



Dispute Resolution Procedure

Introduction

1 Commercial disputes inevitably arise in any sector of economic activity and the telecommunication sector is no exception to this rule. Disputes between private parties in the telecommunications industry, however often have public interest implications that transcend the economic interests of the parties involved. Therefore many regulatory agencies maintain a role in ensuring that the disputes are resolved in a way that serves the public interest.¹

2 The BTA is empowered under Section 19 of the Telecommunications Act Cap 72:03 of the Laws of Botswana to settle any dispute that may arise between licensees, between licensees and other service providers and between licensees and members of the general public.

3 As a regulatory agency the BTA aims at resolving disputes in a speedy, efficient, fair and transparent manner. The BTA believes that justice should not only be done but must be seen to have been done. It is in this spirit that the Authority finds it necessary to equip its stakeholders with all relevant information that will minimise time taken to resolve telecommunication disputes which are bound to arise.

Overview of the main types of disputes in the telecommunications sector

4 Disputes in the telecommunications sector generally arise out of various circumstances. However, disputes with the greatest impact on telecommunications investment and growth typically relate to: (i) interconnection; (ii) relations between service providers and with consumers; (iii) liberalization; (iv) foreign investment and trade; and (v) radio frequency use.²

5 **Interconnection disputes** are the most prevalent type of disputes between service providers, as operators of all different types of access networks (e.g., fixed-mobile, wire line-wireless) must be able to interconnect

¹ Trends in Telecommunication Reform 2002 : Effective Regulation ,International Telecommunications Union (ITU).

² Ict regulation toolkit 7.4.1 dispute resolution infoDev ITU.

with each another. Many aspects of the interconnection relationship involve key policy considerations for the telecommunications sector; therefore, most regulators consider it important to maintain some form of regulatory oversight of the negotiation and implementation of interconnection arrangements.

6 Regulators have opted between various mechanisms in order to strike an appropriate balance between the need to protect the interests of new market entrants while also leaving room for parties to negotiate agreements on their own. Among such approaches are: (i) prescribing interconnection arrangements on an *ex ante* basis; (ii) establishing interconnection guidelines; (iii) approving reference interconnection offers (RIOs) or model interconnection agreements; (iv) policing operators with significant market power; and (v) generally overseeing the interconnection process.

7 Disputes between **service providers and consumers** are also common and occur in every jurisdiction. These conflicts principally stem from the consumer's lack of bargaining power or the absence of competitive options to the incumbent operator. The main type of disputes arising between consumers and service providers derive from the following causes: (i) service charges; (ii) billing; (iii) payment of charges; (iv) quality and terms of service; (v) violation of privacy; and (vi) false or deceptive advertising.³

8 To ensure effective resolution of consumer disputes, regulators use a variety of mechanisms, ranging from requiring service providers and consumers to initially resolve disputes themselves (e.g. United States of America and Botswana; for Botswana refer to the Consumer Complaints handling Procedures available on the BTA website), using ombudsmen type institutions (e.g. the telecommunications industry Ombudsman in Australia), and even employing the broadcast media (e.g. in Nigerian, the "Consumer Parliament")

9 In addition, **disputes also may arise as a consequence of introducing competition into the telecommunications market.** The liberalization process often undermines the established financial and business interests of incumbent network operators. These liberalization-related disputes generally derive from the incumbent's desire to protect and maintain its dominant position in the market. Similarly, investment and trade disputes often occur where regulatory reforms or actions diminish the value of private-sector interests.

10 These types of disputes have the potential to internationalize disputes arising between regulators and foreign investors in the telecommunications sector. Investment disputes typically stem from complaints by investors, operators, and service providers about early termination of exclusive rights, licensing of new competitors, new rate-setting structures and changes to licences.

³ ICT regulation toolkit 7.4.1 infodev ITU.

11 Current trends indicate a recent rise in international investment disputes within the telecommunications sector, based primarily on provisions of bilateral investment treaties. Trade disputes in the context of the World Trade Organisation (WTO) on the other hand, are instituted by member states against other member states primarily due to lack of compliance with obligations assumed under the General Agreement on Trade in Services (GATS) and related documents.⁴

12 Finally, radio frequency allocation and assignment disputes are dealt with internationally through mechanisms available through the ITU, particularly the Radio communications Bureau (ITU-R). Domestically, disputes may arise from interference, licence conditions, and pricing.

Objectives of Dispute Resolution:

13 As stated earlier, dispute resolution is one of the key objectives of the BTA. The Authority has amongst its obligations, the ability to allow any person with an unresolved dispute with their service provider to escalate and thereby register their concern with the regulator. The purpose of dispute resolution therefore is:

- To facilitate and clarify issues through open discussion
- To promote mutually satisfactory resolutions
- To allow for a more efficient process
- To develop creative solutions
- To ensure fairness.

Benefits of Dispute Resolution:

14 Dispute resolution has great benefits for both the service provider and the consumer because they allow for:

- Problems to be resolved constructively
- Help parties find common ground and discover solutions that provide mutual gain
- There is usually greater likelihood of compliance as disputants craft resolution rather than having decisions imposed
- Good working relationships are created among parties
- Avoidance of costly and extensive litigations.

15 From a Regulator's perspective, effective mechanisms for dispute resolution are a key factor for effective competition in the market.

Who can escalate and or lodge a dispute?

16 An individual, a body corporate or an unincorporated body of persons whether engaged or intending to engage in the provision of electronic communication networks, services or associated facilities and individuals or companies who are consumers or clients of service providers.

⁴ ICT regulation Toolkit.

Declaration of a dispute;

17 For a dispute to be accepted the following conditions should prevail: The parties should first attempt to resolve the dispute themselves. Where, despite reasonable attempts, it is not possible for the parties to resolve the dispute, then either party or their legal representatives may refer the dispute to the BTA. The BTA will direct that the dispute be presented in a case stated format, clearly indicating areas of disagreement.

18 There should have been serious and quantifiable attempts to resolve the issue bilaterally and the dispute resolution procedures should not be used as a replacement for normal commercial negotiation.

19 Where there is evidence that one of the parties to the dispute has not engaged seriously to resolve the matter bilaterally, the BTA may direct the parties to renegotiate based on the facts.

20 The Regulator should be satisfied that the matter issue is best resolved within the dispute resolution procedures.

21 The scope of the dispute should be clear. There should be a statement indicating the obligation to which the dispute relates and the legal basis for regulatory intervention.

22 The party bringing the dispute should indicate its preferred remedy. The impact of a failure to resolve the dispute on the affected party should be outlined.

23 The submission of the dispute should normally include all relevant documentary evidence.

24 Once a dispute is accepted by the Regulator, the scope of the dispute would not subsequently be modified unless all parties agree. Under normal circumstances, a dispute should be resolved within four months except in exceptional circumstances.

Standard Procedures

The following stages are involved in the resolution of disputes by the BTA;

1 Preliminary Investigation phase after which the Regulator will decide whether there is a *prima facie* case to answer. This involves a determination by the BTA as to whether there is or there are substantive issues raised in the alleged dispute that require its intervention.

This will normally arise after the assessment of the submissions made by the party seeking redress. The Regulator will determine whether there has been a deadlock and there is evidence to the effect that the parties have failed to reach consensus on either the technical or

commercial aspect of their negotiation especially with regards to interconnection disputes.

Where the regulator is satisfied that **there is a *prima facie* case**, then the submissions will be forwarded to the other party to respond to the allegations made by the plaintiff. At this stage, a notification entitled “**Declaration of dispute**” will be written to both parties by the BTA confirming that it is seized with the matter.

- 2 The Defendant or Responded will be asked to file **their** response in a case stated format within 14 (Fourteen) working days from receipt of the Declaration of dispute notification. The respondent will be advised to attach all relevant information that will assist the regulator to make a determination.
- 3 Parties are usually advised to **seek legal representation** for purposes of preparation of their **submissions or even representation during the Oral hearing**.
- 4 **Full investigation that involves gathering, analysis** and assessment of sufficient information to allow for a decision whether any enforcement action is needed under the Act.
- 5 **Oral presentation**; this stage **is optional**; it is usually done where the regulator **requires clarification** on certain areas which will lead to the regulator making an informed decision. This may happen in instances where there are technical issues that need thorough presentation by both parties.

Oral presentations must be recorded and each party must be accorded an opportunity to respond to issues raised.

- 6 Enforcement of the decision against one or both parties. After the parties have made their submissions and oral presentations have been heard by the BTA if necessary, the Authority will make a determination based on an analysis of the evidence adduced by the disputants.
- 7 The decision of the Authority will be written and read to the disputants Fourteen days after the end of the submissions by both parties. The written said determination will then be sent to the disputants.
- 8 Right of Appeal. The parties must be advised of their right of appeal to the High Court in terms of Section 56 of the Act.

Procedure Flowchart

