

ARBITRATING TELECOMS DISPUTES: DISPUTE RESOLUTION CHOICES IN A REGULATED SECTOR

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Legal Briefings - By **Paula Hodges QC, Partner, May Tai, Partner**

In this article, we take a high level look at the types of disputes which can arise in the telecoms sector and consider the circumstances in which arbitration may be the most appropriate method of dispute resolution. We will focus not on any particular market, but identify differences and particular challenges that arise for operators and regulators when resolving disputes which are of significant public interest and impact.

Law firms often categorise disputes by sector. It helps our clients to find the expert advice they need and it helps us, as lawyers, to identify and hone our in-depth industry experience. Some sectors, like telecommunications, are heavily regulated in many jurisdictions, and disputes in this sector may raise complex and highly technical issues. Yet some disputes are, at their core, defined not so much by sector as by aspects of the underlying transaction, such as a disagreement about contractual terms, pre-contractual negotiations or non-payment. Even many of the investor-state disputes brought by telecoms companies do not hinge on telecom-specific issues.

WHEN CAN ARBITRATION BE USED TO RESOLVE TELECOMS DISPUTES?

Some disputes that arise in the telecoms sector are not suited to resolution by arbitration. There may already be a fixed method of dispute resolution by operation of law or regulation which cannot be bypassed by party agreement, for example, in some jurisdictions, network access, interconnection or consumer disputes.

Yet, there are some types of disputes which are ideally suited to it.

- **Arbitration of inter-operator disputes:** Operators may be able to seek resolution of their disputes between themselves without needing to use public finances (either in court, or through regulator involvement). From an operator's perspective, trying to resolve a dispute out of the public eye through arbitration may be beneficial and may enable the parties to reach an outcome which is commercially more acceptable to both. Yet that needs to be balanced against the need for the regulator to be appraised of the decision, and whether or not the regulator wants parties (and potentially then the regulator) to be bound by the tribunal's decision or to act on it.
- **Disputes between operator and regulator:** The process for resolving disputes between service providers and regulators may be laid out by statute and involve a process of judicial review. There may be public policy reasons for these types of dispute to be resolved in the public domain. However, countries developing their telecoms infrastructure in emerging market jurisdictions and some more developed markets may be willing to permit the arbitration of disputes between operators and regulators, particularly where international investors may have concerns about the impartiality of the domestic judicial system.
- **Disputes between operator and commercial counterparties:** Contractual disputes with a telecoms "flavour" are very well suited to arbitration. When outside the reach of regulation, the parties can choose the method of dispute resolution which best suits them.
- **Disputes between foreign operator and regulator or the state more generally that cannot be resolved domestically:** Depending on the nature of the dispute there may well be the potential for investment arbitration: either on the basis of an investment contract between the service provider and the host state, an investment law which might be relevant, or an investment treaty. An investment treaty arbitration will derive from an alleged breach of treaty standards by the government acting through the regulators. The "information and communication" sector (of which telecoms forms a part) makes up 6% of the total cases brought at the International Centre for the Settlement of Investment Disputes according to the latest set of ICSID statistics. It may also be possible for a foreign operator to enlist the help of its home state in pursuing state-to-state avenues at the WTO.

IS ARBITRATION BEING USED TO RESOLVE TELECOMS DISPUTES?

A recent study by Queen Mary University of London looked at the use of arbitration to resolve TMT disputes. The survey responses indicate that the telecoms sector stands alone amongst technology and media companies in preferring litigation and expert determination¹ for resolving their disputes over arbitration.¹ Indeed, the survey demonstrated reluctance amongst the telecoms sector to enter into any form of formal dispute resolution, preferring to attempt negotiation or mediation to resolve disputes. Only 18% of those disputes which were not settled then went on to be pursued via arbitration, expert determination, adjudication or litigation.¹

Despite the small percentage of cases proceeding to formal dispute resolution, the survey also found that the telecoms industry was, by comparison to the rest of the TMT sector, very litigious. This suggests that the number of disputes that arise in the industry must be (comparatively) very large. 71% of respondents in the telecoms industry had experienced more than 20 disputes and 83% of those surveyed said their largest dispute was more than US\$100m. These high value telecoms disputes occur all over the world, particularly in Europe and North America.¹

Benefits of Commercial Arbitration

- A neutral forum
- Non-national dispute resolution
- The arbitrators are chosen by the parties and can be sector experts
- Party control over the design of the arbitral process
- Confidential or private process
- Enforceability of the Award in 157 countries around the world under the New York Convention

Yet the survey highlights that this institutional preference for litigation and expert determination seems to be at odds with the personal preferences of those in-house counsel responding. 92% of respondents said they thought that arbitration was well suited to resolving TMT (including telecoms) disputes and was the preferred method of dispute resolution for 42% of those surveyed.¹ Indeed, all of the benefits of arbitration highlighted above were also recognised as benefits for resolving disputes by arbitration in the telecoms sector, although notably, ease of enforcement, usually a key factor for many businesses choosing arbitration, was not considered so important in the telecoms sector.² So why then does institutional preference and personal preference amongst in-house counsel diverge?

Companies often have a default position for their dispute resolution provisions. They may have model contracts from which those negotiating them are discouraged from deviating. Where regulation or national legislation requires a particular form of dispute resolution, it can often become the default across the entire business. Some concerns were also expressed about certain aspects of arbitration, such as costs, delay, arbitrator behaviour and the "over-judicialisation" of arbitration. Some commented that the same "tricks" used in litigation had found their way into arbitration.³ Others suggested that there was a need for more specialised arbitrators, and that increased sector specialism was likely to be needed in the next 10 years.

MAKING ARBITRATION WORK FOR TELECOMS DISPUTES

When in-house counsel were questioned about how arbitration could be improved, reducing costs was considered crucial, as was the availability of specialised arbitrators.⁴ Suggestions for improvement included better use of technology, more robust case management, limited cross-examination, disclosure and pleadings, and a schedule for the delivery of the award. Some felt that a neutral system for the accreditation of arbitrators specialising in TMT disputes, a specialised roster or the appointment of industry experts as arbitrators would help, with concerns that the "usual suspects" are often appointed.

These concerns are an important insight, but many can be overcome by drafting the right arbitration clause at the outset and then choosing the appropriate counsel and arbitrators once a dispute arises. Arbitration is, at its heart, an adaptable and flexible process. An arbitration based on a short form institutional arbitration clause can often proceed along a fairly standard timetable and procedure. However, it is entirely possible to draft an arbitration clause to stipulate a more pared-down process or the use of mandatory ADR. Indeed, this could then become the company "standard clause" in its Dispute Resolution policy when negotiating a transaction. Clearly this has its risks; in the event that you are the claimant party and many millions are at stake, an expedited, procedurally limited process may be less appealing. Even if a pared down process is not prescribed in the contract, being clear with your counsel about your objectives for the arbitration is key. Good arbitration counsel will be able to advocate strategically for the process you want and will use their firm's knowledge of arbitrator candidates to help steer the arbitration towards a robust and efficient procedure.

Good arbitration counsel will also be able to find the right arbitrator to determine the relevant dispute. A dispute focused on the breakdown of a commercial relationship may need a good contract lawyer more than it needs a sector specialist, while a highly technical telecoms dispute may need someone with many years of practical industry knowledge and experience. However, proceeding on the basis that telecoms experience is crucial may limit the field too much. It may be that awareness of the region in which the dispute has arisen, or of large scale infrastructure projects, or, indeed, the underlying governing law, or, even, being an experienced arbitrator with a proven track record in pushing forward the resolution of the dispute may be more important. And it may be that limited arbitrator experience in telecoms can be compensated by good expert evidence. An investment treaty dispute involving a telecoms investor is likely to rest on allegations based on breaches of treaty obligations, potentially with telecoms as the underlying factual matrix, or even, with the sector of the party being somewhat irrelevant (eg issues relating to taxation of foreign companies rather than linked to its involvement in a sector). In those circumstances choosing a sector expert rather than a public international law expert would be a mistake.

LOOKING TO THE FUTURE?

The telecoms industry is typified by fast-paced change. The technology at the heart of future disputes is highly likely to change as innovation continues apace. The QMUL Survey highlighted the expectation amongst the TMT industry that the next five years would witness more IP, data protection and privacy, licensing and data breach disputes.⁵ Many of these disputes stem from contractual relationships which will lend themselves to resolution by arbitration. Choosing to arbitrate these disputes (where permitted) is likely to be more efficient and to allow the involvement of experienced, industry expert arbitrators in comparison with national court systems.

Ultimately, it is for arbitration practitioners to demonstrate to their telecoms clients that we can overcome any concerns they may have and offer an arbitral process that can resolve these disputes of the future. Perhaps then the default will move away from litigation and expert determination towards a more tailored arbitral process.

TELECOMS DISPUTES

Inter-operator	Commercial relationships	Regulator
Between fixed network operators and mobile network operators relating to termination rates, interconnection disputes and roaming arrangements.	Not all commercial relationships or disputes that arise from them are focused on highly technical sector-specific or regulated issues.	May result from resolution of inter-operator disputes, liberalization, compliance with regulatory standards, licensing fees, anti-trust or competition issues
True "telecoms" dispute: highly technical, operational and financial issues, often relating to complex, regulated areas.	Telecoms companies enter into mergers and acquisitions and joint ventures (eg Alcatel dispute with Blackberry in relation to Saudi Arabia). They buy equipment, lease property, outsource and enter into finance agreements.	Operator may seek to challenge action or inaction of regulator and it may be open to the service provider to challenge or appeal that decision. There may be some sort of judicial review process available within the national legal system (eg Globacom's legal action against the Nigerian Communications Commission and MTN Nigeria).
Failure to resolve these disputes quickly can affect national telecoms market, affect investment and ultimately limit competition.	Management and shareholders may disagree about the approach to be taken by the company (eg shareholder class action against BT).	Lengthy court battles and judicial decisions reviewing the decision of the regulator may ultimately undermine or limit the regulator's power. Yet, depending on national regulations and the agreement between regulator and service provider, arbitration could be an option and may serve the interests of both the operator and regulator.
In the more developed and regulated of markets, where operators are of equal bargaining power, they may be allowed to resolve disputes and determine their own commercial relationship	At their heart, these types of disputes raise questions of breach of contract, the interpretation of contractual terms and the breakdown of commercial relations. They are perhaps best described as disputes with a telecoms "flavour".	
If the dispute is not resolved, the regulator may step in. It may be required by national or supra-national legislation to adjudicate and resolve particular inter-operator disputes.		
Across the world, the approach is still quite varied, ranging from court resolution to enforced regulator-sponsored ADR and arbitration.		
Consumer v operator	Investment disputes	State-to-state
Disputes relating to service delivery, service costs, equipment failure.	Foreign investors into a national telecommunications market may bring investment disputes under bilateral or multilateral investment treaties.	In a truly global communications era, the ability of an operator to enter a national market, or connect to operators within the domestic sphere, is critical.
Dispute Resolution provisions are set out in the service contract or set by national regulator.	Disputes may relate to licencing issues or freeze in service tariff affecting the value of the investment (such as in Telekom Malaysia v Ghana or Telefonica v Argentina).	WTO GATS commitments on the opening and regulation of telecommunications markets enable disputes which arise at a state-to-state level to be resolved before the Dispute Settlement Body (DSB) of the WTO. The dispute brought by the United States against Mexico in 2000 is a clear example of this kind of sector-specific dispute which was ultimately resolved in 2004 following receipt of a report by a DSB panel.
Disputes are often resolved by a simple and inexpensive out-of-court dispute resolution scheme, overseen by a national body or watchdog.	May not relate to technical telecoms issues but on exercise of state authority and power over a particular investor. For example, the interpretation and application of taxation legislation (such as Vedanta Resources plc v. India or the Belize Telemidia dispute), or the process of privatisation (such as Axos v Kosovo). In each of these, the telecoms element is a factual element, but the public international law aspects are crucial in terms of the legal case.	
Depending on jurisdiction, potential for class actions (eg Telstra (Australia), or Talk Talk for breach of info security).		

FOOTNOTES

1. QMUL Survey 2016, pp20 and 35.
2. QMUL Survey 2016, p23.
3. QMUL Survey 2016, p27.
4. QMUL Survey 2016, p28.
5. QMUL Survey 2016, p16.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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