

Pax Americana:
U.S. Dispute Resolution
of
International Telecommunications Contracts

Materials
Submitted by

Walt Sapronov, Esq.
Robert J. Butler, Esq.
Sapronov & Associates, P.C.
Atlanta, GA USA
Washington, DC USA

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SYNOPSIS: Commercial contracts between multi-national enterprises and global telecommunications carriers typically involve both United States (“U.S.”) domestic, international and foreign services. These multi-national services are often provided by foreign (non-U.S.) carriers or by foreign affiliates of U.S. carriers. The agreements, the parties, and the services may thus be subject to the jurisdiction of both U.S. and foreign juridical and regulatory authorities. In the event of disputes, the party controlling the dispute resolution process through carefully selected judicial and administrative venues will often have a “home court” advantage. Dispute resolution alternatives customarily used in enterprise contracts between customers and carrier suppliers are commercial arbitration following familiar procedures (*e.g.*, the U.S. Federal Arbitration Act), regulatory complaints before federal and state regulatory agencies, and commercial litigation in federal or state courts.

For U.S. domestic disputes, these approaches provide both enterprises and carriers with familiar arbitration or judicial venue selection, choice of law treatment, and predictable enforcement. However, for international or global telecommunications contracts, these approaches are not necessarily ideal – and in some circumstances may be of questionable enforcement. The enterprise contract parties, however, often overlook other dispute resolution options, including international arbitration, for resolving disputes over services that are subject, at least in part, to foreign laws and regulations. These alternatives should be carefully considered when negotiating a multi-national telecommunications agreement with both U.S. and non-U.S. parties.

The authors discuss these various telecom dispute resolution alternatives – both familiar domestic approaches and less familiar international arbitration - compare their respective advantages and disadvantages, and suggest various “practice pointers” meriting consideration when negotiating international and global enterprise telecommunications contracts.

¹ THIS IS PROVIDED FOR TUTORIAL PURPOSES ONLY AND IS NOT TO BE CONSTRUED AS A LEGAL OPINION OR LEGAL ADVICE.

² Walt Saprnov is a partner in the Atlanta law firm of Saprnov & Associates, P.C. www.wstelecomlaw.com; Robert J. Butler is a partner in the Washington, D.C. office of Saprnov & Associates, P.C.. Messrs. Saprnov and Butler have extensive experience in telecommunications dispute matters such as those discussed in this outline.

I. Introduction

A. Enterprise Contracts between Carriers and Customers.

Commercial telecommunications service contracts (“Agreements”) between carriers and large, so-called “enterprise” customers³ often involve complex voice, data, Internet, broadband and other services provided in both U.S. and foreign jurisdictions.⁴ In today’s global economy, many if not most of these Agreements have an international component: telecommunications services are provided to domestic U.S. customers or carriers for access to points abroad and vice versa. Global procurement Agreements between large multi-national enterprises and global carriers (*e.g.*, AT&T, Verizon, British Telecom) often entail foreign in-country services provided to the enterprise in a foreign jurisdiction by the carrier’s foreign affiliate.

Under U.S. law, the Federal Communications Commission (“FCC”) and state utility (public service) commissions regulate, respectively, interstate and intrastate telecommunications services provided as common carriage.⁵ The FCC – but not state utility commissions – also exercises jurisdiction over international telecommunications services provided between the U.S. and foreign locations, and over foreign carriers providing these services to domestic customers.⁶ The FCC further regulates the landing rights of foreign carriers whose facilities are interconnected to points in the U.S.⁷ The FCC also regulates the exchange of cross-border telecommunications traffic between U.S. and foreign carriers, including prohibitions on the acceptance of special concessions from dominant foreign carriers,⁸ international rate regulation (“settlements”) governing traffic exchange between carriers,⁹ and filing requirements for inter-carrier contracts.¹⁰

Historically, common carriers have provided domestic and international service to customers under schedules of rates, terms and conditions (“tariffs”) filed with the FCC. Following the 1996 Federal Telecommunications Act, the FCC detariffed most interstate and international services, requiring most carriers to provide service under commercial

³ For detailed discussion of enterprise Agreements today, see TELECOM & BROADBAND CONTRACTING HANDBOOK, Saprnov & Associates, P.C. (2007 Edition) (available at info@wstecomlaw.com).

⁴ Other telecommunications contracts include wholesale (carrier-to-carrier) agreements and interconnection agreements between incumbent local exchange carriers and competing telecommunications carriers under 47 U.S.C. §§ 251-252. These present their own set of complications (for example, statutorily prescribed filing, arbitration and judicial review procedures) that are beyond the scope of this presentation.

⁵ 47 U.S.C. §§ 201 *et seq.*

⁶ 47 U.S.C. § 214; 47 C.F.R. Part 63.

⁷ See 47 U.S.C. § 35 (requires approval from the President of the United States, or the FCC as his designee for the landing of submarine cables on U.S. territory).

⁸ 47 C.F.R. § 63.14.

⁹ 47 C.F.R. § 43.51(e).

¹⁰ 47 C.F.R. § 43.51 (a).

rates, terms and conditions.¹¹ Enhanced or information services, as well as customer premises equipment (“CPE”) such as routers, have long been deregulated.¹² The FCC has also thus far declined to exercise common carrier jurisdiction over most varieties of voice-over-Internet protocol (“VOIP”).¹³ This detariffed framework permits enterprise customers to negotiate comprehensive Agreements with carriers under commercial rates, terms and conditions – which should include dispute resolution, arbitration, venue, and forum selection provisions.¹⁴

B. Customary Dispute Resolution Measures.

Not surprisingly, such Agreements can, and often do, give rise to disputes. Most of these, such as payment or billing errors, are resolved informally. Well drafted Agreements will include self-enforcing informal dispute mechanisms, such as escalation procedures to higher levels of management or predetermined credits for service interruptions. Still, where the disagreements become more serious (*e.g.*, where a party seeks to terminate an Agreement for cause or to enforce payment obligations), dispute resolution clauses quickly become critical. In such circumstances, well thought out dispute resolution provisions, though frequently viewed as “boilerplate,” can present significant – sometimes outcome determinative – advantages to one party or the other.

Familiar dispute resolution clauses include (i) informal dispute resolution procedures and/or non-binding mediation – often used for payment disputes; (ii) arbitration under the Federal Arbitration Act following procedures such as those adopted by the American Arbitration Association (“AAA”), and (iii) “last clear chance” escalation procedures requiring the parties’ senior management to meet prior to commencement of litigation. In the absence of such a clause, the default is typically to the courts and regulators consistent with the choice of law and venue provisions.

¹¹In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, 11 FCC Rcd 20730 (1996), on Reconsideration, 12 FCC Rcd 15014 (1997); Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999) (subsequent history omitted). Carriers, however, must publish their general rates, terms and conditions on their website and keep a record of individually negotiated agreements. 47 C.F.C. §§ 42.10, 42.11.

¹²47 C.F.R. § 64.702(d) (defining “enhanced services”); 47 C.F.R. § 54.5 (defining “information service”). Many services (*e.g.*, Internet access) provided under enterprise contracts fall into the enhanced/information service category.

¹³See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211, Memorandum Opinion & Order (released 14 November 2004) (Vonage Preemption Order). The FCC does, however, exercise jurisdiction over other aspects of VOIP service, including emergency calls, universal service fund contributions, and number portability requirements. See generally W. Sapronov, *When the Net is Your Phone*, 14 BUSINESS LAW TODAY 4 (March/April 2005) available at <http://www.abanet.org/buslaw/blt/2005-03-04/sapronov.shtml>.

¹⁴A summary of “deal points” customarily negotiated between carriers and enterprise customers is attached at Attachment “A.” For a discussion on negotiation of VOIP Agreements, see W. Sapronov, “Enterprise Contracts In The IP ERA: The Role of Commitments”, BUSINESS COMMUNICATIONS REVIEW (June 2006).

Customary arbitration provisions in Agreements include carve-outs for disputes (*e.g.*, indemnification, intellectual property infringement.) that the parties wish to be resolved by the courts and not by arbitration. Other considerations include limitations on discovery, criteria that the arbitrator must follow in making a decision, choice of law, venue, and post-award (*e.g.*, notice period for payment of an award before it is deemed delinquent) provisions. Exceptions include the parties' respective rights (or not) to seek relief from regulatory agencies (*e.g.*, FCC, state public service commissions) having jurisdiction over the carriers, the services or both.

II. Controlling the Dispute Resolution Process.

U.S. centered enterprise Agreements typically include dispute resolution clauses that are drafted with the presumption that U.S. procedures will control. For multi-national service agreements, however, there are other options, many of which will likely be preferred by foreign providers. These, as well as the respective advantages or disadvantages of arbitration over litigation are briefly discussed below.

A. Pros and Cons of Arbitration vs. Litigation.

There is substantial debate over the question of whether litigation or arbitration is a preferable alternative for enterprise telecom agreements.¹⁵ Although the asserted “pros” and “cons” of litigation versus arbitration are well known, their realization in practice may vary considerably as a result of a number of factors, including the nature and position (customer or provider) of the parties, the nature of the dispute, the rules of the forum, and *sui genesis* developments that may arise as the process plays out.

Broadly speaking, the advantages of litigation include the greater possibility of a “home field” advantage, access to broader discovery, a generally tighter (or more predictable) approach to due process and evidentiary issues, and the right to appeal an adverse decision. Disadvantages include the lack of finality in the initial decision due to appeal rights, expense (although that may be a false negative in many cases), the public nature of the proceedings, the risk of facing a non-expert judge or jury, and potential problems with extra-territorial enforcement of decrees.

In contrast, claimed benefits of arbitration¹⁶ include the potential for selection of decision makers having expertise in the subject matter of the dispute. This can be very important in the highly technical and frequently arcane regulatory environment surrounding telecom services. Resolving disputes here may well lend itself to arbitration as it requires familiarity with technology and industry custom, something that the parties can require of the arbitrator (but not of the judiciary) during the selection process.

¹⁵ A third alternative, mediation, can be employed prior to or in conjunction with either alternative.

¹⁶ *See generally* Douglas J. Behr, Esq., “Structuring Arbitration Clauses and Resolving disputes”, Law Seminars International, Negotiating Telecommunications User Deals (Chicago, Illinois) (23 September 2003).

Parties to arbitration clauses also have greater freedom to choose venue and applicable law. Other potential benefits include more efficient and timely and less costly proceedings (in part due to limited discovery), confidentiality, and greater enforceability in foreign jurisdictions under international conventions. Speed and cost may be enhanced in the case of ad hoc arbitrations, for which the parties can write their own rules. However, institutional arbitrations can be expected to provide greater process controls and a better chance of enforcement. Commonly identified disadvantages of arbitration include the unavailability of precedent, lack of any appeal rights, limitations on discovery and problems with third party practice, in part because arbitrations stem from agreements which bind only the signatories.¹⁷

Apart from the above, a customer may also find arbitration advantageous as it permits customization of the “official” procedures, such as those published by the AAA procedures. The AAA rules, for example, permit the parties to specify in their agreement what provisions and laws the arbitrator is to consider when presented with an arbitration demand. They also permit limitations on the scope of discovery. Similar flexibility may be offered in international forums and, as noted above, may even be greater under ad hoc procedures. This becomes all the more important for U.S. customers purchasing international or foreign services whose jurisdiction is an unfamiliar terrain.

B. International Complications.

For U.S. based customers, the unfamiliar territories involved in multi-national Agreements make dispute resolution that much more complicated. Uncertainties include the following:

Will the foreign jurisdiction recognize choice of law or dispute resolution provisions in the Agreement? Will the providers have the right to litigate the Agreement (regardless of what it says) in one or more foreign (and unfamiliar) jurisdictions? Are there tariffs or other controlling documents (*e.g.*, the carrier’s “service guide” published on its website) that serve as “gap fillers” to – or even supersede – the contract language of the Agreement?¹⁸ If so, where and under what agency’s authority are these filed? At least some of these issues can be addressed by resort to international arbitration fora.

¹⁷ Statutory grounds for vacatur of an arbitration award under the Federal Arbitration Act are limited to fraud or corruption, partiality of the arbitrator, failure to follow applicable procedures, and overstepping the arbitrator’s authority. 9 U.S.C. §10(a) (2000). U.S. federal and some state courts have also adopted a non-statutory standard for setting aside an award based on the “manifest disregard” of the law. *See generally* John W. Hinchey & Thomas V. Burch, *Georgia General Assembly Adopts “Manifest Disregard” as a Ground for Vacating arbitration Awards: How Will Georgia Courts Treat the new Standard?*, 9 GEORGIA BAR JOURNAL 4, 10 (2004)

¹⁸ Federal law, specifically 47 U.S.C. § 203(a)(c) generally prohibits telecommunications carriers from charging rates or from providing interstate and international common carrier services under rates, terms and conditions that differ from the applicable tariff: a principle sometimes referred to as the “filed rate

C. International Arbitration Alternatives.

International arbitration may be conducted under various auspices, including ad hoc (under the UNCITRAL Rules), or institutional such as before the International Chamber of Commerce (“ICC”) International Court of Arbitration (“ICC Court”), the London Court of International Arbitration (“LCIA”), the International Center for Settlement of Investment Disputes (“ICSID”), or the International Center for Dispute Resolution. For example, under the ICC Rules of Arbitration, the ICC Court verifies the existence of an arbitration agreement, formally confirms the arbitrators nominated by the parties or appoints arbitrators absent agreement of the parties, establishes the costs and arbitrator fees for the proceedings and scrutinizes the ultimate awards issued by the arbitral tribunal. The ICC Court is supported in these activities by the ICC Secretariat.

An ICC arbitration is commenced by filing a Request for Arbitration by a Claimant, followed by an Answering Statement and Counterclaims from the Respondent. The parties then nominate arbitrators (who can be one or three), a process that may give rise to controversy, delays and expense that will undermine many of the hoped for benefits of arbitration. The parties and the arbitral tribunal then prepare Terms of Reference which identify the rules to be followed in the proceeding and the claims to be addressed. The actual arbitration process may vary and may include briefing, submission of written testimony, live hearings and oral argument, and even some form of limited discovery. Evidentiary issues are generally addressed under the International Bar Association (“IBA”) Rules.¹⁹ After the close of the case presentations, the tribunal issues its award which the ICC Court reviews for form and substance before its final release to the parties.

III. Pax Americana: Control of International Telecom Disputes in U.S. Based Enterprise Contracts.

Once the parties have agreed on the dispute resolution process, whichever is selected, then experienced practitioners will anticipate the likely areas of disputes and draft appropriate contractual measures for dealing with them when and if they arise. The following practice pointers, based on the authors’ experience, identify typical Agreement controversies and suggested approaches to treating them in the contract drafting and negotiation process.

A. Controlling the Dispute Resolution Process.

doctrine”. See *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998).

¹⁹ International Bar Association, *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, available at http://www.asser.nl/ica/documents/cms_ica_4_1_IBA_ROE2.pdf.

As a routine matter, enterprise Agreement disputes typically involve price (rates, charges, purchase commitments); performance (service warranties, “SLAs”²⁰); termination rights; breach (*e.g.*, violation of a carriers’ privacy or “acceptable use” policies). The large majority of these are resolved informally as neither party wishes to jeopardize their business relationship. However, in those isolated circumstances where they reach an impasse, the dispute will often center around the following considerations.

From the customer’s perspective, service disconnection or suspension represents the most significant exposure and potential damage. From the carrier’s perspective, the major concern is typically the threat of non-payment. Thus, the parties’ respective leverage often depends on the carrier’s right to disconnect or terminate the services and the customer’s right to withhold payment. With this in mind, the enterprise customer may often find commercial arbitration – rather than litigation – to be the most advantageous dispute resolution method. Indeed, the arbitration clause drafting process and the arbitrator selection process present an opportunity for the parties to secure anticipatorily certain tactical advantages in the event disputes do go that far.

Selecting the arbitrators is a critical strategic concern. For instance, the enterprise customer will wish to avoid arbitrators from “carrier friendly” law firms or other organizations. Other desirable arbitrator selection criteria may include familiarity with commercial contract law, technical warranties, and “buyer side” commercial experience. An arbitrator selected from a firm representing corporate enterprises in other matters is a plus. However, an arbitrator must be able to certify his or her independence with regard to the matter and parties subject to arbitration.

Perhaps most importantly, typical procedures permit the parties to negotiate specific arbitrator selection criteria (*e.g.*, experience with regulations and technology). As indicated above, the complex subject matter of these Agreements alone often lends itself to arbitration as the complex technologies may well be unfamiliar to the judiciary. Arbitrator selection procedures may and should contemplate that such technical expertise is required.

Selecting the process is likewise important. In drafting the arbitration clause, the parties will often simply incorporate by reference the U.S. Federal Arbitration Act²¹ and applicable (*e.g.*, AAA)²² rules, or comparable ICC rules – but here enterprise counsel may find it appropriate to negotiate additional provisions, such as to control the discovery process. For example, to limit arbitration costs, the arbitrator should be permitted to conduct only limited discovery: for example, requests for documents – but not interrogatories or depositions.

²⁰ “Service Level Agreements” (or “SLAs”) are detailed service descriptions, credits, and other remedies used to address service failures in complex telecommunications service agreements involving voice, data, Internet access, and new Internet protocol (IP) technologies such as “IP VPN” and “MPLS”.

²¹ 9 U.S.C. § 1 *et seq.*

²² American Arbitration Association, *Arbitration and Mediation* available at http://www.adr.org/arb_med.

Given customers' issue priorities, enterprise counsel should also consider including injunctive relief measures (*e.g.*, AAA emergency measures granting arbitrator injunctive powers) to halt service disconnection during the pendency of the dispute. The agreement, moreover, should expressly provide that the carrier may not disconnect or suspend services while the dispute is pending in arbitration. Nor should the termination right spring immediately into existence if the arbitrator makes an award in the carrier's favor. At a minimum, there should be a post award payment period in arbitration clause for the customer to pay the carrier (without disconnection remedies) if an award is made in the carrier's favor.

The carriers, on the other hand, may well have a different perspective. As indicated, securing payment for the carrier is key. Consequently, the carrier would view any limitation by the arbitrator on the carrier's termination rights as a significant reduction in leverage. The carrier likely will further wish to limit the scope of the arbitrator's review to the contract itself and applicable telecommunications law (*e.g.*, the Communications Act of 1934 (as amended), tariffs, foreign telecommunications statutes) – rather than to general commercial law principles or considerations of equity or “good faith and fair dealing.”

Alternatively, the carrier may insist on pre-payment or escrow of disputed amounts while arbitration is pending, plus interest on amounts resolved in carrier's favor. In addition, carrier counsel will typically seek to enforce its rights under the Agreement over services not subject to arbitration, to preclude class-action arbitration, and to keep the arbitration (and any award) confidential so as to avoid “public relations” problem (if a dispute were to become public) or “copycat” disputes with other customers if arbitration is resolved in the customer's favor.

B. Additional International and Foreign Arbitration Clause Issues.

Arbitration may also be the most advantageous mechanism to resolve enterprise Agreement disputes because forum selection provisions designating another procedure may be unenforceable if the chosen jurisdiction does not have any significant relation to the performance of the Agreement or further complicated by conflicting forum selection clauses in the main Agreement and related contracts. It follows that, if arbitration is the selected dispute resolution mechanism, the parties should give special consideration to where the arbitration would take place. The laws of the chosen location may affect the arbitration both substantively and procedurally because the arbitrators would seek to ensure that the arbitral award does not violate in any manner the rules of the place of arbitration.

Similarly, the substantive law applicable to any potential dispute is also a critical determination that must be addressed during the negotiation of the Agreement. As telecommunication regulation varies widely from jurisdiction to jurisdiction, it is of

utmost importance that the parties are indeed familiar with the selected substantive law and that their choice of applicable substantive law is the result of careful analysis of the advantages and disadvantages of each potentially applicable law as well as the enforceability of such choice. As a practical matter, each party usually gives preference to the substantive law with which it is familiar. For services provided to EU countries, for example, U.S. carriers may prefer U.K. law as it is based on familiar Anglo-American jurisprudence.

In making decisions on all of the issues above, it is also advisable to take into consideration the laws of the state where the arbitral award might be enforced. Of specific importance is whether the particular state is a signatory to the New York Convention on the Recognition and Enforcement of Foreign International Arbitral Awards, which, as noted above would ensure the relative ease of enforcing the award there. The parties must also know if there are public policy or other grounds that might render the award or portions of it unenforceable in the particular state.

With respect to disputes that are not subject to arbitration, *e.g.*, disputes that are carved out of the arbitration clause, it is a good idea to provide for choice of law, venue, and personal jurisdiction in the contract.

Other considerations ripe for potential disputes are regulatory and jurisdictional ones. As noted, telecommunication regulations vary widely. For example, telephone services provided entirely within EU boundaries will be governed by different rules than those imposed by U.S. regulators. Privacy protections, prohibitions on local access, competition, taxation, and various other unfamiliar constraints may apply to foreign “in country” services – but not to those provided elsewhere – even if all are provided under the same agreement. Certainly, each party should engage local counsel to review these foreign regulations (*e.g.*, tariffs) applicable to the “in country” service. In addition, to the extent permissible, they may consider an agreement to consent to (and not to contest) jurisdiction over in-country disputes in a selected forum in advance. As this requires flexibility on the part of the tribunal, arbitration here might be a better choice as a pre-selected foreign dispute resolution authority than would be, say, a foreign court.

Another way to mitigate the uncertainties associated with multi-jurisdictional telecommunications disputes is to include detailed, anticipatory treatment of problematic issues in the agreement, rather than leaving their interpretation to contract construction principles.

Specific issues meriting review here vis-à-vis their disparate treatment under foreign authorities include data protection and privacy. For example, EU privacy laws are stricter than those of U.S. The parties may thus wish to insist on an adequate opportunity to cure violations before action is taken. Others include currency conversion, tax and payment mechanisms. The parties, for example, may consider using a currency conversion formula requiring Euros to be converted to U.S. dollars (or vice versa) based

on the conversion rate published in the London Times on the first business day of the month. Tax withholding requirements will also differ widely in foreign jurisdictions: the obligations (or not) to comply with these should be clearly spelled out in the Agreement.

Finally, the parties may wish to raise the threshold for actionable complaints to those that represent a truly material breach (not just a minor one). This can be addressed, for instance, by inclusion of a so-called “material adverse effect” or “MAE” clause in the agreement: one that expressly limits the parties’ rights to seek recourse before an international tribunal to those violations (especially the unfamiliar ones) that have a “material adverse effect” on an other party’s rights and benefits. Examples of such violations might be increases in a customer’s rates or charges, uncured and ongoing violations of third parties’ privacy or intellectual property rights, and payment or service performance failures that becomes seriously delinquent or habitual, respectively.

IV. Conclusion.

International telecommunications contract disputes are not for the feint of heart. In today’s global economy, multi-jurisdictional telecommunications, Internet and broadband services are becoming very much the norm. The foregoing discussion provides a brief glimpse of the complications when dispute resolution under such Agreements is brought before U.S. or foreign judicial or arbitration authorities.

For U.S. domestic disputes, both enterprises and carriers are in a position to control the dispute resolution process through resort to familiar approaches to arbitration or judicial venue selection, choice of law treatment, and enforcement options. For international or global telecommunications contracts, however, such “American-centric” approaches, a self-imposed *Pax Americana*, are not necessarily ideal and in some circumstances may be of questionable enforcement. Not to be overlooked are other foreign avenues for dispute resolution options, including international arbitration – especially when the subject matter services are subject, in whole or in part, to foreign laws and regulations. These alternatives should be carefully considered when negotiating a multi-national telecommunications Agreement with both U.S. and non-U.S. parties. Assistance of expert counsel - including foreign counsel - here is a must. In other words, “do not try this at home.”

ATTACHMENT “A”

**SUMMARY OF CUSTOMARY DEAL POINTS
IN ENTERPRISE CARRIER CONTRACTS**

Arbitration Considerations: The following is a summary of customary deal points addressed in Agreement negotiations. Considerations meriting anticipatory review by Enterprise counsel include how will these be treated in arbitration? How much flexibility should arbitrator have in resolving them? And which ones (e.g., indemnification, limitation of liability) should not be subject to (“carved out” from) arbitration at all.

Structure of Agreement:	Master/Attachments; Integrated or separated
Type of Services:	Regulated/Unregulated/Managed Service/CPE
Parties:	Carrier; Carrier affiliate; Parent (“who is on the hook?”).
Obligations:	<i>Carrier:</i> Provide services; Commercially reasonable/Best efforts; Subject to facilities availability/regulatory approval. <i>Customer:</i> Payment; “hell or high water” v. undisputed charges only; Toll fraud liability; Revenue commitment.
Access to Premises:	Site preparation; Reconciliation with Enterprise customer’s lease restrictions.
Internet Access:	Compliance with use restrictions (e.g., compliance with “AUP” or acceptable use policy for Internet usage).
Choice of law/Forum/Remedies:	Federal Communications Act / State law; CPE/Managed Services - (does UCC apply?); FCC/state utility commissions (“PUC”) - administrative v. judicial remedies; Standstill provisions (e.g., no termination) pending dispute; Remedies cumulative or exclusive.
Term/Termination:	Term/Renewal; <i>Termination:</i> For cause (breach); For convenience;

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Transition to third party carriers; Migration support (v. flash cut); Is transition (or even discussion) permitted prior to termination?; Confidentiality; Exclusivity clauses (e.g., “90% of customer’s data traffic”).

Regulatory Approval:

Obligation/Representation/Condition/
Force Majeure;

What happens if regulatory approval not obtained or lost? Is this a breach of “no violation” representation?; Does it excuse performance?; Does obligation to pay (e.g., non-recurring charges) survive in such circumstance?

Agreement (e.g., state PUC) filing requirements: Typically carrier’s obligation; Issue whether unregulated portion (e.g., CPE) of contract must be filed; Confidentiality exception; If required by law: (e.g., discovery in cross subsidy cases); Notice to other party/protective treatment usually required.

Bankruptcy:

Bankruptcy default (*ipso facto*) clauses are unenforceable against debtor; May be enforceable against non-debtor (cross default); Pre-bankruptcy protection clauses negotiable.

Agreement Modification:

Typically trigger adjustment to annual purchase Commitment (“MARC”) and/or Rate adjustment and/or Service substitution. *Examples:* “Fresh look”. “Annual review”; “Business downturn”; “Technology upgrade”; “Most favored customer.” Agreement modification clause issues: “Agree to talk clause” v. Termination right; Who is “similarly situated” customer?; How to measure downturn?; Amendment of agreement” v. “agree to agree.”

Warranties / “SLAs:”	Cross reference Tariff or Price Guide. Remedies; Interruption credits. “Chronic”; Termination / Disconnection rights.
Remedies:	Partial/full termination rights. Exclusive v. Cumulative remedies.
Limitations of Liability:	Disclaimers/Damages “Cap” Exceptions Willful misconduct; Negligence v. Gross negligence disclaimer; Disclaimer of security (<u>e.g.</u> , firewall protection).
Liability and Indemnity:	Intellectual property infringement; Environmental law; Third party claims; Control of defense, settlement, indemnitee “opt out” rights; Emergency (“911” or “E-911”) services; public safety issues.
Purchase Commitments:	Monthly v. term v. annual; Sub-commitments; Shortfall/excess treatment: “Rollover/Rollback.”; Covenant “to meet MARC v. simple Payment mechanism; underutilization v. termination charges; State law liquidated damages issues.
Managed Services:	CPE (Lease, Purchase); structure; “professional services”) Statement of work. Scope of obligations. “Service Boundary” Maintenance, Services, CPE (<u>e.g.</u> , routers, LAN, LAN-WAN services). Integration warranties.