

ASPresolve

*Dispute Avoidance and Resolution
Best Practices
for the ASP Industry*

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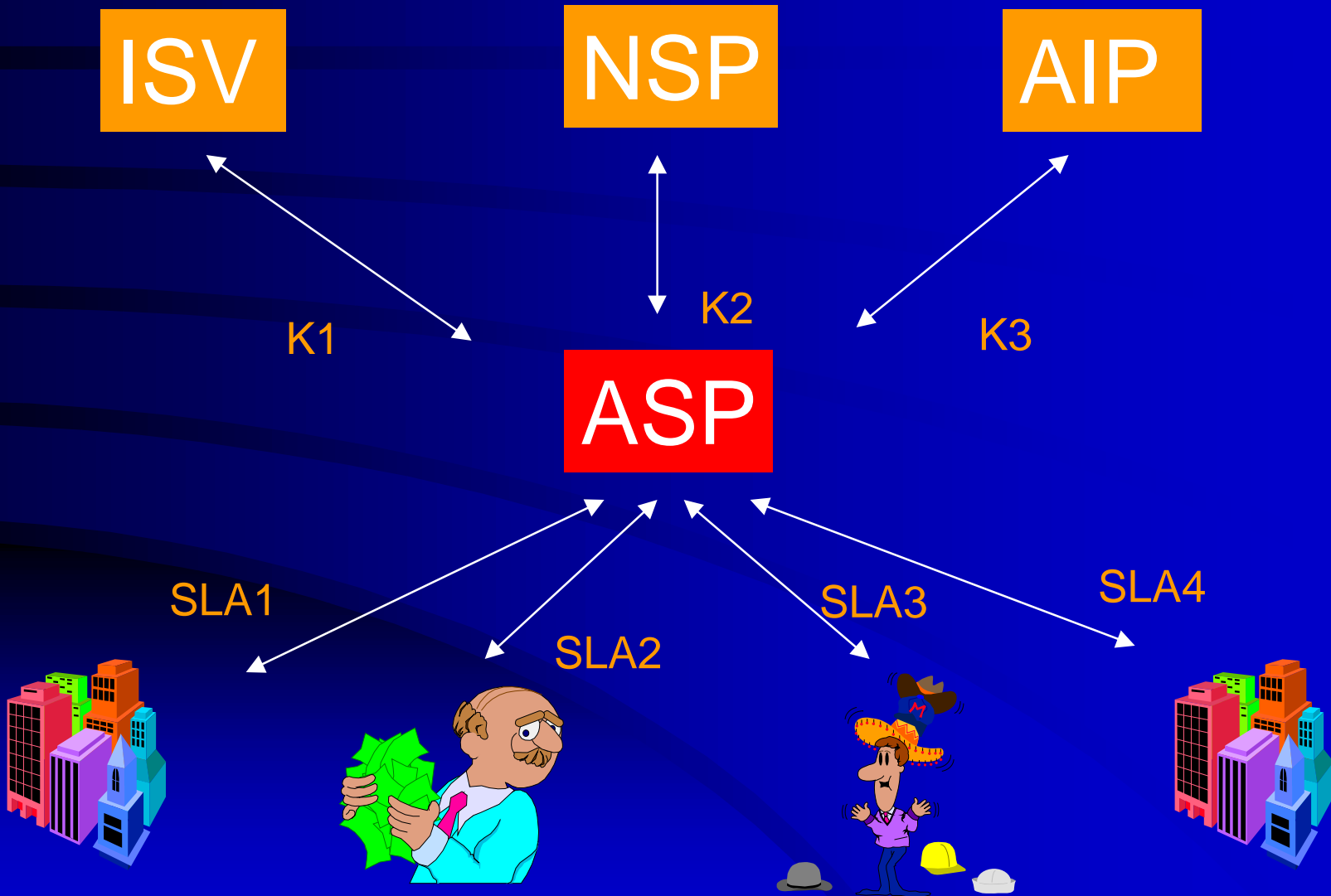
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Overview of Presentation

- ◆ Characteristics of ASP Supply Chain Disputes
- ◆ Dispute Avoidance Best Practices
- ◆ Dispute Resolution Best Practices
- ◆ The ASP Industry Consortium Dispute Resolution Service

ASP Relationships



ASP Supply Chain Disputes

- As the market for ASP services grows, so also the likelihood of disputes
- Main Characteristics
 - ★ One-to-many liability model
 - ★ Problem-sourcing complexities
 - ★ Cutting-edge legal and business issues
 - ★ Symbiotic relationships
 - ★ Unique characteristics of the disputing parties
 - ★ Wide value range
 - ★ Multi-jurisdictional

Examples

➤ **ASP vs. Customer**

- Latency, data ownership, security, integrity, application customization

➤ **ASP vs. ISV/VAR**

- Licensing fees, sales and marketing commitments, intellectual property

➤ **ASP vs. AIP**

- Implementation, data access rights

➤ **ASP vs. NSP**

- Bandwidth and connectivity commitments

ASP Supply Chain Disputes - The Present

- Few disputes to-date
- Market for ASP services in embryonic stage
- SME customers resource constrained to pursue claims against ASP
- Large enterprises less dependent on ASPs for mission critical functions and have higher tolerance thresholds
- Quantum of financial loss not high enough
- Cloud on business activities
- Extraordinary loss-leader measures

Dispute Avoidance

- ★ Operational Best Practices
- ★ Problem Identification Systems
- ★ Customer Care/Helpdesk
- ★ Service Level Agreements
- ★ Relationship Management

Operational Best Practices

➤ Infrastructure Planning and Management

- Data center
- Server configuration
- Load balancing, clustering, geographical redundancy

➤ Connectivity Planning and Management

- Network infrastructure design
- Scalability
- Global connectivity issues

Operational Best Practices

➤ Security Planning and Management

- Authentication
- Access control
- Integrity
- Confidentiality
- Non-repudiation
- Accounting and audit
- Availability/continuity of operations
- Physical security
- Procedural security

Operational Best Practices

➤ **Application Management**

- Ownership
- Software and database licenses
- Application readiness
- Responsibility demarcation
- Application support

➤ **Implementation Planning and Management**

- Application system selection
- Preparation and sizing of hardware platform
- Asp and customer installation
- Configuration/customization
- Testing and quality assurance
- End-user training

Operational Best Practices

➤ **Support Planning and Management**

- Application support
- System support
- Network support
- Monitoring and reporting
- Customer care/Helpdesk

➤ ***A Guide to the ASP Delivery Model*** - prepared by the ASP Industry Consortium (www.allaboutasp.org)

Problem Identification



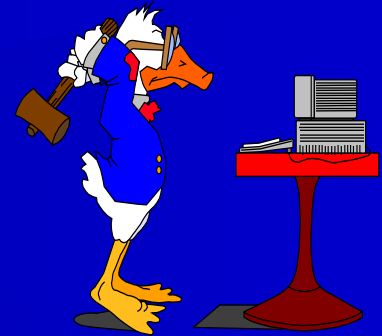
- Reduce risk of disputes arising:
 - By proactively determining service level compliance problems using systems that can isolate cause of a problem and associated vendor
 - Through comprehensive and meaningful reporting of service level compliance issues to customers
- This requires monitoring and management policies and deployment of appropriate tools that can monitor delivery of service levels to end-users

Customer Care/Helpdesk

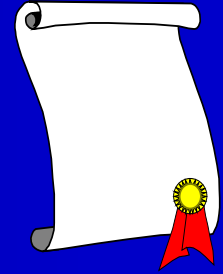


- Central point of control for logging, tracking, escalation and resolution of end-user inquiries and problems and for advanced customer notice for scheduled activities, e.g., outages, upgrades
- Liaison between third party vendors, application support and customer base

Customer Care/Helpdesk

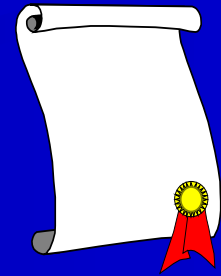


- Requires timely, responsive problem resolution, proactive support services, efficient information management
- Problem management procedures - intake infrastructure, recording systems, categorization guidelines, prioritization criteria, tracking, investigation, analysis, feedback, escalation criteria and guidelines



Service Level Agreements

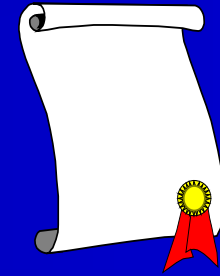
- Broad Definition: A legal contract that specifies the contractual deliverables, terms and conditions between service providers and the end-user
- Master Services Agreement, outsourcing agreement, Scope/Statement of Work
- *The ASP Industry Consortium's Guide to Service Level Agreements*



Service Level Agreements

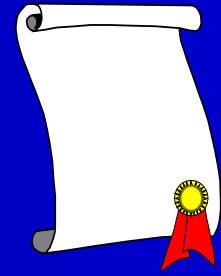
- Well-negotiated, comprehensive and well-drafted SLAs that set out clearly the rights and obligations of the parties are fundamental to reducing scope for disagreement in the course of the parties' relationship
- Gap between expected and actual performance will be the source of majority of disputes

Service Level Agreements

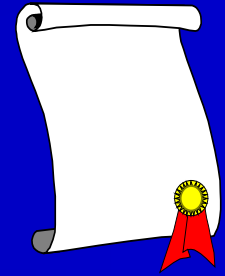


- Key Elements:
 - Definitions
 - Term
 - Services to be provided and excluded
 - Installation timetable
 - Numbers and locations of users
 - Expected performance levels in terms of reliability and availability and responsiveness
 - Explain how service quality metrics are calculated

Service Level Agreements



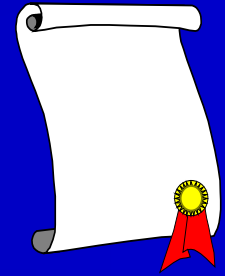
- Key Elements:
 - Payment terms and conditions for each type of service
 - Ownership and return of data
 - Customer's responsibilities
 - Software licensing obligations
 - Monitoring and reporting responsibilities
 - Credits, refunds, charges, other consequences of failure to meet service level commitments



Service Level Agreements

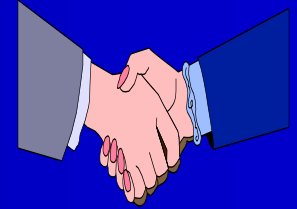
- Key Elements:
 - Latency, outage and packet loss guarantees
 - Problem reporting procedures and resolution metrics
 - Conditions when service levels will not apply (*force majeure*)
 - Limitation of liability
 - Indemnification

Service Level Agreements



- Key Elements:
 - Termination conditions and consequences
 - Insurance
 - Representations and warranties
 - Dispute resolution

Relationship Management



- Partnering - construction and telecom industries
- The process parties go through to finalize their written agreement, as well as their subsequent management and implementation of it, is also fundamental to avoiding disputes

Relationship Management



- Proactively identifying prospective customer's needs and priorities
- Careful self-assessment of resources to satisfy customer requirements
- Careful definition of process through which SLA will be finalized
- Internal review and comment on draft agreement
- Team-building and training to ensure that operations level personnel understand legal obligations
- On-going assessment of customer satisfaction

Dispute Resolution

Least Formal



Most Formal

ADR

Negotiation

Mediation

Mini-trial

Early Neutral
Evaluation

Med-Arb

Expert
Determination

Arbitration

Litigation

Non-binding

Binding

Advantages of ADR

Speed and cost savings

Privacy and confidentiality

Expert decision-makers

Preservation of business relationships

Predictability of outcome

Creative business-drive solutions

Procedural flexibility and party control

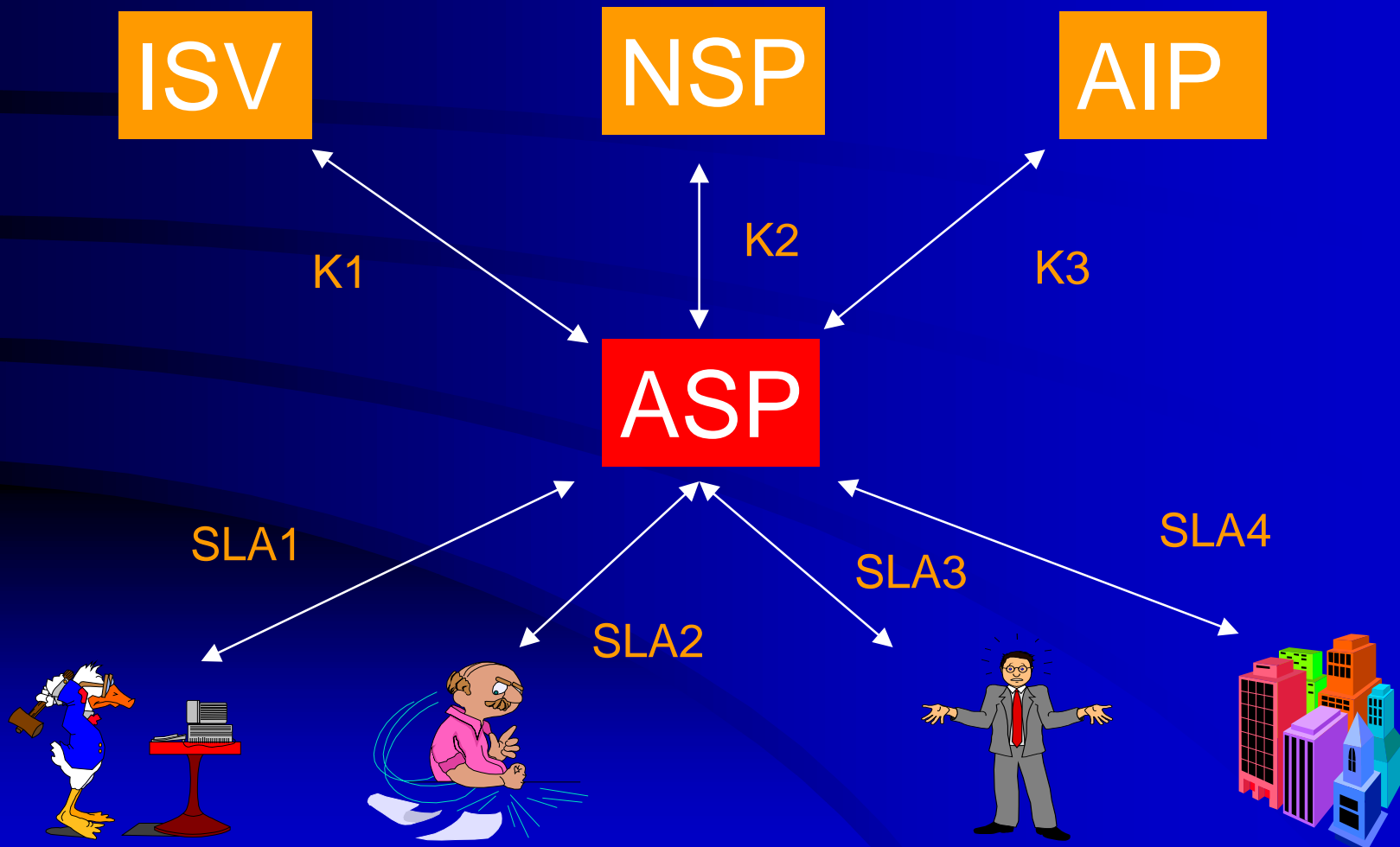
Minimization of business disruption

Reservation of rights

Jurisdictional Issues



Disadvantages of ADR



Model Clause

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, [identify name of person] of [specify name of ASP, as defined] and [identify name of person] of [specify name of contracting party, as defined], or their respective successors in the positions they now hold (the **Relationship Managers**), shall meet, or otherwise communicate, at least [indicate number of meetings] and shall attempt to resolve the matter. Either Relationship Manager may submit a request, in writing, to the other Relationship Manager to meet within [specify number of business or calendar days] days, at a mutually agreed time and place, or if an in-person meeting is not practicable, identify such other methods of communication that may be used.
- 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 settle the matter, 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.

Model Clause

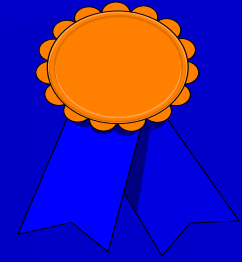
2. Mediation

- 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 [specify applicable rules, e.g., ASP Industry Consortium Mediation Rules] (the **Mediation**). The place of mediation shall be [specify place].

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 10, 30, 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 [specify applicable rules, e.g., ASP Industry Consortium 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 [same rules as specified in clause 3.1].
- 3.3 The arbitral tribunal shall consist of [three arbitrators] [a sole arbitrator]. The place of arbitration shall be [specify place].

ASPresolve Pledge



[Company] recognizes that disputes are often a reality and consequence of commercial relationships. [Company] also recognizes that disputes can rupture long-standing business and personal relationships, distract from core business activities, and stifle important human and financial resources.

[Company] believes that the risk of disputes can be minimized significantly through best practices, and expresses its strong commitment to implementing and promoting the best practices that have been defined and articulated by and for the Consortium's members.

[Company] considers that having in place effective dispute avoidance, management and resolution mechanisms that can be invoked, if and when the need arises, can be fundamental to helping the parties to realize the commercial goals they initially set out to achieve. Such mechanisms are about instilling confidence in a business relationship, not undermining it.

[Company] believes that the most expeditious and cost-effective means for resolving disputes is through alternatives to court litigation, including negotiation, mediation and arbitration. [Company] commits to exploring the use of such dispute resolution options with any party that has expressed a similar commitment or is willing to consider the use of alternative dispute resolution, either at the time of negotiating an agreement or in the event of a subsequent dispute.

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