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Dispute Resolution in the Telecom Sector: Priorities, Processes and Resources

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Liberalization and privatization disputes

- Negotiating transition to open markets without alienating key constituencies
- E.g.: Bulgaria's privatization

Interconnection, access and competition disputes

- Challenging dominant interests and asymmetric market power
- Pricing, operational, technical issues central to functional competition

Disputes between operators and regulators

- Regulatory commitments
- Industry reliance
- E.g.: Turkey's IsTim case

Trade disputes

- WTO
- GATS
- E.g.: US v Mexico

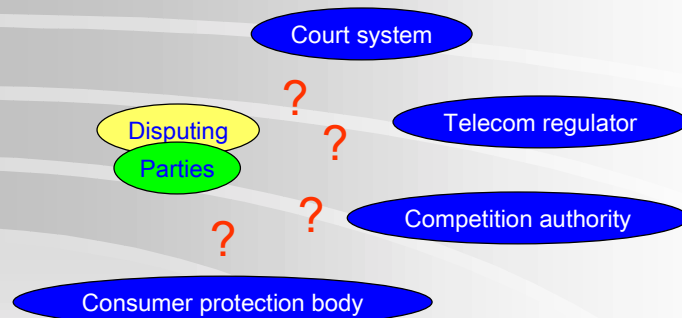
Consumer disputes

- Pricing, billing, slamming, quality of service, privacy, advertising
- E.g: Portugal's DECO case

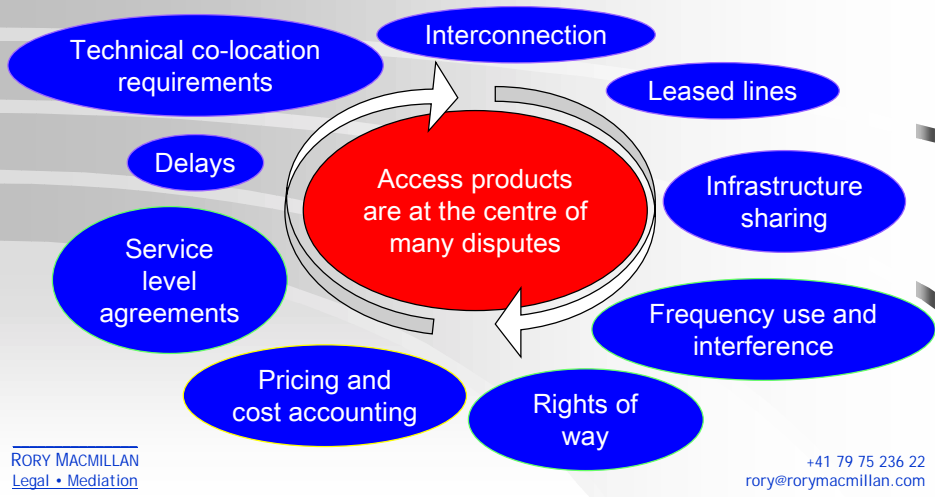
Disputes resulting from structural regulatory problems, changing technologies and markets

- Rapid transition of technologies and markets
- Matching regulatory regime to realities
- E.g.: India WLL(M) dispute; 3G/Wifi?

What disputes concern the telecom regulator as opposed to the courts and other agencies?



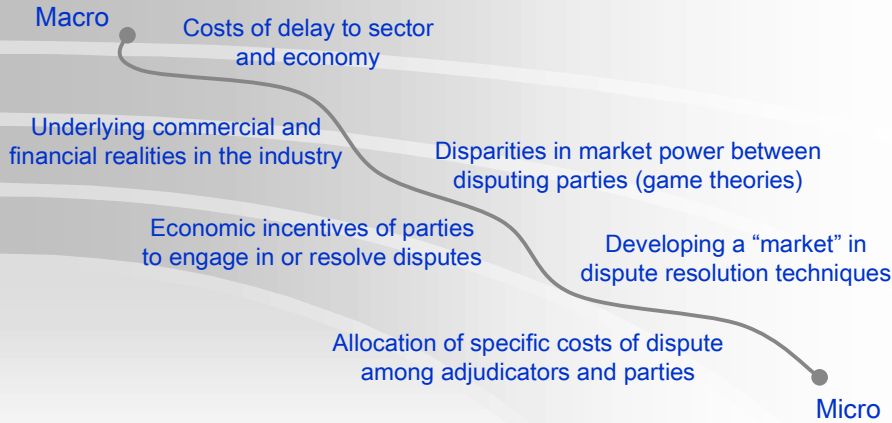
What disputes are specific to the “telecommunications” sector?



Where should policy-makers' and regulators' resources be focused?

- Key obstacles to sector development
- Investment and competition
- Financial and operating conditions

An economic lens is crucial in structuring parties' incentives and reducing or resolving disputes



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What are key aims for policymakers/regulators considering dispute resolution techniques?

- Efficiency of resolution**
 - Speed
 - Cost to parties and official sector
- Efficacy of result**
 - Implementation and enforcement
 - Durability of result
- Coherent regulation**
 - Compliance with regulatory regime
 - Investment and competition
 - Minimizing uncertainties

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There are two key lenses through which to look at dispute resolution techniques

Whether the process and result are determined by a 3rd party or through consensual negotiation by the parties

CONSENSUAL /
ADJUDICATORY

How much involvement the official sector has at various levels in the process

OFFICIAL /
NON-OFFICIAL

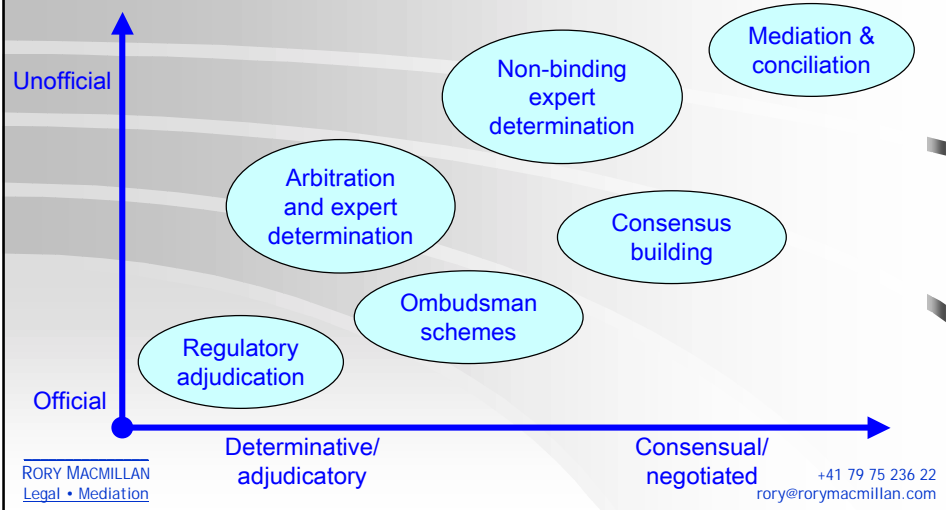
A process is more “consensual” where the disputants, not a 3rd party, have more control

- Agreeing the arbitration or mediation process
- Picking the arbitrator or mediator
- Negotiating a settlement
- Implementing the agreement

A process is more “official” where government officials make more decisions than non-officials

- Policing the procedure
- Choosing the adjudicator or mediator
- Deciding the result
- Reviewing the ruling and/or process
- Enforcing the result

Dispute resolution techniques may be viewed along these two key axes



Each dispute resolution technique has a different level of involvement of the official sector

	Regulatory adjudication	Arbitration	Non-binding determination	Mediation/ conciliation
Controlling the process	Official	Parties & Arbitrator	Parties & Expert	Parties & Mediator
Choice of 3 rd party	Official	Parties	Parties	Parties or Official
Identity of 3 rd party	Official	Non-official	Non-official	Non-official or Official
Deciding result	Official	Arbitrator	Expert	Parties
Review of process/result	Official	Official	Unusual	Probably none
Enforcement	Official	Official	Parties	Parties

How “official” and “unofficial” a process is affects efficiency and effectiveness of dispute resolution

- Control of policymaker or regulator over result may be important for policy reasons
- Official sector’s ability to enforce outcomes
 - Regulatory remedies
 - Courts
- Reliance on resources of the official sector

Whether it is “adjudicatory” or “consensual” also affects efficiency and effectiveness

- Protection of weaker party
- Definitiveness of the outcome
- Ownership of the result

The core issue concerns the best type and level of official involvement to achieve policy goals

- How “regulatory” is the concern
 - Requires official administration?
 - Importance to public policy?
- Bargaining powers of parties and potential for negotiated solution
- Prioritizing the (sometimes scant) resources of official sector

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Regulatory adjudication is both a regulatory function and an adjudicatory function

Regulatory processes

...tend to be more investigatory, consultative and on-going

Adjudicatory processes

...tend to be more adversarial and seek to be finite

Regulatory adjudication needs to address both functions

The regulatory function emphasizes efficiency, sector development and regulatory compliance

- Flexibility of process is important
 - Ireland's ComReg and UK's OFCOM publish draft determinations for comment of market participants
 - Australia's ACCC is "not bound by technicalities, legal forms or rules of evidence"

Section 152DB of Trade Practices Act 1974

- Availability of specific regulatory remedies
- The regulator/adjudicator has a policy agenda

The “adjudicatory” nature makes it important to take into account the role of the “3rd party neutral”

Follows a formal written procedure



Procedure must be transparent

Adjudicator is a third party, not a party to the dispute



Adjudicator must be neutral and accountable

Parties position themselves offering adjudicator a binary choice of decisions



Adjudicator must be well informed of broader sector issues

Adjudicator’s decision is enforced by the state



Remedies must be sure and proportionate

Adjudicator’s decision often produces win-lose results



Correction of mistakes must be available (review and/or appeal)

Relationship of courts and regulatory adjudicators and “review” versus “appeal”

● Traversing government (executive and judicial) branches versus upwards appeal within a branch

● Protecting the integrity of the adjudicatory system versus ensuring individual outcomes

● Focusing on bounds of adjudicator’s authority versus substance of his/her decision

● Emphasizing procedure followed by the adjudicator versus finding on the merits

● Considering factors weighed by the adjudicator versus rules of evidence

● Reasonableness versus correctness of decision

There are numerous approaches to internal and external review/appeal of decisions

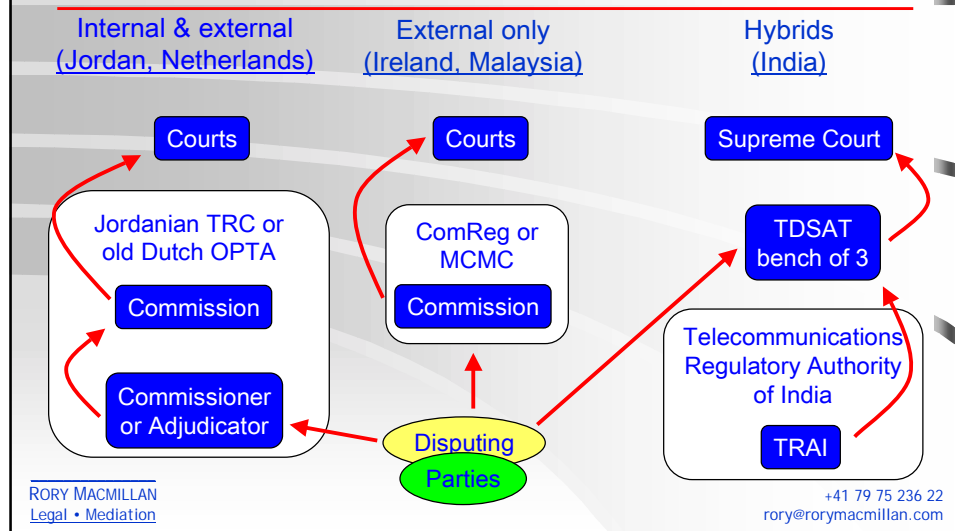


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Dispute prevention as a form of dispute resolution

- Getting players' incentives right
- Consultation and transparency in regulation
- Consensus building fora

The telecom sector has particular features...

- Complex network industry with network operators and service providers
- Capital intensive business, so many there for the long haul
- Webs of on-going commercial relationships

...suggesting intelligent use of ADR techniques may help resolve disputes

- Sector regulation is increasingly encouraging negotiated results
- Techniques emphasize long-term relationship between parties
- Durability of solutions that emerge from parties' own converging interests

OFCOM's attitude to ADR depends on balance or imbalance of "significant market power"

	ADR	OFCOM
Large number of parties	X	✓
One party is dominant in the relevant market	X	✓
Both parties are dominant	✓	X
None of the parties are dominant	✓	X
Similar disputes are resolved in other industries without the regulator's intervention	✓	X
No welfare loss would result from a failure to agree	✓	X

ADR may be used to reduce the burden on the official sector

- Mediation can reduce volume of disputes reaching the regulator
- Arbitration as a supportive alternative to regulatory adjudication

Mediation and conciliation are seldom likely to be a waste of time and resources

- Low cost
- Small time commitment
- Confidential and without prejudice
- **Helps parties understand each others' needs and interests**

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EU is characterized by jurisdictional complexity: vertical, horizontal, international and domestic

	Vertical	Horizontal
Domestic	Internal agency appeals and judicial review before appeal and supreme courts	Interaction between telecom and competition agencies, and convergence of telecom and competition legislation
International	European Court of Justice, European Commission and "direct effect" of European law	Commission Directorates General, cross-border disputes and WTO

Delays and uncertainties are influencing the European agenda on dispute resolution

- Netherlands
 - OPTA's review was averaging 7 months
 - Over 200 cases on appeal
 - final resolution can take 3½ years
- Germany
 - 1,000 cases pending
 - 2,500 appeals of RegTP decisions and 150 appeals to higher court
- Spain
 - Appeal to national court can take 2-3 years
 - Appeals to Supreme Court can take 4 years

Effectiveness of decisions while under appeal is at the centre of delays and uncertainties

- Netherlands: in half of cases before the Court of First Instance, OPTA's decisions were suspended by interim measures

BUT

- Spain: Few interim suspensions of regulator decisions so sector reform can continue despite extensive delays

There is a trend to accelerate official dispute resolution and make it more effective

- EU Framework Directive
- Emphasis on timelines (e.g., 4 months)
- Refining regulatory adjudication and competences
- Reducing extensive appeals processes (e.g.OPTA)
- Innovative dedicated structures (e.g.OFCOM's LLU Adjudication Scheme)

And there are some initiatives to introduce alternatives to regulatory adjudication

- Some regulators using more mediation (e.g.ComReg)
- Ombudsmen schemes
- Industry initiatives (e.g., UKCTA, BT, Vodafone)

Conclusion: Focus on the underlying structural effects of resources and incentives

- Which institutions or parties should bear responsibility at the various levels?
- Who has the resources at those levels?
- How can responsibilities and resources be arranged to ensure efficient, effective resolution consistent with sector policy?

For further information

- “Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions”, Robert Bruce, Rory Macmillan *et al*: http://www.itu.int/ITU-D/treg/Events/Seminars/2003/GSR/Documents/DRS_Final_GSR_5.pdf
- ITU Case Studies in interconnection dispute resolution, Robert R. Bruce & Rory Macmillan: http://www.itu.int/ITU-D/treg/Case_Studies/index.html
- ITU web pages on dispute resolution: <http://www.itu.int/ITU-D/treg/related-links/links-docs/dispute.html>