article 65 (stating the tribunal’s discretion to suggest that the parties explore settlement).</p> <p>The WIPO Mediation Rules reflect a similar concern for speed. <i>See, e.g.</i>, Article 6(a) (undertaking by mediator “to make available sufficient time to enable the mediation to be conducted expeditiously”); Article 10 (requiring the parties to cooperate in good faith with the mediator to advance the mediation “as expeditiously as possible”); several other provisions where terms such as “immediately” or “promptly” are used.</p>
Appointment of Neutrals
<p>The WIPO Arbitration Rules contain detailed provisions regarding the appointment of the arbitral tribunal. Of particular relevance to ASP supply chain disputes is the fact that the Rules leave it to the parties to decide</p>

whether the arbitrator(s) should possess certain technical expertise or other qualifications. The WIPO Center, as administering authority, does not reserve the right to confirm the parties' appointment. The parties thus have the freedom to agree any of the different possible variations for constituting the arbitral tribunal with or without the appointment of experts. Moreover, given the "one-to-many" feature of ASP supply chain disputes, the provisions contained in Article 18 of the WIPO Arbitration Rules regarding the appointment of the arbitral tribunal in multi-party disputes are notable.

Appointment of Experts

Article 55 of the WIPO Arbitration and Expedited Arbitration Rules authorizes the arbitral tribunal to appoint one or more independent experts to report on specific issues designated by the tribunal. That provision sets out the procedures for party participation in determining the expert's terms of reference, comments by the parties on the expert's findings, and the weight to be given by the tribunal to the expert's report and testimony.

Technical Primers

Article 51 of the WIPO Arbitration and Expedited Arbitration Rules contains a unique provision allowing for the parties to submit jointly a technical primer setting out the background of the technical, scientific or other specialized information that may be required for the tribunal to understand fully the matters in issue.

Interim Relief

The WIPO Arbitration and Expedited Arbitration Rules expressly provide that a party's request to a court for interim relief, or to enforce an interim order by the arbitral tribunal, will not be considered incompatible with the parties' agreement to arbitrate, or a waiver of that agreement (Article 46(d)). In addition, both sets of Rules state that an arbitral tribunal has the authority to issue any provisional orders or take other interim measures that it deems necessary, if required, subject to the requesting party furnishing appropriate security (Article 46(a)). Moreover, in recognition of potential enforceability concerns under the New York Convention, the Rules provide that "[m]easures and orders contemplated under this Article may take the form of an interim award" (Article 46(c)).

Outcome Oriented Mediation

The WIPO Mediation Rules are designed to provide the mediator and the parties with a considerable degree of flexibility in the conduct of the mediation. They also provide the mediator with a range of options to maximize the likelihood of an outcome. Thus, where a mediator believes that issues in dispute between the parties are not susceptible to resolution through mediation, under Article 13 of the WIPO Mediation Rules, the mediator is authorized to propose procedures or means most likely "to lead to the most efficient, least costly and most productive settlement of those issues", including (i) an expert determination of one or more particular issues; (ii) arbitration; (iii) arbitration on the basis of last offers of settlement by the parties; (iv) arbitration in which the mediator will, with the express consent of the parties, act as sole arbitrator (with the understanding that the mediator will be able to take into consideration information received during the mediation).

If institutional arbitration is chosen, it is generally advisable to use the standard dispute resolution clauses made available by the selected institution. Such clauses typically have been drafted or reviewed by experts and significantly minimize the possibility of dilatory tactics on the part of the one of the parties once a dispute has arisen and the resolution procedure invoked. Moreover, as the clauses normally will incorporate the institutions' procedural rules, the need to spell out a myriad of procedural matters in the parties' agreement is eliminated. Examples of the WIPO Center's clauses are provided in Annex A.

C. Complexity of Clause/Procedure

The contracting parties will also have to decide whether they desire a single-step or multi-tiered dispute resolution procedure. Typical multi-step procedures often require the parties to first try to settle their dispute through negotiation, and will identify the level of operational or executive personnel at which the negotiations should take place as well as set time limits

within which the negotiations must be completed. In the event that attempts to reach a negotiated settlement fail, the clause may call for the parties to enter into mediation or proceed directly to arbitration (or even litigation). Where mediation is required, it is typically time-barred. If the parties are unable to reach a settlement through mediation within the stipulated time period, the dispute is submitted to arbitration. By contrast, in a single-step procedure, the parties' dispute is submitted directly for third-party resolution without any prerequisites, with arbitration being the most commonly chosen method.

While arbitration is generally regarded as an effective method of resolving disputes, it can be costly and time consuming. Thus, it is often considered as a last resort to be employed when other efforts to resolve the dispute fail. The rationale underlying multi-tiered dispute resolution clauses is that if there are to be attempts to resolve a dispute before resorting to arbitration, these attempts should be formalized and specified in the parties' contract. Having an appropriate multi-tiered clause often may result in the resolution of the dispute by a specified and relatively cheap and cost-effective procedure without having to resort to arbitration.³⁵ Typically, multi-tiered clauses are found in high-value or long-term contracts.

There are several potential difficulties with multi-tiered dispute resolution clauses. The drafting of the clause may raise questions concerning the meaning and operation of a particular stage or stages of the dispute resolution procedure. There may also be an issue as to the point of time at which one procedure terminates and the next may be employed. Another question that arises is whether each stage, or procedure, is enforceable at law. Yet another question is whether a multi-tiered clause can be enforced under laws and conventions that specifically give effect to arbitration agreements. Because of these and similar issues, expert assistance should be sought in deciding the appropriateness of a multi-tiered clause in the context of the parties' specific contractual relationship and the form that it should take.

D. Scope of Clause

³⁰ Another reason cited for the employment of multi-tiered clauses is the diversity of possible disputes in complex contracts of lengthy duration. The purpose of a dispute resolution clause in a contract is to deal with future disputes. These future disputes can be varied in nature. They can involve very different issues and bear very different monetary values. Hence, it is argued, a multi-tiered dispute resolution procedure is likely to contain, in one tier or another, a procedure appropriate for a particular dispute.

Another issue to be decided is whether the clause should be drafted widely so as to include all possible disputes arising out of the parties' relationship, or to exclude certain categories of disputes for resolution by litigation. In part, this decision will be based on business and company policy considerations; for example, software developers may wish to litigate an alleged copyright infringement issue in court in order to send a message and set a precedent. It will also have to take into account which types of disputes may or may not be resolved through ADR as a matter of law.

The issue arises most frequently in the context of considering the use of arbitration. The question of the arbitrability of a dispute relates to the power of a sovereign government to decide which matters may be settled by arbitration and which may not. If an arbitration clause covers matters that cannot be settled by arbitration under (1) the applicable law of the agreement, (2) the law and public policy of the place of arbitration, or (3) the law and public policy of each country where the award may be taken for enforcement, the resulting arbitration award may be partially or wholly unenforceable.³⁶ That said, there are very few substantive issues that cannot be settled by arbitration.

E. Number of Decision-makers

The parties will also have to decide whether to specify the number of decision-makers that will decide the dispute and, if so, whether to submit the dispute to one or more third-party neutrals.

The election most typically made when a dispute is to be submitted to mediation is to specify a sole mediator. However, in international cases, co-mediation by two mediators, one often located at the place of one party and the second located at the place of the other party, has proven to be quite successful. If more than one mediator is desired, this should be clarified in the clause. The WIPO Mediation Rules cater for the possibility that more than one mediator may be appointed.³⁷

³¹ Article V(2) of the New York Convention provides that the recognition and enforcement of an arbitral award may be refused if the competent authority in the country where enforcement is sought finds that, *inter alia*, the subject matters is not capable of settlement by arbitration under the law of that country; or the recognition and enforcement of the award would be contrary to the public policy of that country.

³² WIPO Mediation Rules, Articles 1 and 6.

It is generally the better practice to specify the number of arbitrators in the arbitration agreement, even though this may limit some flexibility in choosing the number later in response to the nature and complexity of the dispute. The considerations that should be taken into account in deciding on the number include, the value of the contract, the location of the parties, their nationality, the place of arbitration, to mention but a few.

The advantages of a sole arbitrator typically include easier logistics, lower fees and a quicker path to a final decision than with a three-member panel. The appointment of a sole arbitrator may also mean fewer procedural complexities, in the event of a dispute involving more than one claimant or respondent. On the other hand, if a sole arbitrator arrives at a wrong decision, normally, there is no appeal procedure by which that decision can be corrected. A sole arbitrator is also denied the benefit of consultation with fellow tribunal members.

Where the arbitral tribunal is to be composed of three members, under most institutional rules, including the WIPO Arbitration Rules, each party will usually have the right to nominate one arbitrator, leaving the presiding arbitrator to be chosen by the two party appointees. While the party-appointed arbitrator is not (or should not be) an advocate for a party's position, the party appointee can ensure that a party's case is properly understood by the tribunal, and can clarify issues that may arise due to language differences, different legal terminology, and unfamiliar legal principles and concepts. Also, even though a three-member tribunal may take longer in arriving at a decision and the costs involved are significantly higher, the risk of an erroneous award is lowered considerably.

The WIPO Arbitration Rules provide that the arbitral tribunal will consist of the number of arbitrators as agreed by the parties.³⁸ They also provide that if the arbitration clause is silent and the parties are unable to agree on the number of arbitrators, the WIPO Center will designate a sole arbitrator, unless the circumstances of the case justify a three-member tribunal.³⁹ The WIPO Arbitration Rules contain particularly detailed clauses dealing with the tribunal appointment procedures when the parties, or their appointees, are unable to agree or in the event of a default.⁴⁰

³³ WIPO Arbitration Rules, Article 14(a).

³⁴ WIPO Arbitration Rules, Article 14(b).

³⁵ WIPO Arbitration Rules, Articles 15 to 20.

Under the WIPO Expedited Arbitration Rules, unless the parties agree otherwise, the proceedings are always before a sole arbitrator.⁴¹

F. Specifying the Identity or Qualifications of the Neutrals

The parties will also have to confront the issue of whether specifically to identify the neutral(s) by name, or to describe with any particularity the qualifications of the person(s) who should serve as the neutral(s).

Generally, it will be easier for the parties to agree on the identity of the neutral(s) or their qualifications before a dispute has arisen. Particularly if the parties are able to name the neutral(s) in the agreement, can greatly expedite the dispute resolution process. There are, however, several downsides. For example, the person(s) identified in the agreement may not be the best suited for the type of dispute that must be resolved, or may not be willing or able to serve.

There are additional factor to be taken into account where the parties are considering only describing the qualifications of the person(s) who should serve as the neutral(s). The appointment of a technically sophisticated neutral can reduce the need for an expert opinion on complex matters. It can also lead to a quicker and cheaper outcome. In practice, however, the choice of a technically sophisticated neutral must be weighed against the need for a neutral who is a dispute resolution specialist with the skills to keep the procedures on track. In addition, the dispute may not necessarily require a neutral with the particular skill set identified in the dispute resolution clause.⁴² Lastly, experience has shown that the very same individuals who previously were able to agree on the qualifications or characteristics of the neutral(s), will very quickly come to an intractable impasse as to whether the candidates proposed by the other side satisfy the contractual criteria. It may also not be possible for the

³⁶ WIPO Expedited Arbitration Rules, Article 14.

³⁷ For example, a dispute involving a large scale integration project may relate to a relatively simple question of contract law rather than the technical aspects of the project. In such a case, a clause requiring that the arbitrator be a computer engineer with a doctorate could well limit the parties' choices unnecessarily.

dispute resolution service provider as the appointing authority to find one or more suitable candidates.

G. Place of the Dispute Resolution Procedure

Where the parties' dispute is to be submitted to arbitration, it will be important to decide on the place or "legal seat" of the arbitration, particularly in the context of an international relationship (although designating the venue can also facilitate matters in a domestic contract). Indeed, choosing the place of arbitration may be one of the most significant issues to be negotiated in an international contract as it is the law of the place of the arbitration (which is not to be confused with the law that will apply to the substance of the parties' dispute) that will govern the arbitral proceedings.

Under most institutional rules, including the WIPO Arbitration Rules, it is possible for the arbitral tribunal, unless otherwise agreed by the parties, to meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties.⁴³ This, however, does not change the "legal seat" of the arbitration.

The most important consideration when selecting an arbitration venue, is to ensure that the country in which the seat of arbitration will be located offers an "arbitration friendly" environment; that is, for example, where the local courts will enforce the arbitration agreement, not interfere unduly in the arbitration process, and respect the finality of the award. Generally, these objectives can be achieved by locating the place of arbitration in a country that:

- (1) is a signatory to the New York Convention, which provides for both the enforcement of arbitration agreements and the enforceability of arbitral awards.⁴⁴

³⁸ WIPO Arbitration and Expedited Arbitration Rules, Article 39(b).

³⁹ Article 2 of the Convention requires the courts of a signatory state to suspend court proceedings brought in breach of the arbitration agreement and refer the parties to arbitration. Also of relevance is the so-called "reciprocity reservation", pursuant to which the courts of a state that has adopted the reservation will enforce an award under the Convention only if it has been made within the territory of another state which has also adhered to the Convention. The nationality of the parties is immaterial. It is the "nationality" of the award that matters. There are other conventions that may also be relevant in an international arbitral proceeding, including: the European Convention on International Commercial Arbitration of 1961 and the Inter-American Convention on International Commercial Arbitration of 1975.

(Even if the country of the place of arbitration is a signatory to the Convention, the local law should be reviewed to determine the extent to which the courts of that country, as practical matter, may be able to interfere unduly in the arbitral process in connection with the enforcement of the award.); and

- (2) has fully and properly adopted the UNCITRAL Model Law on International Commercial Arbitration;⁴⁵ this is not an absolute criterion, as there are other countries that have adopted pro-arbitration laws.

Other factors to be considered in choosing the place of arbitration include geographical and cultural neutrality, convenience of venue for the neutrals, the parties and their counsel, and witnesses, availability of local counsel, and availability of support services, transportation, hotels, meeting facilities, court reporters.

If the parties have not agreed on the place of arbitration, the WIPO Arbitration Rules provide that this decision will be taken by the WIPO Center, taking into consideration any observations of the parties and the circumstances of the arbitration.⁴⁶

The choice of the place of the mediation does not have the same legal implications as is the case with the choice of the place of arbitration. Generally, the place of mediation should be determined on the basis of convenience to the parties; because of the multi-party factor in ASP supply chain disputes it may be advisable for an ASP to insist on the place of mediation being where its principal offices are located. It should be noted that many mediations have been concluded successfully without any physical meeting of the parties or their counsel. It is increasingly common for preliminary meetings and even mediation caucuses to be held using video-conferencing, Internet-based facilities and other communications technology. The extent to which such tools are used depends not only on the parties' acceptance, but also on the mediator's and the administering entity's familiarity with them.

⁴⁰ The Model Law was adopted by the United Nations in 1985 aimed at establishing an internationally acceptable arbitration law which countries could enact with their own legislation, subject only to taking account of any special requirements or idiosyncrasies of their particular legal system.

⁴¹ WIPO Arbitration and Expedited Arbitration Rules, Article 39(a).

H. Language of the Proceedings

In an international contractual relationship, the language to be used in the mediation or arbitral proceedings should be specified. As a practical matter, this may eliminate the need to use interpreters and translators. More importantly, it can minimize the disadvantage resulting from having to struggle with an interpreter's approximations and transliterations of technical terms and legal jargon. When choosing the language of the arbitration, consideration should be given to the applicable law of the contract, the place of arbitration, the language of the contract, the language of the other principal documents, among other factors.

If no language is specified, the WIPO Arbitration Rules provide that the language of the arbitration will be the same as that of the arbitration agreement, subject to the power of the arbitral tribunal to decide otherwise.⁴⁷

I. Applicable Law

The many important consequences of the choice of applicable law are beyond the scope of this document. Suffice it to say that parties should not leave the choice of substantive law unspecified. Rather, the parties should try to resolve the question of what law will govern their substantive rights and obligations under the contract at the time of negotiating the contract.

The WIPO Arbitration Rules provide that the tribunal will decide the substance of the dispute in accordance with the law designated by the parties. It is further clarified that the law designated will be taken to mean the substantive law and not the conflict of law rules of the jurisdiction in question, unless there is a contrary indication. If the parties have not made a choice, the tribunal is authorized to apply the law that it deems to be appropriate.⁴⁸ The law applicable to the arbitration, is the law of the place of the arbitration, unless the parties have expressly agreed on another arbitration law and such agreement is permitted by the law of the place of the arbitration.⁴⁹

⁴² WIPO Arbitration and Expedited Arbitration Rules, Article 40(a).

⁴³ WIPO Arbitration and Expedited Arbitration Rules, Article 59(a).

⁴⁴ WIPO Arbitration Rules, Article 59(b).

J. Optional Clauses

As mentioned, one of the main advantages of using a model dispute resolution clause furnished by the selected administering entity, in which that institutions' procedural rules will be incorporated by reference, is that it obviates the need to draft language dealing with a wide range of issues bearing on the dispute resolution process. While it is possible to derogate from the provisions of a particular institutional rule, this should be clearly stated in the parties' agreement and done with extreme caution.

Discussed below are several matters which are not typically addressed by institutional dispute resolution rules and which the parties to an ASP supply chain contract may wish to address in the dispute resolution clause with additional language. The list of items discussed is by no means all-inclusive and which of the supplementary items should be included will depend on the specifics of each individual contractual relationship.

1. Scope of Relief

The issue of limiting or expanding the scope of relief that may be granted arises most frequently in the context of drafting an arbitration clause; however, the parties may also wish to take the relevant considerations in that context into account in determining whether to circumscribe the scope of settlement in a mediation.

Generally speaking, under a broad arbitration clause, the tribunal will have a wide-ranging authority regarding the relief that may be granted. In certain circumstances the parties may wish to include or exclude certain specific remedies. For example, the parties may wish to specify that the tribunal will have no authority to award punitive damages; or to exclude the possibility of an award of consequential damages or injunctive relief; or to limit the amount of the award to a specified monetary amount or to such amount as may be available pursuant to a liquidated damages clause.

In connection with the foregoing, it should be noted that the WIPO Arbitration and Expedited Arbitration Rules provide that "in the light of all the circumstances and the outcome of the arbitration" the arbitrators may apportion the costs of arbitration⁵⁰ and order a party "to pay

⁴⁵ WIPO Arbitration and Expedited Arbitration Rules, Article 71.

the whole or part of reasonable expenses incurred by the other party in presenting its case”.⁵¹ The award may be rendered in any currency and the tribunal is authorized to award simple or compound interest to be paid by a party on any sum awarded against that party. In this connection, the tribunal is free to determine the interest rate that it considers to be appropriate, without being bound by legal rates of interest, and is free to determine the period for which interest is to be paid.⁵²

Under Article 24 of the WIPO Mediation Rules the parties are required to share all costs associated with the mediation (e.g., the registration fee, the fees of the mediator, the required travel expenses of the mediator, any expenses associated with obtaining expert advice), except if they have agreed otherwise.

2. Third Parties

As discussed above, ASP supply chain disputes will often involve multiple parties and the circumstances of the dispute may benefit from the joinder of third parties in to the dispute resolution proceedings or the consolidation of separate proceedings. However, in the absence of specific contractual clauses dealing with consolidation and third-party joinder, disputes which might better be dealt with together must nevertheless be dealt with separately and several proceedings, normally, will have to organized on the basis of each separate dispute resolution clause.

Set out below are examples of joinder and consolidation clauses, pursuant to which multi-party proceedings have been successfully conducted. It is to be noted that, aside from the fact that the clause must be technically correct, the extent to which a multi-party proceeding will be possible will depend largely on the level co-operation between the parties. It will also depend on the extent to which the various arbitration clauses are materially similar (e.g., same place of arbitration, same language, same number of neutrals). In addition, such factors as the laws applicable to the arbitration, the underlying procedural rules, and the experience and organizational capabilities of the administering entity and the neutrals will also be significant.

Joinder

⁴⁶ WIPO Arbitration and Expedited Arbitration Rules, Article 72.

⁴⁷ WIPO Arbitration and Expedited Arbitration Rules, Article 60.

The parties acknowledge that performance of this contract is affected by the contracts or the types of contracts listed in Attachment __ ("Related Contracts").

To the extent that a dispute, controversy or claim ("Dispute") arising under, out of, or relating to this contract is based on or would affect a Related Contract, the parties undertake to cooperate to ensure that such Dispute and any issue with respect to any such Related Contract shall be resolved in a cost and time effective manner.

In particular, the parties hereby agree and consent to the joining of the parties to any such Related Contract to the extent that the Arbitral Tribunal rules that such joinder would be of assistance in resolving the Dispute and any related disputes under Related Contracts. The parties expressly authorize the jurisdiction of the Arbitral Tribunal to order any such joinder on such terms as the Arbitral Tribunal shall decide.

Each party shall ensure that its Related Contracts provide that the Arbitral Tribunal with respect to any Dispute has jurisdiction to join parties to such Related Contracts to proceedings relating to the Dispute. In particular, each such Related Contract shall expressly provide that any Dispute thereunder is subject to the provisions of the [WIPO Arbitration/Expedited Arbitration/Mediation Rules]. If a party is unable to negotiate such provisions with respect to a Related Contract, it shall give the other party notice thereof and request that it waive such requirement with respect to such Related Contract. The other party shall waive such requirement if such a waiver is necessary or appropriate in the circumstances.

Consolidation and Joinder - Mediation

[Clause to be included in ASP-Customer Contract]

In the event that a dispute is referred to mediation under [paragraph number of the mediation clause] and one of the parties considers that this dispute is connected to:

- (a) Services or goods provided to that party under a third-party contract (***Partner Contract***), the other party shall not object to the participation of such third-party in any meetings relating to the mediation or to the participation of the third-party in the mediation.
- (b) A dispute relating to or arising out of a Partner Contract (the ***Connected Dispute***), which is to be or has been referred to mediation, that party may, by notice in writing, require that the Connected Dispute be referred to the mediator appointed pursuant to this clause. The other party shall not object to the consolidation of the mediations.

[Clauses to be included in ASP-Partner Contract]

In the event that:

- (a) A mediation has already been commenced under a separate contract for services to be provided by [the ASP] (the ***Services Contract***), and
- (b) A dispute relating to or arising out of this contract is to be referred to mediation under [paragraph number of the mediation clause], and
- (c) [The ASP] considers that the dispute under this contract is connected to the dispute that is the subject of the mediation under the Services Contract (a ***Connected Dispute***),

[The Partner] shall not object to a request by [the ASP] that the dispute under this contract be consolidated with the dispute referred to mediation under the Services Contract.

In the event that:

- (a) A mediation has been commenced under the Services Contract, and
- (b) [The ASP] considers that the Connected Dispute is connected to services or goods to be provided under this contract,

[the ASP] may, by notice in writing, request that the [the Partner] provide such information and attend such meetings in connection with the mediation of the Connected Dispute, as may be considered reasonable.

Consolidation and Joinder - Arbitration

[Clause to be included in Customer Contract]

In the event that a dispute is referred to arbitration under [paragraph number of the arbitration clause], and one of the parties considers that this dispute is connected to:

- (a) Services or goods provided to that party under a third-party contract (**Partner Contract**), the other party shall not object to the joinder of the third-party in to the arbitration.
- (b) A dispute relating to or arising out of a Partner Contract (**Connected Dispute**), which is to be or has been referred to arbitration, that party may, by notice in writing, require that the Connected Dispute be referred to and finally settled in the arbitration pursuant to this clause. The other party shall not object to the consolidation of the arbitrations.

[Clauses to be included in Partner Contract]

In the event that:

- (a) An arbitration has already been commenced or is to be commenced under a separate contract for services to be provided by [the ASP] (the **Services Contract**), and
- (b) A dispute relating to or arising out of this contract is to be referred to arbitration under [paragraph number of the arbitration clause], and
- (c) [The ASP] considers that the dispute under this contract is connected to the dispute that is the subject of the arbitration under the Services Contract (a **Connected Dispute**),

[the ASP] may, by notice in writing, require that the dispute under this contract be referred to and finally settled in the same arbitration concerning the Connected Dispute (the **Connected Arbitration**). [The Partner] shall not object to the consolidation of the arbitrations and shall participate in the Connected Arbitration and be bound by the award rendered in the Connected Arbitration in the same manner as if the dispute under this contract had been referred to and finally settled in a separate arbitration pursuant to this clause.

In the event that:

- (a) An arbitration has been commenced under the Services Contract, and

- (b) [The ASP] considers that the Connected Dispute is connected to services or goods to be provided under this contract,

[the ASP] may, by notice in writing, request that the [the Partner] shall be joined as a party in the Connected Arbitration. [The Partner] shall not refuse any such request and shall participate in the Connected Arbitration and be bound by the award rendered in the Connected Arbitration in the same manner as if a dispute had been referred to and finally settled in a separate arbitration pursuant to this clause.

In the event that:

- (a) An arbitration has been commenced under the Services Contract, and
- (b) [The ASP] considers that the Connected Dispute is connected to services or goods to be provided under this contract,

[the ASP] may, by notice in writing, request that the [the Partner] shall provide such information and attend such meetings relating to the Connected Arbitration, as may be considered reasonable.

3. Continued Performance

It may be useful to clarify the parties' respective performance obligations, whether the provision of services or payment for those services, in the event of a dispute. Language dealing with this issue may be important for two reasons. First, it is unlikely that, in the event of a dispute, a customer will no longer continue to require the application services; and if it is to continue to receive the services, it should be obliged to continue making its payments. Second, the fact that the ASP would be required to continue performing in light of the contractual language and the customer required to continue to make payment may increase the likelihood of the parties coming to an amicable settlement of their dispute.

Continued Performance

Each party agrees to continue performing its obligations under this Agreement during the pendency of any dispute resolution procedure commenced in accordance with this Agreement, except to the extent that issue(s) in dispute may preclude performance. A dispute over payment shall not be deemed to preclude performance.

In the event of a dispute, pursuant to which a party believes in good faith that it is entitled to withhold payment during the pendency of the dispute resolution process, the other party shall, subject to the payment into an interest bearing escrow account of the disputed amounts, continue to perform in accordance with its obligations under the Agreement. The [identify party that is withholding payment] shall continue to pay any undisputed amounts to [identify the party that is the beneficiary of the payments]. Upon resolution of the dispute, the parties shall allocate the funds in the escrow account, plus any interest earned on such funds, in accordance with the resolution of the dispute.

4. Discovery

Generally speaking, the term “discovery” in the context of dispute resolution refers to procedural devices that can be used by one party to obtain facts and information about the dispute from other parties in order to assist that party in preparing its case. Discovery is an integral aspect of trial practice in the Anglo-American legal tradition and is the most frequently cited reason for the long delays and high costs of court litigation. Discovery is not common in civil law traditions (e.g., in Continental Europe). The tools of discovery include depositions upon oral and written questions, written interrogatories, and production of documents or things.

As discussed above, among the main benefits of ADR is that the scope of discovery is very limited, and largely subject to the discretion of the neutral. For example, Article 48(b) of the WIPO Arbitration and Expedited Arbitration Rules provides that:

At any time during the arbitration, the Tribunal may, at the request of a party or on its own motion, order a party to produce such documents or other evidence as it considers necessary or appropriate and may order a party to make available to the Tribunal or to an expert appointed by it or to the other party any property in its possession or control for inspection or testing.

In international contracts, where the parties wish to be more specific regarding the standards and procedures relating to the taking of discovery, reference may be made to the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (the “IBA Rules of Evidence”), which strike a sound balance between different procedural perceptions and traditions. The IBA Rules of Evidence supplement the arbitration rules chosen by the parties. The clause below is based on the clause recommended by the IBA.

Discovery
The parties agree that the IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration (IBA Rules), as in force at the time of the institution of the arbitral proceedings, shall apply together with the WIPO [Arbitration/Expedited Arbitration] Rules governing any submission to arbitration incorporated in this contract. Where the IBA Rules are inconsistent with the aforesaid the WIPO [Arbitration/Expedited Arbitration] Rules, the IBA Rules shall prevail, but solely as regards the presentation and reception of evidence.

5. Effect of Award

Where the designated procedural rules do not clarify the parties' agreement as to the effect to be given to the arbitral tribunal's award, the parties should include language in the dispute resolution clause along the lines contained in Article 64 of the WIPO Arbitration and Expedited Arbitration Rules. That Rule provides as follows:

By agreeing to arbitration under these Rules, the parties undertake to carry out the award without delay, and waive their right to any form of appeal or recourse to a court of law or other judicial authority, insofar as such waiver may validly be made under the applicable law.

The award shall be effective and binding on the parties as from the date it is communicated by the Center pursuant to Article 62(f), second sentence.

* * * *

SECTION V

DISPUTE AVOIDANCE BEST PRACTICES AND GUIDELINES

Naturally, it would be optimal to avoid disputes from materializing in the first place. Particularly in the context of a long-term commercial relationship, however, this may not always be possible. Even so, there are a number of measures that, if properly implemented, can significantly minimize the risk of misunderstandings or prevent a minor technical or administrative problem from escalating into a full-blown dispute.

As the ASP business matures, the delivery of services is expected to migrate towards an automatic provisioning, real-time service delivery model in which the parties providing the service will rely heavily on the operational capabilities of their partners for the flow of information, payment and services to be as fluid and responsive as possible. As greater reliance between the parties occurs, the importance of sound contractual relationships, and effective and rapid contingency planning and dispute resolution processes will become even more critical to the avoidance of disputes in the ASP supply chain.

A. Operational Best Practices

Best Practice
<p><i>Adopt and promote operational best practices in the following general areas:</i></p> <ul style="list-style-type: none">• <i>Infrastructure planning and management;</i>• <i>Connectivity planning and management;</i>• <i>Security planning and management;</i>• <i>Applications planning and management;</i>• <i>Implementation planning and management; and</i>• <i>Support planning and management.</i>

1. General Guidelines

As a threshold matter, the best way of minimizing the risk of a dispute is to have a sound, well conceived and properly developed and implemented delivery model, including operational best practices in the areas broadly set out below.⁵³

Infrastructure Planning and Management
<p>Data center – environmental control and disaster protection, access control and guidelines, especially for shared cabinet or rack infrastructures;</p> <p>Server configuration – issues relating to dedicated versus shared hardware environments;</p> <p>Availability planning and management - load-balancing,⁵⁴ clustering⁵⁵ and geographical redundancy;⁵⁶</p>
Connectivity Planning and Management
<p>Design of network infrastructure – minimization of data latency and packet loss, elimination of the possibility of a single point failure, e.g., in the event of a link failure, the network should be designed to instantly reroute traffic, avoiding an interruption of service;</p> <p>Scalability – to meet growing business requirements;</p> <p>Connectivity options and limitations in the global market place.</p>
Security Planning and Management
<p>Authentication – procedures and systems for verifying not only the users of the system, but also the validity of interacting applications and network devices in the delivery model;</p> <p>Access control – the classification of resources, the separation of duties, and the implementation of a system that enforces a relationship between resources, duties and the user;</p> <p>Integrity - the protection of applications and data from unauthorized modifications, whether malicious or accidental, minimizing interruption in service through spare hardware normally available and ready for use at the data center, multiple network paths using diverse carriers, software system and unit testing during development and production to test application correctness, disaster recovery and business continuity plans in place to address unplanned outages;</p> <p>Confidentiality – the protection of applications, data, and their use from disclosure to unauthorized</p>

⁵³ This section is based on *A Guide to the ASP Delivery Model*, a comprehensive document prepared by the ASP Industry Consortium, itemizing best practices in a wide range of ASP operations.

⁵⁴ Load balancing along with fail-over capabilities measures the responsiveness of a set of local servers in order to re-direct clients to the most responsive server in that set.

⁵⁵ One common method of clustering involves the connection of different computers using software technology and physical interconnects. The physical connections are used to transmit data between servers and to tie applications together, so that if one server fails the end-user can continue as if nothing happened.

⁵⁶ Ensuring the availability of systems must take into account the possibility of an entire LAN or even a data center becoming non-functional due to a localized problem. Geographical redundancy can minimize the impact of a local outage by allowing systems in another location to take over for the application.

persons or programs through network monitoring, limiting the visibility of different system functions through covert channels, clearing disk space, memory and other temporary storage before re-use to guarantee that the previous contents cannot be restored;

Non-repudiation – the ability to prove to a third party that a sender actually sent a message;

Accounting and audit – systems that maintain a record of system and user activity, provide an audit trail to determine how, when and why a system event occurred, detect anomalous use of system resources or events that occur outside of the designed chain of events;

Availability/continuity of operations - an ASP must plan and implement procedures to ensure that operations continue despite hardware/software failures, natural disasters or other unforeseen events (although liability for such events can be limited contractually) through business impact assessments, business continuity planning, risk mitigation measures, response and recovery planning;

Physical security – the implementation of physical barriers and control procedures as preventive measures or countermeasures against threats to resources and sensitive information;

Procedural security – security awareness training, security policy development; security incident handling.

Application Management

Application ownership issues;

Adequate software and database licenses;

Pricing policies and management;

Application readiness – definition of bandwidth requirements, definition of user interface requirements, capacity planning and management, scalability assessments, application reliability testing and assessment, availability, adaptability;

Responsibility demarcation - all ASPs must decide where their responsibility for the application and performance ends – at the data center, at the customer premise devices, desktops;

Application Administration – ASPs must decide what administrative tasks can be performed by the customer and how the application security is setup and maintained

Application support - scope, procedures, method and systems.

Implementation Planning and Management

Ensuring that the right application system is selected based on identifying, investigating and mapping out the business requirements of the organization;

Determining, sizing and preparing the hardware platform for the base installation in accordance with the customer's needs;

Proper installation at the ASP;

Client hardware preparation and installation;

Configuration/customization;

Customer data conversion and migration;

Report writing;

Testing and quality assurance;

Application integration;

End-user training

Support Planning and Management.

Application support - client desktop management, version control, new application implementation or upgrade change management, application bug reports and patches, database administration, data backup, data restore/recovery, data archiving, customer support contracts;

System support – operating system support and upgrades, problem resolution to correct hardware errors and to minimize downtime, inventory management;

Network support – latency issues, security, bandwidth management, outage management;

Monitoring and reporting;

Customer care help desk.

2. Problem Identification Systems

Best Practice

Be proactive in determining service-level compliance problems, for example:

- *By deploying systems that can isolate the cause of a problem and the associated vendor that owns the problem component; and*
- *Through comprehensive and meaningful reporting of service level compliance issues to customers.*

It is axiomatic that a service-level deficiency that a customer complains of is a problem pregnant with the possibility of future litigation. On the other hand, a service-level deficiency reported by the ASP to the end-user is customer service.

ASPs and other supply chain stakeholders can significantly reduce the risk of a dispute materializing:

- (1) by taking a proactive approach in determining service level compliance problems through systems that can isolate the cause of a problem and the associated vendor that owns the problem component; and
- (2) through comprehensive and meaningful reporting of service level compliance issues to customers.

In order to achieve the above, ASPs must establish monitoring and management policies and deploy the appropriate tools that can monitor the delivery of service levels to the end-user. To establish the policies, it is important first to determine which infrastructure components within the application ecosystem to monitor and the thresholds or events that signify impending or actual degradation of service levels. Both objectives can be achieved through pre-production performance testing of applications using simulated user volume, load and transaction mix. The results of the testing program can also identify the usage levels at which specific parts of the infrastructure may need to be upgraded to continue acceptable service levels. Benchmarks can also be defined based on an application's actual historical performance trends and, subsequently, documented in a service level agreement. (If service levels and parameters are already determined and agreed upon and documented, initial benchmarking may not be needed.)

Ongoing measurements of the applications' performance using the appropriate monitoring tools can then reveal instances when the benchmarks or parameters are not being met. If the actual performance does not meet the benchmarks and the respective parameters that were agreed, meaningful reports can then be provided to the customer, together with recommendations for addressing the compliance problems.

3. Customer Care/Helpdesk and Escalation Procedures⁵⁷

Best Practice
<i>Provide timely and responsive problem resolution, proactive support services, and efficient information management by establishing customer care policies and comprehensive help desk facilities.</i>

⁵⁷ This sub-section is based largely on materials provided to the WIPO Center and DART by Compaq Computer Corporation.

In the event of a service outage, it will be critical for both the service provider and customer to have a clear course of action that will be used to recover the services. This minimizes service downtime and sets expectations about the amount of time required to resolve the outage, thereby minimizing the risk of the problem escalating into a full-fledged dispute.

The purpose of a Help Desk is to provide support for a customer’s end-users as the central point of control for the logging, tracking, escalation, and resolution of end-user inquiries, problems, or requests. The Help Desk also provides advance customer notice for scheduled activities (e.g., planned outages, service upgrades). In addition, it acts as the liaison between third party vendors, application support and the customer base to facilitate optimum resource utilization and cost-effectiveness. As the centralized support area, the Help Desk should provide timely, responsive problem resolution, proactive support services, and efficient information management.

Integral to a successful Help Desk, are formal, clear and transparent escalation procedures for technical (e.g., service interruption, latency) and administrative problems (e.g., billing issues) that identify how, when and to whom customer problems should be escalated in order to ensure timely and satisfactory resolution. The benefits of properly developed and implemented procedures, include:

- Prompt resolution of customer issues/problems;
- Clear guidelines and directions regarding issue/problem escalation;
- Increased customer satisfaction and loyalty as a result of timely response to reported problems, as well as actions taken to divert potential problems;
- Minimizing the risks of full-blown disputes requiring the intervention of formal dispute resolution processes.

Set out in the table below is a checklist of the main items that should be considered in developing a problem escalation procedure. A model problem escalation contract clause is provided in Annex B.

Problem Resolution Checklist

- Problem intake infrastructure – phone, fax, e-mail, on-line form
- Logging/recording/registration infrastructure and procedures – on-line, paper-based, numbering or naming system
- Categorization guidelines and criteria – application-related, operating system-related, network-related, business-related
- Prioritization criteria and guidelines – for example, single user-minor problem, some aspects of user business affected, user business seriously impaired
- Problem resolution metrics and criteria – response and resolution times
- Escalation standards and guidelines – when should a problem be escalated to the next level of management, technical support or legal counsel and specifically to whom
- Problem ticket tracking infrastructure and audit procedures – how will the problem be tracked and monitored through the various escalation levels and paths
- Customer feedback procedures – what procedures and methods will be used to determine customer satisfaction with the resolution process and the solution itself

B. Service Level Agreements

Best Practice

Negotiate and implement fair, balanced, comprehensive and clearly-drafted service level agreements that set out the respective rights and obligations of the parties and ensure that each party fully comprehends, at an operational level, the legal and technical implications of the contractual commitments.

1. A Primer on Service Level Agreements

An ASP's supply chain can involve a variety of contractual arrangements, the parties to and characteristics of which will depend on the type of ASP delivery model. These can include software licensing agreements, contracts for the sale or rental of hardware, co-marketing, co-selling, data center services, networking services, integration and consulting services, support and, perhaps the most significant and commonly encountered, service level agreements (*SLA*) with end-users and within the SLA value chain (e.g., between an aggregator and an ASP).⁵⁸

⁵⁸ Given the importance of SLAs, the ASPIC Best Practices Committee undertook a separate initiative with the specific objective of identifying the standard elements of SLAs in four areas: networks, applications, hosting

An SLA is a legal contract that specifies the contractual deliverables, terms and conditions between the service provider and an end-user.⁵⁹ As such, the SLA is a formal, legally binding, statement of expectations and obligations between a service provider and its customer or customers, setting out the minimum service levels and performance standards that the ASP agrees to deliver and the customer expects to receive, and which both agree to when deciding to do business with each other. The SLA provides a means to define the quality and level of service in the ASP-customer relationship, the ASP-hosting vendor relationship, the ASP-ISV relationship and the ASP's relationship with NSPs. The SLAs between such organizations may also be symbiotic in nature, in that the two contracting parties may each be a customer of the other's services.

2. SLA Terms and Conditions

Generally speaking, the objectives of an SLA are to assure that ASP's customers of a basic set of expectations that the ASP commits to meet and to protect the ASP by limiting liability, identifying responsibilities and rationally managing expectations. Well-negotiated, comprehensive and well-drafted SLAs⁶⁰ that set out clearly the rights and obligations of the parties thus are fundamental to reducing the scope for disagreement in the course of the parties' business relationship.

It is beyond the scope of this document to provide a comprehensive itemization of the various elements, terms and conditions of an SLA. Some of the key elements of an SLA are provided in the table below.

and customer care/helpdesk. The ASP Industry Consortium's *Guide to SLAs* provides an annotated standard SLA template identifying the various elements that should be included, depending on the underlying relationship, as well as industry and recommended standards and benchmarks for the various SLA metrics.

⁵⁹ Frequently, the contractual relationship between an ASP and its customers may be reflected in two or three separate but interrelated documents, including a Master Services Agreement, a Service Level Agreement and a Scope/Statement of Work. Although in industry practice the SLA may be a separate addendum to an outsourcing contract or Master Services Agreement, it is not legally a separate agreement, but another set of terms and conditions defining the parties' legal relationship. This report uses the term "SLA" generically to describe the agreed terms and conditions between contracting parties in the ASP supply chain.

⁶⁰ The business models of certain types of ASPs depend on the economies-of-scale to be realized from minimal customization. In the "apps-on-tap" ASP model, SLAs are not typically negotiated. Instead, customers are offered standard form agreements. Because these agreements are not negotiated, it is all the more important that they are comprehensive and clearly drafted.

CLAUSE	DESCRIPTION
Definitions	Definitions of key contractual terms
Term	Start date and effective period of the parties' agreement, as well as renewal terms and conditions
Scope	Services to be provided and, if necessary, those not to be provided, if a customer might reasonably assume the availability of such services
Implementation Schedule	Installation timeline for the service(s) to be fully operational or schedule for provisioning new end-users with service(s)
Users and Locations	Numbers and locations of users and/or hardware for which the service(s) will be offered
Performance Levels	Expected performance levels, in terms of reliability and availability (i.e., hours and days during which the service will be offered and what are the bounds for service outages, e.g., a database server will be available 99% of the time) and responsiveness (i.e., how soon the service provider can perform, e.g., 95% of problems will be resolved within 1 hour of complaint), as well as explanations of how the various service quality metrics are calculated
Payment	Payment terms and conditions associated with each type of service
Data Ownership and Return	Terms and conditions regarding the ownership and return of data, including the circumstances (expiration and/or termination of the agreement), and conditions (e.g., payment, other performance) under which data will be returned, the form and method, allocation of costs related thereto
Customer Obligations	Customer's responsibilities under the SLA (e.g., updating its infrastructure (internal networking, desktops) to ensure compatibility with the new ASP services, user training, maintaining proper desktop configuration, not introducing extraneous software or circumventing change management procedures)
Software Licenses	Software licensing obligations and requirements, especially with respect to third-party software, and related payment issues
Reporting	Usage tracking, auditing and reporting responsibilities (i.e., how is the application monitored, who will do the monitoring, what type of statistics will be collected, how often will they be collected, what visibility will be provided to the customer)
Credits, Refunds, Charges	Credits, refunds, charges or other consequences as a result of the service provider's failure to deliver the specified services at the specified standards, including a clear indication of key service levels and the trigger points at which the non-performance penalties will kick-in. An ASP can significantly reduce the risk of disputes by offering objective and fair latency, ⁶¹ outage ⁶² and packet loss ⁶³

⁶¹ Latency guarantees are meant to assure customers that data will travel from the entry to the exit of the NSP's network with minimal delays.

⁶² Outage guarantees are designed to ensure that a customer's connection to the NSP backbone will be maintained for a given amount of time every month.

⁶³ Packet loss guarantees provide credits if a certain level of packet loss occurs on the host network.

	guarantees and associated credits. Clear and well-negotiated compensation schemes have the added advantage of limiting liability exposure to known amounts. Remedies should be directly proportionate to the severity on business impact of the underlying service level problem.
Support	Level and nature of support to be provided (e.g., what support is available, when is the helpdesk available, when are account and billing management staff available, how many operators may be on duty at a given time), including the account management contact (e.g., who at the ASP is responsible for the customer and services its needs, does the ASP take responsibility for telling the customer about network problems, or is onus on the customer to identify problems)
Problem Reporting Procedures	Process for reporting problems with the service (e.g., person to contact for problem resolution, format for filing complaints, procedures for resolving the problem quickly) and the metrics for problem resolution (e.g., time limits for problem response and resolution)
Third Parties	Clause specifying the extent to which the ASP is responsible for the actions, inaction, obligations, operations, etc. of third parties (i.e., its partners)
Force Majeure	Conditions under which the service level will not apply, or under which it is considered unreasonable to meet the expected performance levels (e.g., when the service provider's hardware has been damaged by a natural disaster such as an earthquake, flood, fire or affected by an event such as war or civil disturbance). Such <i>force majeure</i> clauses excuse a party's failure to perform if the failure resulted from an act or event beyond the party's control. The ASP may wish to include failures resulting from the customer's non-performance, failures of third parties, and failures in hardware

⁶⁴ For example:

“Definition. A “Force Majeure Event” is when the performance of this Agreement or of any obligation hereunder is prevented, restricted or interfered with by reason of: (i) acts of God; (ii) wars, revolution, civil commotion, acts of public enemies, blockage or embargo; (iii) acts of a government in its sovereign capacity; (iv) labor difficulties, including, without limitation, strikes, slowdowns, picketing or boycotts; or (v) any other circumstances beyond the reasonable control and without the fault or negligence of the party affected.

Notice of Force Majeure Event. The party affected by a Force Majeure Event shall provide written notice to the other party within five (5) days after becoming aware of such event, and shall be excused from its performance hereunder on a day-to-day basis to the extent of such prevention, restriction, or interference (and the other party shall likewise be excused from performance of its obligations on a day-to-day basis to the extent such party's obligations are related to the performance so prevented, restricted or interfered with); *provided, however,* the party so affected shall use its best efforts to avoid or remove such causes of non-performance and both parties shall proceed in their respective performance hereunder whenever such causes are removed or cease.”

(Provided by Gadsby, Hannah, LLP).

	and software. ⁶⁴
Limitation of Liability	Provisions limiting the liability of the parties. ⁶⁵ Such a clause could provide that neither party is liable for any lost profits or for any indirect, incidental, consequential, punitive or other special damages suffered by the other party or any third party arising out of or related to the agreement, for all causes of action of any kind (including, but not limited to, tort, contract, negligence, strict liability and breach of warranty). A total cap on the amount of direct damages, in the aggregate and additionally per event, may also be included. Alternatively, a liquidated damages clause may be used, i.e., an agreed-upon monetary remedy, in instances where it may be difficult to ascertain actual damages, typically in the form of adjustments to payments to be made under the agreement.
Indemnifications	Provisions dealing with indemnification. For example, the clause could require that an ISV or VAR must defend, indemnify and hold harmless the ASP against any and all claims, losses, actions, damages, expenses and liabilities, including reasonable attorneys' fees and court costs, resulting from a claim asserted against the ASP that any information, design, specification, instruction, software, data, or material furnished by the ISV/VAR and used by the ASP infringes a copyright or patent. ⁶⁶
Termination	Grounds on which a party could terminate the agreement, e.g., for convenience, for cause, material breach, for failure to provide critical services, for change of control, dissolution or winding-up, insolvency, failure to make payment, the notice periods and methods, and the consequences of the termination for existing and future obligations under the agreement (e.g., payment, data ownership, other intellectual property rights ownership).
Change Request Procedures	Explanation of change request procedures, including expected times for completing routine change requests
Insurance	Provisions dealing with insurance obligations
Choice of Law	Substantive law that is to govern the parties' agreement
Dispute Resolution	Method and procedures that will be used for resolving disagreements arising out of the parties' relationship that cannot be resolved in the normal course of business

a. Network SLA

As described above, in the ASP delivery model, application services are delivered across an IP (i.e., Internet Protocol) network from the ASP's data center to the customer's offices.

There are several ownership and management models for the IP networks: the network

⁶⁵ The enforceability of such clauses (wholly or partly) under the applicable law should be examined carefully.
⁶⁶ The indemnification may be provided, subject to certain qualifications, for example: (a) the ASP must notify the ISV/VAR in writing of its receipt of notice of the claim; (b) the ISV/VAR has sole control of the defense and all related settlement negotiations; (c) the ASP provides the ISV/VAR with reasonable assistance, information, and authority to perform the foregoing; and (d) reasonable out-of-pocket expenses incurred by the ASP in providing such assistance will be reimbursed by the ISV/VAR.

services may be provided by an NSP partnering with an ASP, an ASP may own and operate its own IP network or a business customer may make separate business arrangements with an ASP and an NSP in order to have the services delivered directly to its offices. The Network SLA sets out the terms and conditions regarding the delivery of IP services by the NSP. It covers the network connections and performance the NSP will provide to transport the application services to the customer. The Network SLA may be concluded between the customer and the ASP, the NSP and the ASP or the NSP and the end-user directly.⁶⁷

b. Hosting SLA

The ASP delivery model often mandates that hardware be hosted or co-located with a third party. The hosting vendor's role in the ASP value chain is to provide state of the art facilities to house the hardware required for ASPs to deliver applications and the expertise to administer the hardware environments. Hosting solutions deliver a wide array of services and the SLAs associated with these services must often be tailored to the specific solution. The Hosting SLA covers the quality and level of service that the computer hardware vendor expects to deliver and the ASP expects to receive. The focus of the Hosting SLA is the availability of the resources, more than the performance required to deliver applications reliably. Accordingly, the Hosting SLA, normally, is specified in terms of availability levels (e.g., 99.99% system availability over a specified time-period) rather than performance levels, as the provider's performance largely depends on the applications that are being hosted and the number of users being supported, neither of which is controlled by the hardware vendor.⁶⁸

c. Application SLA

⁶⁷ The Network SLA should address such elements as: network availability (guaranteed network up-time), network throughput (capacity, routine operating level capacity, number of customers residing on the same network), redundancy, network equipment and architecture, scalability, peering arrangements, security, encryption, key management, authentication, performance, bandwidth provisioned, granularity, data loss, expected jitter characteristics, expected delay characteristics.

⁶⁸ ASP Hosting SLAs can be grouped into three broad categories: server uptime (guarantees related to managed server availability); field services tape backup and retention (guarantees related to execution of tape backups and length of time that tapes will be securely archived); server administration (guarantees related to the administration duties, e.g., server back-up and restoration, alarming, electronic software distribution, software maintenance, user account management, electronic messaging services, network configuration, print management/administration, reporting).

In the ASP model, there are a variety of application ownership models (e.g., the applications may be licensed by the customer and serviced by the ASP, or owned by the ASP or ISV). The Application SLA provides guarantees of the levels of service that a subscriber can expect from its ASP. The application service level is impacted by several factors and the underlying technologies are complex. For example, in addition to the quality of the application code and the functionality, application service levels are affected by the systems that they are hosted on, the system architecture, the network performance.⁶⁹

C. Relationship Management

Best Practice
<i>Implement technical, administrative and operational mechanisms that enable proactive relationship management.</i>

The final written agreement between contracting parties, typically, is the reflection of a process of needs assessment, negotiation and consensus building. The document that emerges is a memorialization of the parties’ mutual understanding of their future business relationship. It provides an objective reference point for evaluating or measuring their respective performance obligations in accordance with their agreement.

The value of the written contract as a dispute avoidance (and resolution) tool, however, lies not only in the final written product, it also lies in the process the parties must go through to finalize their agreement, as well as in their subsequent management and implementation of that agreement.

The following general guidelines deserve mention:

⁶⁹ An Application SLA should address such matters as: delivery platform and architecture, scalability (i.e., as more users are added, can the applications architecture scale without degrading the service level below agreed-upon levels), data security and availability (e.g., where is the user data stored; how is it backed up; how quickly can it be restored; how secure is the archiving of data; how are service configuration and security information available in backup facilities, are there “backdoors” to the applications that make them vulnerable to hackers), service guarantees for the performance of individual applications being delivered across the network, customer responsibilities relating to deployment, calibration, application version control, or other tasks needed for successful SLA implementation.

- Actively work with a prospective customer to define and clarify the customer's service needs and priorities;
- In light of those requirements, before making any commitments to the customer, carefully examine capabilities and capacity to determine the level of service that can realistically be provided;
- In developing the final SLA, take the lead in drawing the customer's focus to the importance of the process by which the parties will work together to create the final agreement. Discuss issues such as the division of responsibility for development tasks, scheduling issues and constraints, and concerns regarding potential impediments;
- Before implementing the SLA, give all persons who have a stake in, or responsibility for, the success of the agreement an opportunity to review and comment upon the draft. Using this feedback, the developers can conduct further negotiations, gain the necessary approvals, and finalize the document. In addition to generating buy-in, this step improves the quality of the final document.
- As an adjunct to the finalization of a customer SLA or partner contract, promote team-building and familiarization practices and provide appropriate training to ensure that operational level personnel from both contracting parties fully understand the parties' respective contractual rights and obligations.
- Assess customer satisfaction on an on-going basis so as to understand clearly customer concerns and establish a baseline for assessing service improvements.

There are formal procedures that can be invoked to facilitate relationship management. In the construction and telecommunications industries a formal but voluntary and non-binding process known as "partnering" is often used to help parties involved in long-term or high-value contracts to manage their relationships. The objective of partnering is to create, from the outset of a project, an environment of trust, teamwork, open communication and cooperation among the key project participants. Typically through a series of workshops, the partnering process helps the parties to redefine their working relationship in the contractual documentation so that, so far as possible, they collaborate as a team rather than work solely in what they may see as their own separate interests. At the conclusion of the workshops, a "partnering charter", which is generally distinct and separate from the business contract, is drafted and signed by the participants. Some of the elements typically found in partnering

charters include: (1) A statement of the objectives of the partnering relationship in terms of behavioral attitudes to matters such as improved project cost, program and quality, teamwork, and open communication; (2) an issue resolution procedure designed to determine claims and resolve other problems, beginning at the lowest possible level of management and at the earliest possible opportunity; (3) a timeframe and process for selecting a neutral facilitator to help with any negotiations; and (4) a dispute resolution procedure complementary to that reflected in the business contract. Generally, the more partners that are involved in the partnering process, the better the overall results.

D. Insurance Protection

Best Practice
<i>Acquire proper insurance coverage as part of an overall risk reduction plan by obtaining the best, most efficient insurance protection available.</i>

In the context of reducing risks to the industry and its individual members, insurance protection is often mentioned as an unwanted necessity of business life. Many businesses are busy responding to the needs of their customers in Internet time, which leaves little time to evaluate risk and protect against it. And those that pay attention to the need for insurance often purchase whatever their local agent sells, regardless of whether that insurance provides adequate coverage for the company’s exposure.

Service and product providers, like their customers, are typically offered two forms of insurance protection: the kind that protects their own property and the kind that protects them against claims for damages brought by third parties. In many cases, the form policies provide protection against a variety of potential losses, from fire damage to client servers to bodily injury from a slip-and-fall at the home office. However, there is arguably little or no coverage in these policies for data that is lost during installation of a new Internet site; negligent installation of software that results in economic loss only, or a server crash that results in the loss of hosting capacity for several days.

Recently, insurers have been developing and selling newer policies that can accomplish several things. For those who only want to purchase the minimum coverage necessary, there are policies that simply address some of the intellectual property and loss of proprietary data issues that service providers deem most important. For those seeking broader coverage that is

relevant to their business model, insurers are becoming increasingly more creative in their approach to these needs. This is not to suggest that there is coverage for every conceivable risk; it is only to suggest that with the passage of time comes greater variety in the kind of insurance available for the special risks presented by technology product and service providers.

Naturally, this discussion is not a substitute for a proper risk assessment and insurance product evaluation. Members should work with professionals who have the right kind of experience to obtain the best, most efficient protection. But acquiring proper insurance coverage should be part of every overall risk reduction plan.

* * * *

ANNEXES

- A. WIPO Dispute Resolution Clauses
- B. Model Problem Resolution Clause
- C. WIPO Mediation Rules
- D. WIPO Arbitration Rules
- E. WIPO Expedited Arbitration Rules
- F. WIPO Arbitration and Mediation Center Schedule of Fees and Costs
- G. Examples of ASP Supply Chain Disputes
- H. Other ADR Processes

ANNEX A
WIPO DISPUTE RESOLUTION CLAUSES

Set out below are model dispute resolution clauses and optional clauses that contracting parties in the ASP supply chain may consider including in their agreements. No attempt should be made to modify the language or the terms of these clauses without seeking expert advice.

Recommended Clauses for Future Disputes

Mediation
<u>Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].</u>

Arbitration
Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. The arbitral tribunal shall consist of [three arbitrators][a sole arbitrator]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction].

Expedited Arbitration
Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction].

Mediation Followed, in the Absence of Settlement, by Arbitration
Any dispute, controversy or claim arising under, out of or relating to this contract and any

subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

If, and to the extent that, any such dispute, controversy or claim has not been settled pursuant to the mediation within [60][90] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules.

Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute, controversy or claim shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules.

The arbitral tribunal shall consist of [three arbitrators] [a sole arbitrator]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim referred to arbitration shall be decided in accordance with the law of [specify jurisdiction].

Mediation Followed, in the Absence of Settlement, by Expedited Arbitration

Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be submitted to mediation in accordance with the WIPO Mediation Rules. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

If, and to the extent that, any such dispute, controversy or claim has not been settled pursuant to the mediation within [60][90] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules.

Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute, controversy or claim shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules.

The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim referred to arbitration shall be decided in accordance with the law of [specify jurisdiction].

Multi-Step Dispute Resolution Clause

To the extent not resolved in the normal course of business, the parties shall attempt in good faith to resolve any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims (a *Dispute*), in accordance with the following procedures (the *Dispute Resolution Procedure*):

1. Negotiations

- 1.1 If a Dispute should arise, no later than [specify number of business or calendar days] following the transmission of notice in writing by one party to the other party, [identify name of person] of [first contracting party, as defined] and [identify name of person] of [second contracting party, as defined], or their respective successors in the positions they now hold (the *Relationship Managers*), shall meet at a mutually agreed place, or otherwise communicate, in an effort to resolve the Dispute. Any subsequent meetings or communications shall be agreed by the Relationship Managers in light of their first meeting and taking into consideration the circumstances underlying the Dispute.
- 1.2 If the Dispute has not been resolved within [specify number of business or calendar days] days of their first meeting or communication to resolve the Dispute, the Relationship Managers shall refer the Dispute immediately to senior executives, who shall have the authority to settle the Dispute (the *Senior Executives*). Upon such referral, the Relationship Managers shall promptly prepare and exchange memoranda (i) stating the issues in dispute and their respective positions; (ii) summarizing the negotiations that have taken place and (iii) attaching relevant documents. The Senior Executives shall meet for negotiations as soon as practicable and, in any event, within [specify number of business or calendar days] days of the first meeting between the Relationship Managers, at a mutually agreed time and place.

2. Mediation

- 2.1 If the Dispute has not been resolved within [specify number of business or calendar days] days of the meeting of the Senior Executives, except if the parties agree to extend such period, they shall endeavor to settle the dispute by mediation in accordance with the WIPO Mediation Rules (the *Mediation*). The place of mediation shall be [specify place]. The language of the mediation shall be [specify language].

3. Arbitration

- 3.1 If, and to the extent that, the Dispute has not been settled pursuant to the Mediation within [specify number of business or calendar days, usually 60 or 90] days of the commencement of the Mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules.
- 3.2 Alternatively, if, before the expiration of the above period, either party fails to participate or to continue to participate in the Mediation, the Dispute shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally

determined by arbitration in accordance with the WIPO Arbitration Rules.

- 3.3 ***The arbitral tribunal shall consist of [three arbitrators] [a sole arbitrator].*** The place of arbitration shall be [specify place]. The language of the arbitration shall be [specify language]. The dispute, controversy or claim referred to arbitration shall be decided in accordance with the law of [specify jurisdiction].

Note: If the parties refer to the WIPO Expedited Arbitration Rules instead of the WIPO Arbitration Rules, the highlighted clause should be deleted.

Recommended Submission Agreements for Existing Disputes

Mediation

We, the undersigned parties, hereby agree to submit to mediation in accordance with the WIPO Mediation Rules the following dispute:

[Brief description of the dispute]

The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

Arbitration

We, the undersigned parties, hereby agree that the following dispute shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules:

[Brief description of the dispute]

The arbitral tribunal shall consist of [three arbitrators] [a sole arbitrator]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute shall be decided in accordance with the law of [specify jurisdiction].

Expedited Arbitration

We, the undersigned parties, hereby agree that the following dispute shall be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules:

[Brief description of the dispute]

The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute shall be decided in accordance with the law of [specify jurisdiction].

Mediation Followed, in the Absence of Settlement, by Arbitration

We, the undersigned parties, hereby agree to submit to mediation in accordance with the WIPO Mediation Rules the following dispute:

[Brief description of the dispute]

The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

We further agree that, if, and to the extent that, the dispute has not been settled pursuant to the mediation within [60][90] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules.

Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules.

The arbitral tribunal shall consist of [three arbitrators][a sole arbitrator]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute referred to arbitration shall be decided in accordance with the law of [specify jurisdiction].

**Mediation Followed, in the Absence of Settlement,
by Expedited Arbitration**

We, the undersigned parties, hereby agree to submit to mediation in accordance with the WIPO Mediation Rules the following dispute:

[Brief description of the dispute]

The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

We further agree that, if, and to the extent that, the dispute has not been settled pursuant to the mediation within [60][90] days of the commencement of the mediation, it shall, upon the filing of a Request for Arbitration by either party, be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules.

Alternatively, if, before the expiration of the said period of [60][90] days, either party fails to participate or to continue to participate in the mediation, the dispute shall, upon the filing of a Request for Arbitration by the other party, be referred to and finally determined by arbitration in accordance with the WIPO Expedited Arbitration Rules.

The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute referred to arbitration shall be decided in accordance with the law of [specify jurisdiction].

ANNEX B
MODEL PROBLEM RESOLUTION CLAUSE

xx. Problem Resolution

xx.1 Priority Levels

Within the scope of this Agreement contract-related problems shall be categorized as follows:

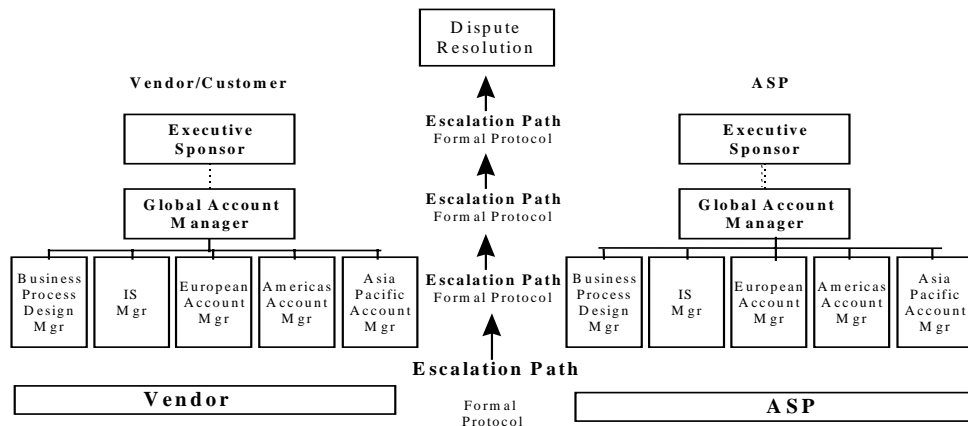
- a: Priority 1
 - Severe impact to performance
 - Requires action within 1 Working Day

- b: Priority 2
 - Significant impact on performance
 - Requires action within 5 Working Days

- c: Priority 3
 - Moderate impact on performance
 - Requires action within 20 Working Days.

xx.2 Problem Escalation Process

The following diagram provides the framework for the Problem Escalation Process.



xx.2.1 The escalation path for all problems shall be through each Parties' respective organizational hierarchy and the formal process described in Section [] to [] will be consistently used at each level.

xx.2.1.1 The first level shall consist of direct reports to the Regional Account Manager.

xx.2.1.2 The second level shall be the Global Account Manager.

xx.2.1.3 The third level shall be the Executive Sponsor.

xx.2.2 All issues must be resolved within the time periods set forth in Section []. Issues not resolved within such time period shall be managed through the dispute resolution procedure set out in [cross-reference to dispute resolution clause]. This consists of problem reporting, acknowledgment and resolution steps. It also requires the Global Account Managers to be kept informed throughout the process.

xx.2.3 The problem escalation process shall incorporate a communications plan to ensure that all impacted groups are informed of the problem and the progress of the resolution.

xx.2.4 In the event that a problem is not resolved within the specified timeframe or an action plan agreed by each Party, then it shall be escalated to the next level in the organizational hierarchy.

xx.2.5 Problems that are escalated above the General Account Manager level shall be dealt with by the Executive Sponsors. If the Executive Sponsors are unable to resolve the problem it shall be classified as a dispute and actioned for settlement in accordance with the dispute resolution procedure set out in [cross-reference to dispute resolution clause].

xx.3 Problem Reporting

xx.3.1 Problems may be reported by either Party. When a problem is reported it shall be in writing, preferably using electronic mail, to the equivalent level of the other Parties' organization.

xx.3.2 The format for problem reporting is:

- Date and time problem reported
- Problem priority
- Problem reported by
- Problem reported to
- Persons copied on the problem report
- Description of the problem
- Suggested solution

xx.3.3 The Party reporting the problem may also call their counterpart in the other Company to report the problem, in addition to reporting it in writing. The priority of the problem shall also be agreed at this stage.

xx.4 Problem Acknowledgment

xx.4.1 The format for acknowledgment of receipt of a problem is:

- Persons acknowledging receipt of the problem
- Persons copied on the acknowledgement
- Action plan description for solving the problem
- Person accountable for the action plan
- Estimated problem resolution date
- Attachments should include the original problem report

xx.4.2 Upon acknowledgment of the problem the Party responsible to take action to resolve the problem shall inform the person who identified it of the action plan.

xx.5 Problem Resolution

xx.5.1 The format for reporting a problem resolution is:

- Date and time of problem resolution notification
- Person accountable for the problem resolution
- Description of problem resolution
- Appropriate attachments including previous communications

xx.5.2 Upon receipt of the problem resolution notification, the Party who identified the problem shall acknowledge receipt of the notification and shall reply stating whether or not that party agrees that the problem has been resolved using the following format:

- Date and time of acknowledgement of problem resolution report
- Person responding to problem resolution report
- Statement of acceptance of the solution, or if the solution has not been accepted a statement as to why it has not been accepted. Such notice shall constitute a new cycle of problem identification and shall follow the protocol described in this Schedule
- Appropriate communications relating to the problem shall be attached

xx.5.3 If the problem resolution has not been accepted by the other Party and an alternative action plan agreed, the problem shall be escalated.

xx.6 Personnel Resolution

xx.6.1 In the event of a personality conflict between the Global Account Managers the problem shall be escalated to the Executive Sponsors of each Party. A resolution plan shall be agreed by the Executive Sponsors and implemented.

- xx.6.2 In the event of a personality conflict between the other key positions defined in this Schedule then the problem shall be escalated to the Global Account Managers of each Party. A resolution plan shall be agreed by the Global Account Managers and implemented.
- xx.6.3 In the event of the resolution plan failing then the other Party has the authority to remove the offending person subject to a reasonable notice period to ensure a smooth handover.

ANNEX C
WIPO MEDIATION RULES

Abbreviated Expressions

Article 1

In these Rules:

Mediation Agreement means an agreement by the parties to submit to mediation all or certain disputes which have arisen or which may arise between them; a Mediation Agreement may be in the form of a mediation clause in a contract or in the form of a separate contract;

Mediator includes a sole mediator or all the mediators where more than one is appointed;

WIPO means the World Intellectual Property Organization;

Center means the WIPO Arbitration and Mediation Center, a unit of the International Bureau of WIPO;

Words used in the singular include the plural and vice versa, as the context may require.

Scope of Application of Rules

Article 2

Where a Mediation Agreement provides for mediation under the WIPO Mediation Rules, these Rules shall be deemed to form part of that Mediation Agreement. Unless the parties have agreed otherwise, these Rules as in effect on the date of the commencement of the mediation shall apply.

Commencement of the Mediation

Article 3

- (a) A party to a Mediation Agreement that wishes to commence a mediation shall submit a Request for Mediation in writing to the Center. It shall at the same time send a copy of the Request for Mediation to the other party.
- (b) The Request for Mediation shall contain or be accompanied by
 - (i) the names, addresses and telephone, telex, telefax or other communication references of the parties to the dispute and of the representative of the party filing the Request for Mediation;

- (ii) a copy of the Mediation Agreement; and
- (iii) a brief statement of the nature of the dispute.

Article 4

The date of the commencement of the mediation shall be the date on which the Request for Mediation is received by the Center.

Article 5

The Center shall forthwith inform the parties in writing of the receipt by it of the Request for Mediation and of the date of the commencement of the mediation.

Appointment of the Mediator

Article 6

- (a) Unless the parties have agreed themselves on the person of the mediator or on another procedure for appointing the mediator, the mediator shall be appointed by the Center after consultation with the parties.
- (b) The prospective mediator shall, by accepting appointment, be deemed to have undertaken to make available sufficient time to enable the mediation to be conducted expeditiously.

Article 7

The mediator shall be neutral, impartial and independent.

Representation of Parties and Participation in Meetings

Article 8

- (a) The parties may be represented or assisted in their meetings with the mediator.
- (b) Immediately after the appointment of the mediator, the names and addresses of persons authorized to represent a party, and the names and positions of the persons who will be attending the meetings of the parties with the mediator on behalf of that party, shall be communicated by that party to the other party, the mediator and the Center.

Conduct of the Mediation

Article 9

The mediation shall be conducted in the manner agreed by the parties. If, and to the extent that, the parties have not made such agreement, the mediator shall, in accordance with these Rules, determine the manner in which the mediation shall be conducted.

Article 10

Each party shall cooperate in good faith with the mediator to advance the mediation as expeditiously as possible.

Article 11

The mediator shall be free to meet and to communicate separately with a party on the clear understanding that information given at such meetings and in such communications shall not be disclosed to the other party without the express authorization of the party giving the information.

Article 12

- (a) As soon as possible after being appointed, the mediator shall, in consultation with the parties, establish a timetable for the submission by each party to the mediator and to the other party of a statement summarizing the background of the dispute, the party's interests and contentions in relation to the dispute and the present status of the dispute, together with such other information and materials as the party considers necessary for the purposes of the mediation and, in particular, to enable the issues in dispute to be identified.
- (b) The mediator may at any time during the mediation suggest that a party provide such additional information or materials as the mediator deems useful.
- (c) Any party may at any time submit to the mediator, for consideration by the mediator only, written information or materials which it considers to be confidential. The mediator shall not, without the written authorization of that party, disclose such information or materials to the other party.

Role of the Mediator

Article 13

- (a) The mediator shall promote the settlement of the issues in dispute between the parties in any manner that the mediator believes to be appropriate, but shall have no authority to impose a settlement on the parties.
- (b) Where the mediator believes that any issues in dispute between the parties are not susceptible to resolution through mediation, the mediator may propose, for the consideration of the parties, procedures or means for resolving those issues which the

mediator considers are most likely, having regard to the circumstances of the dispute and any business relationship between the parties, to lead to the most efficient, least costly and most productive settlement of those issues. In particular, the mediator may so propose:

- (i) an expert determination of one or more particular issues;
- (ii) arbitration;
- (iii) the submission of last offers of settlement by each party and, in the absence of a settlement through mediation, arbitration conducted on the basis of those last offers pursuant to an arbitral procedure in which the mission of the arbitral tribunal is confined to determining which of the last offers shall prevail; or
- (iv) arbitration in which the mediator will, with the express consent of the parties, act as sole arbitrator, it being understood that the mediator may, in the arbitral proceedings, take into account information received during the mediation.

Confidentiality

Article 14

No recording of any kind shall be made of any meetings of the parties with the mediator.

Article 15

Each person involved in the mediation, including, in particular, the mediator, the parties and their representatives and advisors, any independent experts and any other persons present during the meetings of the parties with the mediator, shall respect the confidentiality of the mediation and may not, unless otherwise agreed by the parties and the mediator, use or disclose to any outside party any information concerning, or obtained in the course of, the mediation. Each such person shall sign an appropriate confidentiality undertaking prior to taking part in the mediation.

Article 16

Unless otherwise agreed by the parties, each person involved in the mediation shall, on the termination of the mediation, return, to the party providing it, any brief, document or other materials supplied by a party, without retaining any copy thereof. Any notes taken by a person concerning the meetings of the parties with the mediator shall be destroyed on the termination of the mediation.

Article 17

Unless otherwise agreed by the parties, the mediator and the parties shall not introduce as evidence or in any manner whatsoever in any judicial or arbitration proceeding:

- (i) any views expressed or suggestions made by a party with respect to a possible settlement of the dispute;
- (ii) any admissions made by a party in the course of the mediation;
- (iii) any proposals made or views expressed by the mediator;
- (iv) the fact that a party had or had not indicated willingness to accept any proposal for settlement made by the mediator or by the other party.

Termination of the Mediation

Article 18

The mediation shall be terminated

- (i) by the signing of a settlement agreement by the parties covering any or all of the issues in dispute between the parties;
- (ii) by the decision of the mediator if, in the mediator's judgment, further efforts at mediation are unlikely to lead to a resolution of the dispute;
- (iii) by a written declaration of a party at any time after attending the first meeting of the parties with the mediator and before the signing of any settlement agreement.

Article 19

- (a) Upon the termination of the mediation, the mediator shall promptly send to the Center a notice in writing that the mediation is terminated and shall indicate the date on which it terminated, whether or not the mediation resulted in a settlement of the dispute and, if so, whether the settlement was full or partial. The mediator shall send to the parties a copy of the notice so addressed to the Center.
- (b) The Center shall keep the said notice of the mediator confidential and shall not, without the written authorization of the parties, disclose either the existence or the result of the mediation to any person.
- (c) The Center may, however, include information concerning the mediation in any aggregate statistical data that it publishes concerning its activities, provided that such information does not reveal the identity of the parties or enable the particular circumstances of the dispute to be identified.

Article 20

Unless required by a court of law or authorized in writing by the parties, the mediator shall not act in any capacity whatsoever, otherwise than as a mediator, in any pending or future proceedings, whether judicial, arbitral or otherwise, relating to the subject matter of the dispute.

Registration Fee of the Center

Article 21

- (a) The Request for Mediation shall be subject to the payment to the Center of a registration fee, which shall belong to the International Bureau of WIPO. The amount of the registration fee shall be fixed in accordance with the Schedule of Fees applicable on the date of the Request for Mediation.
- (b) The registration fee shall not be refundable.
- (c) No action shall be taken by the Center on a Request for Mediation until the registration fee has been paid.
- (d) If a party who has filed a Request for Mediation fails, within 15 days after a second reminder in writing from the Center, to pay the registration fee, it shall be deemed to have withdrawn its Request for Mediation.

Fees of the Mediator

Article 22

- (a) The amount and currency of the fees of the mediator and the modalities and timing of their payment shall be fixed, in accordance with the provisions of this Article, by the Center, after consultation with the mediator and the parties.
- (b) The amount of the fees shall, unless the parties and the mediator agree otherwise, be calculated on the basis of the hourly or, if applicable, daily indicative rates set out in the Schedule of Fees applicable on the date of the Request for Mediation, taking into account the amount in dispute, the complexity of the subject matter of the dispute and any other relevant circumstances of the case.

Deposits

Article 23

- (a) The Center may, at the time of the appointment of the mediator, require each party to deposit an equal amount as an advance for the costs of the mediation, including, in particular, the estimated fees of the mediator and the other expenses of the mediation. The amount of the deposit shall be determined by the Center.
- (b) The Center may require the parties to make supplementary deposits.
- (c) If a party fails, within 15 days after a second reminder in writing from the Center, to pay the required deposit, the mediation shall be deemed to be terminated. The Center shall,

by notice in writing, inform the parties and the mediator accordingly and indicate the date of termination.

- (d) After the termination of the mediation, the Center shall render an accounting to the parties of any deposits made and return any unexpended balance to the parties or require the payment of any amount owing from the parties.

Costs

Article 24

Unless the parties agree otherwise, the registration fee, the fees of the mediator and all other expenses of the mediation, including, in particular, the required travel expenses of the mediator and any expenses associated with obtaining expert advice, shall be borne in equal shares by the parties.

Exclusion of Liability

Article 25

Except in respect of deliberate wrongdoing, the mediator, WIPO, the WIPO Center shall not be liable to any party for any act or omission in connection with any mediation conducted under these Rules.

Waiver of Defamation

Article 26

The parties and, by accepting appointment, the mediator agree that any statements or comments, whether written or oral, made or used by them or their representatives in preparation for or in the course of the mediation shall not be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this Article may be pleaded in bar to any such action.

Suspension of Running of Limitation Period Under the Statute of Limitations

Article 27

The parties agree that, to the extent permitted by the applicable law, the running of the limitation period under the Statute of Limitations or an equivalent law shall be suspended in relation to the dispute that is the subject of the mediation from the date of the commencement of the mediation until the date of the termination of the mediation.

ANNEX D
WIPO ARBITRATION RULES

I. GENERAL PROVISIONS

Abbreviated Expressions

Article 1

In these Rules:

Arbitration Agreement means an agreement by the parties to submit to arbitration all or certain disputes that have arisen or that may arise between them; an Arbitration Agreement may be in the form of an arbitration clause in a contract or in the form of a separate contract;

Claimant means the party initiating an arbitration;

Respondent means the party against which the arbitration is initiated, as named in the Request for Arbitration;

Tribunal includes a sole arbitrator or all the arbitrators where more than one is appointed;

WIPO means the World Intellectual Property Organization;

Center means the WIPO Arbitration Center, a unit of the International Bureau of WIPO;

Words used in the singular include the plural and vice versa, as the context may require.

Scope of Application of Rules

Article 2

Where an Arbitration Agreement provides for arbitration under the WIPO Arbitration Rules, these Rules shall be deemed to form part of that Arbitration Agreement and the dispute shall be settled in accordance with these Rules, as in effect on the date of the commencement of the arbitration, unless the parties have agreed otherwise.

Article 3

(a) These Rules shall govern the arbitration, except that, where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

(b) The law applicable to the arbitration shall be determined in accordance with Article 59(b).

Notices, Periods of Time

Article 4

- (a) Any notice or other communication that may or is required to be given under these Rules shall be in writing and shall be delivered by expedited postal or courier service, or transmitted by telex, telefax or other means of telecommunication that provide a record thereof.
- (b) A party's last known residence or place of business shall be a valid address for the purpose of any notice or other communication in the absence of any notification of a change by that party. Communications may in any event be addressed to a party in the manner stipulated or, failing such a stipulation, according to the practice followed in the course of the dealings between the parties.
- (c) For the purpose of determining the date of commencement of a time limit, a notice or other communication shall be deemed to have been received on the day it is delivered or, in the case of telecommunications, transmitted in accordance with paragraphs (a) and (b) of this Article.
- (d) For the purpose of determining compliance with a time limit, a notice or other communication shall be deemed to have been sent, made or transmitted if it is dispatched, in accordance with paragraphs (a) and (b) of this Article, prior to or on the day of the expiration of the time limit.
- (e) For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice or other communication is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.
- (f) The parties may agree to reduce or extend the periods of time referred to in Articles 11, 15(b), 16(b), 17(b), 17(c), 18(b), 19(b)(iii), 41(a) and 42(a).
- (g) The Center may, at the request of a party or on its own motion, extend the periods of time referred to in Articles 11, 15(b), 16(b), 17(b), 17(c), 18(b), 19(b)(iii), 67(d), 68(e) and 70(e).

Documents Required to Be Submitted to the Center

Article 5

- (a) Until the notification by the Center of the establishment of the Tribunal, any written statement, notice or other communication required or allowed under Articles 6 to 36 shall be submitted by a party to the Center and a copy thereof shall at the same time be transmitted by that party to the other party.

- (b) Any written statement, notice or other communication so sent to the Center shall be sent in a number of copies equal to the number required to provide one copy for each envisaged arbitrator and one for the Center.
- (c) After the notification by the Center of the establishment of the Tribunal, any written statements, notices or other communications shall be submitted by a party directly to the Tribunal and a copy thereof shall at the same time be supplied by that party to the other party.
- (d) The Tribunal shall send to the Center a copy of each order or other decision that it makes.

II. COMMENCEMENT OF THE ARBITRATION

Request for Arbitration

Article 6

The Claimant shall transmit the Request for Arbitration to the Center and to the Respondent.

Article 7

The date of commencement of the arbitration shall be the date on which the Request for Arbitration is received by the Center.

Article 8

The Center shall inform the Claimant and the Respondent of the receipt by it of the Request for Arbitration and of the date of the commencement of the arbitration.

Article 9

The Request for Arbitration shall contain:

- (i) a demand that the dispute be referred to arbitration under the WIPO Arbitration Rules;
- (ii) the names, addresses and telephone, telex, telefax or other communication references of the parties and of the representative of the Claimant;
- (iii) a copy of the Arbitration Agreement and, if applicable, any separate choice-of-law clause;
- (iv) a brief description of the nature and circumstances of the dispute, including an indication of the rights and property involved and the nature of any technology involved;
- (v) a statement of the relief sought and an indication, to the extent possible, of any amount claimed;

- (vi) any appointment that is required by, or observations that the Claimant considers useful in connection with, Articles 14 to 20.

Article 10

The Request for Arbitration may also be accompanied by the Statement of Claim referred to in Article 41.

Answer to the Request

Article 11

Within 30 days from the date on which the Respondent receives the Request for Arbitration from the Claimant, the Respondent shall address to the Center and to the Claimant an Answer to the Request which shall contain comments on any of the elements in the Request for Arbitration and may include indications of any counterclaim or setoff.

Article 12

If the Claimant has filed a Statement of Claim with the Request for Arbitration pursuant to Article 10, the Answer to the Request may also be accompanied by the Statement of Defense referred to in Article 42.

Representation

Article 13

- (a) The parties may be represented by persons of their choice, irrespective of, in particular, nationality or professional qualification. The names, addresses and telephone, telex, telefax or other communication references of representatives shall be communicated to the Center, the other party and, after its establishment, the Tribunal.
- (b) Each party shall ensure that its representatives have sufficient time available to enable the arbitration to proceed expeditiously.
- (c) The parties may also be assisted by persons of their choice.

III. COMPOSITION AND ESTABLISHMENT OF THE TRIBUNAL

Number of Arbitrators

Article 14

- (a) The Tribunal shall consist of such number of arbitrators as has been agreed by the parties.
- (b) Where the parties have not agreed on the number of arbitrators, the Tribunal shall consist of a sole arbitrator, except where the Center in its discretion determines that, in view of all the circumstances of the case, a Tribunal composed of three members is appropriate.

Appointment Pursuant to Procedure Agreed Upon by the Parties

Article 15

- (a) If the parties have agreed on a procedure of appointing the arbitrator or arbitrators other than as envisaged in Articles 16 to 20, that procedure shall be followed.
- (b) If the Tribunal has not been established pursuant to such procedure within the period of time agreed upon by the parties or, in the absence of such an agreed period of time, within 45 days after the commencement of the arbitration, the Tribunal shall be established or completed, as the case may be, in accordance with Article 19.

Appointment of a Sole Arbitrator

Article 16

- (a) Where a sole arbitrator is to be appointed and the parties have not agreed on a procedure of appointment, the sole arbitrator shall be appointed jointly by the parties.
- (b) If the appointment of the sole arbitrator is not made within the period of time agreed upon by the parties or, in the absence of such an agreed period of time, within 30 days after the commencement of the arbitration, the sole arbitrator shall be appointed in accordance with Article 19.

Appointment of Three Arbitrators

Article 17

- (a) Where three arbitrators are to be appointed and the parties have not agreed upon a procedure of appointment, the arbitrators shall be appointed in accordance with this Article.
- (b) The Claimant shall appoint an arbitrator in its Request for Arbitration. The Respondent shall appoint an arbitrator within 30 days from the date on which it receives the Request for Arbitration. The two arbitrators thus appointed shall, within 20 days after the appointment of the second arbitrator, appoint a third arbitrator, who shall be the presiding arbitrator.
- (c) Notwithstanding paragraph (b), where three arbitrators are to be appointed as a result of the exercise of the discretion of the Center under Article 14(b), the Claimant shall, by notice to the Center and to the Respondent, appoint an arbitrator within 15 days after the receipt by it of notification by the Center that the Tribunal is to be composed of three arbitrators. The Respondent shall appoint an arbitrator within 30 days after the receipt by it of the said notification. The two arbitrators thus appointed shall, within 20 days after the appointment of the second arbitrator, appoint a third arbitrator, who shall be the presiding arbitrator.
- (d) If the appointment of any arbitrator is not made within the applicable period of time referred to in the preceding paragraphs, that arbitrator shall be appointed in accordance with Article 19.

Appointment of Three Arbitrators in Case of Multiple Claimants or Respondents

Article 18

(a) Where

- (i) three arbitrators are to be appointed,
- (ii) the parties have not agreed on a procedure of appointment, and
- (iii) the Request for Arbitration names more than one Claimant,

the Claimants shall make a joint appointment of an arbitrator in their Request for Arbitration. The appointment of the second arbitrator and the presiding arbitrator shall, subject to paragraph (b) of this Article, take place in accordance with Article 17(b), (c) or (d), as the case may be.

(b) Where

- (i) three arbitrators are to be appointed,
- (ii) the parties have not agreed on a procedure of appointment, and
- (iii) the Request for Arbitration names more than one Respondent,

the Respondents shall jointly appoint an arbitrator. If, for whatever reason, the Respondents do not make a joint appointment of an arbitrator within 30 days after receiving the Request for Arbitration, any appointment of the arbitrator previously made by the Claimant or Claimants shall be considered void and two arbitrators shall be appointed by the Center. The two arbitrators thus appointed shall, within 30 days after the appointment of the second arbitrator, appoint a third arbitrator, who shall be the presiding arbitrator.

(c) Where

- (i) three arbitrators are to be appointed,
- (ii) the parties have agreed upon a procedure of appointment, and
- (iii) the Request for Arbitration names more than one Claimant or more than one Respondent,

paragraphs (a) and (b) of this Article shall, notwithstanding Article 15(a), apply irrespective of any contractual provisions in the Arbitration Agreement with respect to the procedure of appointment, unless those provisions have expressly excluded the application of this Article.

Default Appointment

Article 19

- (a) If a party has failed to appoint an arbitrator as required under Articles 15, 17 or 18, the Center shall, in lieu of that party, forthwith make the appointment.
- (b) If the sole or presiding arbitrator has not been appointed as required under Articles 15, 16, 17 or 18, the appointment shall take place in accordance with the following procedure:
 - (i) The Center shall send to each party an identical list of candidates. The list shall comprise the names of at least three candidates in alphabetical order. The list shall include or be accompanied by a brief statement of each candidate's qualifications. If the parties have agreed on any particular qualifications, the list shall contain only the names of candidates that satisfy those qualifications.
 - (ii) Each party shall have the right to delete the name of any candidate or candidates to whose appointment it objects and shall number any remaining candidates in order of preference.
 - (iii) Each party shall return the marked list to the Center within 20 days after the date on which the list is received by it. Any party failing to return a marked list within that period of time shall be deemed to have assented to all candidates appearing on the list.
 - (iv) As soon as possible after receipt by it of the lists from the parties, or failing this, after the expiration of the period of time specified in the previous sub-paragraph, the Center shall, taking into account the preferences and objections expressed by the parties, invite a person from the list to be the sole or presiding arbitrator.
 - (v) If the lists which have been returned do not show a person who is acceptable as arbitrator to both parties, the Center shall be authorized to appoint the sole or presiding arbitrator. The Center shall similarly be authorized to do so if a person is not able or does not wish to accept the Center's invitation to be the sole or presiding arbitrator, or if there appear to be other reasons precluding that person from being the sole or presiding arbitrator, and there does not remain on the lists a person who is acceptable as arbitrator to both parties.
- (c) Notwithstanding the provisions of paragraph (b), the Center shall be authorized to appoint the sole or presiding arbitrator if it determines in its discretion that the procedure described in that paragraph is not appropriate for the case.

Nationality of Arbitrators

Article 20

- (a) An agreement of the parties concerning the nationality of arbitrators shall be respected.

- (b) If the parties have not agreed on the nationality of the sole or presiding arbitrator, such arbitrator shall, in the absence of special circumstances such as the need to appoint a person having particular qualifications, be a national of a country other than the countries of the parties.

Communication Between Parties and Candidates for Appointment as Arbitrator

Article 21

No party or anyone acting on its behalf shall have any ex parte communication with any candidate for appointment as arbitrator except to discuss the candidate's qualifications, availability or independence in relation to the parties.

Impartiality and Independence

Article 22

- (a) Each arbitrator shall be impartial and independent.
- (b) Each prospective arbitrator shall, before accepting appointment, disclose to the parties, the Center and any other arbitrator who has already been appointed any circumstances that might give rise to justifiable doubt as to the arbitrator's impartiality or independence, or confirm in writing that no such circumstances exist.
- (c) If, at any stage during the arbitration, new circumstances arise that might give rise to justifiable doubt as to any arbitrator's impartiality or independence, the arbitrator shall promptly disclose such circumstances to the parties, the Center and the other arbitrators.

Availability, Acceptance and Notification

Article 23

- (a) Each arbitrator shall, by accepting appointment, be deemed to have undertaken to make available sufficient time to enable the arbitration to be conducted and completed expeditiously.
- (b) Each prospective arbitrator shall accept appointment in writing and shall communicate such acceptance to the Center.
- (c) The Center shall notify the parties of the establishment of the Tribunal.

Challenge of Arbitrators

Article 24

- (a) Any arbitrator may be challenged by a party if circumstances exist that give rise to justifiable doubt as to the arbitrator's impartiality or independence.
- (b) A party may challenge an arbitrator whom it has appointed or in whose appointment it

concluded only for reasons of which it becomes aware after the appointment has been made.

Article 25

A party challenging an arbitrator shall send notice to the Center, the Tribunal and the other party, stating the reasons for the challenge, within 15 days after being notified of that arbitrator's appointment or after becoming aware of the circumstances that it considers give rise to justifiable doubt as to that arbitrator's impartiality or independence.

Article 26

When an arbitrator has been challenged by a party, the other party shall have the right to respond to the challenge and shall, if it exercises this right, send, within 15 days after receipt of the notice referred to in Article 25, a copy of its response to the Center, the party making the challenge and the arbitrators.

Article 27

The Tribunal may, in its discretion, suspend or continue the arbitral proceedings during the pendency of the challenge.

Article 28

The other party may agree to the challenge or the arbitrator may voluntarily withdraw. In either case, the arbitrator shall be replaced without any implication that the grounds for the challenge are valid.

Article 29

If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge shall be made by the Center in accordance with its internal procedures. Such a decision is of an administrative nature and shall be final. The Center shall not be required to state reasons for its decision.

Release from Appointment

Article 30

At the arbitrator's own request, an arbitrator may be released from appointment as arbitrator either with the consent of the parties or by the Center.

Article 31

Irrespective of any request by the arbitrator, the parties may jointly release the arbitrator from appointment as arbitrator. The parties shall promptly notify the Center of such release.

Article 32

At the request of a party or on its own motion, the Center may release an arbitrator from appointment as arbitrator if the arbitrator has become de jure or de facto unable to fulfill, or fails to fulfill, the duties of an arbitrator. In such a case, the parties shall be offered the opportunity to express their views thereon and the provisions of Articles 26 to 29 shall apply mutatis mutandis.

Replacement of an Arbitrator

Article 33

- (a) Whenever necessary, a substitute arbitrator shall be appointed pursuant to the procedure provided for in Articles 15 to 19 that was applicable to the appointment of the arbitrator being replaced.
- (b) In the event that an arbitrator appointed by a party has either been successfully challenged on grounds which were known or should have been known to that party at the time of appointment, or has been released from appointment as arbitrator in accordance with Article 32, the Center shall have the discretion not to permit that party to make a new appointment. If it chooses to exercise this discretion, the Center shall make the substitute appointment.
- (c) Pending the replacement, the arbitral proceedings shall be suspended, unless otherwise agreed by the parties.

Article 34

Whenever a substitute arbitrator is appointed, the Tribunal shall, having regard to any observations of the parties, determine in its sole discretion whether all or part of any prior hearings are to be repeated.

Truncated Tribunal

Article 35

- (a) If an arbitrator on a three-person Tribunal, though duly notified and without good cause, fails to participate in the work of the Tribunal, the two other arbitrators shall, unless a party has made an application under Article 32, have the power in their sole discretion to continue the arbitration and to make any award, order or other decision, notwithstanding the failure of the third arbitrator to participate. In determining whether to continue the arbitration or to render any award, order or other decision without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such non-participation, and such other matters as they consider appropriate in the circumstances of the case.
- (b) In the event that the two other arbitrators determine not to continue the arbitration without the participation of a third arbitrator, the Center shall, on proof satisfactory to it of the failure of the arbitrator to participate in the work of the Tribunal, declare the office vacant,

and a substitute arbitrator shall be appointed by the Center in the exercise of the discretion defined in Article 33, unless the parties agree otherwise.

Pleas as to the Jurisdiction of the Tribunal

Article 36

- (a) The Tribunal shall have the power to hear and determine objections to its own jurisdiction, including any objections with respect to form, existence, validity or scope of the Arbitration Agreement examined pursuant to Article 59(b).
- (b) The Tribunal shall have the power to determine the existence or validity of any contract of which the Arbitration Agreement forms part or to which it relates.
- (c) A plea that the Tribunal does not have jurisdiction shall be raised not later than in the Statement of Defense or, with respect to a counterclaim or a setoff, the Statement of Defense thereto, failing which any such plea shall be barred in the subsequent arbitral proceedings or before any court. A plea that the Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The Tribunal may, in either case, admit a later plea if it considers the delay justified.
- (d) The Tribunal may rule on a plea referred to in paragraph (c) as a preliminary question or, in its sole discretion, decide on such a plea in the final award.
- (e) A plea that the Tribunal lacks jurisdiction shall not preclude the Center from administering the arbitration.

IV. CONDUCT OF THE ARBITRATION

Transmission of the File to the Tribunal

Article 37

The Center shall transmit the file to each arbitrator as soon as the arbitrator is appointed.

General Powers of the Tribunal

Article 38

- (a) Subject to Article 3, the Tribunal may conduct the arbitration in such manner as it considers appropriate.
- (b) In all cases, the Tribunal shall ensure that the parties are treated with equality and that each party is given a fair opportunity to present its case.
- (c) The Tribunal shall ensure that the arbitral procedure takes place with due expedition. It

may, at the request of a party or on its own motion, extend in exceptional cases a period of time fixed by these Rules, by itself or agreed to by the parties. In urgent cases, such an extension may be granted by the presiding arbitrator alone.

Place of Arbitration

Article 39

- (a) Unless otherwise agreed by the parties, the place of arbitration shall be decided by the Center, taking into consideration any observations of the parties and the circumstances of the arbitration.
- (b) The Tribunal may, after consultation with the parties, conduct hearings at any place that it considers appropriate. It may deliberate wherever it deems appropriate.
- (c) The award shall be deemed to have been made at the place of arbitration.

Language of Arbitration

Article 40

- (a) Unless otherwise agreed by the parties, the language of the arbitration shall be the language of the Arbitration Agreement, subject to the power of the Tribunal to determine otherwise, having regard to any observations of the parties and the circumstances of the arbitration.
- (b) The Tribunal may order that any documents submitted in languages other than the language of arbitration be accompanied by a translation in whole or in part into the language of arbitration.

Statement of Claim

Article 41

- (a) Unless the Statement of Claim accompanied the Request for Arbitration, the Claimant shall, within 30 days after receipt of notification from the Center of the establishment of the Tribunal, communicate its Statement of Claim to the Respondent and to the Tribunal.
- (b) The Statement of Claim shall contain a comprehensive statement of the facts and legal arguments supporting the claim, including a statement of the relief sought.
- (c) The Statement of Claim shall, to as large an extent as possible, be accompanied by the documentary evidence upon which the Claimant relies, together with a schedule of such documents. Where the documentary evidence is especially voluminous, the Claimant may add a reference to further documents it is prepared to submit.

Statement of Defense

Article 42

- (a) The Respondent shall, within 30 days after receipt of the Statement of Claim or within 30 days after receipt of notification from the Center of the establishment of the Tribunal, whichever occurs later, communicate its Statement of Defense to the Claimant and to the Tribunal.
- (b) The Statement of Defense shall reply to the particulars of the Statement of Claim required pursuant to Article 41(b). The Statement of Defense shall be accompanied by the corresponding documentary evidence described in Article 41(c).
- (c) Any counterclaim or setoff by the Respondent shall be made or asserted in the Statement of Defense or, in exceptional circumstances, at a later stage in the arbitral proceedings if so determined by the Tribunal. Any such counterclaim or setoff shall contain the same particulars as those specified in Article 41(b) and (c).

Further Written Statements

Article 43

- (a) In the event that a counterclaim or setoff has been made or asserted, the Claimant shall reply to the particulars thereof. Article 42(a) and (b) shall apply mutatis mutandis to such reply.
- (b) The Tribunal may, in its discretion, allow or require further written statements.

Amendments to Claims or Defense

Article 44

Subject to any contrary agreement by the parties, a party may amend or supplement its claim, counterclaim, defense or setoff during the course of the arbitral proceedings, unless the Tribunal considers it inappropriate to allow such amendment having regard to its nature or the delay in making it and to the provisions of Article 38(b) and (c).

Communication Between Parties and Tribunal

Article 45

Except as otherwise provided in these Rules or permitted by the Tribunal, no party or anyone acting on its behalf may have any ex parte communication with any arbitrator with respect to any matter of substance relating to the arbitration, it being understood that nothing in this paragraph shall prohibit ex parte communications which concern matters of a purely organizational nature, such as the physical facilities, place, date or time of the hearings.

Interim Measures of Protection; Security for Claims and Costs

Article 46

- (a) At the request of a party, the Tribunal may issue any provisional orders or take other interim measures it deems necessary, including injunctions and measures for the conservation of goods which form part of the subject matter in dispute, such as an order for their deposit with a third person or for the sale of perishable goods. The Tribunal may make the granting of such measures subject to appropriate security being furnished by the requesting party.
- (b) At the request of a party, the Tribunal may, if it considers it to be required by exceptional circumstances, order the other party to provide security, in a form to be determined by the Tribunal, for the claim or counterclaim, as well as for costs referred to in Article 72.
- (c) Measures and orders contemplated under this Article may take the form of an interim award.
- (d) A request addressed by a party to a judicial authority for interim measures or for security for the claim or counterclaim, or for the implementation of any such measures or orders granted by the Tribunal, shall not be deemed incompatible with the Arbitration Agreement, or deemed to be a waiver of that Agreement.

Preparatory Conference

Article 47

The Tribunal may, in general following the submission of the Statement of Defense, conduct a preparatory conference with the parties for the purpose of organizing and scheduling the subsequent proceedings.

Evidence

Article 48

- (a) The Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.
- (b) At any time during the arbitration, the Tribunal may, at the request of a party or on its own motion, order a party to produce such documents or other evidence as it considers necessary or appropriate and may order a party to make available to the Tribunal or to an expert appointed by it or to the other party any property in its possession or control for inspection or testing.

Experiments

Article 49

- (a) A party may give notice to the Tribunal and to the other party at any reasonable time before a hearing that specified experiments have been conducted on which it intends to

rely. The notice shall specify the purpose of the experiment, a summary of the experiment, the method employed, the results and the conclusion. The other party may by notice to the Tribunal request that any or all such experiments be repeated in its presence. If the Tribunal considers such request justified, it shall determine the timetable for the repetition of the experiments.

- (b) For the purposes of this Article, "experiments" shall include tests or other processes of verification.

Site Visits

Article 50

The Tribunal may, at the request of a party or on its own motion, inspect or require the inspection of any site, property, machinery, facility, production line, model, film, material, product or process as it deems appropriate. A party may request such an inspection at any reasonable time prior to any hearing, and the Tribunal, if it grants such a request, shall determine the timing and arrangements for the inspection.

Agreed Primers and Models

Article 51

The Tribunal may, where the parties so agree, determine that they shall jointly provide:

- (i) a technical primer setting out the background of the scientific, technical or other specialized information necessary to fully understand the matters in issue; and
- (ii) models, drawings or other materials that the Tribunal or the parties require for reference purposes at any hearing.

Disclosure of Trade Secrets and Other Confidential Information

Article 52

- (a) For the purposes of this Article, confidential information shall mean any information, regardless of the medium in which it is expressed, which is

- (i) in the possession of a party,
- (ii) not accessible to the public,
- (iii) of commercial, financial or industrial significance, and
- (iv) treated as confidential by the party possessing it.

- (b) A party invoking the confidentiality of any information it wishes or is required to submit in the arbitration, including to an expert appointed by the Tribunal, shall make an application to have the information classified as confidential by notice to the Tribunal, with a copy to the other party. Without disclosing the substance of the information, the

party shall give in the notice the reasons for which it considers the information confidential.

- (c) The Tribunal shall determine whether the information is to be classified as confidential and of such a nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality. If the Tribunal so determines, it shall decide under which conditions and to whom the confidential information may in part or in whole be disclosed and shall require any person to whom the confidential information is to be disclosed to sign an appropriate confidentiality undertaking.
- (d) In exceptional circumstances, in lieu of itself determining whether the information is to be classified as confidential and of such nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality, the Tribunal may, at the request of a party or on its own motion and after consultation with the parties, designate a confidentiality advisor who will determine whether the information is to be so classified, and, if so, decide under which conditions and to whom it may in part or in whole be disclosed. Any such confidentiality advisor shall be required to sign an appropriate confidentiality undertaking.
- (e) The Tribunal may also, at the request of a party or on its own motion, appoint the confidentiality advisor as an expert in accordance with Article 55 in order to report to it, on the basis of the confidential information, on specific issues designated by the Tribunal without disclosing the confidential information either to the party from whom the confidential information does not originate or to the Tribunal.

Hearings

Article 53

- (a) If either party so requests, the Tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral argument or for both. In the absence of a request, the Tribunal shall decide whether to hold such a hearing or hearings. If no hearings are held, the proceedings shall be conducted on the basis of documents and other materials alone.
- (b) In the event of a hearing, the Tribunal shall give the parties adequate advance notice of the date, time and place thereof.
- (c) Unless the parties agree otherwise, all hearings shall be in private.
- (d) The Tribunal shall determine whether and, if so, in what form a record shall be made of any hearing.

Witnesses

Article 54

- (a) Before any hearing, the Tribunal may require either party to give notice of the identity of witnesses it wishes to call, as well as of the subject matter of their testimony and its relevance to the issues.
- (b) The Tribunal has discretion, on the grounds of redundancy and irrelevance, to limit or refuse the appearance of any witness, whether witness of fact or expert witness.
- (c) Any witness who gives oral evidence may be questioned, under the control of the Tribunal, by each of the parties. The Tribunal may put questions at any stage of the examination of the witnesses.
- (d) The testimony of witnesses may, either at the choice of a party or as directed by the Tribunal, be submitted in written form, whether by way of signed statements, sworn affidavits or otherwise, in which case the Tribunal may make the admissibility of the testimony conditional upon the witnesses being made available for oral testimony.
- (e) A party shall be responsible for the practical arrangements, cost and availability of any witness it calls.
- (f) The Tribunal shall determine whether any witness shall retire during any part of the proceedings, particularly during the testimony of other witnesses.

Experts Appointed by the Tribunal

Article 55

- (a) The Tribunal may, after consultation with the parties, appoint one or more independent experts to report to it on specific issues designated by the Tribunal. A copy of the expert's terms of reference, established by the Tribunal, having regard to any observations of the parties, shall be communicated to the parties. Any such expert shall be required to sign an appropriate confidentiality undertaking.
- (b) Subject to Article 52, upon receipt of the expert's report, the Tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party may, subject to Article 52, examine any document on which the expert has relied in such a report.
- (c) At the request of a party, the parties shall be given the opportunity to question the expert at a hearing. At this hearing, the parties may present expert witnesses to testify on the points at issue.
- (d) The opinion of any expert on the issue or issues submitted to the expert shall be subject to the Tribunal's power of assessment of those issues in the context of all the circumstances of the case, unless the parties have agreed that the expert's determination shall be conclusive in respect of any specific issue.

Default

Article 56

- (a) If the Claimant, without showing good cause, fails to submit its Statement of Claim in accordance with Article 41, the Tribunal shall terminate the proceedings.
- (b) If the Respondent, without showing good cause, fails to submit its Statement of Defense in accordance with Article 42, the Tribunal may nevertheless proceed with the arbitration and make the award.
- (c) The Tribunal may also proceed with the arbitration and make the award if a party, without showing good cause, fails to avail itself of the opportunity to present its case within the period of time determined by the Tribunal.
- (d) If a party, without showing good cause, fails to comply with any provision of, or requirement under, these Rules or any direction given by the Tribunal, the Tribunal may draw the inferences therefrom that it considers appropriate.

Closure of Proceedings

Article 57

- (a) The Tribunal shall declare the proceedings closed when it is satisfied that the parties have had adequate opportunity to present submissions and evidence.
- (b) The Tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the proceedings it declared to be closed at any time before the award is made.

Waiver

Article 58

A party which knows that any provision of, or requirement under, these Rules, or any direction given by the Tribunal, has not been complied with, and yet proceeds with the arbitration without promptly recording an objection to such non-compliance, shall be deemed to have waived its right to object.

V. AWARDS AND OTHER DECISIONS

Laws Applicable to the Substance of the Dispute, the Arbitration and the Arbitration Agreement

Article 59

- (a) The Tribunal shall decide the substance of the dispute in accordance with the law or rules of law chosen by the parties. Any designation of the law of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. Failing a choice by the parties, the Tribunal shall apply the law or rules of law that it determines to be appropriate. In all cases, the Tribunal shall decide having due regard to the terms of any relevant contract and taking into account applicable trade usages. The Tribunal may decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized it to do so.
- (b) The law applicable to the arbitration shall be the arbitration law of the place of arbitration, unless the parties have expressly agreed on the application of another arbitration law and such agreement is permitted by the law of the place of arbitration.
- (c) An Arbitration Agreement shall be regarded as effective if it conforms to the requirements concerning form, existence, validity and scope of either the law or rules of law applicable in accordance with paragraph (a), or the law applicable in accordance with paragraph (b).

Currency and Interest

Article 60

- (a) Monetary amounts in the award may be expressed in any currency.
- (b) The Tribunal may award simple or compound interest to be paid by a party on any sum awarded against that party. It shall be free to determine the interest at such rates as it considers to be appropriate, without being bound by legal rates of interest, and shall be free to determine the period for which the interest shall be paid.

Decision-Making

Article 61

Unless the parties have agreed otherwise, where there is more than one arbitrator, any award, order or other decision of the Tribunal shall be made by a majority. In the absence of a majority, the presiding arbitrator shall make the award, order or other decision as if acting as sole arbitrator.

Form and Notification of Awards

Article 62

- (a) The Tribunal may make preliminary, interim, interlocutory, partial or final awards.
- (b) The award shall be in writing and shall state the date on which it was made, as well as the

place of arbitration in accordance with Article 39(a).

- (c) The award shall state the reasons on which it is based, unless the parties have agreed that no reasons should be stated and the law applicable to the arbitration does not require the statement of such reasons.
- (d) The award shall be signed by the arbitrator or arbitrators. The signature of the award by a majority of the arbitrators, or, in the case of Article 61, second sentence, by the presiding arbitrator, shall be sufficient. Where an arbitrator fails to sign, the award shall state the reason for the absence of the signature.
- (e) The Tribunal may consult the Center with regard to matters of form, particularly to ensure the enforceability of the award.
- (f) The award shall be communicated by the Tribunal to the Center in a number of originals sufficient to provide one for each party, the arbitrator or arbitrators and the Center. The Center shall formally communicate an original of the award to each party and the arbitrator or arbitrators.
- (g) At the request of a party, the Center shall provide it, at cost, with a copy of the award certified by the Center. A copy so certified shall be deemed to comply with the requirements of Article IV(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958.

Time Period for Delivery of the Final Award

Article 63

- (a) The arbitration should, wherever reasonably possible, be heard and the proceedings declared closed within not more than nine months after either the delivery of the Statement of Defense or the establishment of the Tribunal, whichever event occurs later. The final award should, wherever reasonably possible, be made within three months thereafter.
- (b) If the proceedings are not declared closed within the period of time specified in paragraph (a), the Tribunal shall send the Center a status report on the arbitration, with a copy to each party. It shall send a further status report to the Center, and a copy to each party, at the end of each ensuing period of three months during which the proceedings have not been declared closed.
- (c) If the final award is not made within three months after the closure of the proceedings, the Tribunal shall send the Center a written explanation for the delay, with a copy to each party. It shall send a further explanation, and a copy to each party, at the end of each ensuing period of one month until the final award is made.

Effect of Award

Article 64

- (a) By agreeing to arbitration under these Rules, the parties undertake to carry out the award without delay, and waive their right to any form of appeal or recourse to a court of law or other judicial authority, insofar as such waiver may validly be made under the applicable law.
- (b) The award shall be effective and binding on the parties as from the date it is communicated by the Center pursuant to Article 62(f), second sentence.

Settlement or Other Grounds for Termination

Article 65

- (a) The Tribunal may suggest that the parties explore settlement at such times as the Tribunal may deem appropriate.
- (b) If, before the award is made, the parties agree on a settlement of the dispute, the Tribunal shall terminate the arbitration and, if requested jointly by the parties, record the settlement in the form of a consent award. The Tribunal shall not be obliged to give reasons for such an award.
- (c) If, before the award is made, the continuation of the arbitration becomes unnecessary or impossible for any reason not mentioned in paragraph (b), the Tribunal shall inform the parties of its intention to terminate the arbitration. The Tribunal shall have the power to issue such an order terminating the arbitration, unless a party raises justifiable grounds for objection within a period of time to be determined by the Tribunal.
- (d) The consent award or the order for termination of the arbitration shall be signed by the arbitrator or arbitrators in accordance with Article 62(d) and shall be communicated by the Tribunal to the Center in a number of originals sufficient to provide one for each party, the arbitrator or arbitrators and the Center. The Center shall formally communicate an original of the consent award or the order for termination to each party and the arbitrator or arbitrators.

Correction of the Award and Additional Award

Article 66

- (a) Within 30 days after receipt of the award, a party may, by notice to the Tribunal, with a copy to the Center and the other party, request the Tribunal to correct in the award any clerical, typographical or computational errors. If the Tribunal considers the request to be justified, it shall make the correction within 30 days after receipt of the request. Any correction, which shall take the form of a separate memorandum, signed by the Tribunal in accordance with Article 62(d), shall become part of the award.
- (b) The Tribunal may correct any error of the type referred to in paragraph (a) on its own initiative within 30 days after the date of the award.

- (c) A party may, within 30 days after receipt of the award, by notice to the Tribunal, with a copy to the Center and the other party, request the Tribunal to make an additional award as to claims presented in the arbitral proceedings but not dealt with in the award. Before deciding on the request, the Tribunal shall give the parties an opportunity to be heard. If the Tribunal considers the request to be justified, it shall, wherever reasonably possible, make the additional award within 60 days of receipt of the request.

VI. FEES AND COSTS

Fees of the Center

Article 67

- (a) The Request for Arbitration shall be subject to the payment to the Center of a registration fee, which shall belong to the International Bureau of WIPO. The amount of the registration fee shall be fixed in the Schedule of Fees applicable on the date on which the Request for Arbitration is received by the Center.
- (b) The registration fee shall not be refundable.
- (c) No action shall be taken by the Center on a Request for Arbitration until the registration fee has been paid.
- (d) If a Claimant fails, within 15 days after a second reminder in writing from the Center, to pay the registration fee, it shall be deemed to have withdrawn its Request for Arbitration.

Article 68

- (a) An administration fee, which shall belong to the International Bureau of WIPO, shall be payable by the Claimant to the Center within 30 days after the commencement of the arbitration. The Center shall notify the Claimant of the amount of the administration fee as soon as possible after receipt of the Request for Arbitration.
- (b) In the case of a counterclaim, an administration fee shall also be payable by the Respondent to the Center within 30 days after the date on which the counterclaim referred to in Article 42(c) is made. The Center shall notify the Respondent of the amount of the administration fee as soon as possible after receipt of notification of the counterclaim.
- (c) The amount of the administration fee shall be calculated in accordance with the Schedule of Fees applicable on the date of commencement of the arbitration.
- (d) Where a claim or counterclaim is increased, the amount of the administration fee may be increased in accordance with the Schedule of Fees applicable under paragraph (c), and the increased amount shall be payable by the Claimant or the Respondent, as the case may be.

- (e) If a party fails, within 15 days after a second reminder in writing from the Center, to pay any administration fee due, it shall be deemed to have withdrawn its claim or counterclaim, or its increase in claim or counterclaim, as the case may be.
- (f) The Tribunal shall, in a timely manner, inform the Center of the amount of the claim and any counterclaim, as well as any increase thereof.

Fees of the Arbitrators

Article 69

- (a) The amount and currency of the fees of the arbitrators and the modalities and timing of their payment shall be fixed, in accordance with the provisions of this Article, by the Center, after consultation with the arbitrators and the parties.
- (b) The amount of the fees of the arbitrators shall, unless the parties and arbitrators agree otherwise, be determined within the range of minimum and maximum fees set out in the Schedule of Fees applicable on the date of the commencement of the arbitration, taking into account the estimated time needed by the arbitrators for conducting the arbitration, the amount in dispute, the complexity of the subject matter of the dispute, the urgency of the case and any other relevant circumstances of the case.

Deposits

Article 70

- (a) Upon receipt of notification from the Center of the establishment of the Tribunal, the Claimant and the Respondent shall each deposit an equal amount as an advance for the costs of arbitration referred to in Article 71. The amount of the deposit shall be determined by the Center.
- (b) In the course of the arbitration, the Center may require that the parties make supplementary deposits.
- (c) If the required deposits are not paid in full within 30 days after receipt of the corresponding notification, the Center shall so inform the parties in order that one or other of them may make the required payment.
- (d) Where the amount of the counterclaim greatly exceeds the amount of the claim or involves the examination of significantly different matters, or where it otherwise appears appropriate in the circumstances, the Center in its discretion may establish two separate deposits on account of claim and counterclaim. If separate deposits are established, the totality of the deposit on account of claim shall be paid by the Claimant and the totality of the deposit on account of counterclaim shall be paid by the Respondent.
- (e) If a party fails, within 15 days after a second reminder in writing from the Center, to pay the required deposit, it shall be deemed to have withdrawn the relevant claim or counterclaim.

- (f) After the award has been made, the Center shall, in accordance with the award, render an accounting to the parties of the deposits received and return any unexpended balance to the parties or require the payment of any amount owing from the parties.

Award of Costs of Arbitration

Article 71

- (a) In its award, the Tribunal shall fix the costs of arbitration, which shall consist of:
- (i) the arbitrators' fees,
 - (ii) the properly incurred travel, communication and other expenses of the arbitrators,
 - (iii) the costs of expert advice and such other assistance required by the Tribunal pursuant to these Rules, and
 - (iv) such other expenses as are necessary for the conduct of the arbitration proceedings, such as the cost of meeting and hearing facilities.
- (b) The aforementioned costs shall, as far as possible, be debited from the deposits required under Article 70.
- (c) The Tribunal shall, subject to any agreement of the parties, apportion the costs of arbitration and the registration and administration fees of the Center between the parties in the light of all the circumstances and the outcome of the arbitration.

Award of Costs Incurred by a Party

Article 72

In its award, the Tribunal may, subject to any contrary agreement by the parties and in the light of all the circumstances and the outcome of the arbitration, order a party to pay the whole or part of reasonable expenses incurred by the other party in presenting its case, including those incurred for legal representatives and witnesses.

VII. CONFIDENTIALITY

Confidentiality of the Existence of the Arbitration

Article 73

- (a) Except to the extent necessary in connection with a court challenge to the arbitration or an action for enforcement of an award, no information concerning the existence of an arbitration may be unilaterally disclosed by a party to any third party unless it is required to do so by law or by a competent regulatory body, and then only
- (i) by disclosing no more than what is legally required, and

- (ii) by furnishing to the Tribunal and to the other party, if the disclosure takes place during the arbitration, or to the other party alone, if the disclosure takes place after the termination of the arbitration, details of the disclosure and an explanation of the reason for it.
- (b) Notwithstanding paragraph (a), a party may disclose to a third party the names of the parties to the arbitration and the relief requested for the purpose of satisfying any obligation of good faith or candor owed to that third party.

Confidentiality of Disclosures Made During the Arbitration

Article 74

- (a) In addition to any specific measures that may be available under Article 52, any documentary or other evidence given by a party or a witness in the arbitration shall be treated as confidential and, to the extent that such evidence describes information that is not in the public domain, shall not be used or disclosed to any third party by a party whose access to that information arises exclusively as a result of its participation in the arbitration for any purpose without the consent of the parties or order of a court having jurisdiction.
- (b) For the purposes of this Article, a witness called by a party shall not be considered to be a third party. To the extent that a witness is given access to evidence or other information obtained in the arbitration in order to prepare the witness's testimony, the party calling such witness shall be responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party.

Confidentiality of the Award

Article 75

The award shall be treated as confidential by the parties and may only be disclosed to a third party if and to the extent that

- (i) the parties consent, or
- (ii) it falls into the public domain as a result of an action before a national court or other competent authority, or
- (iii) it must be disclosed in order to comply with a legal requirement imposed on a party or in order to establish or protect a party's legal rights against a third party.

Maintenance of Confidentiality by the Center and Arbitrator

Article 76

- (a) Unless the parties agree otherwise, the Center and the arbitrator shall maintain the confidentiality of the arbitration, the award and, to the extent that they describe information that is not in the public domain, any documentary or other evidence disclosed

during the arbitration, except to the extent necessary in connection with a court action relating to the award, or as otherwise required by law.

- (b) Notwithstanding paragraph (a), the Center may include information concerning the arbitration in any aggregate statistical data that it publishes concerning its activities, provided that such information does not enable the parties or the particular circumstances of the dispute to be identified.

VIII. MISCELLANEOUS

Exclusion of Liability

Article 77

Except in respect of deliberate wrongdoing, the arbitrator or arbitrators, WIPO and the Center shall not be liable to a party for any act or omission in connection with the arbitration.

Waiver of Defamation

Article 78

The parties and, by acceptance of appointment, the arbitrator agree that any statements or comments, whether written or oral, made or used by them or their representatives in preparation for or in the course of the arbitration shall not be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this Article may be pleaded as a bar to any such action.

ANNEX E
WIPO EXPEDITED ARBITRATION RULES

I. GENERAL PROVISIONS

Abbreviated Expressions

Article 1

In these Rules:

Arbitration Agreement means an agreement by the parties to submit to arbitration all or certain disputes that have arisen or that may arise between them; an Arbitration Agreement may be in the form of an arbitration clause in a contract or in the form of a separate contract;

Claimant means the party initiating an arbitration;

Respondent means the party against which the arbitration is initiated, as named in the Request for Arbitration;

Tribunal means the sole arbitrator;

WIPO means the World Intellectual Property Organization;

Center means the WIPO Arbitration and Mediation Center, a unit of the International Bureau of WIPO;

Words used in the singular include the plural and vice versa, as the context may require.

Scope of Application of Rules

Article 2

Where an Arbitration Agreement provides for arbitration under the WIPO Expedited Arbitration Rules, these Rules shall be deemed to form part of that Arbitration Agreement and the dispute shall be settled in accordance with these Rules, as in effect on the date of the commencement of the arbitration, unless the parties have agreed otherwise.

Article 3

(a) These Rules shall govern the arbitration, except that, where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

(b) The law applicable to the arbitration shall be determined in accordance with Article 53(b).

Notices, Periods of Time

Article 4

- (a) Any notice or other communication that may or is required to be given under these Rules shall be in writing and shall be delivered by expedited postal or courier service, or transmitted by telex, telefax or other means of telecommunication that provide a record thereof.
- (b) A party's last known residence or place of business shall be a valid address for the purpose of any notice or other communication in the absence of any notification of a change by that party. Communications may in any event be addressed to a party in the manner stipulated or, failing such a stipulation, according to the practice followed in the course of the dealings between the parties.
- (c) For the purpose of determining the date of commencement of a time limit, a notice or other communication shall be deemed to have been received on the day it is delivered or, in the case of telecommunications, transmitted in accordance with paragraphs (a) and (b) of this Article.
- (d) For the purpose of determining compliance with a time limit, a notice or other communication shall be deemed to have been sent, made or transmitted if it is dispatched, in accordance with paragraphs (a) and (b) of this Article, prior to or on the day of the expiration of the time limit.
- (e) For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice or other communication is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day that follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.
- (f) The parties may agree to reduce or extend the periods of time referred to in Articles 11, 14(b), 37(a), 47(b) and 49(a).
- (g) The Center may, at the request of a party or on its own motion, extend the periods of time referred to in Articles 11, 14(b), 37(a), 47(b), 49(a), 60(d), 61(e) and 63(e).
- (h) The Center may, in consultation with the parties, reduce the period of time referred to in Article 11.

Documents Required to Be Submitted to the Center

Article 5

- (a) Until the notification by the Center of the establishment of the Tribunal, any written statement, notice or other communication required or allowed under Articles 6 to 30 shall be submitted by a party to the Center and a copy thereof shall at the same time be transmitted by that party to the other party.

- (b) Any written statement, notice or other communication so sent to the Center shall be sent in a number of copies equal to the number required to provide one copy for the Tribunal and one for the Center.
- (c) After the notification by the Center of the establishment of the Tribunal, any written statements, notices or other communications shall be submitted by a party directly to the Tribunal and a copy thereof shall at the same time be supplied by that party to the other party.
- (d) The Tribunal shall send to the Center a copy of each order or other decision that it makes.

II. COMMENCEMENT OF THE ARBITRATION

Request for Arbitration

Article 6

The Claimant shall transmit the Request for Arbitration to the Center and to the Respondent.

Article 7

The date of commencement of the arbitration shall be the date on which the Request for Arbitration, together with the Statement of Claim as required by Article 10, is received by the Center.

Article 8

The Center shall inform the Claimant and the Respondent of the receipt by it of the Request for Arbitration and Statement of Claim and of the date of the commencement of the arbitration.

Article 9

The Request for Arbitration shall contain:

- (i) a demand that the dispute be referred to arbitration under the WIPO Expedited Arbitration Rules;
- (ii) the names, addresses and telephone, telex, telefax or other communication references of the parties and of the representative of the Claimant;
- (iii) a copy of the Arbitration Agreement and, if applicable, any separate choice-of-law clause;
- (iv) any observations that the Claimant considers useful in connection with, Articles 14 and 15.

Article 10

The Request for Arbitration shall be accompanied by the Statement of Claim in conformity with Article 35(a) and (b).

Answer to the Request and Statement of Defense

Article 11

Within 20 days from the date on which the Respondent receives the Request for Arbitration and Statement of Claim from the Claimant, the Respondent shall address to the Center and to the Claimant an Answer to the Request which shall contain comments on any of the items in the Request for Arbitration.

Article 12

The Answer to the Request shall be accompanied by the Statement of Defense in conformity with Article 36(a) and (b).

Representation

Article 13

- (a) The parties may be represented by persons of their choice, irrespective of, in particular, nationality or professional qualification. The names, addresses and telephone, telex, telefax or other communication references of representatives shall be communicated to the Center, the other party and, after its establishment, the Tribunal.
- (b) Each party shall ensure that its representatives have sufficient time available to enable the arbitration to proceed expeditiously.
- (c) The parties may also be assisted by persons of their choice.

III. COMPOSITION AND ESTABLISHMENT OF THE TRIBUNAL

Number of Arbitrators

Article 14

- (a) The Tribunal shall consist of a sole arbitrator, who shall be appointed by the parties.
- (b) If the appointment of the sole arbitrator is not made within 15 days after the commencement of the arbitration, the sole arbitrator shall be appointed by the Center.

Nationality of Arbitrator

Article 15

- (a) An agreement of the parties concerning the nationality of the arbitrator shall be respected.
- (b) If the parties have not agreed on the nationality of the sole arbitrator, such arbitrator shall, in the absence of special circumstances, such as the need to appoint a person having particular qualifications, be a national of a country other than the countries of the parties.

Communication Between Parties and Candidates for Appointment as Arbitrator

Article 16

No party or anyone acting on its behalf shall have any *ex parte* communication with any candidate for appointment as arbitrator except to discuss the candidate's qualifications, availability or independence in relation to the parties.

Impartiality and Independence

Article 17

- (a) The arbitrator shall be impartial and independent.
- (b) The prospective arbitrator shall, before accepting appointment, disclose to the parties and the Center any circumstances that might give rise to justifiable doubt as to the sole arbitrator's impartiality or independence, or confirm in writing that no such circumstances exist.
- (c) If, at any stage during the arbitration, new circumstances arise that might give rise to justifiable doubt as to the arbitrator's impartiality or independence, the sole arbitrator shall promptly disclose such circumstances to the parties and the Center.

Availability, Acceptance and Notification

Article 18

- (a) The arbitrator shall, by accepting appointment, be deemed to have undertaken to make available sufficient time to enable the arbitration to be conducted and completed expeditiously.
- (b) The prospective arbitrator shall accept appointment in writing and shall communicate such acceptance to the Center.
- (c) The Center shall notify the parties of the establishment of the Tribunal.

Challenge of Sole Arbitrator

Article 19

- (a) The arbitrator may be challenged by a party if circumstances exist that give rise to justifiable doubt as to the sole arbitrator's impartiality or independence.
- (b) Notwithstanding Article 14, a party may challenge the appointed sole arbitrator only for reasons of which it becomes aware after the appointment has been made.

Article 20

A party challenging the arbitrator shall send notice to the Center, the Tribunal and the other party, stating the reasons for the challenge, within seven days after being notified of the sole

arbitrator's appointment or after becoming aware of the circumstances that it considers give rise to justifiable doubt as to the sole arbitrator's impartiality or independence.

Article 21

When the sole arbitrator has been challenged by a party, the other party shall have the right to respond to the challenge and shall, if it exercises this right, send, within seven days after receipt of the notice referred to in Article 20, a copy of its response to the Center, the party making the challenge and the sole arbitrator.

Article 22

The Tribunal may, in its discretion, suspend or continue the arbitral proceedings during the pendency of the challenge.

Article 23

The other party may agree to the challenge or the sole arbitrator may voluntarily withdraw. In either case, the sole arbitrator shall be replaced without any implication that the grounds for the challenge are valid.

Article 24

If the other party does not agree to the challenge and the sole arbitrator does not withdraw, the decision on the challenge shall be made by the Center in accordance with its internal procedures. Such a decision is of an administrative nature and shall be final. The Center shall not be required to state reasons for its decision.

Release from Appointment

Article 25

At the sole arbitrator's own request, the sole arbitrator may be released from appointment as arbitrator either with the consent of the parties or by the Center.

Article 26

Irrespective of any request by the sole arbitrator, the parties may jointly release the sole arbitrator from appointment as arbitrator. The parties shall promptly notify the Center of such release.

Article 27

At the request of a party or on its own motion, the Center may release the sole arbitrator from appointment as arbitrator if the sole arbitrator has become de jure or de facto unable to fulfill, or fails to fulfill, the duties of arbitrator. In such a case, the parties shall be offered the opportunity to express their views thereon and the provisions of Articles 21 to 24 shall apply *mutatis mutandis*.

Replacement of Sole Arbitrator

Article 28

- (a) Whenever necessary, a substitute arbitrator shall be appointed pursuant to the procedure provided for in Article 14 that was applicable to the appointment of the arbitrator being replaced.
- (b) Pending the replacement, the arbitral proceedings shall be suspended, unless otherwise agreed by the parties.

Article 29

Whenever a substitute arbitrator is appointed, the Tribunal shall, having regard to any observations of the parties, determine in its sole discretion whether all or part of any prior hearings are to be repeated.

Pleas as to the Jurisdiction of the Tribunal

Article 30

- (a) The Tribunal shall have the power to hear and determine objections to its own jurisdiction, including any objections with respect to form, existence, validity or scope of the Arbitration Agreement examined pursuant to Article 53(b).
- (b) The Tribunal shall have the power to determine the existence or validity of any contract of which the Arbitration Agreement forms part or to which it relates.
- (c) A plea that the Tribunal does not have jurisdiction shall be raised not later than in the Statement of Defense or, with respect to a counterclaim or a setoff, the Statement of Defense thereto, failing which any such plea shall be barred in the subsequent arbitral proceedings or before any court. A plea that the Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The Tribunal may, in either case, admit a later plea if it considers the delay justified.
- (d) The Tribunal may rule on a plea referred to in paragraph (c) as a preliminary question or, in its sole discretion, decide on such a plea in the final award.
- (e) A plea that the Tribunal lacks jurisdiction shall not preclude the Center from administering the arbitration.

IV. CONDUCT OF THE ARBITRATION

Transmission of the File to the Tribunal

Article 31

The Center shall transmit the file to the sole arbitrator as soon as the sole arbitrator is appointed.

General Powers of the Tribunal

Article 32

- (a) Subject to Article 3, the Tribunal may conduct the arbitration in such manner as it considers appropriate.
- (b) In all cases, the Tribunal shall ensure that the parties are treated with equality and that each party is given a fair opportunity to present its case.
- (c) The Tribunal shall ensure that the arbitral procedure takes place with due expedition. It may, at the request of a party or on its own motion, extend in exceptional cases a period of time fixed by these Rules, by itself or agreed to by the parties.

Place of Arbitration

Article 33

- (a) Unless otherwise agreed by the parties, the place of arbitration shall be decided by the Center, taking into consideration any observations of the parties and the circumstances of the arbitration.
- (b) The Tribunal may, after consultation with the parties, conduct hearings at any place that it considers appropriate. It may deliberate wherever it deems appropriate.
- (c) The award shall be deemed to have been made at the place of arbitration.

Language of Arbitration

Article 34

- (a) Unless otherwise agreed by the parties, the language of the arbitration shall be the language of the Arbitration Agreement, subject to the power of the Tribunal to determine otherwise, having regard to any observations of the parties and the circumstances of the arbitration.
- (b) The Tribunal may order that any documents submitted in languages other than the language of arbitration be accompanied by a translation in whole or in part into the language of arbitration.

Statement of Claim

Article 35

- (a) The Statement of Claim shall contain a comprehensive statement of the facts and legal arguments supporting the claim, including a statement of the relief sought.
- (b) The Statement of Claim shall, to as large an extent as possible, be accompanied by the documentary evidence upon which the Claimant relies, together with a schedule of such documents. Where the documentary evidence is especially voluminous, the Claimant may add a reference to further documents it is prepared to submit.

Statement of Defense

Article 36

- (a) The Statement of Defense shall reply to the particulars of the Statement of Claim required pursuant to Article 35(a). The Statement of Defense shall be accompanied by the corresponding documentary evidence described in Article 35(b).
- (b) Any counterclaim or setoff by the Respondent shall be made or asserted in the Statement of Defense or, in exceptional circumstances, at a later stage in the arbitral proceedings if so determined by the Tribunal. Any such counterclaim or setoff shall contain the same particulars as those specified in Article 35(a) and (b).

Further Written Statements

Article 37

- (a) In the event that a counterclaim or setoff has been made or asserted, the Claimant shall reply to the particulars thereof within 20 days from the date on which the Claimant receives such counter-claim or set-off. Article 36(a) shall apply *mutatis mutandis* to such reply.
- (b) The Tribunal may, in its discretion, allow or require further written statements.

Amendments to Claims or Defense

Article 38

Subject to any contrary agreement by the parties, a party may amend or supplement its claim, counterclaim, defense or setoff during the course of the arbitral proceedings, unless the Tribunal considers it inappropriate to allow such amendment having regard to its nature or the delay in making it and to the provisions of Article 32(b) and (c).

Communication Between Parties and Tribunal

Article 39

Except as otherwise provided in these Rules or permitted by the Tribunal, no party or anyone acting on its behalf may have any *ex parte* communication with the Tribunal with respect to any matter of substance relating to the arbitration, it being understood that nothing in this paragraph shall prohibit *ex parte* communications that concern matters of a purely organizational nature, such as the physical facilities, place, date or time of the hearings.

Interim Measures of Protection; Security for Claims and Costs

Article 40

- (a) At the request of a party, the Tribunal may issue any provisional orders or take other interim measures it deems necessary, including injunctions and measures for the conservation of goods which form part of the subject matter in dispute, such as an order for their deposit with a third person or for the sale of perishable goods. The Tribunal may make the granting of such measures subject to appropriate security being furnished by the requesting party.
- (b) At the request of a party, the Tribunal may, if it considers it to be required by exceptional circumstances, order the other party to provide security, in a form to be determined by the Tribunal, for the claim or counterclaim, as well as for costs referred to in Article 65.
- (c) Measures and orders contemplated under this Article may take the form of an interim award.
- (d) A request addressed by a party to a judicial authority for interim measures or for security for the claim or counterclaim, or for the implementation of any such measures or orders granted by the Tribunal, shall not be deemed incompatible with the Arbitration Agreement, or deemed to be a waiver of that Agreement.

Preparatory Conference

Article 41

The Tribunal may, in general following the submission of the Statement of Defense, conduct a preparatory conference with the parties for the purpose of organizing and scheduling the subsequent proceedings.

Evidence

Article 42

- (a) The Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.
- (b) At any time during the arbitration, the Tribunal may, at the request of a party or on its own motion, order a party to produce such documents or other evidence as it considers necessary or appropriate and may order a party to make available to the Tribunal or to an

expert appointed by it or to the other party any property in its possession or control for inspection or testing.

Experiments

Article 43

- (a) A party may give notice to the Tribunal and to the other party at any reasonable time before a hearing that specified experiments have been conducted on which it intends to rely. The notice shall specify the purpose of the experiment, a summary of the experiment, the method employed, the results and the conclusion. The other party may by notice to the Tribunal request that any or all such experiments be repeated in its presence. If the Tribunal considers such request justified, it shall determine the timetable for the repetition of the experiments.
- (b) For the purposes of this Article, "experiments" shall include tests or other processes of verification.

Site Visits

Article 44

The Tribunal may, at the request of a party or on its own motion, inspect or require the inspection of any site, property, machinery, facility, production line, model, film, material, product or process as it deems appropriate. A party may request such an inspection at any reasonable time prior to any hearing, and the Tribunal, if it grants such a request, shall determine the timing and arrangements for the inspection.

Agreed Primers and Models

Article 45

The Tribunal may, where the parties so agree, determine that they shall jointly provide:

- (i) a technical primer setting out the background of the scientific, technical or other specialized information necessary to understand fully the matters in issue; and
- (ii) models, drawings or other materials that the Tribunal or the parties require for reference purposes at any hearing.

Disclosure of Trade Secrets and Other Confidential Information

Article 46

- (a) For the purposes of this Article, confidential information shall mean any information, regardless of the medium in which it is expressed, which is
 - (i) in the possession of a party,
 - (ii) not accessible to the public,

- (iii) of commercial, financial or industrial significance, and
 - (iv) treated as confidential by the party possessing it.
- (b) A party invoking the confidentiality of any information it wishes or is required to submit in the arbitration, including to an expert appointed by the Tribunal, shall make an application to have the information classified as confidential by notice to the Tribunal, with a copy to the other party. Without disclosing the substance of the information, the party shall give in the notice the reasons for which it considers the information confidential.
- (c) The Tribunal shall determine whether the information is to be classified as confidential and of such a nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality. If the Tribunal so determines, it shall decide under which conditions and to whom the confidential information may in part or in whole be disclosed and shall require any person to whom the confidential information is to be disclosed to sign an appropriate confidentiality undertaking.
- (d) In exceptional circumstances, in lieu of itself determining whether the information is to be classified as confidential and of such nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality, the Tribunal may, at the request of a party or on its own motion and after consultation with the parties, designate a confidentiality advisor who will determine whether the information is to be so classified, and, if so, decide under which conditions and to whom it may in part or in whole be disclosed. Any such confidentiality advisor shall be required to sign an appropriate confidentiality undertaking.
- (e) The Tribunal may also, at the request of a party or on its own motion, appoint the confidentiality advisor as an expert in accordance with Article 49 in order to report to it, on the basis of the confidential information, on specific issues designated by the Tribunal without disclosing the confidential information either to the party from whom the confidential information does not originate or to the Tribunal.

Hearings

Article 47

- (a) If either party so requests, the Tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral argument or for both. In the absence of a request, the Tribunal shall decide whether to hold such a hearing or hearings. If no hearings are held, the proceedings shall be conducted on the basis of documents and other materials alone.
- (b) If a hearing is held, it shall be convened within 30 days after the receipt by the Claimant of the Answer to the Request and the Statement of Defense. The Tribunal shall give the parties adequate advance notice of the date, time and place of the hearing. Except in exceptional circumstances, hearings may not exceed three days. Each party shall be

expected to bring to the hearing such persons as necessary to adequately inform the Tribunal of the dispute.

- (c) Unless the parties agree otherwise, all hearings shall be in private.
- (d) The Tribunal shall determine whether and, if so, in what form a record shall be made of any hearing.
- (e) Within such short period of time after the hearing as is agreed by the parties or, in the absence of such agreement, determined by the Tribunal, each party may communicate to the Tribunal and to the other party a post-hearing brief.

Witnesses

Article 48

- (a) Before any hearing, the Tribunal may require either party to give notice of the identity of witnesses it wishes to call, as well as of the subject matter of their testimony and its relevance to the issues.
- (b) The Tribunal has discretion, on the grounds of redundancy and irrelevance, to limit or refuse the appearance of any witness, whether witness of fact or expert witness.
- (c) Any witness who gives oral evidence may be questioned, under the control of the Tribunal, by each of the parties. The Tribunal may put questions at any stage of the examination of the witnesses.
- (d) The testimony of witnesses may, either at the choice of a party or as directed by the Tribunal, be submitted in written form, whether by way of signed statements, sworn affidavits or otherwise, in which case the Tribunal may make the admissibility of the testimony conditional upon the witnesses being made available for oral testimony.
- (e) A party shall be responsible for the practical arrangements, cost and availability of any witness it calls.
- (f) The Tribunal shall determine whether any witness shall retire during any part of the proceedings, particularly during the testimony of other witnesses.

Experts Appointed by the Tribunal

Article 49

- (a) The Tribunal may, after consultation with the parties, appoint one or more independent experts to report to it on specific issues designated by the Tribunal. A copy of the expert's terms of reference, established by the Tribunal, having regard to any observations of the parties, shall be communicated to the parties. Any such expert shall be required to sign an appropriate confidentiality undertaking. The terms of reference shall include a requirement that the expert report to the Tribunal within 30 days of receipt of the terms of reference.

- (b) Subject to Article 46, upon receipt of the expert's report, the Tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party may, subject to Article 46, examine any document on which the expert has relied in such a report.
- (c) At the request of a party, the parties shall be given the opportunity to question the expert at a hearing. At this hearing, the parties may present expert witnesses to testify on the points at issue.
- (d) The opinion of any expert on the issue or issues submitted to the expert shall be subject to the Tribunal's power of assessment of those issues in the context of all the circumstances of the case, unless the parties have agreed that the expert's determination shall be conclusive in respect of any specific issue.

Default

Article 50

- (a) If the Claimant, without showing good cause, fails to submit its Statement of Claim in accordance with Articles 10 and 35, the Center shall not be required to take any action under Article 8.
- (b) If the Respondent, without showing good cause, fails to submit its Statement of Defense in accordance with Articles 11, 12 and 36, the Tribunal may nevertheless proceed with the arbitration and make the award.
- (c) The Tribunal may also proceed with the arbitration and make the award if a party, without showing good cause, fails to avail itself of the opportunity to present its case within the period of time determined by the Tribunal.
- (d) If a party, without showing good cause, fails to comply with any provision of, or requirement under, these Rules or any direction given by the Tribunal, the Tribunal may draw the inferences therefrom that it considers appropriate.

Closure of Proceedings

Article 51

- (a) The Tribunal shall declare the proceedings closed when it is satisfied that the parties have had adequate opportunity to present submissions and evidence.
- (b) The Tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the proceedings it declared to be closed at any time before the award is made.

Waiver

Article 52

A party which knows that any provision of, or requirement under, these Rules, or any direction given by the Tribunal, has not been complied with, and yet proceeds with the arbitration without promptly recording an objection to such non-compliance, shall be deemed to have waived its right to object.

V. AWARDS AND OTHER DECISIONS

Laws Applicable to the Substance of the Dispute, the Arbitration and the Arbitration Agreement

Article 53

- (a) The Tribunal shall decide the substance of the dispute in accordance with the law or rules of law chosen by the parties. Any designation of the law of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. Failing a choice by the parties, the Tribunal shall apply the law or rules of law that it determines to be appropriate. In all cases, the Tribunal shall decide having due regard to the terms of any relevant contract and taking into account applicable trade usages. The Tribunal may decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized it to do so.
- (b) The law applicable to the arbitration shall be the arbitration law of the place of arbitration, unless the parties have expressly agreed on the application of another arbitration law and such agreement is permitted by the law of the place of arbitration.
- (c) An Arbitration Agreement shall be regarded as effective if it conforms to the requirements concerning form, existence, validity and scope of either the law or rules of law applicable in accordance with paragraph (a), or the law applicable in accordance with paragraph (b).

Currency and Interest

Article 54

- (a) Monetary amounts in the award may be expressed in any currency.
- (b) The Tribunal may award simple or compound interest to be paid by a party on any sum awarded against that party. It shall be free to determine the interest at such rates as it considers to be appropriate, without being bound by legal rates of interest, and shall be free to determine the period for which the interest shall be paid.

Form and Notification of Awards

Article 55

- (a) The Tribunal may make preliminary, interim, interlocutory, partial or final awards.
- (b) The award shall be in writing and shall state the date on which it was made, as well as the place of arbitration in accordance with Article 33(a).

- (c) The award shall state the reasons on which it is based, unless the parties have agreed that no reasons should be stated and the law applicable to the arbitration does not require the statement of such reasons.
- (d) The award shall be signed by the sole arbitrator. Where the sole arbitrator fails to sign, the award shall state the reason for the absence of the signature.
- (e) The Tribunal may consult the Center with regard to matters of form, particularly to ensure the enforceability of the award.
- (f) The award shall be communicated by the Tribunal to the Center in a number of originals sufficient to provide one for each party, the sole arbitrator and the Center. The Center shall formally communicate an original of the award to each party and the sole arbitrator.
- (g) At the request of a party, the Center shall provide it, at cost, with a copy of the award certified by the Center. A copy so certified shall be deemed to comply with the requirements of Article IV(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958.

Time Period for Delivery of the Final Award

Article 56

- (a) The arbitration should, wherever reasonably possible, be heard and the proceedings declared closed within not more than three months after either the delivery of the Statement of Defense or the establishment of the Tribunal, whichever event occurs later. The final award should, wherever reasonably possible, be made within one month thereafter.
- (b) If the proceedings are not declared closed within the period of time specified in paragraph (a), the Tribunal shall send the Center a status report on the arbitration, with a copy to each party. It shall send a further status report to the Center, and a copy to each party, at the end of each ensuing period of one month during which the proceedings have not been declared closed.
- (c) If the final award is not made within one month after the closure of the proceedings, the Tribunal shall send the Center a written explanation for the delay, with a copy to each party. It shall send a further explanation, and a copy to each party, at the end of each ensuing period of one month until the final award is made.

Effect of Award

Article 57

- (a) By agreeing to arbitration under these Rules, the parties undertake to carry out the award without delay, and waive their right to any form of appeal or recourse to a court of law or other judicial authority, insofar as such waiver may validly be made under the applicable law.

- (b) The award shall be effective and binding on the parties as from the date it is communicated by the Center pursuant to Article 55(f), second sentence.

Settlement or Other Grounds for Termination

Article 58

- (a) The Tribunal may suggest that the parties explore settlement at such times as the Tribunal may deem appropriate.
- (b) If, before the award is made, the parties agree on a settlement of the dispute, the Tribunal shall terminate the arbitration and, if requested jointly by the parties, record the settlement in the form of a consent award. The Tribunal shall not be obliged to give reasons for such an award.
- (c) If, before the award is made, the continuation of the arbitration becomes unnecessary or impossible for any reason not mentioned in paragraph (b), the Tribunal shall inform the parties of its intention to terminate the arbitration. The Tribunal shall have the power to issue such an order terminating the arbitration, unless a party raises justifiable grounds for objection within a period of time to be determined by the Tribunal.
- (d) The consent award or the order for termination of the arbitration shall be signed by the sole arbitrator in accordance with Article 55(d) and shall be communicated by the Tribunal to the Center in a number of originals sufficient to provide one for each party, the sole arbitrator and the Center. The Center shall formally communicate an original of the consent award or the order for termination to each party and the sole arbitrator.

Correction of the Award and Additional Award

Article 59

- (a) Within 30 days after receipt of the award, a party may, by notice to the Tribunal, with a copy to the Center and the other party, request the Tribunal to correct in the award any clerical, typographical or computational errors. If the Tribunal considers the request to be justified, it shall make the correction within 30 days after receipt of the request. Any correction, which shall take the form of a separate memorandum, signed by the Tribunal in accordance with Article 55(d), shall become part of the award.
- (b) The Tribunal may correct any error of the type referred to in paragraph (a) on its own initiative within 30 days after the date of the award.
- (c) A party may, within 30 days after receipt of the award, by notice to the Tribunal, with a copy to the Center and the other party, request the Tribunal to make an additional award as to claims presented in the arbitral proceedings but not dealt with in the award. Before deciding on the request, the Tribunal shall give the parties an opportunity to be heard. If the Tribunal considers the request to be justified, it shall, wherever reasonably possible, make the additional award within 30 days of receipt of the request.

VI. FEES AND COSTS

Fees of the Center

Article 60

- (a) The Request for Arbitration shall be subject to the payment to the Center of a non-refundable registration fee. The amount of the registration fee shall be fixed in the Schedule of Fees applicable on the date on which the Request for Arbitration is received by the Center.
- (b) Any counterclaim by a Respondent shall be subject to the payment to the Center of a non-refundable registration fee. The amount of the registration fee shall be fixed in the Schedule of Fees applicable on the date on which the Request for Arbitration is received by the Center.
- (c) No action shall be taken by the Center on a Request for Arbitration or counterclaim until the registration fee has been paid.
- (d) If a Claimant or Respondent fails, within 15 days after a second reminder in writing from the Center, to pay the registration fee, it shall be deemed to have withdrawn its Request for Arbitration or counterclaim, as the case may be.

Article 61

- (a) An administration fee shall be payable by the Claimant to the Center within 30 days after the Claimant has received notification from the Center of the amount to be paid.
- (b) In the case of a counterclaim, an administration fee shall also be payable by the Respondent to the Center within 30 days after the date the Respondent has received notification from the Center of the amount to be paid.
- (c) The amount of the administration fee shall be calculated in accordance with the Schedule of Fees applicable on the date of commencement of the arbitration.
- (d) Where a claim or counterclaim is increased, the amount of the administration fee may be increased in accordance with the Schedule of Fees applicable under paragraph (c), and the increased amount shall be payable by the Claimant or the Respondent, as the case may be.
- (e) If a party fails, within 15 days after a second reminder in writing from the Center, to pay any administration fee due, it shall be deemed to have withdrawn its claim or counterclaim, or its increase in claim or counterclaim, as the case may be.
- (f) The Tribunal shall, in a timely manner, inform the Center of the amount of the claim and any counterclaim, as well as any increase thereof.

Fees of the Sole Arbitrator

Article 62

The amount and currency of the fees of the sole arbitrator and the modalities and timing of their payment shall be fixed in accordance with the Schedule of Fees applicable on the date on which the Request for Arbitration is received by the Center.

Deposits

Article 63

- (a) Upon receipt of notification from the Center of the establishment of the Tribunal, the Claimant and the Respondent shall each deposit an equal amount as an advance for the costs of arbitration referred to in Article 64. The amount of the deposit shall be determined by the Center.
- (b) In the course of the arbitration, the Center may require that the parties make supplementary deposits.
- (c) If the required deposits are not paid in full within 20 days after receipt of the corresponding notification, the Center shall so inform the parties in order that one or other of them may make the required payment.
- (d) Where the amount of the counterclaim greatly exceeds the amount of the claim or involves the examination of significantly different matters, or where it otherwise appears appropriate in the circumstances, the Center in its discretion may establish two separate deposits on account of claim and counterclaim. If separate deposits are established, the totality of the deposit on account of claim shall be paid by the Claimant and the totality of the deposit on account of counterclaim shall be paid by the Respondent.
- (e) If a party fails, within 15 days after a second reminder in writing from the Center, to pay the required deposit, it shall be deemed to have withdrawn the relevant claim or counterclaim.
- (f) After the award has been made, the Center shall, in accordance with the award, render an accounting to the parties of the deposits received and return any unexpended balance to the parties or require the payment of any amount owing from the parties.

Award of Costs of Arbitration

Article 64

- (a) In its award, the Tribunal shall fix the costs of arbitration, which shall consist of:
 - (i) the sole arbitrator's fees,
 - (ii) the properly incurred travel, communication and other expenses of the sole arbitrator,
 - (iii) the costs of expert advice and such other assistance required by the Tribunal pursuant to these Rules, and

- (iv) such other expenses as are necessary for the conduct of the arbitration proceedings, such as the cost of meeting and hearing facilities.
- (b) The aforementioned costs shall, as far as possible, be debited from the deposits required under Article 63.
- (c) The Tribunal shall, subject to any agreement of the parties, apportion the costs of arbitration and the registration and administration fees of the Center between the parties in the light of all the circumstances and the outcome of the arbitration.

Award of Costs Incurred by a Party

Article 65

In its award, the Tribunal may, subject to any contrary agreement by the parties and in the light of all the circumstances and the outcome of the arbitration, order a party to pay the whole or part of reasonable expenses incurred by the other party in presenting its case, including those incurred for legal representatives and witnesses.

VII. CONFIDENTIALITY

Confidentiality of the Existence of the Arbitration

Article 66

- (a) Except to the extent necessary in connection with a court challenge to the arbitration or an action for enforcement of an award, no information concerning the existence of an arbitration may be unilaterally disclosed by a party to any third party unless it is required to do so by law or by a competent regulatory body, and then only
 - (i) by disclosing no more than what is legally required, and
 - (ii) by furnishing to the Tribunal and to the other party, if the disclosure takes place during the arbitration, or to the other party alone, if the disclosure takes place after the termination of the arbitration, details of the disclosure and an explanation of the reason for it.
- (b) Notwithstanding paragraph (a), a party may disclose to a third party the names of the parties to the arbitration and the relief requested for the purpose of satisfying any obligation of good faith or candor owed to that third party.

Confidentiality of Disclosures Made During the Arbitration

Article 67

- (a) In addition to any specific measures that may be available under Article 46, any documentary or other evidence given by a party or a witness in the arbitration shall be treated as confidential and, to the extent that such evidence describes information that is not in the public domain, shall not be used or disclosed to any third party by a party whose access to that information arises exclusively as a result of its participation in the arbitration for any purpose without the consent of the parties or order of a court having jurisdiction.
- (b) For the purposes of this Article, a witness called by a party shall not be considered to be a third party. To the extent that a witness is given access to evidence or other information obtained in the arbitration in order to prepare the witness's testimony, the party calling such witness shall be responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party.

Confidentiality of the Award

Article 68

The award shall be treated as confidential by the parties and may only be disclosed to a third party if and to the extent that

- (i) the parties consent, or
- (ii) it falls into the public domain as a result of an action before a national court or other competent authority, or
- (iii) it must be disclosed in order to comply with a legal requirement imposed on a party or in order to establish or protect a party's legal rights against a third party.

Maintenance of Confidentiality by the Center and Arbitrator

Article 69

- (a) Unless the parties agree otherwise, the Center and the arbitrator shall maintain the confidentiality of the arbitration, the award and, to the extent that they describe information that is not in the public domain, any documentary or other evidence disclosed during the arbitration, except to the extent necessary in connection with a court action relating to the award, or as otherwise required by law.
- (b) Notwithstanding paragraph (a), the Center may include information concerning the arbitration in any aggregate statistical data that it publishes concerning its activities, provided that such information does not enable the parties or the particular circumstances of the dispute to be identified.

VIII. MISCELLANEOUS

Exclusion of Liability

Article 70

Except in respect of deliberate wrongdoing, the sole arbitrator, WIPO and the Center shall not be liable to a party for any act or omission in connection with the arbitration.

Waiver of Defamation

Article 71

The parties and, by acceptance of appointment, the arbitrator agree that any statements or comments, whether written or oral, made or used by them or their representatives in preparation for or in the course of the arbitration shall not be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this Article may be pleaded as a bar to any such action.

ANNEX F

**WIPO ARBITRATION AND MEDIATION CENTER
SCHEDULE OF FEES**

ANNEX G

EXAMPLES OF ASP SUPPLY CHAIN DISPUTES

	Application Service Provider
CUSTOMER	<ul style="list-style-type: none">• Dispute arising out of perceived versus actual service level agreement terms – customer does not fully understand the service level agreement and expects more than what it contracted for• Dispute over pricing model – subscription versus transaction-based• Dispute concerning limitations of software or customization of software• Dispute over latency problems, e.g., resulting from application performance or network problems• Dispute resulting from problems caused by changes from one version of an application to the next• Dispute over modifications requested by the ASP or customer, e.g., as a result of changes in operational conditions of one or both of the parties, thereby requiring a renegotiation of certain aspects of the existing contractual relationship• Dispute over data ownership, e.g., conflict over the centralized aggregated data at an ASP site for analysis regarding customer behavior (i.e. purchasing activities, vendors used, etc); customer claims• Dispute resulting from breach of data security• Dispute arising out of change in personnel, e.g., change in end-user's CIO who then wishes to re-negotiate the contract terms or sever the relationship completely• Dispute resulting from customer's refusal to modify SLAs• Dispute arising out of customer allegation that support response-time is not being met• Dispute regarding accuracy of usage data, billing, payment• Customer allegation that support is inappropriate or inadequate to address the type of problem being experienced or its frequency• Customer allegation that the actual solution is not what it understood it had contracted for• Disputes arising over application administration, where the customer expects more control, which the ASP refuses to grant due to configuration and security issues• Disputes over misrepresentation of ownership of services (e.g., how much the company says it provides versus what it subcontracts)• Dispute over time to implementation• Dispute over move to new ASP, e.g., if a customer does not like the service provided by its ASP, what time/plan is in place to allow for the movement of data to another ASP• Dispute over ownership of software, i.e., who owns it? Customer, ASP, ISV?

ISV/VAR

- Dispute resulting from inadequate or improper auditing, accounting and payment of licensing fees
- Dispute resulting from ISV allegation that the ASP does not have sufficient licenses to cover the number of users coming in to the server farms resulting in lost revenue to the ISV
- Dispute resulting from ISV's allegation that an ASP is recycling customer license keys as a result of customer turnover
- Dispute resulting from ASP allegation that the ISV has not fulfilled the sales or marketing commitments that were made when the two partnered up – often tied in with licensing fees
- Dispute resulting from ISV allegation that its intellectual property rights are being infringed by the ASP or its customer
- Dispute resulting from ISV allegation that the ASP has not complied with installation protocols as to use and or documentation thereof
- Dispute resulting from ASP allegation that the ISV is not meeting support commitments or response times
- Dispute resulting from ASP allegation that the ISV is not meeting its technical commitments as to software applicability
- Dispute resulting from access rights to the licensed applications and data (Example: Company A is an ISV, which is experimenting with an ASP deployment of its legacy client/server application. It is working with a systems integrator. The ISV requires greater administrative access to its application than the ASP is willing to provide. The ISV is concerned that the live data that it has had its customers enter will be held hostage in a dispute with the ASP as the ISV contemplates re-locating.)
- Sales channel conflicts between ASP-oriented “software rental” sales and an ISV's traditional software sales channel and licensing model
- Dispute resulting from ISV allegation that ASP violated its non-disclosure commitments
- Disputes that might arise when an ISV discontinues a particular application or sells the application to another ISV. For instance, what obligations does an ISV have to continue to support the application, especially as compared to the ASPs obligations to support the application to its customers/end users
- Disputes over modifications of software. For instance, how many versions or modifications of the same application will an ISV agree to support
- Disputes over how ISVs and ASPs define the market sector that the ASP will pursue.
- Disputes over branding. An ISV will likely want to make sure that its trade name is protected while the ASP may believe that functionality should trump branding issues.
- Disputes over customer's termination of services. Who should bear the burden and risk of customers terminating services. For instance, an ISV may invest a significant amount of money up front to create an application for a particular customer of the ASP. What result should occur if that customer terminates service before the ASPs contract with that customer naturally terminates?

AIP	<ul style="list-style-type: none"> • Dispute resulting from ASP allegation that the AIP is not meeting the application implementation schedule promised to the customer • Dispute arising out of data access rights, e.g., in some hosted applications there will be integration requirements to other services and applications. The lines on what data can be accessed must clearly be drawn or disputes will arise over privacy and security.
IUP Aggregator	<ul style="list-style-type: none"> • Disputes arising from ASP's inability to deliver on the ASP's downstream business growth objectives
NSP	<ul style="list-style-type: none"> • Dispute arising out of ASP allegation that the NSP is not meeting its bandwidth and connectivity commitments; the NSP counters by claiming that the problem lies with the application or data center, not the network

ANNEX H

OTHER ADR PROCESSES

Summarized below are several ADR techniques that are increasingly being used in the United States of America and the United Kingdom, but that have yet to gain widespread acceptance elsewhere in the world.

Settlement Counsel

This is a relatively new ADR technique where the disputing parties retain counsel who are given the specific mandate of settling the dispute. The settlement counsel normally are not permitted to participate in any subsequent proceedings, in any capacity, if the attempts at settlement fail.

Mini-trial

The “mini-trial” is a private, confidential, voluntary and non-binding procedure (sometimes referred to as “executive tribunal”) that takes the form of a mock trial in which the parties make submissions to a panel comprised of senior executives of the disputing companies and a third-party neutral.⁷⁰ Its purpose is to inform a company’s chief executive decision-makers of the issues involved in the dispute and to provide them with some forewarning as to the possible outcome of a real trial.

A mini-trial is usually a more formal structured proceeding than mediation in which the roles for the parties’ business executives and counsel are more precisely defined. Even so, the parties have considerable flexibility in fashioning the procedures.

Mini-trial procedures usually provide for some limited discovery and information exchange (e.g., document production, depositions, interrogatories) between the parties prior to their meeting. The overall objective is to elicit enough information, within a short period of time, to define the issues and to enable the parties to learn the significant strengths and weaknesses of their case.

The mini-trial hearing consists of more elaborate presentations by counsel than in the typical mediation. It is also possible to provide for the testimony of witnesses, especially experts. The presentations are usually followed by rebuttals and questions by the opposing sides. The neutral does not rule on evidence or objections to arguments.

After the submissions, which are typically made within predetermined time periods, the executives enter into a facilitated negotiation procedure with the assistance of the neutral in an

⁷⁰ A variant of the mini-trial is a procedure known as “senior executive appraisal”. This procedure is similar to the mini-trial but is less adversarial. Another variant is the “Summary Jury Trial”, where a private “jury pool” is assembled to provide a “moot jury verdict”.

effort to reach an agreement and take advantage of the issues that have been elucidated during the mini-trial, thereby enabling them to exercise their business judgment in the ensuing settlement negotiations on a more informed basis. As the participating executives normally will have the authority to settle the case on behalf of their respective companies, the chances of a negotiated settlement are relatively high.

The neutral does not provide a decision or evaluation unless specifically requested to do so by the parties. If the parties are still at an impasse, if asked by the parties, the neutral can render an advisory opinion as to the outcome had the procedure been a real trial. Any such decision or evaluation, in any event, is non-binding.

The main disadvantages of the mini-trial are that it typically requires a significant commitment of time by senior company executives and considerable planning and coordination. It also takes longer, is more formalistic and more costly than other ADR processes. There is also a risk for the parties involved in the procedure that may reveal some aspect of their trial strategy.

Typically, the mini-trial procedure is invoked after a dispute has arisen and the parties are faced with the prospect of a long and costly dispute resolution process. The procedure can be used in both domestic and international disputes, whether or not litigation or arbitration has been commenced and in two-party and multi-party disputes. It is particularly appropriate in substantial business disputes covering mixed issues of fact and law or involving technical issues. However, care should be taken to ensure that the amount in controversy justifies the preparation and running costs.

Early Neutral Evaluation

Early neutral evaluation involves the referral of a case to a third-party for non-binding evaluation, in which the evaluator applies all of the principles that would be used in the event of formal adjudication. Like mediation or the mini-trial, it is voluntary, non-binding and confidential.

The early neutral evaluator assesses the strengths and weaknesses of the parties' respective positions and considers how best to conduct the litigation rapidly and economically. This is done on the basis of the pleadings that have already been filed by the parties in the court proceedings. At a subsequently convened evaluation session, presentations may be made by the parties or their counsel. This is followed by an evaluation by the evaluator, who will provide an objective assessment of the relative strengths and weaknesses of the case and will express his or her reasoning for the views expressed. The evaluator helps the parties to devise plans for conducting discovery, sharing material and expediting procedures. In some instances, if requested by the parties, the evaluator can also serve as a mediator and may provide advice on options the parties might consider to resolve their dispute more effectively and expeditiously.

The evaluation session and its related material do not become part of the trial record and are privileged. No communication made in the evaluation may be disclosed or used in any pending or subsequent proceedings.

Neutral Fact-Finding Expert

Where a case involves technical, scientific, accounting, economic or any other specialized issues, the appointment of a neutral fact-finding expert can help considerably in facilitating an early resolution. Not being partisan, such an expert can make a neutral evaluation of the facts, which can be of assistance to a court in adversarial proceedings and can help the parties by narrowing the issues and promoting settlement.

The neutral fact-finding procedure is non-binding. The parties commonly agree that the expert's opinion will be admissible in any court proceeding between the parties, but that it is not conclusive. If this is agreed, it allows each party to adduce any other expert evidence to try to controvert the neutral expert's views. This gives the neutral expert's opinion a persuasive quality without making it decisive. It is this factor which keeps it a non-adjudicatory form of ADR. The information provided by the neutral expert will quite commonly cause either or both of the parties to reassess and perhaps modify their estimate of their probability of success, with consequent impact on settlement attitudes. If the parties agree, the neutral can also act as a mediator.

Ombudsperson

A particular kind of fact finder used by many corporations, educational institutions, government agencies, trade groups and consumer agencies to investigate and assist in resolving grievances and complaints. Generally, ombudspersons make non-binding advisory reports and recommendations to the responsible manager about how to resolve a dispute, but can also issue decisions that are binding.

Dispute Review Board

A private, voluntary and confidential procedure commonly used in the context of an ongoing long-term relationship, which consists of an informed standing group of experts who can quickly deal with disputes as they arise. This is commonly used in the construction industry and in high-value outsourcing contracts. Determinations may be binding or advisory.

ASP INDUSTRY CONSORTIUM

(<http://www.allaboutasp.com>)

Founded in May of 1999, the Application Service Provider Industry Consortium is an international advocacy group of more than 1000 companies formed to promote the application service provider industry by sponsoring research, promoting best practices, and articulating the measurable benefits of the ASP delivery model. Its goals include educating the marketplace, developing common definitions for the industry, as well as serving as a forum for discussion and sponsoring research. Among the technology sectors represented among the ASP Industry Consortium membership are Independent Software Vendors (ISVs), Network Service Providers (NSPs), Application Service Providers (ASPs), as well as emerging business models and other sectors supporting the industry.

WIPO ARBITRATION AND MEDIATION CENTER

(<http://arbiter.wipo.int>)

Based in Geneva, Switzerland, the WIPO Arbitration and Mediation Center was established in 1994 to offer arbitration and mediation services for the resolution of international commercial disputes between private parties. Developed by leading experts in cross-border dispute settlement, the procedures offered by the Center are widely recognized as particularly appropriate for technology, entertainment and other disputes involving intellectual property.

The Center has focused significant resources on establishing an operational and legal framework for the administration of disputes relating to the Internet and electronic commerce and is frequently consulted on issues relating to intellectual property dispute resolution and the Internet. The Center also provides dispute resolution advisory services and has worked with a variety of organizations to develop dispute resolution schemes tailored to meet their specific requirements.

An independent and impartial body, the Center is administratively part of the International Bureau of the World Intellectual Property Organization.