Asia-Pacific
Economic Cooperation

APECTEL REGULATORY TRAINING PROGRAM

Program Resource

MODULE SIX

ARBITRATION

APEC Telecommunications & Information Working Group

Published by InfoCommunications International Pty Ltd

November 2005

November 2005

PUBLISHED BY InfoCommunications International Pty ltd

PO Box 4272, Knox City VIC 3152, AUSTRALIA. Telephone (61) 3 9887 5126

Email: mail@infocomin.com.au Website: www.infocomin.com.au

FOR THE ASIA PACIFIC ECONOMIC COOPERATION SECRETARIAT

35 Heng Mui Terrace, Singapore 119616

Tel: (65) 6775-6012 Fax (65) 6775-6013

Email: info@apec.org Website: www.apec.org

APEC Publication Number APEC#206-TC-03.6

Developed by Hanley Consulting P/L and InfoCommunications International Pty Ltd

MODULE SPECIFICATIONS

MODULE CODE AND TITLE

06 Arbitration

MODULE DESCRIPTION

This module will provide the successful participant with the background knowledge and procedural skills to contribute to a telecommunications regulator arbitration procedure and to facilitate the adoption of arbitration procedures by service providers in the context of a home economy.

MODULE OBJECTIVES

For the participant to be able to:

Objective 1 – Explain the benefits of arbitrated dispute settlements for industry participants and the Regulator.

Objective 2 – Describe applications of arbitration in a national telecommunications regulation program

Objective 3 – Describe the main features and steps involved in an arbitration process

PRE-REQUISITES

Introductory Module 01 and Dispute Resolution, Module 05

SUGGESTED REFERENCES

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

http://www.globalarbitrationmediation.com/arbitration.shtml

http://www.sbg.ac.at/arb/people/roth/engl_links.htm

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

Arbitration institutions are an excellent place to start if looking for formal training or a qualification in mediation and arbitration. Many URL's

and/or institute names are listed along with other useful links at: http://www.sbg.ac.at/arb/people/roth/engl_links.htm

This site is reasonably up to date. Links posted on the above site that was up and running as of May 2005 are shown here in alphabetical order, and others have been added to improve the list:

- American Arbitration Association
- Australia - The Institute of Arbitrators
- Australian Centre for International Commercial Arbitration
- China International Economic and Trade Arbitration Commission - Arbitration Rules
- China Maritime Arbitration Commission - Arbitration Rules
- Commercial Arbitration Association of Chinese Taipei
- Hong Kong International Arbitration Centre
- Indonesian National Board of Arbitration
- Japanese Commercial Arbitration Association
- Tokyo Maritime Arbitration Commission)
- Korean Commercial Arbitration Board
- Kuala Lumpur Regional Centre for Arbitration
- Singapore International Arbitration Centre
- Thailand- Arbitration Rules of the Arbitration Institute
- Vietnam International Arbitration Center - Arbitration Rules

USING THIS GUIDE

The presenters, facilitator or workshop coordinator will present and discuss most of the content in this module. They will also advise you on the learning activities to undertake.

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

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

MODULE OVERVIEW

INTRODUCTION

This module is made up of six topics:

TOPIC 1 - CASE STUDY: THE SCENARIO

This topic looks at the way a growing economy developed a framework to resolve interconnection disputes that required the parties to exercise greater initiative, including recourse to negotiation and private arbitration before laying a case before the regulator.

TOPIC 2 – OVERVIEW

This topic examines the telecommunications sector and the need for arbitration, its relevance to the key regulatory tasks, its relationship to other forms of dispute resolution and the benefits for stakeholders.

TOPIC 3 – PRINCIPLES

This topic looks at the underlying principles of arbitration. The principles have evolved over many years. These principles are embodied in the UNCRITAL Arbitration rules and have gained widespread international support and acceptance.

TOPIC 4 - PROCESS MODEL

This topic looks at the steps involved in the conduct of an arbitration process. It also highlights important options or strategic approaches that regulators can take either as arbitrators in their own right, or as monitors of private arbitral procedures.

TOPIC 5 - CASE STUDY: OUTCOMES

This topic looks at the results of the opening case study and at some of the benefits that flowed from the particular approach that was adopted by the regulator in that country.

TOPIC 6 - APPLICATION

This topic contains an application activity that invites participants to look at ways to promote greater use of mediation and arbitration in the telecommunications sector of their home economies.

This module will require 3 - 4 hours to complete.

TOPIC 1 – CASE STUDY: THE SCENARIO

RATIONALE

We will open this Module with an arbitration case study. The purpose of the study is to provide a realistic context for the principles and methods we will be discussing.

The scenario is set in Jordan and relates to the way that economy improved its regulatory framework so that service providers could resolve interconnection disputes more efficiently.

The benefit of looking at successful examples is that some features of the solution may be relevant to other economies. There is a summary on ITU web site, see Suggested References.

CASE STUDY

Changing the Environment for Dispute Resolution

Jordan has a population of 5.6 million, an economy of US$9.3 billion, 675,000 fixed lines, a teledensity of around 12.7%, 1.22 million mobile phone customers and a penetration rate of 22%.

Jordan's Telecommunications industry had been undergoing a staged process of liberalisation since 1995. Jordan's Telecommunications Regulatory Commission (TRC) had attempted to facilitate interconnection issues through an industry consultative committee. However it became apparent that the committee could not deliver timely outcomes and that cost data provided by the incumbents was in dispute. In response to the latter issue, the TRC adopted a benchmark approach drawing on data from 16 unidentified, but comparable countries, and utilized this data in preference to that provided by the incumbents. It seemed that the incumbents had managed to find ways to slow down the liberalisation process, and while the benchmarking approach helped, things were still moving too slowly.

DISCUSSION POINT

What do you think the TRC could try as its next strategy?

The TRC's response will be reviewed in Topic 5.

TOPIC 2 – PRINCIPLES

Arbitration is a dispute resolution technique with a long and established history. It is both efficient and effective in the great majority of cases. These qualities are derived from the principles on which it is based. We will discuss these principles in this topic. The list is not exhaustive, but it covers the most important points.

PRINCIPLES OF EFFECTIVE ARBITRATION

1) FAIRNESS

Fairness is the most fundamental principle. Win or lose, provided the parties regard the process as "fair", they will retain confidence in the technique and are more likely to honor the award. Fairness means many things, including:

- Consistency with natural justice principles
- An impartial process, equal treatment for the parties and free of external influence
- A process that works effectively when there is an imbalance of power or resources
- Independence of arbitrators
- The rights of the parties are not compromised

2) FLEXIBILITY

Flexibility is a key advantage of arbitration as a dispute settlement technique.

For the parties, it means they can decide:

- The procedures that apply
- Legal and technical representation at hearings
- The choice of experts to serve as arbitrators
- The powers of discovery available to the arbitrators
- The place of arbitration hearings

- The applicable jurisdiction, which sets the law that governs the contract and provides the basis for assessing the claims of the parties

For the tribunal, it means the flexibility to:

- Decide arbitral procedures as they see fit
- Grant interim awards, e.g. where the time delay in establishing facts will cause damage to one of the parties
- Grant partial awards, where some issues can be resolved and it is advantageous to the parties to proceed to a partial implementation
- Grant final awards, where all issues are determined.

3) DUE PROCESS

Arbitration of disputes needs to be based on an agreed process or procedure. As mentioned earlier, this is usually achieved by inserting a suitable clause in the contract. Due process means:

- The agreed procedures were followed
- Principles of natural justice were maintained during the process

4) FINALITY

Most arbitration rules regard the award as final, with only limited right of appeal. Appeals are generally restricted to manifest errors of law, corruption or a failure of natural justice. No right of appeal is granted on substantive as opposed to procedural issues, nor can new issues be raised as grounds for appeal. The purpose of this principle is to ensure the parties gain the benefit of an efficient process free of the risk of delaying tactics in the form or repeated and trivial appeals.

DISCUSSION POINT

What is the position on finality of arbitrated awards in your economy?

5) ENFORCEABILITY

Legislation that allows court enforcement of arbitrated awards builds confidence in the process. For example, it ensures full and timely implementation of awards and it ensures awards that favour less powerful parties are complied with. Most jurisdictions provide enforceability of awards. In addition, countries that are signatories to international arbitration enforcement conventions provide enforceability for international disputes.

6) CONFIDENTIALITY

The basis for an award remains confidential to the parties, as do all documents, records and other evidence used to argue a case. This includes sensitive information such as pricing or trade secrets, which are withheld from the other party, but made known to Tribunal members.

7) AWARDS DO NOT CREATE PRECENDENTS

This principle ensures that arbitration processes and the awards they generate retain the capacity for flexibility. This principle ensures that each award is arrived at by discovery and review of the facts that relate to a unique context and situation as it existed at a given point in time.

This principle leaves arbitrators quite free to discuss, review and benefit from other awards that may offer useful insights and lines of solution without being bound to them.

DISCUSSION POINT

Can you think of a recent dispute in your economy where an understanding of what other regulators did to solve similar disputes provided a useful precedent?

Would the other regulator's solution work "as is" or would you need to modify and adapt it to local conditions?

8) THE THRESHOLD PRINCIPLE

The encouragement of private arbitration procedures poses the risk of private parties determining industry policy and its direction. When a private dispute relates to policy objectives, it is said to have reached the arbitration "threshold".

At this point it may be necessary for the regulator to intervene and ensure the outcome is consistent with policy. The effect of this principle is to retain freedom for arbitrators up to a point, while retaining sufficient control over industry direction.

DISCUSSION POINT

Can you think of several threshold issues in your economy and likely disputes that could arise in relation to these issues?

9) PROCEDURAL OVERSIGHT

This is an important, but optional principle. The rationale is that procedural oversight of a system of arbitration will strengthen and improve it over time, and build greater confidence in the use of private arbitration. Procedural oversight means an independent body or authority within the overall system has the function of reviewing cases in terms of due process and procedural fairness to the parties. Such a body does not review the substantive findings, though it may make comments. Its sole purpose is to ensure the agreed rules governing the arbitration process were adequately followed and resulted in a fair outcome. In the ICC (International Chamber of Commerce) arbitration system, this function is performed by the ICC's own private Court of Arbitration. The oversight process must be efficient, impartial and conducted by highly experienced and skilled personnel. It is a function that can be performed by the courts. An independent body can also perform this function.

DISCUSSION POINT

At this point in time and in the context of your economy, what would be the most efficient and effective way to provide a procedural oversight function in relation to arbitration cases? Would it be the regulator, the courts, or some other body?

TOPIC 3 – PROCESS MODEL

RATIONALE

This topic sets out the steps involved in an arbitration procedure and itemizes important features and events that are relevant to each step.

It will help you understand how arbitration might work in actual practice, but the actual rules will vary somewhat within each economy.

THE ARBITRATION PROCESS

IN OUTLINE

1 SERVE NOTICE OF ARBITRATION
2 HOLD PRE ARBITRATION MEDIATION
3 SELECT AND APPOINT ARBITRATOR
4 CHOOSE REPRESENTATIVE AND VENUE
5 ATTEND PRELIMINARY HEARING
6 PREPARE CLAIM AND DEFENSE
7 ARBITRATOR DETERMINES PROCEEDINGS
8 ATTEND ARBITRATION HEARINGS
9 AWARD

1. SERVE NOTICE OF ARBITRATION

The first step is the serving of a **Notice of Arbitration**. The party initiating arbitration, (the claimant), gives notice to the other party, (the respondent or defendant), that they are seeking recourse to arbitration.

The commencement date for the arbitration is the date the respondent receives the notice of arbitration.

A notice of arbitration needs to include

- A demand that the dispute be referred to arbitration
- Names and addresses of the parties
- A reference to a dispute clause or other agreement regarding the way disputes are to be managed
- A reference to the contract giving rise to the dispute
- The general nature of the claim, and the amount of money involved
- The remedy that is sought
- The proposed number of arbiters

2. PRE ARBITRATION MEDIATION

Some jurisdictions and many Arbitration Institutes either strongly recommend or even require as a condition precedent (necessary step), a prior attempt at negotiation in good faith, or a mediation meeting before allowing a case to go forward to arbitration.

The benefit is that it can result in an early settlement and save cost and time. The defendant now knows that the matter is serious, and the sudden risk of delays, plus the sheer distraction of the process is a powerful stimulant to a settlement.

This is the final opportunity to voluntarily resolve a dispute.

3. SELECT AND APPOINT ARBITRATOR

The choice of a capable and experienced arbitrator is one of the most important steps in the whole process.

The parties agree on the number of arbitrators, and choose the arbitrator or arbitrators.

As we saw with mediation, there would be a written **Agreement to Arbitrate** or an equivalent letter, setting out the terms and conditions on which the arbitrator agrees to take on the assignment.

If the number of arbitrators is three, each party chooses one each, the two arbitrators then choose a third, who then presides.

The parties have the right to challenge nominated arbitrators if there is any doubt about impartiality or conflict of interest. The arbitration rules will define what is to be done if a nominated arbitrator is challenged.

It is important to choose a skilled, impartial and capable arbitrator, with an understanding of the industry.

The work will be done more efficiently, the arbitrator will have insight and is more likely to know what evidence is relevant and what is not.

An arbitrator with a high fee might produce the lowest total cost of arbitration, because they are more efficient. This may not always be so, but it is worth considering.

4. CHOOSE REPRESENTATIVES AND VENUE

The parties can choose lawyers or other experts to either assist or represent them.

Once representatives are chosen, they must notify the other party of the names and addresses of these people and their role, as an assistant or representative.

Venue. The parties are free to choose the venue.

If they do not or cannot agree, the tribunal will choose.

5. ATTEND PRELIMINARY HEARING (SCHEDULING CONFERENCE)

The purpose of the preliminary hearing is to determine the scope and complexity of work and to establish a schedule for its accomplishment. The key document is called a **Preliminary Hearing Scheduling Order**. It is issued by the Arbitrator and is binding on the parties and their advisers.

Important points about the Scheduling Order:

The arbitrator determines the scope of discovery activities

- **Notes**. "Discovery" is the legal term for the process of locating and obtaining relevant documents and records to support a legal argument.
- This is a useful rule that stops the parties from going to excess.

- Sets the proposed date, time and place of arbitration hearings
- Cut off dates for filing additional claims, motions or evidence
- Witness disclosures (Who will be called)
- How exhibits will be handled and exchanged
- The filing of briefs relating to the case
- The need for transcripts and a reporter

An estimate of arbitrator's fees would also be made at or around this time.

6. PREPARE CLAIM AND DEFENCE

The claimant or party who initiated the arbitration prepares a **Statement of Claim** if they have not already done so, and forwards copies to the arbitrator and the defendant.

The defendant can now understand the claims and prepares a reply called a **Statement of Defence**. Both documents require a good deal of work.

Counter claims can be made at this point, and they put a strain on the relationship.

The parties have the burden of proving the facts they will rely on.

This means both parties need to collect documents, provide records, or certified copies, take sworn statements, and add other information relevant to their case.

Should the need arise, the parties are allowed to amend or supplement their Statements of Claim and Defence after filing, subject to the arbitrator's approval.

Amendments will not be approved if they:

- Unfairly disadvantage the other party
- Cause significant delay
- Fall outside the scope of the arbitration clause.
    - **Note.** With regard to the last point, (outside the scope), this means the rejected amendment relates to issues that are not covered by the dispute clause. Arguments can be fought over this very point, adding cost and delay. This can happen if the dispute clause is not written in a very broad and general way. See the heading *"Sample Dispute Clause*" in Topic 4 for an example of a clause that aims to provide complete coverage of all conflicts that can arise in relation to a contract,

How to manage counter claims

While the claimant is the one who starts complaining, there may be grounds for grievance on the part of the defendant. Lawyers routinely advise clients to look for counter-claims and make the most of them, to the limit of the law. If the parties need to preserve the relationship, they need to think carefully, and act in constructive ways at all times.

When the cycle of claim and counter-claim starts, relationships are strained, if not broken, especially by trivial or professionally insulting counter-claims.

If the relationship is important, there are protective measures to consider, such as:

- The negative impact is best reduced by only making reasonable claims and counter claims.
- The way the parties communicate with each other about the various claims is vital. If they regard the dispute as a challenging episode in an enduring relationship rather than as a betrayal, the relationship tends to suffer less damage.

- Seasoned management teams tend to see disputes as "part of the industry" or as part of doing business, and take care to treat the other party in a calm, courteous and impartial manner at all times.

7. ARBITRATOR DETERMINES PROCEDURES

After the Preliminary Hearing, the arbitrator is a position to consider the best way to proceed, and starts making up his or her mind about the right approach.

The Arbitrator has the right to make all decisions relating to procedure. (There is additional information on arbitrator powers in Topic 4.)

However he or she will be bound by the relevant local laws and has to ensure that all parties are treated fairly and equally.

The rules allow the arbitrator to call for whatever information they require to arrive at a sound decision. However, the arbitrator would confer with the parties on costly items such as testing or use of experts.

The arbitrator can:

- Decide the basis for hearings, e.g. by documents only, or with oral testimony
- Hold hearings to receive oral and written evidence
- Conduct site visits, provided all parties are present
- Call for inspection and test, e.g. of facilities, equipment or materials
- Commission experts and receive expert reports and witness
- Grant interim measures of protection or interim awards. This issue is important and is covered in more detail in Topic 4.

8. ATTEND ARBITRATION HEARINGS

Hearings commence after sufficient time has passed for the parties to complete the Statements of Claim and Defence, collect supporting information and make depositions. A deposition is the filing of sworn evidence by the parties. As distinct from the Court system, which sets its

schedule without any regard for the people involved, the arbitrator sets the schedule at the convenience of the parties.

Hearings vary in scope and length.

The main features are:

- Opening statements are made by the Arbitrator and the parties
- Evidence is taken in the presence of all parties
- There is no necessity for transcripts, but judicious use is desirable
- Lawyers can attend either to assist or represent the client
- The rules of evidence as used in courts are not strictly applied
- Legal advisers can examine witnesses and ask leading questions
- The arbitrator decides when hearings will close
- If warranted, hearings can re opened and new evidence heard, but only in exceptional circumstances.

9. AWARD

The arbitrator hands down a decision in a written statement called an **Award.** It sets out the details of the decision, including if applicable, the amount of money awarded, and who is to pay.

If there are successful counter claims, they will be included as offsets.

Awards usually set out the reasoning behind the decision, but if the parties choose, the reasons remain confidential.

Awards must be signed and dated by the arbitrator and the place or "seat" of the award clearly indicated.

If there are three arbitrators, the award needs to be signed by all three. If all three cannot sign, most arbitration rules will require signatures from two arbitrators, plus a statement of the reason for the absence of the third signature.

Most jurisdictions require that a copy of the award to be filed with the courts.

After it is over, there is the question of costs.

Costs

Costs of arbitration go against the losing party, but the arbitrator has the power to apportion costs in a reasonable manner. This has implications for frivolous claims, as we will see later.

- The costs of the arbitration are set out in the Award.
- Unlike the court system, where the government pays for the judge and the cost of courts; in arbitration, the parties pay the fees of the arbitrator and the hire of venues and support staff such as reporters.
- Cost also include travel and accommodation for tribunal members, for experts and for witnesses called for and approved by the tribunal.
- Costs also include the legal fees of the successful party, and most parties hire lawyers if the stakes are high.

TOPIC 4 - LAWS AND RULES OF ARBITRATION

RATIONALE

Arbitration is a complex technique and to create a better understanding, we need to take a brief look at additional issues and provide a little more detail relating to the steps of the process model that was covered in the previous topic.

The information has been arranged to follow a logical sequence, and then the sequence of the steps in the process model covered in Topic 3.

ADDITIONAL ISSUES

RELEVANT LAW

To be effective, arbitration has to be supported by law. Local laws regulate domestic arbitration in each home economy. International Conventions and UNCRITAL Model Law governs international arbitration in economies that have passed the necessary Act or Regulation to implement these Conventions within their jurisdictions. Other aspects of local law may also apply to International arbitration.

The applicable laws should be publicly available and easily accessible.

Here are a few examples to highlight different stages of development and the responses of different legal systems within APEC.

In the People's Republic of China, the principal law is The Arbitration Law of The Peoples Republic of China, 1994. It is unusual in that it is a unified law that applies to both International and domestic arbitration.

In Vietnam, the principal source of jurisdiction comes from Legislation only. Pryles states that in 2002, there was not yet an arbitration law per se, but that: "*Government Decree 116/CP (15th September 1994) provides an indication of the Vietnamese government's, and accordingly of the courts as well, increasingly positive views regarding arbitration."* Page 391. Vietnam is a signatory to the New York Convention. In bilateral trade agreements, its laws allow the use of foreign arbitration to settle disputes.

This would include telecommunications disputes with foreign carriers or providers.

In Indonesia, the principal law is the Law on Arbitration and Alternative Dispute Resolution, Law No. 30, 12th August, 1999; and Supreme Court Regulation No.1, 1990 implements the New York Convention and the Washington Convention. This means that International Arbitration awards are enforceable in Indonesia provided the other party is from a country that is a signatory to the same Conventions.

In Korea, the principal law is the Arbitration Act, Act No. 6083, Dec. 31, 1999. This Act is also a unified law that combines both domestic arbitration and international arbitration. Korea is a signatory to the New York Convention.

SAMPLE OF A DISPUTE CLAUSE FOR ARBITRATION

This is a typical dispute clause and is taken from the Australian Centre for International Commercial Arbitration.(ACICA). It is available on their web site. It relates to international contracts, and recommends the following arbitration clause. The site makes it clear that parties are free to insert this clause into their contracts:

Any dispute, controversy or claim arising out of or relating to or in connection with this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as present in force. The appointing authority shall be the Australian Centre for International Commercial Arbitration. The number of arbitrators shall be _____ (one or three). The place of arbitration shall be _____ (choose an Australian city). The language of the arbitration shall be English.

PLEAS REGARDING JURISDICTION

Pleas as to the jurisdiction of the arbitration or the validity of the contract should be resolved as early as possible in the proceedings, and if it can be done, at the Preliminary Hearing Stage.

Arbitrators have the power to rule on jurisdiction, the validity of the contract and the validity of the dispute clause or its equivalent.

In most systems of rules, the latest that an objection to jurisdiction can be made is at the time the **Statement of Defence** is submitted to the tribunal, or at the time a counter-claim is submitted.

ADDITIONAL INFORMATION ON THE ARBITRATION PROCESS

WAIVER OF RULES

This item is relevant to all steps of the arbitration process outlined in Topic 3.

A waiver means that a party "gives away" their right to enforce one or more of the rules governing the arbitration. Here is how it can happen. If the rules are broken and not promptly challenged by one of the parties, that party is deemed to have wavered their right to object and demand enforcement of the rule.

DEFAULTS

If the claimant fails to lodge their **Statement of Claim** in due time, the proceedings are closed.

If the defendant fails to lodge their **Statement of Defence**, the proceedings will continue without their input.

The arbitrator has the right to make determinations based on the evidence placed before the tribunal, and it needs to be on time. Failure to submit in good time can be costly.

POWERS OF ARBITRATORS

(Relevant from *Step 5, Preliminary Hearing and onwards.*)

SUBPOENA POWERS

If a party is non-cooperative regarding requests for evidence, arbitrators can issue subpoenas, or legal demands to submit evidence.

However, the arbitrator's power to enforce sanctions is limited to monetary fines, usually reflected in the Award.

AMIABLE COMPOSITION

The arbitrator can act as a conciliator and is not bound to render a strict interpretation of the law. This is a great advantage, as it allows the arbitrator to pursue *equity* rather than strict *"justice"* under the law. However, the arbitrator must still act according to the terms of the contract that gave rise to the dispute. This qualification stands because even if the contract imposed heavy risks and burdens on one party, it is still enforceable on its own terms because the parties signed it.

INTERIM MEASURES

These are most relevant at *Step 5, Preliminary Hearing*.

The interim measures provision allows the arbitrator to address time critical aspects of the dispute by granting the parties the right to take protective or remedial action.

An example might be a service provider who is losing premium accounts on a daily basis because of a dispute with their carrier, and they want to use another carrier as a temporary remedy, without incurring breach of contract.

But all is not as it seems! A request for an interim measure is usually made right at the outset, e.g. at the Preliminary Hearings or even earlier, precisely because it is time urgent. But at that point, the Arbitrator does

not understand the issues, and would want to wait until the commencement of hearings, which could be weeks or months away.

To make an interim measure happen quickly, a court order is often the only practical option.

If a court order is sought and granted, the arbitration rules explicitly declare that by doing so, the party has not wavered (given away) their rights to arbitrate, i.e. the case proceeds. This is an important point. If a claimant initiates any other court action to pursue their claim, the law regards it as a choice of law rather than arbitration, and the claimant loses the right to arbitrate.

FRIVOLOUS CLAIMS

The points that follow have interesting implications if widely adopted.

Arbitration, in contrast to the courts, can deliver equity in those instances where use of the law is inappropriate, or is being misused or taken to an extreme.

This can happen with some customer complaints. There are always a few complainants who are motivated by a frivolous claim, with the sole object of gaining a monetary compensation.

If arbitrators make more frequent use of their ability to allocate costs as they see fit and reasonable, they can successfully impose sanctions for frivolous claims. This would apply whenever a claim is not strictly based on legal theory. Such an attitude by arbitrators would act as a powerful deterrent to frivolous claims, and would allow more time and resources to deal equitably with legitimate claims, which are usually made by valued and reliable customers. There is some movement in this direction in the USA.

QUALIFICATIONS OF ARBITRATORS

It is essential to have legal training of some form, and strong procedural skills. Arbitration is effectively a judicial process, and while it may run to slightly more relaxed and flexible rules, those rules have the force of law through various statutes and regulations. Local arbitration institutions should be able to provide sound advice on qualifications and all would offer training programs.

TOPIC 5 – CASE STUDY: OUTCOMES

INTRODUCTION

This Topic allows you to think about what you have learned and start to apply some of your own best ideas to the Jordanian situation, and then to compare and contrast the Jordanian situation and response to your own economy.

RECOMMENDED STEPS

Now that you have completed both Modules 5 and 6, and drawing on what you have learned from both modules, you might like to provide a brief answer to the following question:

Please spend just a few minutes on the following question, perhaps one idea from each person in the room.

What do you think the Jordanian TRC might have done to improve the situation?

When you have finished, please feel free to read the conclusion to the Case Study on the next page.

There is another important question at the end of the Case Study. It will require more time to complete.

CASE STUDY (PART II)

THE JORDANIAN TRC RESPONSE

To facilitate further change, Jordan's Telecommunications Regulatory Commission (TRC) adopted an interconnection dispute resolution process in July 2003 that was designed to produce higher quality decisions, a more efficient process and devolve greater responsibility to the parties.

The process applied to disputes arising in the context of existing agreements rather than to new entrants and it built on the emphasis on mediation and negotiation that was already embodied in Jordanian law.

The new process provided negotiation guidelines and required the parties to enter into negotiations and seek a good faith solution prior to submitting any disputes to the Regulator. It also required the Regulator to verify that there was a genuine dispute and that the parties had attempted to resolve it. The process imposed a timetable of requiring the disputants to meet within 10 working days of notification of a dispute, and it allowed at least 20 working days for negotiation.

If the negotiations failed, the parties were given freedom to choose a privately agreed arbitration process rather than go to the TRC for adjudication. This allowed the parties to choose their own experts, to design their own process, provided it was consistent with the guidelines and Jordanian Law, and to seek an arbitrated solution.

Importantly, legislation in Jordan made privately arbitrated awards enforceable at law. This gave confidence to the parties that an arbitrated solution would be effective.

Where the parties chose to have the TRC adjudicate, the TRC could hire experts and charge the cost to the parties. With costs covered by the disputants, the TRC could afford to hire highly qualified experts, an approach that improved its own decision making, and developed the insight and skills of its own personnel in the process. Improved decisions, arrived at in a limited time, frame reduced the scope for judicial review should the TRC/s final decision be challenged in a court.

Since the parties had to cover TRC expenses, dispute resolution by the Regulator was no longer a free public "good". The change reduced incentives on the part of operators to make frivolous claims as part of an

overall delaying strategy. The dispute process did not specify how costs were to be allocated. This allowed the TRC to allocate costs against the loser, or else on the merits of the arguments presented by each party, as is done in the court system. This served as a further disincentive to manipulation of the regulatory process in order to buy time and delay the liberalization process.

With the disputants free to choose their process and bear the costs, the TRC effectively created a market in dispute resolution that would draw in experts and build a pool of resources not only for Jordan, but also for the wider region. There is a strong chance that the strategy will work well in the long term. The parties will have confidence in the process as they have procedural options, yet the arbitration framework is regulated and an enforceable regulatory adjudication remains available.

The full case study can be obtained from:

http://www.itu.int/ITU-D/treg/Case_Studies/Disp-Resolution/Jordan.pdf

DISCUSSION POINT

How does this scenario compare with the circumstances in an economy you know? Are similar issues faced?

What are the key features of the Jordanian solution?

Would some of these features be useful in the context of the economy you know?

TOPIC 6 - APPLICATION

RATIONALE

Modules 5 and 6 have covered dispute resolution ideas and techniques that are important to Regulators. To gain the most value, we need to give thought to practical ways to apply what has been learned. That is the purpose of this exercise.

ACTIVITY - PROMOTING ALTERNATIVE DISPUTE RESOLUTION

You have just returned from this workshop, you are trying to hide yourself in the office and get over the jet lag and catch up with the backlog when your manager walks in.

With a look of glee, your manager says: "OK you are now *the resident expert*, how would you promote greater use of mediation and arbitration in the industry? What initiatives can we take as the Regulator, and where would we start in order to encourage consumers, service providers, equipment suppliers and ourselves, and what skills will *we* need?" Can you have a paper on my desk within three days?

You stare out the window, you glance back with your best jet-lagged look, you let your shoulder sink, but you know none of that will work. You have to write a paper, with practical and realistic ideas!

If you work in a specialized area, you might like to respond with a special focus on your area and your part of the industry. Feel free to approach the task in a way that ensures you gain the best value for your effort.

HOW WILL YOU REPLY?

Please work in teams for around 40 minutes and focus on ideas that you believe would be workable and realistic in the context of what you know about an economy.

When you have done that, be prepared to outline your proposal to others in the room. That might take another 20 minutes.

Asia-Pacific
Economic Cooperation

Telecommunications & Information Working Group

Infocommunication International Pty ltd
PO Box 4272, Knox City VIC 3152, AUSTRALIA. Telephone (61) 3 9887 5126
Email: mail@infocomin.com.au Website www.infocomin.com.au

FOR THE ASIA PACIFIC ECONOMIC COOPERATION SECRETARIAT
35 Heng Mui Terrace, Singapore 119616
Tel: (65) 6775-6012 Fax (65) 6775-6013
Email: info@apec.org Website: www.apec.org

APEC Publication Number [To be advised]