

Status of Dispute Settlement Scenario in Telecom & Broadcasting Sectors

By
Madhav Joshi,
Tata Teleservices Limited

30th August, 2008

The present-day telecom sector is characterized by:

- **simultaneous existence of state and private owned multiple operators**
- **fast changing technologies, convergence of ideas, services markets**
- **liberalized and customer oriented regulatory regimes.**
- **subscribers wanting Value Added Services using IP, wireless and broadband technologies rather than Plain Old Telephony Service(POTS)**
- **Countries wanting to attract private investment by providing favourable investment climate.**

➤ INVESTORS

- ✓ Telecom sector needs huge capital investments.
- ✓ Investors need assurance about quick, fair and effective disputes resolution mechanism.

➤ SUBSCRIBERS

- ✓ Need new services at lower tariffs
- ✓ Delays in dispute resolution would deny them this benefit.

➤ ECONOMY

- ✓ Slower growth of telecom sector would retard general economic and technical development of the country.
- ✓ In order to avoid disruptions and delays in the development of telecom markets, disputes need to be resolved expeditiously.

Successful dispute resolution:

- ✓ facilitates investment climate, stimulates growth and is of prime importance to developing countries targeting higher teledensities and even spread of telecom across all the regions.
- ✓ is increasingly important for introducing competition
- ✓ should be as speedy as the networks and technologies they serve.

Official dispute resolution mechanisms are important as a basic guarantee that sector policy will be implemented.

- Regulatory
 - ✓ Handled by Regulators appointed under statute, review within the regulatory organization followed by appeals to hierarchy of Courts.

- Non-Regulatory - i.e. Alternative Disputes Resolution (ADR)
 - ✓ Less official means of dispute resolution i.e. negotiation, mediation and arbitration.
 - ✓ Awards are subject to limited review by Courts but ONGC v Saw Pipes has provided new meaning to “Public Policy” as added ground of challenge.

- Countries vary in their stage of market development, regulatory approaches, dispute resolution and general business cultures, and in the types of disputes that commonly arise.

- These factors will result in different experiences with regulatory adjudication, arbitration, mediation, negotiation, ombudsmen schemes and other approaches .

- ART- independent administrative authority performs regulatory, consultative and dispute settlement and conciliatory functions.
- It can rule on disputes between operators, impose sanctions for non-compliance of legislations and regulations.
- It may suspend/withdraw licenses, impose penalty up to 5% of turnover.
- EU directive to settle cases in 4-6 months.
- Appeal to ordinary courts (contractual matters) or Administrative Courts which deal with sanctioning powers granted to ART.
- Court decisions can be appealed against by parties to dispute.
- ART can't appeal but is heard.
- Minister of industry also shares some powers with ART i.e. to issue licences.

FCC IS THE REGULATOR - interprets,co-ordinates and adjudicates on policy issues and disputes arising from them.

- **FCC provides parties with a choice of ADR procedures as mandated under the Telecommunications Act of 1996.**
- **No separate appellate mechanism for telecom.**
- **FCC generally takes pro-consumer,anti-monopolistic stance in regulatory and dispute resolution functions.**
- **There is a provision of final decision to be given by a commissioner or panel of commissioners.It also admits review petitions.**
- **The decisions can be appealed in US Court of Appeal.**
- **Many of FCC orders are subject to review in Federal Courts.**
- **Unless “arbitrary and capricious” the courts generally don’t interfere in regulatory decisions.**

India has perhaps a unique model since year 2000

- Regulatory functions are vested with the telecom regulator Telecom Regulatory Authority of India (TRAI),
- Policy and licensing functions are retained by the Union Government's wing Department of Telecommunications (DoT),
- Adjudication function has been vested with a specialized high powered tribunal Telecom Disputes Settlement & Appellate Tribunal (TDSAT).

TDSAT- a one stop solution !



- By TRAI Act, which is a special Act, Jurisdiction of civil courts has been ousted and for all telecom, cable and broadcasting sector related disputes, the jurisdiction has been vested only with TDSAT.
- High courts entertain telecom disputes if TDSAT is not sitting.
- HC has limited jurisdiction under Art 226 of constitution to correct gross errors of jurisdiction.

- TDSAT has the following powers i.e. to
 - (a) adjudicate any dispute –
 - (i) between a licensor and a licensee;
 - (ii) between two or more service providers;
 - (iii) between a service provider and a group of consumers

 - (b) hear and dispose of appeal against any direction, decision or order of the Telecom Regulatory Authority of India.

- TDSAT does not hear restrictive and monopolistic practices issues.
- In Sea TV Network judgment of 24th Aug.,05 TDSAT observed that

‘(MRTP) commission ...can’t adjudicate a dispute based on violation of a Regulation made under TRAI Act. Even though the Regulation incidentally trenches on subject of monopoly and RTP’

‘any dispute which is not based on rights and liabilities arising out of TRAI Act or the Regulations made there under and pertaining solely to a complaint of MTP, RTP and UTP only cannot be tried by TDSAT’.

In MTNL Vs TRAI challenge to ADC matter,

- Challenge by TRAI to the jurisdiction of TDSAT to hear appeal of MTNL challenging the Regulation – claimed by TRAI that regulations framed under Section 36 of the TRAI Act are statutory, having become part of the Act could not be subject matter of appeal – further plea that TDSAT, a Tribunal constituted under the Act cannot question the vires of the Legislation .
- TDSAT in an interim order held on Jan 31,'05 that it has jurisdiction in the matter. No subordinate legislation can take away jurisdiction of TDSAT conferred upon it by the Act and any clause in the Regulation seeking to divest TDSAT of its jurisdiction to adjudicate upon any disputes is non est and has to be ignored.
- This had been challenged before Delhi High Court which upheld TDSAT jurisdiction.

- TDSAT does not hear individual consumer complaints. Consumer Group (not defined ?) can however approach TDSAT.

- SUPREME COURT-
 - WLL Case- TDSAT powers are not limited to judicial review. It is creature of statute-an expert body created to determine correctness of an order passed by another expert body.

- SC in UOI Vs Tata Teleservices (Maharashtra) Ltd. held in 2006 that licensee includes Lol holder also and TDSAT thus has jurisdiction to deal with disputes between Licensor and Lol holder.

TDSAT- Its different!



- It has wide original and appellate jurisdiction.
- As the only telecom adjudicator, it hears questions of facts and law.
- It blends law, commerce and technology.

Chairperson - serving or retired judge of Supreme Court or Chief Justice of a High Court.

Two members - well versed with technology, telecommunication, industry, commerce or administration or Secretary to Union of India for 2 years minimum.

- It can regulate its own procedures.
- Appeal lies only to the highest court i.e. Supreme Court of India.

TDSAT- overcomes disadvantages of Regulatory Adjudication



- It has gathered required expertise.
- Very few matters are pending.
- It passed orders on interconnection issues, license agreement interpretation, pricing, jurisdictional issues, policy interpretation, level playing field.
- Even complex matters like challenge to limited mobility service reached finality in less than 3 years, despite appeal to Supreme court.
- Operators, especially in cable and broadcasting sectors are feeling the need to have more benches of TDSAT.

- Industry ombudsman recommended by TRAI to deal with individual consumer complaints.
- Precedents-telecom ombudsman in Australia (TIO) and U.K.(Otelco) and banking & insurance ombudsman in India.
- If subscriber is not satisfied with decision of Ombudsman, he is free to approach consumer forum.

- Arbitration Act is an earlier legislation.
- TRAI Act which is a later and special Act excludes only Statutory Arbitration under Sec 7 B of Indian Telegraph Act.
- Licence agreements now provide for dispute resolution through TDSAT.

Aircel Digilink Vs UOI and Star TV Vs Asianet decided in Jan 05:-

'TDSAT will have jurisdiction in respect of any dispute as mentioned in Section 14 of the Act. It will also have the jurisdiction if dispute arises in respect of direct activities in telecom sector i.e. those relating to the telecom services.'

Dispute between two service providers as landlord and tenant would certainly be outside the ambit of the Act.

Those disputes over which TDSAT has no exclusive jurisdiction and where the third party's interest like the consumers is not in issue or where there does not exist any public interest, the domestic forums chosen by the parties by way of an Arbitration Agreement may be held to be valid.

We must, therefore, hold that arbitration is barred in respect of the matters which are within the exclusive jurisdiction of the TDSAT under the provisions of Telecom Regulatory Authority of India Act, 1997.

- In BSNL vs TRAI - RIO matter decided on 27th April 05 –TDSAT observed that :-

'...TRAI observation that operators appoint jointly an auditor to decide billing disputes (instead of BSNL Chairman deciding it) is fine but if they fail to appoint such person, reference to TDSAT needs to be made.'

Market power asymmetries decide choice of DR method



- Internationally, comparative market power of parties may decide type of dispute resolution.
- ADR techniques may help where disputing parties have similar levels of market power, where parties are more likely to negotiate solutions that meet their mutual on-going commercial interests.
- Regulatory intervention is considered necessary where one party effectively requires the protection from abuse by the other.

BPL vs TRAI – dt 28th March 2006

The Supreme Court held that where ever TRAI issues any Directive which are directory in nature and not advisory, TRAI will be free to take action under Section 29 read with Section 34 of the TRAI Act in case there is non compliance by service providers of the same.

Hotel Association case

SC held that Hotel who provide television services to their guests have privity of contract with broadcasters and are thus, "consumers". It is not correct to say that commercial cable subscribers will be outside the purview of regulatory jurisdiction of TRAI.

Thank you