DISPUTE RESOLUTION IN THE TELECOMMUNICATIONS SECTOR:
CURRENT PRACTICES AND FUTURE DIRECTIONS

WORK-IN-PROGRESS, FOR DISCUSSION PURPOSES

EXECUTIVE SUMMARY

PREPARED FOR THE INTERNATIONAL TELECOMMUNICATION UNION (ITU) AND THE WORLD BANK
The ITU and The World Bank have commissioned two legal firms Debevoise & Plimpton and McCarthy Tétrault to undertake a study on dispute resolution in the telecommunications sector as a contribution to the Global Symposium for Regulators (GSR) and the World Summit on the Information Society (WSIS), December 2003.

This study does not pretend to exhaust the range of issues and experiences that are relevant in discussing telecommunications sector dispute resolution. The study does however provide descriptions of how a wide range of disputes have been dealt with and of key issues facing policy makers and regulators. We, the authors hope that the experience and analyses we have assembled will contribute to the understanding of telecom dispute resolution and to the dialogue on how to improve it.

In communicating with regulators, industry and other sector representatives around the world, we discovered that there is a remarkable range of experience and expertise available to assist in resolving telecom disputes. Yet they also realized that the art of telecom dispute resolution is still in its very early stages. Much can be done in most countries to improve the speed, efficiency and effectiveness of dispute resolution. Too often, telecom disputes have caused unnecessary disruption and delay in the development of telecom markets. Improvement is clearly required.

Despite our efforts, we, the authors, are sure that some errors may have crept into the report; for these we remain responsible and apologize.

Our team was composed of Robert R. Bruce, partner in the London office of Debevoise & Plimpton, Rory Macmillan, mediator and lawyer, Debevoise & Plimpton, Timothy St. J. Ellam, partner with the Calgary office of McCarthy Tétrault LLP, Hank Intven, partner in the Toronto office of McCarthy Tétrault, Theresa Miedema, consulting lawyer with McCarthy Tétrault LLP.

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1. Introduction

The global telecom sector is in the midst of a transformation caused by privatization, liberalization and technological change. These trends have dramatically changed the way the sector functions. The number of service providers has increased substantially, as has the range of services they offer. Old business models and commercial arrangements are being abandoned or bypassed while new ones emerge. An era characterized by regional monopolies providing plain old telephone service is colliding with one that has multiple ICT service providers using IP, wireless and broadband technologies. Disputes are inevitable by-products of these changes, as new interests clash with traditional ones.

Policy makers and regulators are recognising that effective dispute resolution is an increasingly important objective of telecom policy and regulation. Failure to resolve disputes quickly and effectively can:

- delay the introduction of new services and infrastructure,
- block or reduce the flow of capital from investors in the telecom sector,
- limit competition, leading to higher pricing and lower quality of service, and
- retard sectoral liberalization and with it general economic and technical development.

Ultimately the test of successful dispute resolution – as with regulation generally – is its impact on investment, growth and development in the sector. Successful dispute resolution is important for all countries that seek to facilitate the rapid diffusion of new communications infrastructure and ICT services. It is particularly crucial for countries that have historically experienced a lack of investment and growth. Rapid and effective resolution of disputes is a key component in bridging the “digital divide”.
The experience documented in this report indicates that existing regulatory and legal institutions are not always best equipped to resolve disputes efficiently and effectively. Lack of resources, expertise and time often lead to delays or less than optimal dispute resolution. Therefore policy makers, regulators and courts are adopting a range of alternative approaches to dispute resolution.

This report documents a wide range of global experience with telecom dispute resolution. It describes and analyses the major existing and alternative approaches to dispute resolution, with a view to providing policy makers and regulators with a better information base on how to resolve different types of sector disputes.

2. Overview of Dispute Resolution Techniques

There are various common official and non-official ways of resolving disputes:

**Regulatory adjudication:** Regulatory adjudication is used by most regulatory bodies. Regulators decide between positions of disputing parties, typically after a formal process. Adjudicatory decisions are often subject to review internally within a regulatory agency and externally by the courts or by politicians. Regulatory adjudication can have the following advantages:

- well-structured channels of decision-making,
- accountability of official decision-makers,
- established mechanisms for coordinating decisions among agencies with related responsibilities, and
- availability of the state’s enforcement mechanisms.

Regulatory adjudication can have the disadvantages of delays, being subject to abuse by competitors, and lack of necessary economic, legal and financial expertise to resolve disputes efficiently and with adequate finality.

**Court adjudication:** While this report focuses on regulatory and alternative dispute resolution methods, court adjudication remains an important final recourse for many types of disputes, particularly those that are less policy related. It has the advantage of finality and official enforcement mechanisms, but, also has a number of disadvantages. These include high costs and delays in some jurisdictions and a perceived lack of telecom-specific expertise to deal with many complex industry disputes.

**ADR:** Alternative dispute resolution (ADR) involves less official means of dispute resolution, such as negotiation, mediation and arbitration. Parties have traditionally pursued ADR processes voluntarily, sometimes by contractual commitment. Regulators are increasingly turning to ADR approaches to assist them to deal with excessive pressures on official resources available for dispute resolution.

**Negotiation and mediation:** Negotiation and mediation are flexible consensual approaches that have the advantage of encouraging parties to identify common interests to find win-win solutions. Negotiation and mediation processes can, however, be subject to abuse by disputing parties that seek to delay adverse resolution of disputes or to obtain information about the other party’s case.
Regulators often require parties to try negotiation or mediation before bringing their dispute before the regulator. Some regulators or their staff perform the role of mediator. Some parties prefer to use independent mediators instead. The involvement of regulators can help improve the reasonableness of parties’ behaviour. However, it can also reduce parties’ incentive to negotiate in a candid constructive manner since parties may see it as a precursor of a formal regulatory proceeding and so take a more adversarial strategic approach.

Arbitration: Arbitration is an adjudicatory process in which the disputing parties appoint arbitrators and retain control over the design of the process. Arbitration awards made by the arbitrators usually are enforceable in courts. Awards tend to be subject to limited review by courts on procedural grounds, such as those related to the scope of the authority to resolve the dispute conferred on the arbitrators by the parties. The advantages of arbitration include:

- confidentiality,
- parties’ control over the design of the process,
- speed compared with most regulatory or judicial procedures and,
- in international arbitration, the neutrality of the forum (compared with the national courts of either of the parties).

Telecom regulators are increasingly encouraging parties to use arbitration as a means of resolving disputes. There are numerous well-established arbitration institutions internationally which have developed their own procedures and trained arbitrators. Where individual countries lack such resources domestically, they are often available regionally.

3. Current Practice: Disputes and Techniques

Disputes arise in various circumstances. Those which have the greatest impact on sector investment and growth include:

Disputes related to liberalization: Introducing competition often undermines established financial and business interests of incumbent operators. Many disputes arise from the incumbent’s desire to protect its dominant position in the market. Reduction or termination of exclusive rights has frequently led to legal and regulatory disputes.

Investment and trade disputes: Disputes often arise where regulatory reforms diminish the value of private sector interests. These include complaints by investors, operators and service providers about early termination of exclusive rights, licensing of new competitors, new rate-setting structures and changes to licenses. Among other grounds, claims have been contractual or based on alleged breaches of legal or policy commitments.

Interconnection disputes: These are the most common type of dispute between service providers. New technologies have given rise to a myriad of different network alternatives for providing services, including fixed, mobile, wireless local loop, limited mobility variations and WiFi. Preventing and resolving technical, operational and pricing disputes are key to the development of competitive markets. Asymmetric market power on the part of dominant operators often makes regulatory intervention necessary. Regulators are increasingly providing advance guidelines for the negotiation of interconnection arrangements. They are also developing
specialized adjudicatory procedures to resolve interconnection disputes. Where regulators lack information and expertise, they are turning to international benchmarking and outside expert consultants for assistance.

**Consumer disputes:** Disputes between service providers and consumers are common, particularly in basic telephone markets. Consumers can be disadvantaged due to their lack of bargaining power or competitive options. Regulators are using a variety of mechanisms to ensure effective resolution of consumer disputes, normally by the service providers in the first instance, with appropriate supervision and appeal provisions. Informal mechanisms are sometimes used, such as ombudsmen schemes. Consumer disputes are often dealt with by consumer protection agencies as well as regulators.

**Radio frequency disputes:** Radio frequency allocation and assignment disputes are dealt with internationally through mechanisms available through the ITU. Domestically, disputes arise relating to interference with frequencies and disputes over license conditions and pricing.

4. **Key Perspectives on Dispute Resolution**

Dispute resolution in the telecom sector is at a relatively early stage. While there are many complex issues and perspectives, some key ones are most relevant in designing dispute resolution processes:

**Changing patterns and assumptions:** The telecom sector is changing rapidly due to new technologies and convergence among technologies and services. The dispute resolution field is also changing and introducing alternative methods for resolving disputes. These trends provide opportunities for telecom regulators to use alternative dispute resolution methods. Both trends suggest regulators should re-evaluate assumptions about the roles of regulators and market participants in resolving disputes.

**Economics of dispute resolution:** In evaluating the success of dispute resolution processes it is important to consider economic costs to the sector as a whole. Costs may result from delays and lack of transparency and predictability. At a more ‘micro’ level, the emergence of a ‘market’ for dispute resolution techniques and professionals is likely to improve them. Some regulators are providing parties with a choice of alternative dispute resolution procedures. In managing dispute resolution processes, it is important to design appropriate economic incentives for the parties to disputes. The allocation of responsibility for the costs of disputes, for example, can affect the manner in which parties behave.

**Market power asymmetries:** The appropriate choice of dispute resolution technique in any situation depends partly on the comparative levels of parties’ market power. Some regulators take the view that they can encourage the employment of ADR techniques 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 more often considered necessary where disparities of market power mean that one party effectively requires the protection of the official sector from abuse of process by the other.

**Confidentiality and transparency:** Balancing the competing priorities of protecting confidential business information and publishing reasoned decision-making is as relevant to dispute resolution as to any other aspect of regulation.

**Dealing with complexity:** Many disputes involve complex webs of interrelated issues that defy simple categorization. Pricing, technical, operational, licensing and policy issues must all be
considered when regulatory regimes are in transition. Jurisdictional overlaps among telecom sector, competition and consumer authorities, as well as between national, regional and international authorities are making disputes more complicated. A co-ordinated or integrated view is often required to prevent delays and fragmented resolution of disputes. Consensus building measures are particularly well suited to traversing categorical and jurisdictional boundaries to resolve underlying problems affecting sector development.

5. The Role of Official and Non-Official Sectors in Dispute Resolution

A well-resourced official sector – utilizing regulatory adjudication and the courts – is crucial to a successful dispute resolution environment. However, alternative approaches are often useful to deal with the lack of available regulatory or judicial resources, or where less formal techniques offer particular advantages.

Drawing on non-official resources: The commercial world’s extensive experience with arbitration and other ADR techniques can help policy makers and regulators in considering whether and how to encourage the use of non-official dispute resolution approaches in a regulated industry. Commercial arbitration illustrates how the official sector can retain control over important policy issues – as well as ensuring the efficacy of the dispute resolution system – while lifting workload burdens on the official sector.

Quality control over official and non-official processes: The type of dispute resolution process chosen influences the appropriate role of the official sector. Regulatory adjudication and arbitration require procedural oversight by courts because the parties have relinquished control over the outcome to the adjudicator or arbitrator. Regulatory adjudication may also appropriately be subject to various levels of ‘internal’ agency and ‘external’ court review for substantive appeal. It is important, however, not to undermine the credibility or timeliness of regulatory adjudication through over-use of review procedures.

Voluntary negotiated processes, including mediation, depend for their success on abstinence from official review. Even where there are doubts about the efficacy of voluntary negotiations, regulators may be able to provide incentives for good faith engagement in negotiations instead of imposing substantive decisions.

Confidence factors in relying on non-official approaches: A range of factors are important in gauging the maturity and suitability of non-official dispute resolution approaches compared to official regulatory adjudication and the courts. These factors include the professionalisation of the arbitration and mediation communities, the development of arbitration and mediation institutions, and effective oversight procedures.

6. Improving telecom dispute resolution

At this early stage of development of global telecom sector dispute resolution, it is not appropriate to provide uniform recommendations as to how to design and conduct dispute resolution procedures. Countries vary in their stage of market development, regulatory approaches, dispute resolution and general business cultures, as well as 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 described in the report.

However, the following steps can be taken by policy makers and regulators and related organizations to improve approaches to dispute resolution

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• Publish adjudicatory decisions and facilitate access to them through the Internet and other means to provide resources for regulators and other adjudicators as well as disputing parties and their advisors. Creation of a well-organized international database would be invaluable to promote adoption of best practices in resolving disputes.

• Publish and organize precedents of innovative dispute resolution procedures, including less formal approaches, in order to promote their adoption.

• Strengthen non-official ADR approaches by endorsing their usage, improving understanding of the legal frameworks in which they operate and supporting them with official enforcement of their results.

• Tap into the human resources available to dispute resolution by establishing panels of arbitrators and mediators and collaborating with existing arbitration and mediation institutions.

• Improve networking among regulators internationally to exchange dispute resolution experience.

• Increase cross-pollination of ideas and collegial sharing of experiences between the telecom sector and the dispute resolution communities, in order to improve in greater application of effective techniques in resolving disputes.

• Harness new on-line resources and services can be harnessed to assist policy makers and regulators to improve dispute resolution techniques. Several are already being used to garner experience and perspectives in dispute resolution, such as the ITU’s on-line Global Regulators Exchange and live virtual conferencing facilities. Collaboration with educational and other institutions and the e-business community offers the opportunity to build consultative networks where ideas, precedent and information can be shared.

• Recognize that dispute prevention is as important as dispute resolution. Reduce the contentiousness of the sector and reliance on destructive dispute processes would enhance its prospects for investment and growth. Use of consensus building measures by policy makers and regulators can engage sectoral parties and identify converging interests and mutual commercial opportunities.

7. Conclusion

Successful dispute resolution is increasingly important for attracting investment, competition and development. Dispute resolution mechanisms in the telecom sector need to 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.

This report examines the current state of dispute resolution, explores key issues and offers suggestions aimed at assisting policy makers and regulators in evaluating, designing and managing dispute resolution processes.

It is important for policy makers and regulators to use minimal but well focused regulatory intervention to create an enabling environment where industry players’ incentives influence them to resolve disputes constructively. This can often involve the use of appropriate alternative dispute
resolution mechanisms. Disputes can be enormously destructive to the sector and effective dispute resolution is increasingly central to successful deployment of modern information infrastructure. This is particularly so where it is necessary to encourage investment and competition to reach the underserved billions of people of global citizens on the wrong side of the digital divide.