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Discussion

Paper

The Liberalization of ICT Dispute Resolution

Work in progress, for discussion purposes

Please send your comments on this paper at: gsr@itu.int before 30 November 2010.



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1 THE LIBERALIZATION OF ICT DISPUTE RESOLUTION

Author: Rory Macmillan, Partner, Macmillan Keck

1.1 Introduction: fault lines

Readers of this chapter will be well aware that the ICT sector worldwide has been undergoing major liberalization and unbundling over the last quarter of a century. They may be less aware that so has the field of dispute resolution, though in certain respects over a longer period. Where these two trends meet, numerous opportunities open up. The ICT sector is increasingly exploiting skills and experience in, and methods of, unbundled dispute resolution to improve the way disputes are resolved. Some of the most proactive in seizing these opportunities are developing countries, often due to pressure on officials to resolve disputes expeditiously with inadequate resources.

Disputes are inevitable in a sector where a unique tension between the need to collaborate and the imperative to compete is set against the background of extensive official intervention through regulation. Someone stands to gain, someone to lose, the official sector is deeply involved in framing who and how, and the stakes are very large. Disputes are in many cases merely another aspect of the strategic effort to win the market. If Clausewitz famously described war as “the continuation of politics by other means,”¹ disputes are in a sense the continuation of competition by other means. They involve seeking to influence the future whether through providing reasons from the past or through shaping analyses of how problems should be addressed in the future.

Traditional telecommunications disputes over interconnection and access to wholesale services and essential facilities remain very much the order of the day, only adding new dimensions. The fixed and mobile sectors remain relatively segregated from one another in terms of network technologies, ownership, business cultures and historic regulatory models. Unsurprisingly, debate is developing between the fixed and mobile sectors over justifications for widely varying termination charges.

Shifting regulatory paradigms, emphasizing the horizontal layering of networks², focus increasingly on layers where capital investment levels may merit greater aggregation, such as passive network infrastructure and wireline access networks. These, together with renewed interest in government involvement in public private partnerships and other public investment projects to develop high speed connectivity, can be expected to bring new disputes over the terms of open access to infrastructure platforms.

The economics of the Internet remain very uncertain and some basic tensions are visible between different groups, such as infrastructure providers and network operators on the one hand and applications and service providers on the other. The world of “ICT” is not a happily united one. Gains in market value have been predominantly enjoyed in those parts of the value chain that have benefit particularly from “network effects” and require comparatively low capital expenditures, such as search services, social networks and operating systems. On the other hand, infrastructure provision and content production and distribution have not enjoyed the same growth in market value. Core and access network operators are making the large majority of capital expenditures in the Internet, and argue that they earn a much smaller proportion of revenues generated by it.³ In traditional media such as music distribution and newspapers, Internet activity shifts economic output from the offline world to the online world – without always creating new economic output.⁴

Pricing models exhibit various anomalies. Usage often bears little relation to costs and revenues. Over three quarters of Internet traffic generated by consumers is video streaming and file sharing, but these services account for a small portion of revenues.⁵ For the first time in years, demand is putting pressure on network capacity, raising the need for greater investment in high speed networks to reach buildings and base stations. So long as capacity is constrained, network management is

increasingly regarded as necessary, for example to prioritize certain applications with low tolerance for latency, such as high definition video, rich voice and medical services. The terms of such management are controversial. As usage of network capacity rapidly becomes dominated by data on both fixed and mobile networks, inter-operator transfers in this area are also increasingly important. Some network operators are beginning to propose shifting pricing models from peering to charging for data termination. Disputes over per minute of voice traffic may find their equivalent in data traffic.

With convergence, new tensions are arising between the infrastructure and content providers. Broadband providers complain against satellite TV providers whose control over premium video content (generally high profile sporting events and major movies) permits them to distribute it exclusively over their own network platforms. Converged regulators which can deal with the combination of telecommunications, media and competition issues are beginning to tackle such matters. Some have found that premium content is a wholesale market in itself, treat some distributors as dominant, and intervene to prevent abuse of this upstream market dominance to favour their own downstream distribution platforms over cable, digital terrestrial television (DTT) and IPTV competitors.⁶ The terrestrial broadcasters and wireless telecommunications companies also wrestle over radio spectrum refarming, the digital dividend and white space frequencies.

Most telecommunications regulators are more familiar with the deeper network and infrastructure layers of the ICT sector than the upper network layers of operating systems, applications, content and Internet services. Their mandates have evolved with the historic process of privatization and liberalization of telecommunications networks. They are less familiar with the “network effects” of services such as social networking and search, and how these affect competition in these markets. Fully “converged” regulators equipped to deal with the full ecosystem of information technologies are still the exception.

The wide range of unresolved legal and regulatory questions around data protection, cybersecurity and privacy are continuing to find their way into dispute processes. To pick a recent example merely for illustrative purposes, the Supreme Court of the State of New York recently found that information placed on Facebook and MySpace, but hidden from view because of a user’s privacy settings, was not necessarily protected from a litigant wanting access to the information. In the

case, a plaintiff claimed to have suffered permanent injuries and loss of quality of life, but the defendant had reason to believe that the plaintiff’s online social networking pages included evidence that was inconsistent with these claims. The court allowed the defendant access to the protected information.⁷

The scope for disputes in ICT also extends to intellectual property. Many telecommunications regulators are also less familiar with the development of standards and the role of patents in technology development, and cases where exclusive intellectual property rights may be abused to hinder the development of standards. Standard setting bodies are not necessarily adequately equipped to deal effectively with disputes among members. Nor are regulators. These matters are typically left to competition regulators and the courts, often in key jurisdictions such as France (which is home to the European Telecommunications Standards Institute, ETSI) and the United States. These may require patent holders to license essential patents to their competitors in downstream markets,⁸ for example, or control failures to disclose essential patents during standardization processes while demanding royalties for them.⁹

There are, then, numerous fault lines in the ICT sector that, if not anticipated and resolved by the foresight of legislators and regulators, may and do spill into disputes and have to be resolved in the courts, in regulatory proceedings and in arbitrations. This chapter does not seek to bridge or repair these fault lines, but rather explores how the transformation of dispute resolution processes – which in some ways mirrors the transformation of the ICT sector itself – may be used to deal with the traditional and the new disputes facing the sector.

In doing so, this chapter builds upon the work of the ITU and the World Bank in a joint study on dispute resolution in 2004.¹⁰ That study, to which this author contributed, found that the telecommunications sector could benefit from numerous innovations in dispute resolution processes. This chapter builds on that observation, which has proven correct, exploring in particular the interaction between authority and private actors in ICT dispute resolution. Its main theme revolves around the degree and style of intervention by the official sector through dispute resolution in a liberalized market.

This chapter does not attempt to cover all of the important areas of dispute resolution, such as interim remedies, increasing use by regulators of timelines to

ensure rapid resolution, treatment of confidential submissions, allocation of parties' costs, enforcement and many other subjects. Readers may wish to refer back to the previous study for discussion of these in the context of the ICT sector.

Section 1.2 of the chapter explores how ICT and dispute resolution have each been undergoing a process of liberalization and unbundling, creating multiple roles and opportunities for private actors in each. Section 1.3 discusses dispute resolution in the regulatory context, including the continuum between regulation and dispute resolution, questions of party autonomy in a liberalized environment and the appropriate processes for different regulatory purposes. Section 1.4 explores various specific examples of the liberalization of dispute resolution in the telecommunications sector, including adjudicatory processes, appeals and other control systems and enforcement. It also discusses the increasing use of mediation processes to solve regulatory objectives, and highlights examples of how mediation can be particularly successful in resolving major complex multi-party problems. Section 1.5 concludes the chapter.

1.2 The liberalization and unbundling of ICT and dispute resolution

1.2.1 ICT

Separating the operation of telecommunications networks and service provision from the organs of government has become a pillar of international best practice in telecommunications policy (notwithstanding large public private partnerships underway in Australia and elsewhere). Telecommunications is a capital-intensive industry. It requires the construction of networks covering a large portion of a country's population. It is widely recognised that such large scale investment is less efficient, and service quality and prices are poorer, where investment decisions are subject to excessive governmental control. Investment and operating decisions with long term consequences are too vulnerable to short term political considerations.

For this reason, a large number of countries have over the last quarter century separated previously government-provided or government-owned services into incorporated entities. These have distinct corporate and financial governance, and many have been partially or entirely privatized. By issuing licences to new providers, countries have also introduced third parties (i.e.,

private operators and investors) to take substantial control over new telecommunications operations. As a result, the power to make investment and operating decisions is better aligned with the responsibility for their consequences.¹¹

Competition among providers of services is widely recognized as a valuable and necessary driver of improvement in the availability, variety, quality and price of telecommunications services. As is evident in reforms undertaken in markets on every continent and reflected in the General Agreement on Trade in Services (GATS) of the World Trade Organisation (WTO), international best practice clearly favours the removal of exclusive arrangements protecting incumbent operators, and the introduction of fair competition from providers funded by private capital.¹²

Competition provides a strong and direct incentive to optimise the use of resources. It thus further improves investment and operational decision-making because providers of capital hold decision-makers accountable for maximising returns on investment under competitive pressure.

These policy considerations of separation (and often some level of privatization¹³) of state-owned providers from the organs of the State and the promotion of competition have been the foundation of sector reform. Operational control of and financial risk in the telecommunications sector is to a large extent now in the hands of multiple operators, many funded by private capital. In short, the official sector has retreated, allowing private actors to emerge to play leading roles in meeting demand for telecommunications services.

Still, telecommunications is universally considered to be a critical public service with extensive economic and social benefits. To ensure the successful functioning of the market, the official sector has redefined its role, focusing on regulatory oversight, in large part to ensure fair competition, provide protocols for handling scarce resources, and address other aspects of market failure.

The liberalization of telecommunications – the retreat of the official sector and introduction of competition – has brought about a very extensive unbundling of infrastructures, network elements, service provision and functionalities. It began with interconnection. Instead of a monolithic centrally controlled network, interconnection permits a contiguous communication system comprised of connected networks operated by

different competing undertakings. The network effects allow the whole to be greater than the sum of its parts.

In addition to interconnection, it has become increasingly recognized that a vibrant telecommunications market also depends on some providers having access to the network assets and services of other providers. As mentioned above, the sector is a capital intensive one, and has evolved from its origins as a government monopoly service to public services provided by regulated private enterprises. As a result, most countries' telecommunications markets still have one large operator controlling a major part of the sector's infrastructure assets – in many countries at all levels of the core (backbone), metropolitan and access networks.

Continuing asymmetries of market power and dominance in key infrastructure have led to many countries requiring further unbundling of wholesale services and passive infrastructure to permit competitors to develop in particular market segments. The unbundling ranges from trunk services through carrier selection, leased lines and other capacity services, the local loop, dark fiber and ducts, to provide but a few examples.

Sometimes the unbundling also arises from market-led initiatives, such as tower leasing companies providing passive infrastructure in India, the United States and now Africa, and a wide variety of wholesale services in most developed markets. Market-led unbundling extends increasingly also to managed network services providers, often manufacturers, running licensees' network operations and sometimes service provision.¹⁴

A significant aspect of unbundling arises from the "end-to-end" architecture of Internet Protocol (IP) based networks. Under the end-to-end principle, the "intelligence," or computing, in the network occurs to the greatest extent possible at the edge of the network on computers, business servers, corporate mainframes, datacentres and customer mobile handsets. Simplistically described, data is disaggregated and broken into addressed IP packets on the sender's computing device or system and transmitted efficiently across the network to the destination where it is reassembled by the recipient's computing device or system. The common use of the IP/TCP protocol unbundles the network into those passive and active network elements required to support carriage of IP packets, the transmission of such bits, and the services and content that can be provided and transactions exchanged using them. This permits market entry in segments not weighed down by huge

capital costs, freeing innovation in applications and services that run across the IP platform.

As illustrated in Figure 1.1, a result of the combination of liberalization of telecommunications, the commercial and regulatory development of wholesale markets and the horizontal layering of the networks, numerous roles in the ICT sector are now unbundled and handled by private actors serving customers for commercial gain.

1.2.2 Dispute resolution

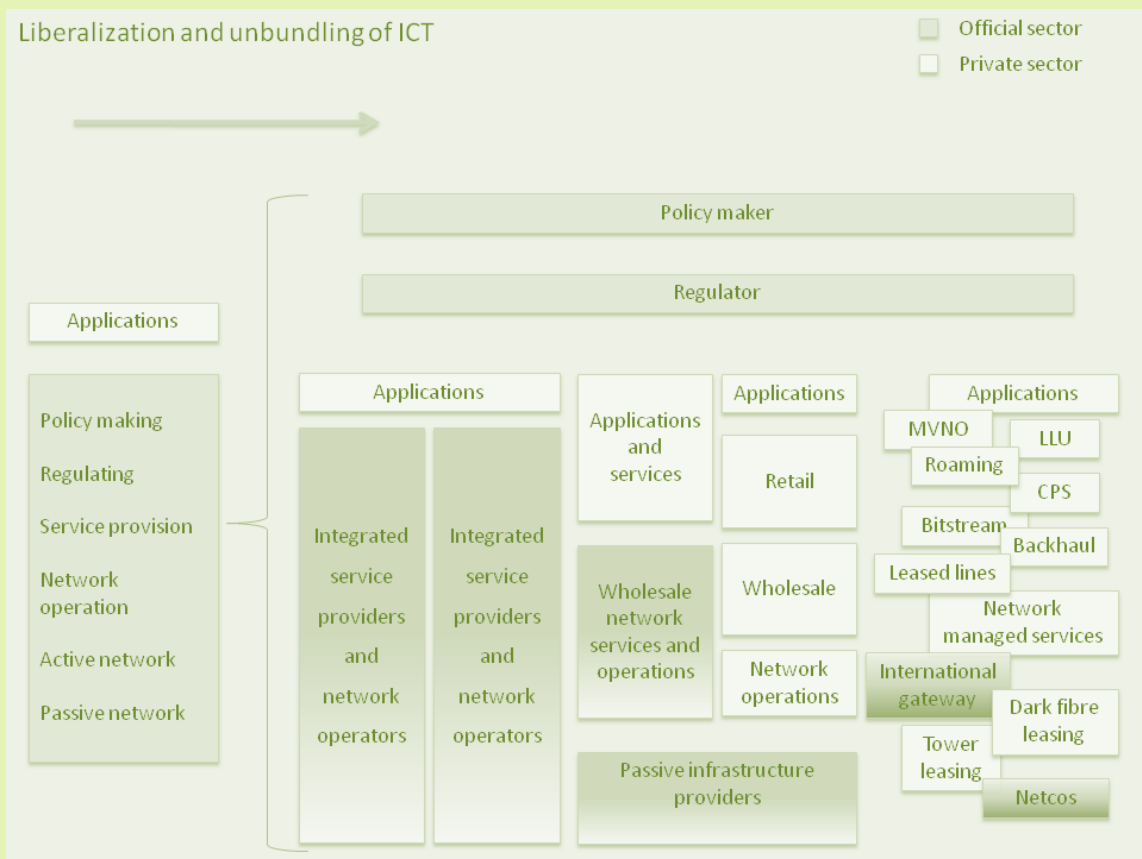
Something similar has been happening in the field of dispute resolution.

Until relatively recently, the official sector in most countries retained sovereign control – a sort of near monopoly – over the resolution of disputes. The court house would be the legitimate forum to which parties would resort to resolve differences that they could not otherwise negotiate. Over the last several decades, however, numerous countries have recognized that the public judicial system is inadequate to the task of resolving the cases brought before them. Some cases were voluminous and involved simple matters, and others involved highly complex time and resource consuming disputes. The official sector's monopoly over the operations of dispute resolution – i.e., the process of setting procedure, hearing the parties and deciding cases – was not adequately serving society's needs. Through various means, there has been a shift to approaches whereby private actors would have a greater role in how disputes would be resolved.

A number of steps have been redefining the role of the official sector in dispute resolution and the increased role of private actors over the last several decades. Initially and most prominently, these include international initiatives to encourage commercial arbitration whereby parties would agree to appoint their own arbitrators who would set procedure, hear the parties and decide their cases. They also involve the development of a variety of expert determination and mediation processes.

Such initiatives included, most importantly, the New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958. The State parties agreed in that treaty to ensure that their judicial systems would respect parties' agreements to resolve a dispute by arbitration rather than in the courts, and to enforce arbitral awards rendered in such arbitrations.

Figure 1.1: Liberalization and unbundling of ICT



Source: Author.

By law, private individuals appointed by private actors would decide their disputes, and their decisions would be enforceable by law. In 1966, the Washington Convention on International Centre for Settlement of Investment Disputes (ICSID) entered into force, which provided an even more robust regime for arbitration of investment disputes between foreign investors and host States where the investments were made.

The New York Convention led to many countries adopting national laws supporting the resolution of disputes by arbitration. The development under the auspices of the United National Commission for International Trade Law of a model arbitration law (the UNCITRAL Model Law) in 1985 accelerated countries' adoption of domestic pro-arbitration legislation. Numerous new countries enacted laws affirming arbitration's effectiveness as a means of dispute resolution. They also permitted private parties to determine where the arbitration would be held, its language, the law governing the procedure of the arbitration as well as the substantive law of the dispute, and the procedure of the arbitration itself. The role of the official sector

would be primarily to enforce arbitral awards and to check that the parties had legal capacity to agree to arbitration in the first place – and that the arbitration had been carried out properly. This last would mean that the losing party had had an opportunity to present its case in the arbitration, and that the arbitration was carried out in accordance with the parties' agreement to arbitrate.

In parallel, numerous international, regional and national institutions developed to provide various services that would previously have been viewed as under the official sector's monopoly over dispute resolution. These institutions would register arbitrators on their rosters, appoint arbitrators to decide cases, provide rules of procedure to govern arbitrations, and in some cases even review arbitrators' decisions before they are issued, or effectively provide an appeal service after they are made.¹⁵ Different institutions would provide different combinations of these services. Dispute resolution was undergoing its own unbundling.

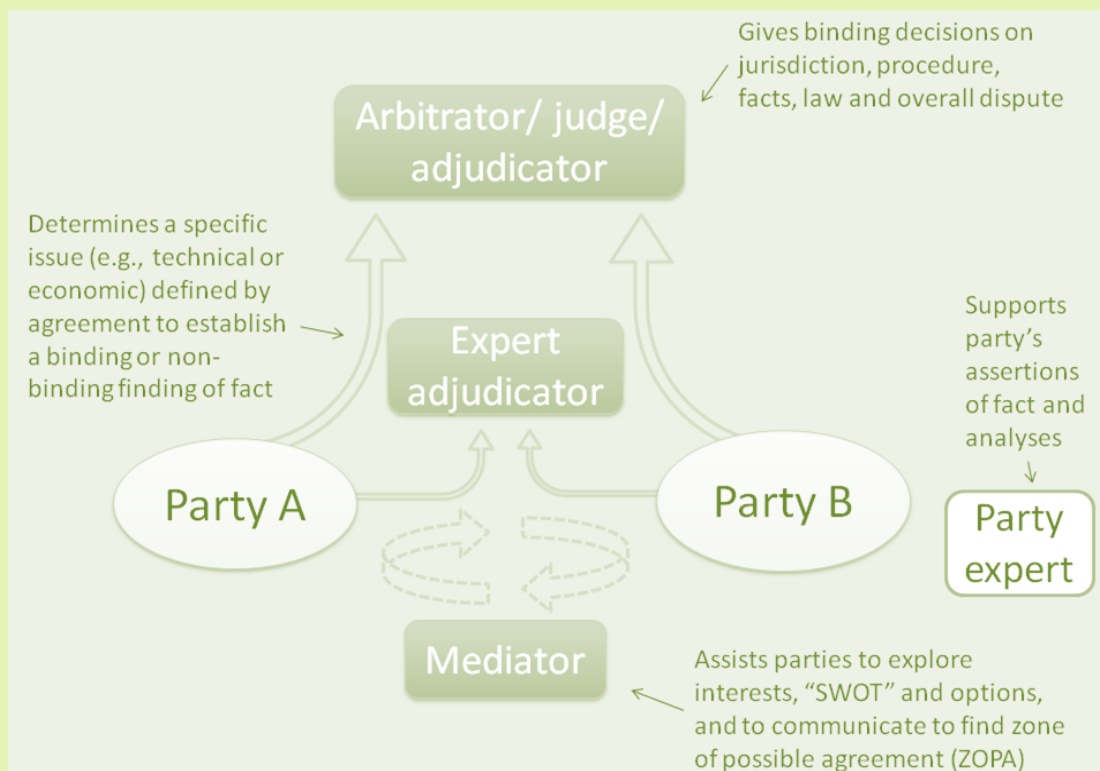
Governments pushed this liberalization as a matter of international trade policy and then domestic reform of their judicial systems. At the same time the official sector's courts controlled the pace of liberalization of dispute resolution through the care they took over enforcement of agreements to arbitrate and arbitral awards. Parties still depended upon the courts to make orders for enforcement against a losing party and its assets. The courts often took an initial view that certain subject areas in disputes were too important as a matter of public policy to be permitted to be decided by arbitrators. These included competition law and securities law for example.

However, as it became increasingly clear that a reliable and professional arbitration community – complete with institutions, leaders and protocols – had emerged, the courts increasingly accepted the validity of arbitration and stepped back, their role redefined as that of regulator – ensuring procedural fairness and due process between parties. Courts have progressively

permitted arbitration in areas of public policy that were previously considered too important to be decided by arbitration tribunals.

The public policy benefits of unbundling elements of dispute resolution process and redefining the role of the official sector to remove its direct control over each element have become widely recognized. The liberalization and unbundling of dispute resolution has evolved further, including the emergence of a variety of dispute resolution subfields. These include adjudication, binding expert determination, non-binding expert determination, mediation, ombudsman schemes, dispute boards and hybrids between these (the most basic roles are illustrated in Figure 1.2). The variety of methods of dispute resolution that have taken their place in the rostrum of commonly acceptable ways to resolve disputes illustrates how the component parts of dispute resolution can be unbundled in different combinations.

Figure 1.2: Basic role types in dispute resolution



Source: Author.

In simple terms, the component parts of dispute resolution can be summarized as follows:

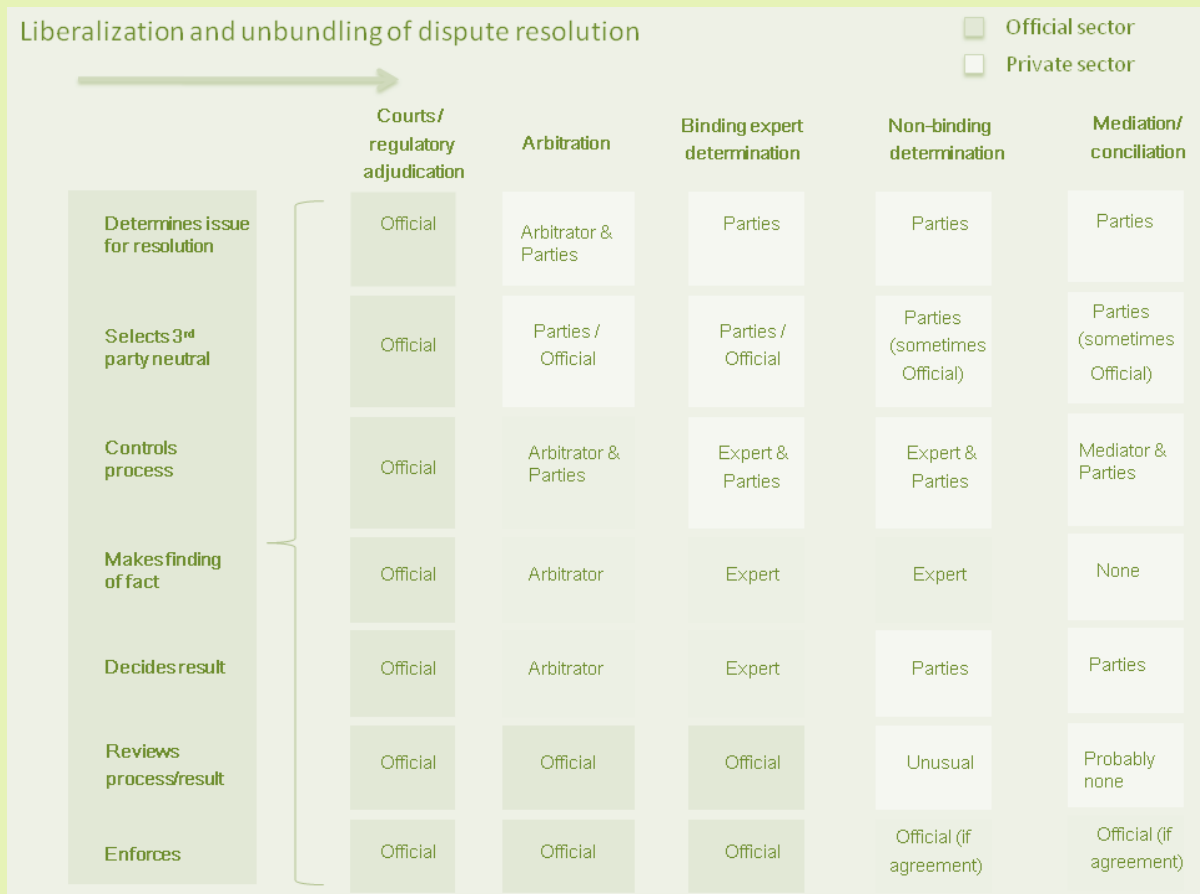
- identifying and framing the issue to be resolved;
- selecting the 3rd party neutral who will intervene;
- selecting and controlling the process by which the dispute will be resolved;
- making findings of fact;
- deciding the substantive result of the disputed matter;
- reviewing the process/result; and
- enforcing the result.

Each dispute resolution method involves a different role for private actors and the official sector in the resolution of the dispute, as illustrated in Figure 1.3. The unbundling of these functionalities allows them to be combined in different ways, creating dispute processes tailored as needed to specific situations, as discussed

further in section 1.4.5 in the context of the ICT sector. No longer would a monolithic centralized system control how disputes are resolved. Numerous combinations of the unbundled elements of dispute process become possible, mixing official and private intervention for optimal results.

Many of the types of dispute resolution process mentioned above are founded on the agreement of the parties to resolve their dispute by the chosen method. The parties may agree, for example, that a particular issue of fact, or law, or both will be determined by an expert, and may agree on the expert, or on one someone who will appoint the expert. The parties may agree on whether the determination is to be binding or not. Or they may agree on submitting the broader dispute to an arbitral tribunal. To the extent that these agreements of the parties are respected by the official sector, the parties bear more responsibility in various elements of the resolution of their own disputes.

Figure 1.3: Liberalization and unbundling of ICT



Source: Author.

Not only is the agreement of parties over elements of the process an increasingly important aspect of dispute resolution, but dispute resolution processes increasingly provide for fostering such consensus. The last decade has seen a wave of changes in numerous countries seeking to introduce and increase the use of mediation to resolve disputes, or to facilitate consensus over key aspects of dispute processes. A number of hybrid alternative dispute resolution approaches have emerged involving mediation followed by arbitration (known as “Med-Arb”) and the inverse (known as “Arb-Med”).

All of these various types of dispute process involve greater or less reliance on, and encouragement of, consensus of parties than others. To the extent that they rely less on consensus, they are more adjudicatory, or determinative. They also each involve greater or less involvement of the official sector. The relationship between these two dimensions (adjudicatory – consensual; and official – unofficial) in different types of dispute resolution process is illustrated in Figure 1.4.

This interplay between official and private sector, and the boundary between consensual and mandatory elements of dispute resolution, is particularly tricky in a liberalized environment that nevertheless remains subject to extensive regulation. As discussed in the re-

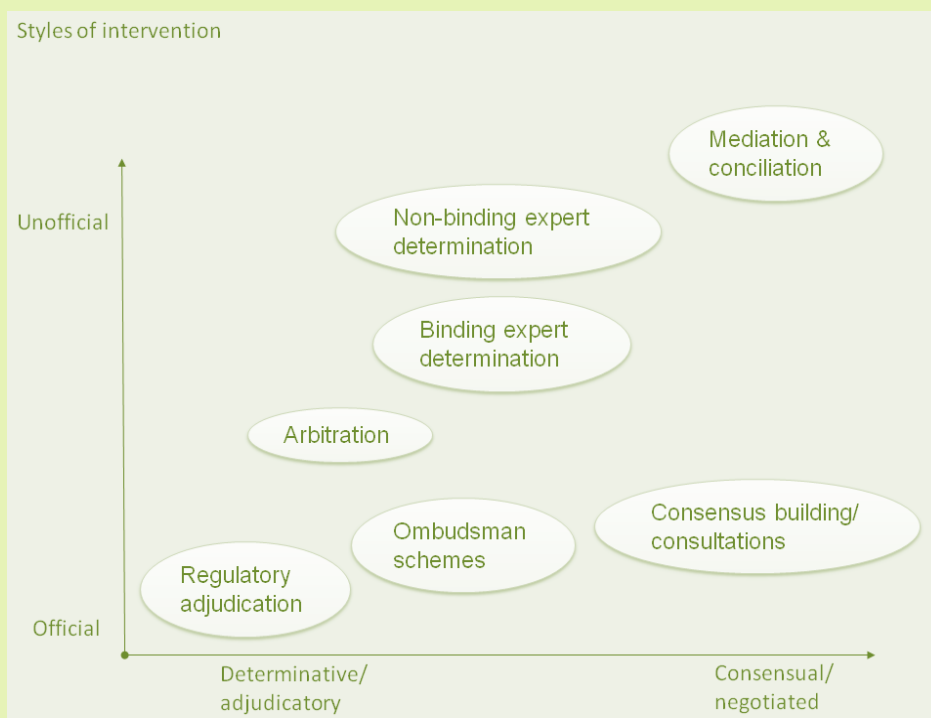
mainder of this chapter, a fundamental issue is how the official sector interacts with and intervenes in relationships between private actors acting on the basis of party autonomy.

1.3 *Dispute resolution and regulation*

1.3.1 *Party autonomy and economic regulation*

As a result of the liberalization and unbundling of the ICT sector described in section 1.2.1 above, business relationships among telecommunications providers (such as interconnection, access to facilities and other wholesale services) involve cooperation between private companies. As a result, these relations are, in almost all countries worldwide, a contractual matter. Put very simply, they comprise the commercial bargain between parties according to which they will cooperate to use their respective network assets and services which have been funded by their capital investment. Law and regulations may frame what is permissible or required in their contracts, or may establish other rights and obligations between them, but the deal they agree within those parameters is a shared act, a joining of mind and volition, and is essentially contractual.

Figure 1.4: Styles of intervention



Sources: Author.

Since the commercial exchange between any two operators in almost every country in the world is based on contract, party autonomy is a key dimension of how disputes over such agreements are resolved, only modified to the extent provided by law and regulation. “Party autonomy” refers to the ability of potential or actual disputing parties to choose the forum in which, procedures and substantive law according to which, and individuals by whom, their dispute will be resolved. Described simply, party autonomy means that where parties agree on an aspect of how their dispute should be resolved, this should generally be respected. Thus, for example, except where ethical or public policy concerns are present, arbitral tribunals tend to follow the parties’ lead regarding the scope of a dispute and matters of procedure.

Numerous initiatives worldwide in recent years to allow parties greater control over their own disputes, whether in arbitration and increasingly now using alternative dispute resolution methods (ADR), evidence an expansion in party autonomy in disputes.¹⁶

Where a contract stipulates the manner by which disputes arising from it will be resolved, the parties’ discretion to determine how the contractual dispute process will be managed is essentially an application of the original freedom to contract. The manner of adjudication for which the parties provide in their agreement represents an agreed arrangement for the allocation of contractual risks. They may choose arbitration, for example, for a number of reasons, including preference for a particular forum, the flexibility and confidentiality of the process, and the wish to choose the individuals they will trust to decide the dispute.

Whatever their reasons, and whether the agreement is an international one or a domestic one, the election of arbitration typically stems from the parties’ desire to control the risk inherent in litigation or other official adjudicatory processes. The selection of arbitration is, indeed, a precondition to the parties’ achievement of the certainty which they require in their business transaction. In this sense, arbitration is the ultimate expression of the parties’ contractual freedom as they bargain over commercial arrangements.¹⁷ Arbitration is a fundamentally private affair.¹⁸

A delicate question arises in relation to private actors’ freedom to pursue their activities according to their own interests and judgment – i.e., where regulation has not intervened – where they exercise this freedom not only for the commercial terms governing their

business relations but for the resolution of their disputes. No country allows absolute freedom of contract, nor does any allow completely untrammelled party autonomy in the resolution of disputes arising from their contracts. For example, some limitations make contracts illegal for moral reasons (e.g., provision of morally unacceptable services).

In the case of economic activity, freedom to contract is in some cases curtailed by law and regulation. Law and regulation may prohibit certain activities that are the subject of a contract, and prescribe how others must be conducted. The degree to and manner in which such regulation respects or curtails the freedom to contract differs in each country according to its economic and other policies as reflected in its laws. So, for example, many countries’ economic regulations prohibit contracts having or intended to have an anticompetitive effect, such as contracts that fix market prices.

In significant measure, however, economic regulation aims to support an environment in which freedom of contract can flourish. For example, a large part of competition law seeks to prevent providers with significant market power from abusing such power to curtail the freedom of contract of others. It does so specifically in outlawing restrictive agreements, for example, and generally in protecting non-dominant undertakings from being excluded from the market by dominant parties.

In turn, some countries consider some economic policies to relate so profoundly to the country’s public policy that disputes over them must be decided by the public adjudication system, for example in the applicable courts or by other public bodies.¹⁹ For this reason, countries make some matters non-arbitrable.²⁰ Examples of matters that are commonly not arbitrable include criminal, (legal) status and family law.²¹

After some initial distrust of arbitration as a method of resolving disputes with an economic regulatory bearing, international practice evidences a trend towards reducing the variety of disputes that are non-arbitrable. For example, in Europe, since the European Court of Justice decision in *Eco Swiss China Time Ltd. v. Benetton International NV*,²² the arbitrability of disputes involving EU competition law is no longer doubted. Similarly, in the United States, the Supreme Court decided in *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*²³ that antitrust claims are arbitrable.

While the examples from Europe and the United States mentioned above initially related to international arbitration, the difference, if any remains at all, between international and domestic arbitration bears diminishing importance to arbitrability in many countries.²⁴ Indeed, many countries' arbitration laws make little or no distinction for these purposes between international and domestic arbitration.

In numerous areas of law, disputes that were previously viewed as non-arbitrable have been permitted to be arbitrated. Indeed, in Europe, arbitration has been embraced not only as an appropriate forum for hearing antitrust disputes. As discussed below in section 1.4.3, it has also been embraced by the European Commission as an appropriate process by which to enforce antitrust remedies.²⁵

As a result, arbitration is increasingly accepted internationally as a means by which matters of both "corrective justice" (e.g., contract law claims and remedies) and "distributive justice" (e.g., welfare-oriented economic regulation)²⁶ may be properly heard and decided.²⁷ Party autonomy, then in the permission of arbitration even in areas of economic regulation, is firmer than ever – notwithstanding that the full set of mandatory rules such as competition laws will apply.

1.3.2 The continuum between regulation and dispute resolution

In the liberalized ICT sector, the official sector has taken a step back to redefine its role primarily as policy maker and regulator, even in countries where the State continues to have a substantial interest in one or more operators. Regulation is, simplistically described, planned official intervention through rules intended to address existing or anticipated problems of market failure with the purpose of protecting and advancing sector policy objectives. In the liberalized environment, a key skill and task of the official sector – particularly the regulator – is to strike the optimal balance between the policy benefits of:

- allowing and encouraging private actors to behave according to their own judgment and interests, including in the resolution of their own disputes; and
- constraining their freedom to do so by official intervention, including the process it adopts, how adjudicatory as opposed to consensual, and how much responsibility for the process remains with the disputing parties.

Countries practice different approaches to the intervention of a regulatory authority through dispute resolution processes in the interaction between private actors. Ultimately all of these revolve around the notion of a failure of agreement on a matter where regulatory policy has a strategic interest in parties' obligations, whether to ensure compliance with their obligations voluntarily assumed by contract or to impose obligations on them by authority. A failure of agreement may be a failure of an existing agreement or a failure of parties to reach agreement in the first place. The nature of the failure affects the boundaries between various types of official intervention, as discussed below.

In many respects, most regulation is in one way or another contentious. It will be favoured by some and not by others, chiefly because it will typically serve to protect the former from the adverse effects of the latter's behaviour. For example, regulation may protect consumers from inadequate or overpriced service provision by an operator, or one operator from abuse of market power by another. A regulation requiring an operator with significant market power to publish a reference offer seeks to procure, often for the operator's competitors, the offered service or facility on terms to which the operator would not otherwise have agreed.

Because most regulation is contentious, there is something of a continuum between official intervention to introduce laws and regulations on the one hand and to resolve disputes on the other. Indeed, in some markets, service providers will seek to influence the introduction of new laws or regulations with the same vigour as they might pursue or defend a dispute, as seen recently for example in the North American net neutrality debate.

To some degree, the introduction of laws and regulation differs from dispute resolution in that the former are general, requiring compliance by all parties to which they apply by their terms, whereas disputes are specific to the disputing parties and not to others. Still, this difference is limited. In many cases, regulation is targeted sufficiently specifically that it will only apply to a very limited number of persons, and often only one. Mobile termination rates will usually only apply to the few mobile service providers in a market. An obligation requiring a reference interconnection offer, or a reference access offer, will – when applied – very often apply to only one operator in such market. The reason is simple: since much regulation is intended to address problems of significant market power, there can be only

a small number of entities, and sometimes only one, to which it will apply.²⁸

The line between regulating and resolving disputes can be a thin one in practice, and it affects the resources required. The United States has perhaps the longest experience with the interaction between regulatory compliance and dispute resolution. Competition policy is enforced more through the so called “private attorney general,” by which an aggrieved party may pursue a respondent for violations of the U.S. antitrust laws, than by the US Department of Justice and Federal Trade Commission. The claimant does not merely seek compensation for harm caused by the alleged wrongful conduct, but in doing so upholds important public norms and interests. The claimant’s private cause of action is bolstered by the award of punitive damages and providing that the successful claimant’s costs will be borne by the respondent. To deal with the challenge of monitoring compliance with and enforcing competition law, the European Commission now also promotes private litigation as a remedy.

The importance of the relationship between regulation and dispute resolution relates less to the nature of the underlying problem, and more to the process designed to address it. Regulatory process is, conceptually at least, regulator driven. The regulator pursues its mandate under the law, gathers information and exercises its powers. In disputes, the parties bring the matter to the regulator, and because the situation is contentious, it is all the more important that each has a full opportunity to be heard. A key difference between regulation and dispute resolution, then, is in the planned nature of regulation compared to the relatively unplanned nature of disputes.

Regulation is authorized in advance by law, and the regulator has the benefit of time to gather information, analyse the functioning of the market and take soundings from stakeholders through formal consultations and informal meetings. The regulator can identify existing and anticipated problems in the market, assess the incentives of those involved, and analyse its information according to the policy objectives established by law or otherwise. The regulator can then consider what kinds of regulatory remedies, if any, might best address the problems and determine how best to use its legal powers to implement such remedies. It may then consult again on its proposals and make adjustments in light of such consultations before issuing the applicable

regulatory instrument introducing new legal obligations. This ongoing process of regulating ensures a healthy flow of information to the regulator in a manner and on a timeframe that enables it to use its statutory powers to take measured, proportionate action directed at the issues at hand.

In contrast, when a dispute arises, official intervention that was not necessarily planned in advance takes place. The official sector does not typically solicit disputes (although it does occasionally – see section 1.3.3 and Box 1.1) but rather they are brought to it for resolution by one of the private actors claiming that it has a right to official intervention. Until the dispute arises and the official sector intervenes, they have been acting according to their own judgment and interests. The intervention of a regulator or court may determine that one or both parties may no longer act freely, and identify or impose an obligation on one or both to act in a particular way. The claimant will of course hope that the determination requires the respondent to do what the claimant is asking for, and the respondent will of course hope that the determination leaves it to carry on as before.

The unplanned nature of dispute resolution has various implications.

First, because the nature of the legal relationship between the disputing parties is not established in advance by law or regulation, is the subject of disagreement, and is submitted for determination of the regulator or court, the process for reaching a result comes under considerable pressure, such as risk of further litigation in the form of appeals, adverse media coverage and political attention. A determination may require a party to change its behaviour, for example, to provide a certain service or standard of service, to charge certain prices or to pay damages for breach. The determination must be reached without necessarily having the luxury to pursue all of the steps and take all of the time available in developing new laws and regulations. Because the dispute is specific to the parties in question, each of whom has something immediate and identifiable to gain or lose, it is typically particularly contentious. As a result, each party is all the more concerned that it should have every opportunity possible to influence the outcome, and be satisfied that the regulator has duly heard and considered their arguments. Due process in disputes is, then, particularly important.

Box 1.1: Vodafone Qatar v Qatar Telecom²⁹

The State of Qatar recently initiated a process of sector liberalization, establishing a sector regulator, ictQATAR in 2004 and enacting a Telecommunications Law in 2006. It licensed Vodafone Qatar to provide competitive services in 2008.

In 2010, the incumbent licensed provider, Qatar Telecom (Qtel), entered into an agreement with Virgin Mobile and began to brand certain of its services under the Virgin Mobile Qatar brand. By prompt public announcement, the regulator ictQATAR quelled confusion as to whether a third licence had been granted and began investigating the arrangement. Concerned that consumers might perceive Virgin Mobile Qatar as a third competitive service provider, ictQATAR ordered Qtel to change its marketing and promotional materials to ensure that it did not represent or advertise Virgin Mobile Qatar as being a service provider, including by using dedicated number range or SIM cards for its Virgin Mobile Qatar branded service. Qtel was required to display its own Qtel logo prominently with its Virgin Mobile branded service.

Still, a two-player market is often particularly contentious, and Vodafone Qatar was not satisfied that this result was sufficient. Seeking to resolve the matter, ictQATAR introduced new dispute resolution procedures³⁰ and sent them to Vodafone Qatar, inviting it to file a complaint if it believed Qtel was violating the Telecommunications Law. Vodafone Qatar did so, alleging that Qtel's launch of Virgin Mobile services had effectively introduced a third mobile telecommunications provider without a licence. A customary exchange of pleadings occurred between Vodafone Qatar and Qtel. Vodafone Qatar also complained that ictQATAR had let this happen during a strategic review of its liberalization plan, and that it should only permit a third entrant when this was completed.

For the reasons cursorily summarized above, ictQATAR found that Virgin Mobile Qatar was not acting as a service provider, and indeed it did not hold a licence to do so. Qtel entered into the contracts with customers and Qtel operated the network and provided the service. Virgin Mobile did not operate facilities, nor did it sell or resell services. Qtel did not even sell wholesale minutes to Virgin Mobile for it to sell onwards to customers, as might occur with a mobile virtual network operator (MVNO) arrangement. Virgin Mobile simply lent its brand to Qtel and provided consulting services in return for valuable consideration. (By coincidence, the transaction bore some resemblance to an earlier arrangement between Vodafone and Gulf operator MTC by which MTC (now Zain) marketed itself as MTC Vodafone.) ictQATAR accordingly dismissed Vodafone Qatar's complaints, although it did require Qtel to implement additional remedial measures to prevent further confusion among consumers.

Source: The Supreme Council for Information and Communications Technology (ICTQATAR), www.ictqatar.qa

Secondly, the aggravated contentiousness of disputes is coupled with the difficulty of planning for them. As a financial matter, while a regulator may budget for various planned regulatory initiatives over the course of its financial year, it is difficult to know what disputes will arise. A regulator may seek to establish a contingency budget in advance, but contingencies are often the worst funded. Similarly, readiness to handle a dispute procedure and adequacy of human resources is frequently a challenge. Disputes are often very demanding in requiring legal, technical and economic expertise deployed intensely under considerable pressure. If there is one thing one can be sure of, it is that in a dispute resolved by adjudication, at least one party will be unhappy at the end, and may wrap the regulator into the dispute in further appeals or judicial review proceedings.

Thirdly, dispute resolution is often at the sharp edge of the regulatory process. It is where the judgment of the official sector about what to preordain by regulation and what to leave to private actors has not framed behaviour to control optimal business relationships among them. Indeed, the very decision to liberal-

ize a market involves an acceptance that there will be disputes – they could only be prevented if the official sector were to determine everything in advance by regulation. In some instances, disputes are a positive sign that parties are competing, albeit competing in a dispute resolution forum for a particular view of the law and the facts. And in many cases, it is next to impossible to prevent disputes from occurring, particularly as rapidly shifting service markets and technological innovation change parties' incentives, transform previously valuable rights into stranded assets and require reinvention of business models.

Together, these factors make the question of when and how the official sector intervenes to resolve disputes particularly important, and the degree of interventionism of authority in otherwise free commercial activity.

1.3.3 Pick your process

The relationship between resolving disputes and regulating typically depends on a given country's legal and regulatory philosophy.

In the UK, for example, complaints over compliance with ICT regulation are treated separately from disputes. The former is a matter of investigation and regulatory remedies (possibly including penalties) while the latter concerns the failure of a commercial negotiation over network access or other regulatory conditions.³¹ The UK's Ofcom thus tends to keep exercise of its regulatory powers for addressing SMP separate from its dispute resolution powers, and indeed its dispute resolution powers are limited with respect to SMP matters.³² So, for example, in a string of British Telecom (BT) dispute determinations over wholesale rates of the mobile operators, Ofcom declined to carry out a cost based assessment of the proposed charges. In Ofcom's view, charges should be set according to the regulatory process for dealing with terminating operators having SMP, not in resolving a dispute over BT's end-to-end obligations. In considering an appeal from Ofcom's decisions, the UK Competition Appeal Tribunal (CAT) took the view that Ofcom "erred in drawing too rigid a boundary between the exercise of its dispute resolution powers and its SMP-related powers."³³ The case illuminated the risk that while "the dispute resolution procedure is meant to provide a quick answer to the dispute, the parties may be tempted to swamp the regulator with the same level of economic and accountancy information that they generally provide in market reviews."³⁴ The CAT took the view that Ofcom should have carried out some review of the relationship between costs and charges in resolving the dispute.

On the other hand, in Trinidad & Tobago, the failure of the incumbent operator Telecommunications Systems of Trinidad & Tobago (TSTT) and new entrant Digicel to reach agreement on interconnection rates led to disputes before specially constituted arbitration panels. In the first, the arbitration panel considered cost information submitted by each party, and engaged an expert to report on such information in deciding on whether TSTT could insist on symmetric interconnection rates (i.e., each licensee charging the other the same rate per minute of terminated voice traffic). The panel found that TSTT was not prevented from so doing. Subsequently, another arbitration panel actually determined the rates.³⁵

Regulators may use a dispute process to bring a fermenting contentious compliance problem to a head. This can allow them to ensure that the facts are transparently understood, the interested parties are heard, the issues are squarely addressed, and proper regulatory authority is asserted. Doing so can help settle a matter that might otherwise continue to simmer or boil over. A dispute process allows the regulator the benefit

of hearing arguments and factual submissions from the licensee whose compliance is questioned and other affected parties in a manner designed to test the verity of facts and the strength of their respective arguments. It enables the regulator to shift some of the burden of analysis and fact finding to the parties in the sector. This can effect a subtle shift of the regulator's primary role as well, from policeman and enforcer to arbitrator between parties and their differing views.

The Virgin Mobile case in Qatar, described in Box 1.1, is an example of this. The matter was fundamentally one of compliance by Qtel with its licence terms. ictQATAR used a dispute resolution procedure to deal with Vodafone Qatar's dissatisfaction over Qtel's introduction of a Virgin Mobile branded service. Indeed, it apparently issued dispute resolution procedures for the very purpose of addressing the matter, inviting Vodafone Qatar to initiate proceedings if it was not satisfied with ictQATAR's compliance measures. The dispute resolution procedures were by their terms not so much concerned, as might be more common, with resolving a failure of agreement between parties (pre- or post-contract) but with compliance with the Qatari Telecommunications Law. Essentially, dispute procedures served the purpose of a transparent complaint and compliance process.

In some cases, a regulator will conclude that a matter is not appropriate for the to-and-fro of dispute resolution procedures and will intervene with regulation to determine a matter that might otherwise have been negotiated. In many areas where regulators are concerned that significant market power will (whether or not it prevents a commercially negotiated agreement) produce wholesale conditions that will adversely affect the retail market, they will simply regulate the result. Interconnection is the most common example of this. However, in some cases, even without this rationale, some regulators will intervene when they conclude that negotiations will not produce agreement, and do so by exercising regulatory power directly rather than the power to resolve the failure of agreement.

An example of this is found in the decision of the UAE Telecommunications Regulatory Authority (TRA) decision in 2010 on mobile site sharing (see Box 1.2). The TRA sought to nudge the parties towards an agreement by providing them with international pricing benchmark information. After many months of negotiations and observing that their positions were far from one another and the TRA's benchmark study, the TRA concluded that the parties were failing to reach agreement.

Box 1.2: Evolution of telecommunications dispute resolution in the UAE

Since the introduction of competition in the United Arab Emirates, numerous disputes have arisen between incumbent operator Etisalat and new entrant Emirates Integrated Telecommunications Company (known as du) as they negotiated and then implemented interconnection. In April 2006, du submitted to the Telecommunications Regulatory Authority (TRA) requests that the TRA issue decisions regarding the parties's failures to agree on pricing of inbound international traffic carried by du and requiring termination by Etisalat³⁶ as well as carrier selection and pre-selection.³⁷

The TRA initiated proceedings to hear the disputes, and meanwhile ordered the parties to continue to negotiate in good faith and conclude an interconnection agreement. It issued its decision on carrier selection and pre-selection in September 2006, requiring Etisalat to provide such services and specifying certain information it was required to provide to du for such purposes.

With still no interconnection agreement concluded by February 2007, Etisalat requested the TRA's intervention to resolve a dispute about the pricing of carrier selection and carrier pre-selection.³⁸ The TRA, acting under its powers relating to interconnection rather than dispute resolution,³⁹ promptly issued a directive ordering du and Etisalat immediately to implement an Interconnection Agreement attached to the directive.⁴⁰ In June 2007, the TRA issued its decision on the carrier selection and pre-selection pricing dispute.

In December 2007, after ordering Etisalat to provide a LRIC cost model by June 2006 and subsequently exchanging cost model information with Etisalat, the TRA remained dissatisfied and issued a directive setting Etisalat's interconnection termination rates.⁴¹ It also issued its decision on termination of inbound international traffic, requiring Etisalat to treat such traffic received from du the same way as other traffic received from du.

In March 2008, du declared that it had fulfilled its network coverage obligations in its licence and sought the TRA's intervention in a failure to agree on the provision of roaming services by Etisalat in the Western Region of the UAE.⁴² Etisalat argued that the previous national roaming negotiations had occurred before the TRA had ordered the parties to implement the Interconnection Agreement in February 2007, and that these could not be the basis for a dispute filing. Furthermore, Etisalat contested that there was a dispute over an existing agreement. The obligations in the Interconnection Agreement requiring Etisalat to negotiate national roaming with du had not been entered into by agreement. Rather, they had been imposed by the TRA. As such, the matter of national roaming was not really a dispute over an agreement between Etisalat and du that should be addressed in dispute resolution procedure. Instead, it was a direct matter between the TRA and Etisalat under the TRA's regulatory compliance related enforcement powers. The TRA issued its decision in October 2008, concluding pragmatically that there was a failure to agree on national roaming after an attempt to negotiate, and ordering Etisalat to provide national roaming in the Western Region.

Some of these cases involved interim decisions in which the TRA granted the initial petition on an interim basis on the basis that it considered that the matter was urgent and that the harm threatened to the claimant could not be redressed and was more serious than the respondent was expected to suffer. In addition, almost every decision of the TRA was the subject of a Petition for Reconsideration, and in each of these the TRA reaffirmed the original decision.

The most recent stage in the contentious relationship has involved pricing of sharing of Etisalat's mobile sites by du. The TRA sought to encourage the parties to agree on pricing for mobile site sharing. In July 2008, seeking to draw the parties towards agreement by reference to international prices, it provided them with a benchmark study of mobile site sharing in various international markets. By July 2010, no agreement was forthcoming. Each party wrote to the TRA indicating the charges it thought appropriate. Neither was aligned with the benchmarks, and in August 2010 the TRA intervened without requiring further negotiations or conducting a formal dispute proceeding, issuing a determination setting prices.⁴³

Source: Telecommunications Regulatory Authority of the United Arab Emirates, www.tra.gov.ae

Without either party initiating a dispute proceeding and without conducting a full dispute process to hear their pleadings, the TRA issued a determination setting mobile site sharing charges.

Official sector interventions where the economic rationale is unclear, and where the parties have not filed formal dispute proceedings, raise a number of questions about parties' expectations of the bounds of freedom of contract and party autonomy. Establishing a

clear understanding of when a regulator will intervene in commercial negotiations and the basis on which it will do so is a valuable component in securing investor confidence and certainty about their regulatory environment.

1.4 *Liberalization and unbundling of ICT dispute resolution*

1.4.1 *Adjudicatory processes*

As illustrated in Figure 1.3, there are numerous elements within adjudicatory processes that may be unbundled from control of the official sector. One is through appointment of decision makers who are at arms' length from the traditional official decision makers, such as courts and regulators. In Trinidad & Tobago, for instance, the dispute resolution procedures established by the Telecommunications Authority of Trinidad & Tobago (TATT) use arbitrators to decide disputes, as described in Box 1.3. TATT thus ensures that it can draw on external talent and a process separate from its day to day activities as a regulator.

This can prove particularly useful, for instance, where the regulator itself has become embroiled in earlier phases of a disputed matter and one or both parties doubt its independence and possibly its capability. There have been instances where a regulator wisely established an arbitration scheme that enabled the dispute to be heard steadily by an arbitration panel de-

spite the loss of confidence of a party in the impartiality of the regulator's staff.

Entrusting dispute resolution to arbitrators is also particularly useful for relatively recently established regulators which are still finding their way and building up resources. Small developing countries commonly face significant limitations on capacity. This can mean that a regulator may not be able to develop extensive regulation to deal in advance with problems typically addressed by regulation in other countries. Where a regulator does develop regulation, it may still face major challenges in monitoring compliance and enforcing it. As a result, a dispute resolution process may become the forum in which important regulatory issues are addressed. For example, as described in Box 1.4, Solomon Islands recently introduced a new Telecommunications Act 2009 with significant emphasis on putting a robust dispute resolution scheme in place. The Solomon Islands dispute resolution regime provides for a List of Experts to be available for ad hoc Disputes and Appeals Panels, freeing the Telecommunications Commission of Solomon Islands (TCSI) to focus on other ongoing regulatory functions.

Box 1.3: Arbitration in Trinidad & Tobago

In Trinidad & Tobago, Digicel won a concession to provide mobile telecommunications services. In 2006, when negotiations with Telecommunication Systems of Trinidad & Tobago (TSTT) over the terms of Digicel's market entry met with a blockage, the Telecommunications Authority of Trinidad & Tobago (TATT) introduced a dispute scheme providing for arbitration and mediation between service providers. It revised the scheme in 2010.

Under its procedures, the Authority handles the exchange of pleadings between the parties all the way through complaint, response and reply before handing over to a panel to make a decision within three months. After the due date for the last submission, the Authority notifies the parties of its choice of persons to be appointed to a dispute resolution panel and directions for the conduct of the proceedings. The parties are given an opportunity to object to the choice of panel members and directions.

The Authority has significant discretion as to its choice of panel members. The panel in the first dispute that arose under the procedures was composed of a Canadian professor of technology, a highly respected local economist (each of whom was a board member of the Authority) and a chairman based in Switzerland. The next arbitration panel on a regulatory matter was chaired by a prominent lawyer from Trinidad & Tobago and included a communications sector professor from the United States and a technical telecommunications expert from Canada.

The panel appointed by the Authority hears the dispute in much the same manner as an arbitration panel, except that the terms of reference and procedural directions have been set by the Authority. The panel is required to deliver a decision within three months.

In shepherding the submissions until complete, the Authority handles a substantial part of the process. This may include objections to jurisdiction and various other preliminary, procedural, evidentiary and other matters. In addition to playing a role in setting up the arbitration and framing the decision that is required, the Authority's procedural role also saves considerable costs, particularly fees of panel members for their time dealing with such matters.

Source: Telecommunications Authority of Trinidad & Tobago, www.tatt.org.tt; Author

Box 1.4: The Solomon Islands arbitration and mediation scheme

The Solomon Islands Telecommunications Act of 2009 seeks to ensure that qualified and experienced persons will be ready and available to deal with disputes. It provides for a List of Experts headed by a President, who must be a lawyer with 10 years' experience in telecommunications regulation and dispute resolution. All members of the List, who will be appointed by an independent evaluation committee or the President of the List, must be independent of the service providers. A Secretary is also provided for to assist with administration.

The Act provides that disputes between service providers will be:

- adjudicated by a Dispute and Appeal Panel drawn from the List of Experts;
- adjudicated by the Telecommunications Commission of Solomon Islands (TCSI); or
- handled in mediation by an official from the TCSI or a member of the List of Experts (and if necessary subsequently by adjudication).

The TCSI is generally required to defer to the disputing parties regarding the choice of dispute resolution method. If the matter concerns a contravention of the Act or is expected to set an important precedent, the TCSI may insist on adjudicating the matter. If mediation or adjudication by a panel from the List of Experts is selected, the parties have extensive influence over the selection of the mediator or Panel members, the number of members on a Panel, and the conduct of the proceedings. The President may with good reason justified under the Act reject a Panel member selected by the parties. These provisions strike a balance enabling disputing parties to ensure that they can have confidence in the persons deciding their disputes.

Panels have broad powers to obtain and consider evidence. Their determinations, orders and directions have the force of those of the TCSI, and Panels may act on an interim basis. They must notify the President and the parties of reasons for any delays.

Panels drawn from the List of Experts provide an additional function: to hear service provider appeals of key determinations and orders of the TCSI. To avoid such appeals becoming an inevitable additional step before judicial review for every matter, the scope of matters that may be appealed is limited. Appeals may only be made in respect of revocations, suspensions or amendments of licences; dominance designations; anticompetitive violation determinations; terms and conditions for interconnection and access; and price regulation. Appeals may only be heard on the record of the original proceeding with no new evidence save in exceptional circumstances, thus confining the appeals to a review of what was before the TCSI rather than carrying out a new assessment. Thereafter, appeals from Panel decisions may only be made to the High Court on a question of law or jurisdiction unless the High Court grants special leave.

The Act establishes funding for the scheme, including bank account arrangements, to ensure that the lack of or delay in funding does not prevent or delay the availability of experts and resolution of the dispute. Disputing parties bear all of the costs of a Panel, as ordered by the Panel. The Panel may make cost orders at any time regarding the costs of the parties and its own costs (including fees of Panel members), requiring advances from the parties.

Source: Solomon Islands Telecommunications Act 2009, Chapter 17

Disputes can have a very substantial financial impact on service providers' financial conditions. As a result, investor confidence in dispute resolution is particularly important – especially as matters that were not set at the time of investment may subsequently adversely affect such investments. The Solomon Islands legislation addresses this by ensuring that, to a large extent, the service providers may themselves determine who from the List of Experts will deal with their dispute, whether it is by adjudication or mediation, and the procedures that will apply. Defaults for each of these are provided for in case the service providers do not agree, but to a large extent disputes are expected to be handled in a similar manner to arbitration, with substantial party ownership of the process.

The liberalization of adjudicator selection permits the parties to influence the choice of adjudicator. This liberalization may be carried out to different levels. While in Solomon Islands, the parties will choose the arbitrator from the List of Experts, in Trinidad & Tobago, arbitrators are appointed by the regulator to hear disputes on an ad hoc basis after consulting with the disputants, although a reasonable objection from a disputing party is unlikely to be ignored.

Final offer arbitration, also known as “baseball arbitration” (because of its historic use to resolve salary disagreements in baseball player contracts), is another means of providing ownership of key aspects of the dispute process to private actors rather than retaining complete official control. The Canadian Canadian Ra-

radio-television and Telecommunications Commission (CRTC) for example uses the methodology.⁴⁴ In a regular adjudicatory process, such as a court litigation, arbitration or regulatory adjudication, the official decision maker has considerable flexibility in the terms of the decision he or she makes. The decision may fully adopt the position of one or other party, but it may also effect a compromise or even another result not specifically expected and demanded by either. This leaves considerable power in the hands of the official sector. On the other hand, in final offer arbitration, the official decision maker must choose between the final offers put forward by the parties when making its binding determination. The pragmatic rationale of the mechanism is that it drives the parties towards offering more reasonable offers because the more unreasonable a party's offer is, the higher the chance will be that the decision maker will adopt the other party's offer. In addition, in final offer arbitration, the parties have a large amount of control over the result. It is the parties that frame the decision for the decision maker, who has merely a binary discretion to make. It effects a form of neo-Solomonic justice, in which the party wishing most to have its way gravitates towards reasonable compromise.⁴⁵

The movement towards using ADR schemes was given a significant boost in Europe with the 2003 Telecoms Framework Directives, which encouraged regulators to employ ADR to speed up case management. This has gained greater momentum particularly in developing countries and smaller countries whose official sectors do not always have the resources to handle telecommunications disputes. For example, the Fijian Telecommunications Promulgation requires the Telecommunications Authority of Fiji (TAF) to establish an alternative dispute resolution scheme, and it to approve an ADR scheme proposed by licensees if it satisfies certain minimum criteria. To qualify, such a scheme must be:⁴⁶

- fair, transparent and non-discriminatory;
- administered by persons who are for practical purposes independent of the licensees to whom they apply;
- designed to ensure that individuals to be employed under the scheme as mediators, adjudicators, arbitrators or such other roles as may be contemplated have qualifications and experience to carry out such powers and functions; and
- designed to further the objectives of the legislation.

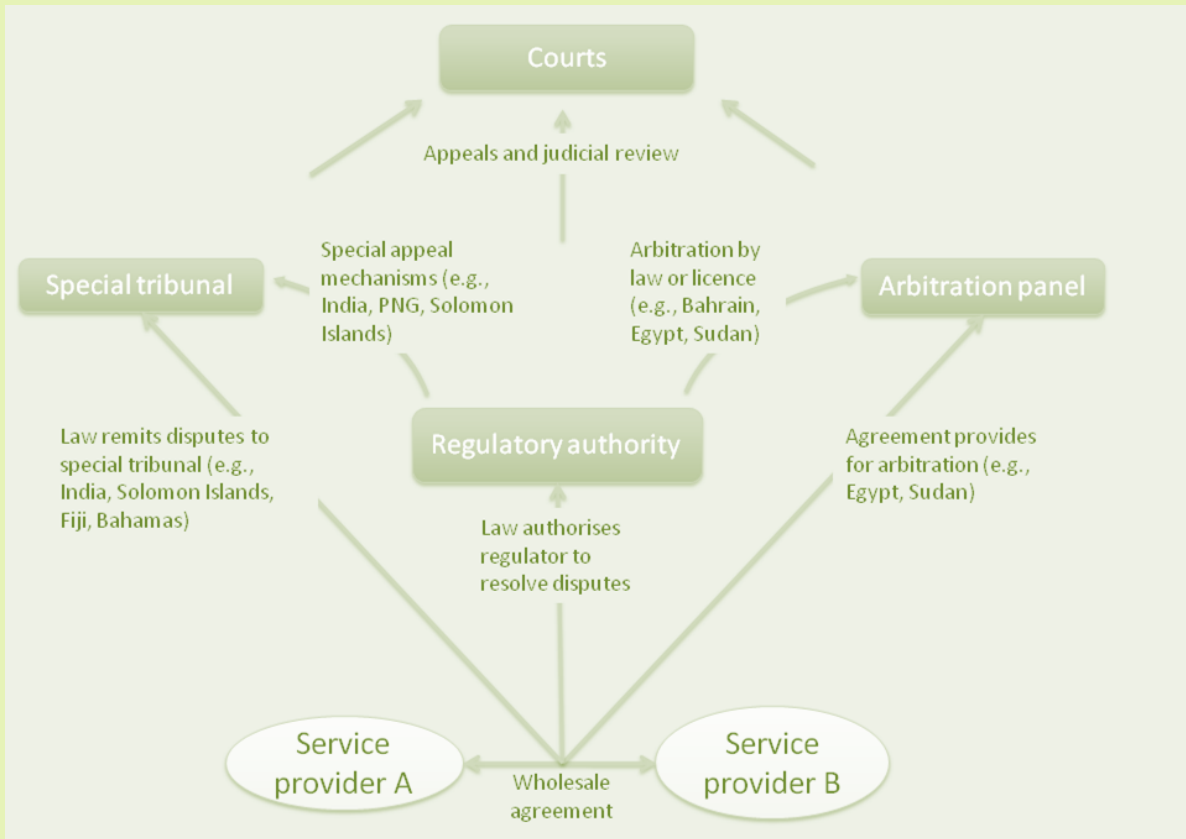
Importantly, the law provides that the scheme may provide for binding decisions and interim and conservatory measures. Thus telecommunications providers are given a significant opportunity to agree on how they shape resolution of their disputes. This is particularly valuable where investors' confidence depends on their ability to ensure that the design of the process and selection of third party neutrals (mediators, adjudicators or arbitrators) is satisfactory.

The increasing provision for ADR, the uses of special tribunals, as well as ongoing regulatory adjudication, introduces a competitive dynamic among dispute processes. The relative successes of the various approaches are increasingly visible. Indeed, in some countries, the competition is direct because parties may choose. So, for example, under the new Solomon Islands Telecommunications Act, when providers refer a dispute to the TCSI, it must decide whether it will adjudicate the dispute or refer it to a Disputes and Appeals Panel (described above).⁴⁷ In making its choice, the TCSI must defer to the parties if they are agreed. This provides some assurance to licensees that if the regulator is for some reason not ready for a major dispute, they can use an alternative.

Just as liberalization of ICT has provoked many complexities in law and regulation, the liberalization of adjudication is not without its complications. For example, there are many instances where jurisdiction to decide disputes appears to overlap between different dispute forums, as illustrated in Figure 1.5. In some cases, a regulatory authority may have statutory power to resolve disputes between service providers, while at the same time the service providers may have entered into an agreement including provision for arbitration of disputes by an arbitration panel.

These sorts of potential complexities are not uncommon. New telecommunications licences have often been issued to foreign investors along with interconnection being arranged as part of market entry. Investors' uncertainty over the reliability of the law and courts, as well as the regulator's independence from the incumbent operator, has led to requests for dispute resolution by arbitration. As the legal and regulatory system developed, countries have strengthened the powers of regulators to build up jurisdiction over disputes, but the earlier arbitration provisions in the licences and interconnection agreements remain.

Figure 1.5: Regulatory adjudication, arbitration and special tribunals



Source: Author.

For example, in 1998, the Egyptian Government committed in a licence granted to a new entrant mobile operator that disputes over the licence would be resolved by arbitration under the rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA). The interconnection agreement between the new entrant mobile operator and the incumbent Government-owned Telecom Egypt also provided for disputes over the interconnection agreement to be resolved by CRCICA arbitration. In 2003, the Egyptian Telecommunication Regulation Law No. 10/2003 was promulgated, establishing the National Telecommunications Regulatory Authority (NTRA) and conferring on it certain dispute resolution powers. Regulatory approvals of interconnection agreements after the 2003 law and establishment of the NTRA thereafter reaffirmed the use of arbitration.

Subsequently, in a disagreement over interconnection, Telecom Egypt initiated a dispute proceeding with a mobile operator before the NTRA under the 2003 law. Meanwhile, the mobile operator initiated arbitration with Telecom Egypt under CRCICA rules pursuant to the

parties' arbitration clause in their interconnection agreement. The NTRA proceeded to hear the matter submitted to it and gave a ruling (though its ruling has been suspended by the Administrative Court pending judicial review). Meanwhile, a CRCICA arbitration tribunal has also been constituted to hear the case. The Egyptian courts may yet be requested to deal with any inconsistency that may arise between decisions of the NTRA and the arbitration tribunal. Other countries may have to deal with similarly complex questions. Bahrain's 2002 Telecommunications Law provides for the Telecommunications Regulatory Authority (TRA) to resolve disputes between service providers.⁴⁸ On the other hand, the licences granted to service providers provide that disputes between the licensee and other licensees will be subject to jurisdiction of courts or arbitration.⁴⁹ Furthermore, the Supply Terms in Batelco's reference wholesale offer provides that if the regulator doesn't decide a dispute between Batelco and the interconnecting party, it will be referred to arbitration under the rules of the International Chamber of Commerce (ICC).⁵⁰

Notwithstanding the considerable benefits on offer from the liberalization of adjudicative processes, challenges abound and the devil is in the detail. The range of remedies available to arbitrators may not be the same as those available to court judges and regulators, for example. The power to impose interim measures may be wanting unless clearly agreed in the parties' consent to arbitration.

There may also be situations where the official sector prefers to retain control over an adjudicatory process. These arise particularly where a type of dispute is being resolved for the first time and so has significance

for how similar disputes will be addressed – i.e., to set a precedent. Some policy matters may need to be reserved to regulators rather than entrusted to arbitrators, as the UK's Ofcom provided in the OTA scheme when it restricted the Telecommunications Adjudicator from making decisions that would set new policy or set prices of local loop unbundling (see Box 1.5). The need for ongoing monitoring and enforcement may also justify a regulator not permitting disputes to be resolved by private means, although as discussed below in section 1.4.3 there is also increasing liberalization even of enforcement, including through use of arbitration mechanisms.

Box 1.5: The UK's Office of the Telecommunications Adjudicator – OTA and OTA2

The UK's regulator, Ofcom, created the telecommunications adjudication scheme in 2004 to improve and accelerate the implementation of local loop unbundling (LLU) by British Telecom (BT). It involved the appointment by Ofcom of a Telecommunications Adjudicator after consultation with BT and other communications providers. The Adjudicator had two roles:

- he or she would facilitate negotiations between BT and communications providers seeking access to BT's unbundled local loops, assisting them to reach agreement; and
- if necessary, he or she would provide a binding expert adjudication ruling on the matter.

The issues subject to the scheme were intended to ensure practical implementation of LLU. They included appropriate product functionality, process specifications, change management, implementation plans and monitoring activities for LLU to rapidly deliver fit for purpose and appropriately industrialised products and processes.

Although initiated by Ofcom, the official, legal basis of the scheme was an agreement which was entered into by BT and each provider seeking LLU from BT. The Telecommunications Adjudicator was intended to be independent of Ofcom, BT and the providers. Ofcom would bear the OTA's costs but would recoup 50% from BT.

In his facilitation role, the Adjudicator's job was to "create and maintain an environment in which the parties may quickly reach substantial agreement ..., thereby accelerating implementation and reducing the occurrence of disputes." He would facilitate working groups of BT and the providers, facilitate information sharing, maintain close dialogue with scheme members to understand their individual concerns, constraints, capabilities and issues. He would help scheme members to agree on product and process definitions and specifications. He could also make non-binding recommendations.

The adjudication role of the Adjudicator was intended to bring about "rapid, fair and authoritative resolution of the dispute without necessarily having to bring it to Ofcom" for resolution. Because adjudication rulings were to be binding, the Adjudicator was not permitted to deal with a dispute if its resolution was likely to conflict with existing Ofcom regulatory policy; establish new regulatory policy; set LLU charges (i.e. the Adjudicator was not to venture into price regulation, which remained the domain of Ofcom); result in excessive additional expenditure by operators and/or BT in relation to the benefits; result in a significant detrimental impact on network security or network integrity; or result in significant detrimental operational disruption, dislocation or re-engineering of operational systems or processes.

Ofcom found that the scheme succeeded in coordinating a set of diverse and disparate demands from individual LLU operators into a single roadmap for the industry. The introduction of an agreed set of key performance indicators (KPIs) also provided a "common language" for the discussion of performance and issues experienced. However, a failing was the omission of backhaul from its scope. In addition, the adjudication part of the OTA scheme was almost never used.

These factors and the introduction of functional separation with BT Openreach in the UK led Ofcom to revise the scheme in 2007, renaming it OTA2. It broadened the scope to include a number of "inscope products," adding to local loop unbundling new products including wholesale line rental/ carrier pre-selection; geographic number portability and broadband of both BT and other communications providers where migration impacts may occur. At the same time, it removed the adjudication role, which had been largely unused, leaving the scheme focused on facilitation, which could include non-binding recommendations.

Its members currently include BT Group, BSkyB, Cable & Wireless, Everything Everywhere, O2, Scottish & Southern, TalkTalk Group and Virgin.

Source: Ofcom and Office of the Telecommunications Adjudicator, www.ofcom.org.uk and www.otta.org.uk

1.4.2 Control systems

Almost all countries have a system of judicial review over administrative agency decisions. In only a few countries, for example where the executive branch of government is an extension of royal authority, are administrative actions beyond judicial controls. Judicial review in most countries focuses on procedural and jurisdictional matters, such as whether the regulator has given each party a fair opportunity to be heard, has considered relevant factors, and has acted within its powers. But even such matters can require significant technical and economic understanding. In addition, the rapid development of the market and the large amounts of investment at stake require regulators' decisions to be affirmed or overturned relatively quickly. Investor confidence depends on the experience and expertise of those who have the power to annul or change regulators' decisions.

Many countries' judicial systems struggle with the complex and urgent task of telecommunications dispute resolution. Some countries have taken the step of obtaining training from institutions such as the ITU in telecommunications regulation and dispute resolution for key members of the judiciary who are expected to hear disputes.

Many countries have bolstered the quality, and sometimes the speed, of controls over administrative agency decision-making through various innovations. These include the referral of appeals to special tribunals. For example, in the UK, Ofcom's decisions may be appealed to the CAT,⁵¹ which hears appeals of various other matters as well (including decisions of the Competition Commission).⁵² Thereafter, countries often restrict the scope of further appeals. In the UK, appeals from the CAT can only be on points of law.⁵³

Some countries have innovated by combining in a single tribunal mechanism both appeals from regulators' decisions and original disputes between service providers. India's Telecommunications Disputes Settlements and Appeals Tribunal (TDSAT) is an oft mentioned example.⁵⁴ Similarly, Solomon Islands' new Telecommunications Act provides that a Dispute and Appeals Panel may hear disputes between providers as well as appeals from the TCSI.⁵⁵

There has been significant liberalization even in the important area of controls over regulatory decisions. The UK's CAT is composed of a number of different private individuals drawn from a variety of backgrounds.

This variety is tempered by provisions in the law ensuring that a given panel is always chaired by a suitably qualified lawyer, often in fact a judge.⁵⁶ Fiji's Telecommunications Promulgation 2008 provides for a Telecommunications Appeal Tribunal. Appeals from the TAF on the basis of law or fact may be brought to the Tribunal⁵⁷ (although it does not have jurisdiction over disputes concerning interconnection and access which are heard by the country's Commerce Commission).

Such tribunals can assemble well qualified individuals with a blend of experience. The chairperson of Fiji's Tribunal must be a lawyer who is at least seven years qualified, but the other members, who are appointed by the Judicial Services Commission, must have qualifications and experience in any of the legal, financial, economic, public administration, engineering or telecommunications fields. The new Bahamas Utilities Appeal Tribunal Act 2009 similarly provides for a Utilities Appeal Tribunal (UAT) comprising members appointed by the Governor General acting on the advice of the Judicial Services Commission.⁵⁸ By providing for standing lists of available persons to sit on panels, these tribunals begin to have resemblances to arbitration institutions, particularly where the parties can influence the selection of individuals to sit on a given dispute.

Some countries have taken such liberalization and unbundling of control systems a step further. For example, Bahrain provides an innovative arbitration arrangement for appeals from decisions of the TRA. The Telecommunications Law provides that disputes between the TRA and a licensed operator shall be arbitrated. These do not include all regulatory decisions of the TRA that apply sector-wide, but must be specific to the relevant licensee. Under the law, the TRA and the licensee each appoint an arbitrator, and the two arbitrators together select a chairman and the panel decides on the dispute.⁵⁹

In many countries, licences remain the main instrument for regulating telecommunications service providers. These serve both to impose regulatory obligations on the service providers, such as obligations to interconnect and resolve disputes with other service providers, as well as grant them rights, protections and guarantees about what a regulator will or will not do. For example, some licences provide protections as to the pace at which further licences will be granted, or set the terms on which the regulator will regulate the licensee, for example setting out the regulatory parameters for interconnection and access. In such cases, the licence itself may become the basis of a dispute be-

tween the regulated entity and the regulator's decisions. A dispute under the licence may then resemble an appeal of a regulatory decision – but where the licence provides that disputes between the regulator and the licensee under the licence will be resolved by arbitration, the appeal is to an arbitral panel rather than a court (although it may also be made to a court, or the panels' award may also subsequently be enforced or challenged in court).

1.4.3 Enforcement

Section 1.4.1 above mentioned provision for arbitration in the reference wholesale offer of Batelco in Bahrain. Similarly, Jordan Telecom's reference interconnection offer provides for resolution of disputes between Jordan Telecom and the interconnecting party by arbitration or the Jordanian Telecommunications Regulatory Commission (TRC). The provision for arbitration in regulated instruments such as reference offers reflects part of a broader innovative trend in regulatory practice to use private arbitration agreements and proceedings to achieve regulatory policy goals. This is evident in three areas.

First, as mentioned above in section 1.3.1, competition policy matters are increasingly expected to be considered by arbitrators in disputes between commercial undertakings. Arbitrators are expected to give effect to competition law notwithstanding complex questions of which countries' competition laws apply to parties in international settings. Arbitrators are expected not only to act pursuant to the parties' contractual intentions but in a sense serve as an enforcement arm of the official sector. Of course, it is presumed that parties intend their contractual relationship to comply with the law, including competition laws. The arbitrator's role is thus in theory still consistent with the underlying notion of party autonomy, i.e., parties' rights to determine how, by whom and in accordance with which laws their dispute will be resolved. Nevertheless, the private arbitrator begins to have a quasi-public enforcement function.

Secondly, regulators often impose or approve arbitration provisions in regulated instruments. For example, in granting its approval to mergers and acquisitions, the European Commission has often used arbitration clauses to guarantee implementation of a regulatory remedy – particularly in the ICT sector. Merger and acquisition controls raise questions of competition policy where market consolidation results, or risks resulting, in significant market power. Where property rights over

intellectual or physical assets which are essential to the businesses of different entities are combined, they may create a bottleneck in the sector. Thus the European Commission has, in approving mergers and acquisitions, required the parties to make these assets available to third party beneficiaries – basically a sort of reference offer. In doing so, it has often required disputes over negotiations and agreements with the third party beneficiaries to be resolved by arbitration rather than direct ongoing supervision by the Commission.

So, for example, when the Commission approved the merger of telecommunications providers Telia and Sonera, they were required to offer competitors wholesale fixed and mobile network services and international wholesale roaming on the mobile networks in Sweden and Finland. A fast track arbitration procedure was agreed to apply to disputes relating to the merged entity's offer.⁶⁰ Similarly, in connection with the merger of Vodafone Airtouch and Mannesmann,⁶¹ the merged entity undertook to provide roaming on services and to make certain standards and SIM cards available to its competitors. A fast track arbitration procedure was approved for resolution of disputes between the merged entity and such competitors.

The European Commission's view of arbitration as a mechanism for resolving disputes in the context of competition law exemptions has gone "from distrust to embrace."⁶² Arbitration as part of a competition remedy is being employed across multiple platforms in the ICT sector for intellectual property licensing arrangements, access to technical interfaces, access to infrastructure, supply and purchasing relationships and termination of exclusive or long-term contractual arrangements and anti-competitive distribution arrangements.⁶³ For example, in the BskyB/Kirch Pay TV merger,⁶⁴ the European Commission addressed its concerns over dominance in the German pay-TV market and digital interactive TV services by requiring the merged entity to provide interoperability to competing technical platforms with its own set top boxes, and to grant non-discriminatory licences for set top box hardware manufacturers. Disputes with the third parties over such arrangements were required to be resolved by arbitration.

The benefits of arbitration in such circumstances are a combination of speedy resolution and access to expert decision-makers without requiring the European Commission itself to be closely at hand monitoring every detail of every interaction with a company's competitors. It decentralizes the monitoring and en-

forcement from the Commission to the parties and arbitrators. It reflects a broader trend in the Commission's approach to incentivizing private actors to have a significant role in enforcement of competition law, as evidenced in its promotion of private enforcement actions in the area of competition law.⁶⁵ These examples suggest that there is considerable opportunity for increasing use of arbitration in ICT regulatory remedies at national levels as well – regardless of the degree of economic development of the country.

Thirdly, there are even examples in the communications sector of arbitration being used not only between service providers for enforcement of regulatory remedies but to deal with questions of compliance disputed between regulators and regulated entities. For instance, in the United Arab Emirates, the Dubai Technology and Media Free Zone Authority has established an arbitration scheme to deal with questions of compliance with applicable media standards.⁶⁶ These provide for the constitution of a tribunal to consider whether a transmission has complied or will comply with the standards. So, when the magazine *Time Out Dubai* showed a cover page with pictures of bars in Dubai and included information for how to find them, the question as to whether this violated a prohibition of glorifying alcohol was brought before a tribunal – and heard by a third party, an English lawyer in London.

1.4.4 Mediation processes

Recent years have seen greater use of mediation in telecommunications dispute resolution. Increasingly, mediation is provided as a component of regulators' dispute resolution portfolio of procedures, and sometimes is a condition precedent to a formal adjudication proceedings.

The UK's Office of the Telecommunications Adjudicator scheme (OTA, now revised and renamed as OTA2) described in Box 1.5 illustrates innovative use of dispute resolution methods in core regulatory areas. After slow development of local loop unbundling in the UK, the OTA scheme was established to improve cooperation between British Telecom and communications providers seeking access to its unbundled local loops.

The scheme illustrates carefully set arrangements for the interplay between official intervention and the freedom of private actors to behave in accordance with

their own judgment and interests. Ofcom created the dispute scheme but parties sign up to participate voluntarily (or as voluntarily as is possible with a scheme proposed by a regulatory authority). Ofcom appoints the Telecommunications Adjudicator but he is intended to act independently. Under the initial OTA, the Adjudicator could make binding decisions (i.e., adjudicate), but these would have the status only of expert determinations – i.e., of discrete issues generally of a technical or procedural nature – rather than a basis in full statutory dispute resolution powers to end the broader dispute. However, due to their importance, Ofcom reserved control over regulatory policy and pricing matters; these were explicitly excluded from the Telecommunications Adjudicator's remit.

As described in Box 1.6, for example, Japan has had considerable success in using mediation by a special dispute resolution commission. To address an increase in number and complexity of disputes, Japan established the Japanese Telecommunications Business Dispute Settlement Commission (TBDSC) in 2001 as a special agency for prompt and fair settlement of interconnection and other disputes between telecommunications providers. Since its establishment, it has dealt with three arbitrations and 48 mediations, showing a substantial preference for mediation over arbitration. This may relate to the success of mediation in resolving disputes. As shown in Figure 1.6, approximately two thirds of the TBDSC's mediations succeeded in finding resolution.

The OTA scheme seeks to introduce facilitation skills and methods into longer term sector relationships. It has witnessed a marked increase in uptake of local loop unbundling in the UK, recently exceeding 7 million lines in October 2010. The success of the facilitation function led to the broadening of the scope of the scheme under OTA2 to other core regulatory areas, including wholesale line rental, carrier pre-selection, geographic number portability and migration aspects of broadband. Parties' tendency to resolve minor matters through facilitation (including non-binding recommendations in the case of the OTA) meant that they preferred to take unresolved significant matters to the full Ofcom dispute resolution process rather than adjudication under the OTA scheme. This led Ofcom to drop the adjudication function from the OTA2 scheme, leaving it focused on facilitation.

Box 1.6: Telecommunications mediation and arbitration in Japan

Japan's Telecommunications Business Dispute Settlement Commission (TBDS) is independent of the Telecommunications Bureau, which develops competition rules for the sector, although the TBDS may make recommendations to the Telecommunications Bureau. Both bodies exist under the auspices of the Minister for Internal Affairs and Communications.

The TBDS comprises five part-time Commissioners with 3-year terms, appointed by the Minister with parliamentary consent, as well as eight special Commissioners with 2-year terms appointed by the Minister. The Commissioners are generally professors of law, economics and engineering and practising lawyers. The TBDS has a secretariat, including a Director-General and other staff.

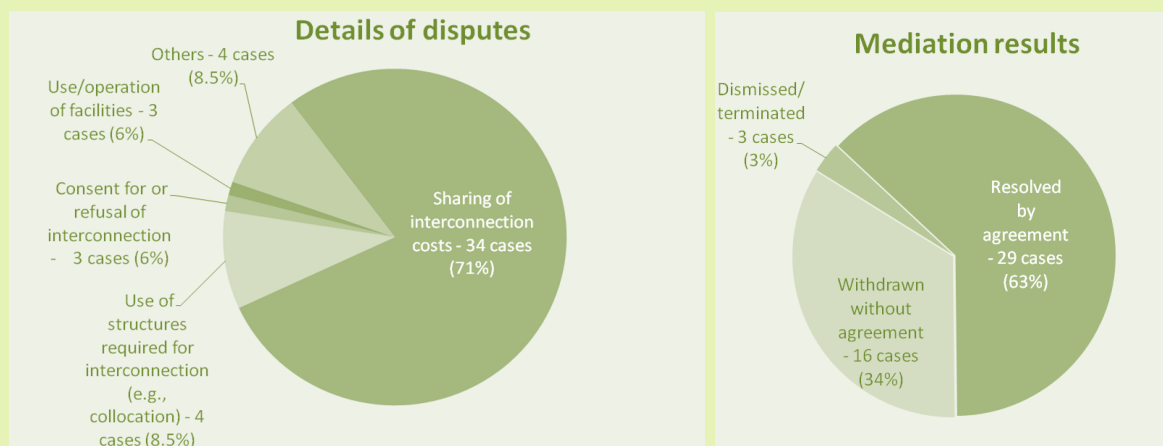
- In mediations, mediation Commissioners are appointed (usually three) and assist the parties to reach agreement. The mediation process resembles what other countries might call conciliation: the mediators may offer a proposal of a solution rather than merely help the parties in their discussions.
- In arbitrations, the disputing parties agree on three Commissioners to act as arbitrators. An award has the effect of a final court decision. The country's Arbitration Law applies, adjusted to fit the situation.

The number of mediations has typically greatly exceeded the number of arbitrations (by 2009, the TBDS had handled 48 mediations compared with three arbitrations). The average time to reach settlement through mediation is an impressive 1½ months. The TBDS introduced a consultation process in 2006 to avoid escalation of a difference into a dispute. The process has become extensively used.

In 2008, pursuant to amendments to the Radio Law and Telecommunications Business Law, the TBDS began offering mediation and arbitration in connection with radio station interference, enabling new wireless providers to be licensed. Allowable interference levels, interference avoidance measures and costs can be agreed on.

Source: Ministry of Internal Affairs and Communications, Telecommunications Business Dispute Settlement Commission

Figure 1.6: Mediation in Japanese telecommunications



Source: TBDS

Mediation and facilitation involve exploring a party's positions and interests openly with the mediator or facilitator with a view to seeking a mutually acceptable outcome with another party. They are only effective if the parties have some measure of trust in and respect for the mediator or facilitator. As a result, the personality and style of the mediator is important – probably more important than anything else. The website of the UK's Office of the Telecommunications Adjudicator provides a brief biography of the Adjudicator,

Rod Smith. Nearly a third of it describes how he took a career break of 12 months to sail a yacht across the Atlantic and compete in a number of offshore races.⁶⁷ This is not immaterial information randomly dropped in. It conveys a message that he takes a broader perspective of what really matters, that he is courageous, adventurous and is goal oriented, that he seeks fun but with discipline, and that he is willing to think unconventionally (as sometimes described, "out of the box").⁶⁸ Particularly in the UK with its Edwardian heroic explorer

tradition, these present an ideal combination of personality traits for a mediator in that market.

More than personality matters in developing trust, however. Trust that the communications with the mediator will not find their way into the record of an adjudicative dispute proceeding is also important, i.e., some measure of confidentiality. Thus the Canadian CRTC provides for an “ethical wall” (sometimes referred to in other circles as a “Chinese wall”) between staff conducting mediation and those conducting the CRTC’s adjudicatory proceedings of final arbitration and expedited hearings.⁶⁹ Similarly, Japan’s TBDSC is established at arms’ length from the competition regulatory functions of the Ministry. The Canadian CRTC safeguards confidentiality to the point that a report of the mediation prepared by the CRTC staff identifying outstanding issues may be prepared and form part of the record for consideration in final offer arbitration, an expedited hearing or another Commission proceeding – but only with the consent of all parties.

Mediation is often misunderstood. Parties typically seek finality, and claimants typically seek it quickly. Mediation depends on consensus and so is often distrusted as an inadequate method of dispute resolution. After all, a dispute arises where parties disagree, so how can a process that depends on the parties’ agreement on the process and the result be helpful? Thus mediation is often adversely perceived in comparison with adjudicatory processes which produce a binding decision.

However, mediation is not really an alternative to an adjudicatory process if the parties insist on requiring a third party (whether a judge, arbitrator or regulator) to render a decision for them. In such circumstances, the adjudicatory process is necessary. The purpose of mediation is really to maximise the benefits that can be obtained (at any stage of a dispute) from improving communication, ensuring full understanding and establishing common ground to the extent possible between parties. Appreciating its benefits, the CRTC will typically require the parties to engage in mediation before seeking final offer arbitration or expedited proceedings save in exceptional circumstances where there is an urgent need to resolve a particular dispute.

This reflects a wider trend in civil court litigation in many countries. Mandatory mediation before advancing with adjudicatory proceedings is becoming increasingly common. Some States require the parties to try mediation as a required condition to proceeding with an action. Others only require mediation where the

judge has concluded that the case is appropriate for mediation before the adjudicatory proceedings continue. Some countries, such as the UK, impose cost incentives on parties to try to settle through mediation before litigation – so that even if a party wins the ultimate case, it may bear some of the costs of the losing party if the winning party had refused to participate in mediation.

In highly contentious matters where a third party adjudicator can be depended on to give a reasonable and relatively predictable decision, mediation may do little more than assist the parties to establish agreed facts, eliminate non-disputed issues and define more precisely the disputed issues. But this can still be immensely helpful. Thus, in the Canadian CRTC’s staff-assisted mediation process, “Where full resolution cannot be achieved, the objective of the Commission staff will be to reduce the number of contentious issues in order to clearly identify those that may require further Commission intervention.”⁷⁰

In situations where the decision of a judge, arbitrator or regulator may not be anticipated to be as reasonable and predictable as might be desired, mediation offers the parties greater opportunity to control the result. The benefits of mediation, then, depend extensively on the opportunity cost of the available adjudicatory process. Where the uncertainty, cost and other adverse factors of an adjudicatory process are unattractive, parties may find mediation useful. Thus, for example, in the initial phase of market liberalization in Fiji in 2007, described in Box 1.7, where the High Court was unlikely to be a helpful forum to resolve differences between the Government and the telecommunications operators, they sought to reach agreement through mediation.

Mediation, then, can be employed in almost any circumstance, and beneficially for all of the parties if it is handled responsibly. In theory, almost any dispute could be better run if a parallel mediation support were provided throughout it. However, effective mediation in telecommunications requires skilled mediators who understand the technical, economic and legal aspects of the contentious matters. Effective mediation also requires to be kept somewhat separate from adjudicatory and regulatory processes. The need for dedicated, skilled mediators may make it expensive to provide for mediation to accompany an adjudicatory process from start to finish. It is likely, however, that investment in mediation to ensure constructive communication between disputing parties will often shorten dispute proceedings.

Box 1.7: Mediation of major policy and legislative reform of Fiji's telecommunications market

In the early years of the decade commencing in 2000, the Government of the Republic of Fiji decided to introduce competition to the country's telecommunications sector. To do so, it required to overcome disputed exclusive licence rights of the incumbent operators Vodafone Fiji (the country's mobile operator), Telecom Fiji (the fixed line provider) and Fintel (the international operator). After a period of uncertainty over the proposed liberalization process, Vodafone Fiji brought legal proceedings, including expropriation claims under the Fijian Constitution, in the High Court. Vodafone explained that it sought to ensure that the Government would not unilaterally legislate away the operators' rights but rather that competition would be introduced in an orderly manner with a firm regulatory framework. A blockage set in for several years.

In 2007, the Government and the operators agreed to seek to resolve the standoff through mediation with World Bank support. A mediator was appointed, who arranged for the parties to sign a mediation agreement. The same mediator had previously drafted the proposed legislation for a new regulatory framework in consultation with the operators. The confidence of all parties from this process was essential to his role as mediator.

In addition to the operators, their shareholder Amalgamated Telecom Holdings participated, as did the Fiji National Provident Fund, Cable & Wireless (part-owner of Fintel) and Vodafone which each held equity interests in the operators.

Over 40 persons from the various parties mentioned above participated in the mediation. These included three cabinet level ministers (Minister of Finance, Minister of Telecommunications and Attorney General) and the CEOs and other staff of the operators, as well as counsel and consultants from Australia and New Zealand.

The mediation was conducted using a "hub and spokes" approach. One central process housed the Government and the telecom operators. In addition, numerous "side-mediations" were held to resolve disputes over specific relevant issues between the operators, between the operators and their shareholders, and between the Government and the other parties. These fed back into the central process, as well into the other side-mediations. Resolution of each of these was necessary to enable the overall settlement to fall into place.

After four days' negotiating in a secluded hotel, a settlement was reached and at 2am the television cameras were admitted to film the signing. The settlement agreement became known in the press as the "Radisson Accord," and opened the way for liberalization, the entry of the operators into each others' markets, and the licensing of Digicel as a new mobile provider.

Source: Author

Mediation has strong potential ultimately to be a net cost saver in most circumstances. But, like carbon emissions, the difficulty of measuring and accounting for the impact may restrain rational use of mediation for some time to come.

1.4.5 Mediation of fundamental policy change and complex cases

The introduction to this chapter outlined various fault lines in the ICT sector. Some of these may require important reforms of law and business models, and involve numerous parties. Various official processes exist to deal with such problems, and each has strengths and weaknesses.

Adjudicatory dispute resolution processes (court litigation, arbitration and expert adjudication) are typically built for small numbers of parties – often only two. A dispute typically involves aggravated tension. The submissions made to the decision-maker are framed in binary terms. Each claims that its version of events, analysis and legal position is right and that the other's is wrong. This tension and the structure of the communi-

cation have shaped the development of dispute resolution processes. Such processes focus on the impartiality and independence of the third party neutral, and on permitting each party to submit its arguments and evidence, and allowing each party to respond to the other party's submissions. Although class action and consumer dispute processes have developed greatly in recent years to handle large scale disputes, dispute processes are therefore typically not the strongest method for dealing with multiple interests and multiple inter-related issues.

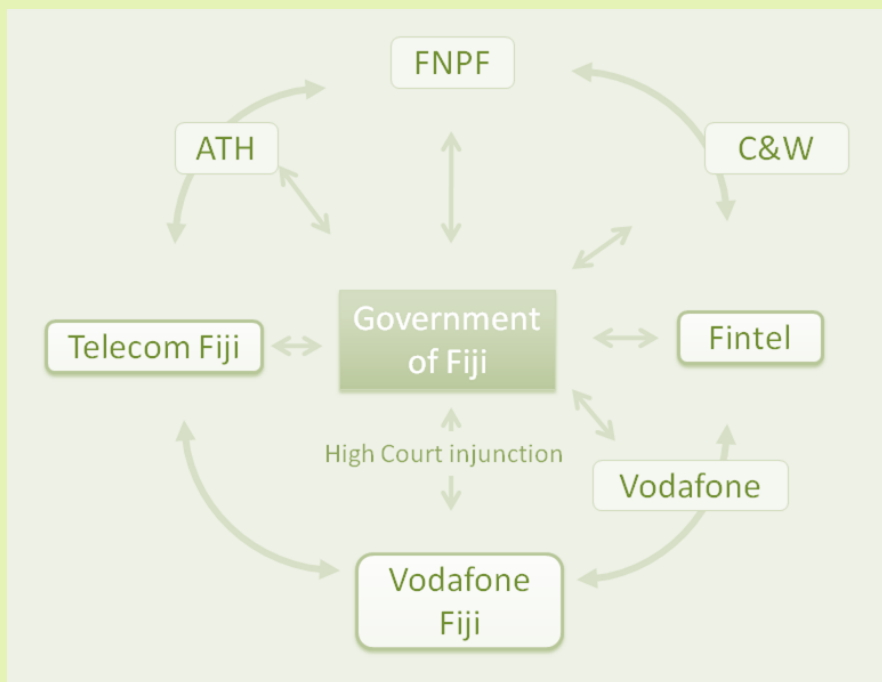
Parliaments, which bring together numerous politicians, and behind them parties, lobbyists and funders, tend to be the institution of last resort for resolving complex matters. Parliamentary processes for law making, including committees and consultations and exchanges with the executive branch, seek to ensure that interests are represented. However, voting systems are somewhat crude and too easily diverted by influence for unrelated reasons (for example, what is sometimes referred to in the United States as "pork barrel" politics, where individual representatives' votes are secured for

legislation on one matter by laws on another, typically spending).

In a given economic sector, such as ICT, regulatory bodies with sufficiently broad mandates often use consultation processes to gather information and views from various interested parties on inter-related matters. Such consultations can be important for the effective airing of issues, providing interested parties the opportunity (if not technically the right) to be heard. They have the advantage over parliamentary processes of having a limited number of decision makers, which may be a single individual or commission. However, consultation processes are not always sufficient to reconcile conflicting interests, and may result in an imposed solution rather than one which interested parties have negotiated with each other. The regulatory authority is also often not viewed as an impartial player, but rather advancing its own agenda, and may provoke resistance from, and polarize, some key constituencies.

In the telecommunications sector, some dispute resolution processes have been found particularly useful in coping with complex situations. For example, as described in Box 1.7 and illustrated in Figure 1.7, a mediation process was employed in the Republic of Fiji Islands to reconcile several competing interests. The primary problem lay between the Government and the telecommunications operators. The former sought to liberalize the sector and the latter were concerned about the approach taken. In addition, however, the operators faced various tensions among themselves and their respective interests and positions. These had to be resolved in order to reach agreement with the Government. A focused process involving Cabinet Ministers, the CEOs of the telecommunications companies and third party mediators brought about agreement on the basic terms of liberalization in a relatively short period of time. The example illustrates the powerful potential of mediation processes to bring parties together around common interests and to find ways to address those that diverge. Such processes have been used in numerous other areas of public policy.⁷¹

Figure 1.7: Mediation of sector reform in Fiji



Source: Author

The multiple interwoven relationships in the telecommunications sector make mediation and similar dispute resolution processes particularly useful. Box 1.8 describes, and Figure 1.8 illustrates, the kinds of complex relationships that can arise in telecommunications, and the considerable possibilities for tailor making hybrid dispute resolution techniques. In that case, private sector companies and a European government estab-

lished an innovative dispute process with a unique combination of mediation, adjudication and negotiation roles. The process successfully resolved claims exceeding multiple parties and international telecommunications traffic exceeding EUR 100 million in aggregate value. There is, then, demand for using these methods in the ICT sector, and a proven record of success.

Box 1.8: Multi-party hybrid dispute process for international telecommunications traffic dispute

As illustrated in Figure __, a European telecom operator faced claims from 10 major international transit operators and indirectly over 100 destination carriers over international telecommunications traffic exceeding EUR 100 million in aggregate value. Large amounts of money were being withheld from the telecom operator by the transit operators until the disputes were resolved. At the same time, the telecom operator was being sold by one shareholder to another. The old shareholder thought the claims were unlikely to materialize into significant liabilities. The new shareholder assessed the potential liability above EUR 100 million. The telecom operator did not accept that it really faced potential large scale liabilities. The sale of the company was blocked because the seller and buyer could not agree on terms for the indemnity regarding the claims.

Negotiations between the Old Shareholder and the New Shareholder of the share price became completely blocked due to the difference in perception, and the transaction became increasingly bitter. Relations with the Government minority shareholder became strained. A classic French-English cultural clash entrenched the problem further.

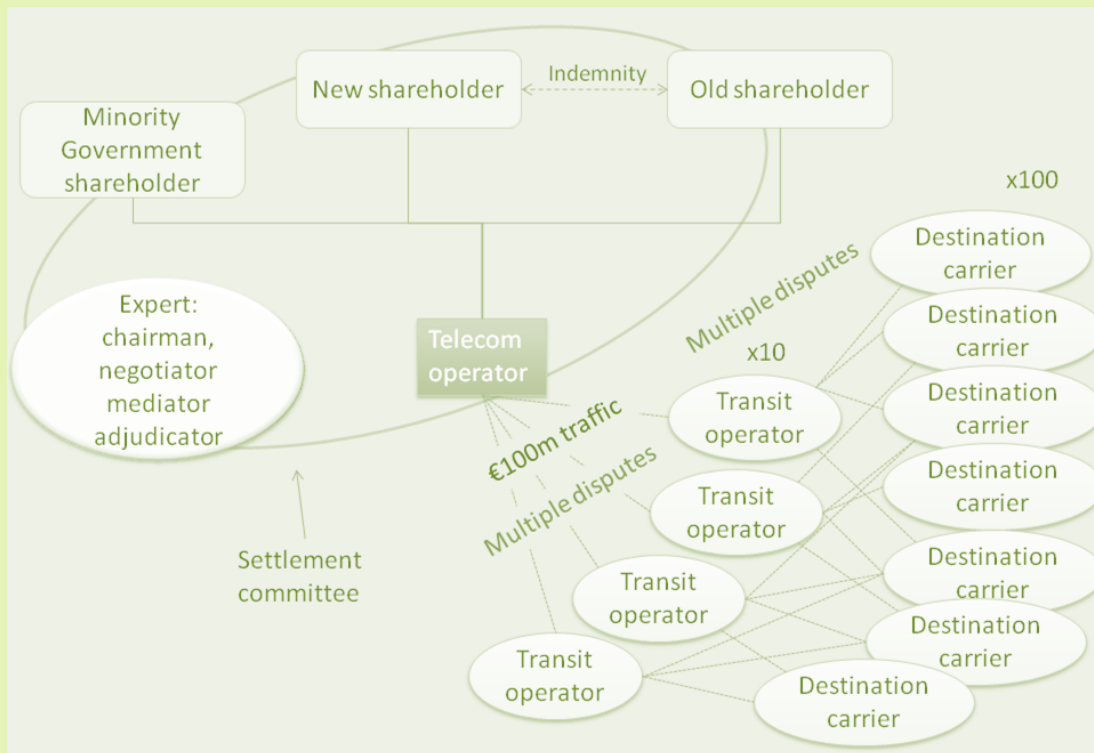
The parties succeeded in reaching a deal by creating a unique dispute resolution process. The old shareholder agreed to indemnify the new shareholder for the settlements of the telecom operator if they were resolved under the dispute process. Under the process, the new and old shareholders agreed to appoint an expert from a list proposed by a dispute resolution centre to act as a mediator-adjudicator-negotiator. The expert would have key roles:

- **Mediator/facilitator:** The expert would chair a Settlement Committee comprised of representatives from the telecom operator, the new shareholder, the old shareholder and a Government minority shareholder. The committee's purpose was to oversee the settlement of the claims against the telecom operator. Given the fundamental difference of perspectives between the old and new shareholders and the indemnity at stake, this role was fundamentally one of mediation.
- **Adjudicator:** If the old and new shareholders failed to agree on whether the telecom operator should enter into a settlement with a transit operator or destination carrier, the expert had the power of decision that would bind them – a sort of adjudicatory role.
- **Negotiator:** The expert also had the job of actually negotiating the settlements with the transit operators and destination carriers on behalf of the telecom operator.

The combination of these three roles was fraught with numerous potential pitfalls. Combining the mediator/facilitator and adjudicator functions provokes legendary challenges regarding how to build the trust necessary to act as a mediator when one may need to become an adjudicator. And adjudicating between the new and old shareholders regarding the reasonableness of settlements of the telecom operator negotiated by the expert with the transit operators and destination carriers could be viewed as judging one's own work. However, by building relationships and trust with all parties and working hard to negotiate the settlements, the settlements were successfully concluded.

Source: Author

Figure 1.8: Multi-party hybrid dispute process for international telecommunications traffic dispute



Source: Author

1.5 Conclusion: where next?

A wide range of dispute processes are being used in ICT disputes today as a result of the liberalization and unbundling of dispute resolution. This can be expected to continue, with more reliance on private actors to assist with the resolution of disputes with a public policy dimensions. In some cases, only dispute resolution processes such as mediation will be able to help bridge the fault lines in the sector.

Perhaps the most interesting thought about ICT dispute resolution arises from the experiences of unbundling in the ICT industry. In some places, commercial pressures have led to the introduction of managed services, with contractors taking wholesale responsibility for network operations of telecommunications providers.

In the same vein, it is entirely possible that officials responsible for ICT dispute resolution could begin to take advantage of the equivalent in the dispute resolution field – i.e., managed dispute resolution services. Such services exist in the form of the world's arbitration and mediation institutions. These compete with each other for the dispute resolution business. They have

demonstrated a degree of reliability and excellence not rivalled by many regulatory adjudication and other official dispute resolution processes.

Some of these institutions have significant experience in areas related to the ICT sector, such as the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO), which handles numerous technology disputes as well as Internet domain name disputes and even regular commercial disputes over telecommunications infrastructure.⁷² This and several generalist dispute resolution institutions are capable of providing dispute resolution services to regulatory authorities, whether administering disputes pursuant to agreed rules, assembling panels of arbitrators and mediators, training regulators in the art of dispute resolution.

However, the primary area for innovation lies with private actors which can devise ingenious processes to handle difficult situations, as in the example described in Box 1.8. The official sector will continue to develop if it engages with private participants in the ICT sector and seeks to collaborate on developing suitable dispute resolution methods.

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- ¹ Karl von Clausewitz, *On War*.
- ² See Richard S. Whitt, "A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model", *Federal Communications Law Journal* 2004, 587 [Vol. 56]; Lawrence B. Solum and Minn Chung, "The Layers Principle: Internet Architecture and the Law," Research Paper 55, June 2003, University of San Diego Law School, at page 42; available at <http://ssrn.com/abstract=416263>; and Rob Frieden, "Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach", *Federal Communications Law Journal* 2003, 207 [Vol. 56].
- ³ Global capital expenditure on network infrastructure has been estimated at about USD 215 billion, representing 75% of global Internet capex, and revenues. Infrastructure and access providers have been estimated, on the other hand, to earn about 15% of revenues generated by the Internet. See A.T. Kearney, *Internet Value Chain Economics*, in *The Economics of the Internet*, available at www.vodafone.com/etc/medialib/public_policy_series.Par.21246.File.dat/public_policy_series_11.pdf.
- ⁴ See Scott Wallsten, *The Future of Digital Communications Research and Policy*, June 2010 Technology Policy Institute, available at www.techpolicyinstitute.org/files/the%20future%20of%20digital%20communications%20research%20and%20policy.pdf.
- ⁵ See *Internet Value Chain Economics*, footnote 3.
- ⁶ See for example UK Ofcom's Pay TV consultation, available at www.ofcom.org.uk/tv/paytv/.
- ⁷ See *Romano v Steelcase Inc.* 2010 NY Slip Op 20388, 21 September 2010, www.courts.state.ny.us/Reporter/3dseries/2010/2010_20388.htm.
- ⁸ See FTC Challenges Patent Holder's Refusal to Meet Commitment to License Patents Covering 'Ethernet' Standard Used in Virtually All Personal Computers in U.S. Available at www.ftc.gov/opa/2008/01/ethernet.shtml.
- ⁹ See *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007).
- ¹⁰ International Telecommunication Union (ITU) – World Bank, *Dispute Resolution in the Telecommunications Sector*, available from the ITU at: www.itu.int/ITU-D/treg/publications/ITU_WB_Dispute_Res-E.pdf.
- ¹¹ See generally OECD, *Regulatory Reform as a Tool for Bridging the Digital Divide*, pp 12 et seq. Available from the ITU-Infodev ICT Regulation Toolkit at www.ictregulationtoolkit.org/en/Publication.2360.html.
- ¹² See, for example, Boutheina Guermazi and David Satola, *Creating the "Right" Enabling Environment for ICT*, citing to Harris Wiltshire & Grannis LLP, *Telecommunications Trade Liberalization and the WTO*, Final Report for the GICT Department, World Bank, 2004.
- ¹³ For example, the French Government continues to own about 27% of France Telecom. See www.francetelecom.com/fr_FR/finance/action-capital/repartition/index.jsp. In Egypt, the state continues to own 80% of Telecom Egypt.
- ¹⁴ In 2009, Sprint Nextel in the United States and Vodafone in the UK unbundled their network operations outsourcing them to Ericsson. Orange outsourced its network operations to Nokia in Spain. Such levels of outsourcing had hitherto been seen only in less developed markets such as Brazil, China, India, Hong Kong and Saudi Arabia where Ericsson provided outsourcing services. See, e.g., Richard Martin, "Outsourcing Operations, Telcos Remake Business Models: Sprint-Ericsson Managed Services Deal a Watershed for U.S. Carriers," *Von Magazine*, 13 July 2009. See www.von.com/articles/outsourcing-telcos-remake-business-models.html.
- ¹⁵ The International Centre for the Settlement of Investment Disputes provides for an [appeal] of a tribunal's award to an *ad hoc* committee of the Centre.
- ¹⁶ See, for example, Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor in Civil Justice Systems in England and Wales*, London, July 1996. See also, for example, DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 21 May 2008 on certain aspects of mediation in civil and commercial matters. Available from the Europa website at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>.

- ¹⁷ M. Bagheri, *International Contracts and National Economic Regulation* (1st ed. 2000) at 105.
- ¹⁸ It has been expressed thus : “Cette justice, née des marchands, qui allie droit et respect des usages, sait concilier l’approche d’Antigone et celle de Créon. Elle a, au cours des siècles, acquis sa noblesse et sa sérénité car elle était une procédure par laquelle gentlemen were settling a dispute between gentlemen in a gentlemanly way.” Lazareff, ‘L’arbitre singe ou comment assassiner l’arbitrage’, in *Global Reflections in International Law, Commerce and Dispute Resolution* (ICC Publishing, 2005) 477, at 478.
- ¹⁹ This possibility of countries limiting the arbitrability of disputes is reflected in the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards. Article V(2) of the New York Convention provides that recognition and enforcement of an arbitral award may be refused if “(a) the subject matter of the difference is not capable of settlement by arbitration under the laws of that country, or (b) the recognition or enforcement of the award would be contrary to the public policy of the country.”
- ²⁰ For a general discussion of “arbitrability”, see Sanders, “The Domain of Arbitration”, pp.113 *et seq.* in the Arbitration section of the *Encyclopaedia of International and Comparative Law* Vol. XVI, Ch.12 (published by Martinus Nijhoff).
- ²¹ In Egypt, for example, enforcement of an arbitral award may not be ordered until verifying that it does not contradict “public policy.” (Arbitration Law, section 55(2)(b)).
- ²² [1999] ECR I-3055
- ²³ 473 U.S. 614, 655 (1985)
- ²⁴ For example, the Supreme Court in the United States in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) extended to domestic arbitration the arguments justifying arbitrability of antitrust matters in international arbitration. In *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 883 (1996), the Supreme Court stated: “As [*McMahon*] demonstrates, a statute conferring exclusive federal jurisdiction for a certain class of claims does not necessarily require resolution of those claims in federal court.”
- ²⁵ See G. Blanke, *The Use and Utility of International Arbitration in EC Commission Merger Remedies* (1st ed. 2006).
- ²⁶ J. Rawls, *A Theory of Justice* (1st ed. 1971).
- ²⁷ See generally Bagheri, *supra* note 17
- ²⁸ For this reason, the difference between including obligations in licences, in specific undertakings negotiated between operators and regulators, or in generally applicable regulations is not as clear as might be expected. In many cases, the obligations apply to one target entity regardless of form.
- ²⁹ ictQATAR, Decision, 22 July 2010, available at www.ictqatar.qa.
- ³⁰ ictQATAR, Dispute Resolution Rules, 7 June 2010, available at www.ictqatar.qa.
- ³¹ See Ofcom, Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives (July 2004), available at <http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/complaints-disputes/>.
- ³² UK Communications Act 2003, section 185.
- ³³ *T-Mobile (UK) Limited, British Telecommunications PLC, Hutchison 3G UK Limited, Cable & Wireless UK & Ors, Vodafone Limited, Orange Personal Communications Services Limited v Office of Communications*, Judgment on the Core Issues, 20 May 2008, at paragraph 103.
- ³⁴ *Ibid*, at paragraph 105.
- ³⁵ See www.tatt.org.tt/RegulatoryFramework/RegulatoryDecisions.aspx.
- ³⁶ Case IT/D/22Apr06/02, available at www.tra.gov.ae.
- ³⁷ Case CS/D/22Apr06/04, available at www.tra.gov.ae.
- ³⁸ Case CS/E/07Feb07/05, available at www.tra.gov.ae.

- ³⁹ The TRA cited Article 14 of the Federal Law by Decree No. (3) of 2003 regarding the Organisation of the Telecommunications Sector, which concerned regulation of interconnection, rather than Articles 39 and 40 which empowered it to resolve disputes.
- ⁴⁰ Directive No. (1) of 2007, Interconnection Agreement, 8 February 2007, available at www.tra.gov.ae.
- ⁴¹ Directive No. (4) of 2007, Interconnection Prices, 30 December 2007, available at www.tra.gov.ae.
- ⁴² Case NR/D/19Mar08, available at www.tra.gov.ae.
- ⁴³ Determination No.(3) of 2010, Mobile Site Sharing Charges, 29 August 2010, available at www.tra.gov.ae.
- ⁴⁴ See the CRTC Bulletin referred to in footnote 69.
- ⁴⁵ In the case of Solomon, the King was asked to arbitrate between two women each claiming to be the mother of a baby. When the King suggested cutting the baby in two, the true mother immediately yielded her claim to ensure the baby would live. By showing her best offer, in effect, she won the dispute and was awarded the baby.
- ⁴⁶ Fiji Telecommunications Promulgation, section 16.
- ⁴⁷ Solomon Islands Telecommunications Act 2009, section 100.
- ⁴⁸ Legislative Decree No. 48 Of 2002 Promulgating the Telecommunications Law, section 57.
- ⁴⁹ The licences are available at www.tra.org.bh.
- ⁵⁰ The reference offer and supply terms are available at www.batelco.com/portal/Wholesale/wholesale_reference_offer.asp.
- ⁵¹ UK Communications Act, section 192.
- ⁵² See www.catribunal.org.uk
- ⁵³ UK Communications Act, section 196.
- ⁵⁴ See Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions, Bruce, Macmillan et. al, ITU-World Bank, October 2004; and Reflections on Regulation and Dispute Resolution in India's Telecommunications Sector, Rory Macmillan, Journal of the Indian Law Institute, Vol 47:1 (2005).
- ⁵⁵ Solomon Islands Telecommunications Act 2009, section 103.
- ⁵⁶ UK Enterprise Act 2002, Schedule 2.
- ⁵⁷ Fiji Telecommunications Promulgation, section 62.
- ⁵⁸ Panels are to be formed on an *ad hoc* basis for appeals from the Utilities Regulatory and Competition Authority (URCA). Tribunal members must be "persons with experience, expertise or professional qualifications that the Governor General considers relevant to exercising the jurisdiction of the Tribunal and may include economists, lawyers, surveyors, accountants or persons with substantial and relevant experience in business or public service." Utilities Appeal Tribunal Act 2009, Schedule 1, section 2.
- ⁵⁹ Bahrain Telecommunications Act, section 68.
- ⁶⁰ Commission decision of 10 July 2002, OJ C201, 24.8.2002, at p.19.
- ⁶¹ Commission decision of 12 April 2000, OJ C141, 19.5.2000, at p.19.
- ⁶² See A.P. Komninos, "Arbitration and the Modernisation of European Competition Law Enforcement," 24(2) World Competition (2001).
- ⁶³ See G.Blanke, The Use and Utility of International Arbitration in EC Commission Merger Remedies (Europa 2006).
- ⁶⁴ Commission decision of 21 March 2000, OJ C110, 14.4.2000, at p.45.
- ⁶⁵ See Johan Ysewyn, Private Enforcement of Competition Law in the EU: Trials and Tribulations, 19 SPG INTL L. PRACTICUM 14 (2006).
- ⁶⁶ Dubai Technology and Media Free Zone Broadcasting and Publication Standards Tribunal Regulations 2003

⁶⁷ See www.offta.org.uk/about.htm.

⁶⁸ The author does not know Mr. Smith – these characteristics are the conclusions about him intended by the information provided on the website.

⁶⁹ See the CRTC's Broadcasting and Telecom Information Bulletin CRTC 2009-38, 29 January 2009, Practices and procedures for staff-assisted mediation, final offer arbitration, and expedited proceedings, available at www.crtc.gc.ca.

⁷⁰ *Ibid.*

⁷¹ For example, in the UK, the approach to the controversial decommissioning by oil company Shell Expro of its Brent Spar floating storage buoy was worked out, after much public outcry led by Greenpeace over deep sea disposal plans, through multiple mediation groups.

⁷² See www.wipo.int/amc/en/