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A STUDY OF THE DISPUTE RESOLUTION IN THE TELECOM SECTOR IN INDIA WITH SUGGESTIONS FOR ADR TECHNIQUES

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1. Introduction

The telecommunication sector worldwide is an ever-changing environment. The technological advancements, competition, deregulation, and other continuous changes in the functioning of the telecommunication industry gives rise to various disputes amongst the users and the participants in the sector. India is globally ranked as the second largest mobile data consumer, which brings with it a number of challenges and so disputes can hugely destroy the sector as the technology is changing at a fast pace and there exists certain drawbacks in the current regulations.¹ This research paper talks about the dispute resolution mechanism that was established in India. It details the regulatory authority that established certain Tribunals to deal with dispute resolution in the telecom sector and also throws light on various countries having dispute settlement mechanisms specifically for the telecom sector. Various other dispute resolution mechanisms that are being followed in India have been explained in this research paper.

2. Dispute Settlement Practices Prevalent in India

One of the major systems that gained recognition in India during the rise of deregulation of the telecom sector is Dispute Resolution. In mid-1992, it was realized that there was a need to protect and promote fair competition and consumer interests in the telecom sector. For this, the divisions of the telecom sector of value-added services were open for private investments. This was followed by offering basic telecom services to be operated by the private corporations in India through the National Telecom Policy, 1994. Later, Liberalization led by the introduction of

¹www.ibef.org/industry/telecommunications.aspx, Last Visited at 4 PM on 9th October, 2020.

the New Telecom Policy, 1999 increased the scope of fixed and cable services, cellular mobile services along with ecommerce, restructuring of Telecom Department, standardization, etc. The New Telecom Policy, 1999 had a wider scope in the sense of development of telecom worldwide. Therefore, in order to establish a regulatory authority for the governance of the telecom sector in our country, the Telecom Regulatory Authority of India (TRAI) Act, 1997 was established. The powers and functions of the TRAI Act, 1997 were stated in Chapter III of the Act. Other steps taken towards good governance of the telecom sector included the corporatization of the Department of Telecommunications in 2000.

Earlier, the telecom regulator included the dispute resolution function within its purview. Hence the telecom regulatory authority was stripped of the adjudicatory obligation through an amendment of the Telecom Regulatory Authority Act, 1997 back in 2000. This brought about the foundation of a specific dispute resolution body which came to be known as the Telecom Dispute Settlement and Appellate Tribunal (TDSAT) for the telecom sector. The establishment of TDSAT is mentioned in Chapter IV of the TRAI Act, 1997. The powers of the Appellate Tribunal are stated under Section 16 of the TRAI Act, 1997. The policy makers were of the opinion that regulation and dispute settlement be considered as two separate practices so that deregulation and competition along with consumer interest protection are well served. Also they were of the opinion that separating these two practices would result in more transparency and better credibility to the mechanism of dispute settlement in India. The TDSAT has been endowed with the duty and power regarding settlement of disputes among licensor and licensees, between two or more parties providing services, and between a service provider and more than two consumers.

The decision is taken by majority in a proceeding before the TDSAT. The proceedings are treated as judicial proceedings and the order passed in such proceedings should be executed the same way as a decree of a civil court is executed. Penalties against any conduct of wilful failure to comply with the TDSAT's orders are also stated in the amended Act. The Tribunal possesses the power to direct its own procedures and follow the principles of natural justice in order to deal with disputes in this sector. The Tribunal typically functions as a court possessing appellate jurisdiction. The Tribunal decides on the admissibility or otherwise of a petition when any of the parties to a dispute makes an appeal in the Tribunal for consideration. The procedure for filing

appeal/ application, petition in the TDSAT has been mentioned in Section 14A of the Telecom Regulatory Authority of India Act, 1997. After an appeal is filed with the Tribunal, the Tribunal has the authority to either accept the appeal as it is, or ask the party to make amendments in it or simply reject it. In case of rejection, it needs to be done within 90 days from date of receipt. This power of the Tribunal to accept, reject or ask to amend the appeal is stated under Section 5 of the TDSAT Procedures, 2005. Notices are issued to the parties in dispute by the Tribunal after accepting the petition from the petitioner. This puts both the parties under strict obligation to file their responses to the Tribunal within a specified time frame. Thereafter, a date is set, to which both the parties are obligated to appear along with their lawyers/ legal representatives and make verbal submissions which are taken on record. The proceedings take place in an open court, i.e. any person from the public has access to these proceedings, however, during a proceeding if the Tribunal is of the opinion that the matter should not be taken up in open court or in the presence of a particular person, the matter shall be taken privately or may ask the person to vacate the room or building of the Tribunal. This power of the Tribunal is conferred under Section 17 of the TDSAT Procedures, 2005. After all the submissions and arguments, the conclusion or the judgement in the matter is pronounced by the TDSAT in an open court. The TDSAT in certain cases, reserves the judgement and announces a date on which both the parties have to appear for pronouncement of judgement. However, in certain cases which are complex in nature, the Tribunal can take several months in order to decide upon the matter and pronounce the judgement.²

2.1. Authority of TDSAT V. TRAI

In the famous case, MTNL Vs. TRAI, the main objective was to figure out whether TDSAT holds any authority to consider an appeal which may be against any law or regulation established by the TRAI. The main cause of filing an appeal in the TDSAT by MTNL was with regard to the decision taken by the regulatory on ADC (access deficit charge). TRAI, in its argument stated that the laws and regulations established by the ACT under certain sections are statutory in nature. Also, it stated that since TDSAT is a body that has been established through the sections mentioned in TRAI, TDSAT holds no authority to take up matters which may be against any law mentioned in the TRAI or question the validity of legislation. However, TDSAT via an interim

²kingcenter.stanford.edu/sites/default/files/publications/372wp.pdf, Last Visited at 10 PM on 12th October, 2020.

order dated January 31, 2005, stated that it has authority over impugned subject-matters. It also challenged the powers of the TRAI by making a statement that no subordinate legislation can question the authority it holds by the provisions of the Act. It also held that every clause which falls under the regulation which makes an attempt to deprive the TDSAT from its jurisdiction, is bound to be ignored at all levels. The same was upheld by the Delhi High Court where it was later challenged.

2.2.Drawbacks in dispute resolution by TDSAT

There exist certain drawbacks in the dispute resolution by TDSAT. Although, the Tribunal has been praised time and again for serving well in the discharge of its mandate, yet it remains burdened with court-like processes/procedures that result in the dispute resolution process being a high-cost, tedious and time-consuming affair. Another point to be raised is its decision-making processes, & question if the straight-jacket adherence to judicial interpretation of issues stand a chance for modification wherein the intention of the policy for upholding and protecting competition as enshrined in the statutes can be allowed its due appreciation. Another aspect to take into account is the magnitude to which adhering to a formal process in handling the disputes serves the logic for establishment of a specialised body, entrusted with the responsibility to efficiently & objectively devise solutions in a speedy manner, meanwhile keeping the dynamics of the telecommunication situation in the country in mind.

When parties to a dispute follow court-like procedures, making written submissions, it imposes on them a formal process while solving the conflict, which often works against the desired speedy dispute resolution. By allowing them a greater amount of flexibility to reduce the formal court-like procedure and providing the option of ADR methods to settle disputes before turning to formal processes will help the sector. Another viewpoint is that establishment of the Tribunal having appellate jurisdiction over the regulator has resulted in the authority of the regulator to diminish & dilute. It has also caused setbacks in executing regulatory decisions. A way to tackle this problem would be to strengthen the institution of the regulator to adequately address competition matters in a fast-changing telecommunications sector. The way to achieve this scenario would be to lessen the appellate authority's role when dealing with issues that fall under the domain of the regulator.

Moreover, a pressing priority in the sector is properly dealing with the various consumer complaints. At present, according to the provisions of the TRAI Act, 1997, TDSAT doesn't have the authority to deal with individual consumers complaints, it can only handle complaints that are raised from a group of consumers. Individual consumers have to take up their grievances to the consumer protection redressal agencies (District Commission, State Commission & National Commission) under the Consumer Protection Act, 2019. The appointment of a Telecom Ombudsman will help address issues & complaints of individual consumers in relation to service providers, following an arrangement quite alike the U.K. and Australia's model of telecom ombudsman.

2.3. Other Dispute Resolution Mechanism for Telecom Disputes including proposal for ADR techniques:

2.3.1. Lok Adalat System

The system of Lok Adalat is an example of an alternative dispute resolution mechanism to exist in India. It has gained momentum in the country from being an informal dispute resolution mechanism working locally to becoming a recognized forum at the national level. Section 22B of the Legal Services Authorities Act, 1987 established "permanent Lok Adalats". Their jurisdiction extends over telecom services and entities amongst other public utility services. The decision of the forum is final and binding on the parties to the dispute, and a court of law can execute the award granted. Although their pecuniary jurisdiction has been raised to the limit of Rs. One Crore yet they lack the expertise and experience in the telecom sector which is pertinent for resolving huge disputes, which acts as a hindrance to their success in the dispute resolution of telecom cases.³

2.3.2. Telecom Ombudsman

An ombudsman refers to an official, who deals with complaints filed by private citizens usually, and tries to resolve the concerns & conflicts with zero or minimal friction and is generally appointed by the government body. It comes from a Swedish word which translates to "legal representative". TRAI came up with the proposal of setting a position for a telecom ombudsman back in 2017, which got clearance from the Telecom Commission in 2018. However, till date, no

³www.macmillankeck.pro/media/pdf/1a%20Dispute%20resolution%20in%20India's%20telecom%20sector.pdf, Last Visited at 8 PM on 11th October, 2002.

robust foundation has been laid in this front even after continuous reminders have been sent by TRAI to DoT. The Telecom Ombudsman will have the task of dealing with consumer grievances & complaints relating to the low & unsatisfactory quality of telephone services. For consumers, it will act as the third-level of authority, if the telecom service providers fail to hear and address the user's complaints. First authority to approach is the complaint center, telecom company, & then appellate authority i.e., the second-level authority. If these two authorities fail then the telecom ombudsman shall resolve the dispute, however, it is yet to be properly set-up in India but the post of the ombudsman is promising and can help the telecom sector in the long run if it becomes a part of the dispute resolution mechanism.⁴

2.4.ITU/World Bank Study of Dispute Resolution, 2004

The International Telecommunication Union (ITU)/ World Bank⁵ detailed in their dispute resolution study various suggestions to better and enhance the process of dispute resolution. Some of them are that higher synergy level should be developed amongst the ADR & telecom communities so as to leverage settlement of disputes ways from commercial sector, then policy makers/legislators and the regulators should have a better knowledge-sharing platform, an expanded view-point through actively partaking in national as well as international forums, creating an international database containing best methods/practices to adopt for dispute resolution including examples of creative procedures of dispute resolution, and encouraging and inviting universities & the related industries to participate in resolution of telecom disputes. Implementing a few and in time all of the recommendations could help better and improve the methods that are used at present to resolve disputes.

2.5.Proposal to include ADR Techniques for Resolving Disputes in Telecom Sector

Alternate Dispute Resolution (ADR) techniques include such dispute settlement methods that are substitutes to the formal processes. Court litigation and regulatory adjudication are methods of the official dispute resolution route. ADR forums in telecom would typically include arbitration, mediation, conciliation & a variety of other hybrid techniques and other creative approaches. There is a pressing need to promote ADR in telecom disputes in India as it would open

⁴Aashish Aryan, "Govt: DoT planning to set up Telecom Ombudsman", The Indian Express, Feb. 6, 2020.

⁵Dispute Resolution Telecommunications Sector- Current Practices and Future Directions, ITU-World Bank, Geneva, 2004.

communication between both the parties and help them reach an amicable resolution using an informal process. Adjudication or litigation process are adversarial in nature. The telecom sector requires speedy resolution of disputes because of its cordial matrix of relationships that exists amongst various players. The industry where technology progresses at a fast-pace, the regulator might fall short in terms of the information about these new advancements in technologies. Therefore, if parties to the dispute resolve the conflict themselves or with the help of some third party having required expertise in the area (ADR process). ADR techniques would reduce the workload of the regulator and tribunal that are overburdened with cases.

However, TDSAT's exclusive jurisdiction in this regard is preventing beneficial ADR techniques from being arranged by the parties. Witnessing TDSAT being over-encumbered with disputes calls for allowing & encouraging alternative forms of dispute resolution to shape up to bring in innovativeness and the parties handling their disputes in a better manner along with a speedy resolution and a fairly inexpensive process. So, it is time to reconsider if TDSAT's exclusive jurisdiction is in the best interest of all the constituents of the sector. TDSAT should hold their jurisdiction where major public interest is at stake as it is a trusted guardian, designed & mandated for the same to uphold public interest in disputes.

3. The ADR techniques have been mentioned below:

3.1.Arbitration:

Arbitration can be referred to as a quasi-judicial adjudicatory process, where the court or the parties on consensus decide upon the arbitrator(s) to decide on the conflict amongst the parties. The Arbitration and Conciliation (A&C) Act, 1996 contains various provisions that deal with arbitration such as the decision & procedure are controlled & governed by the said Act, and the award is binding on the parties and enforceable in law. However, this method is more cost-effective and time efficient and parties have the authority to decide the procedure to be followed for the proceedings which are held in private.

3.2.Negotiation:

It is an ADR technique of a consensual activity. The main attribute of this method is that it allows the parties to the dispute to mutually decide and arrive at an agreeable solution. Traditional negotiations do not generally involve any third-party facilitator. Negotiation makes

room for resolution of disputes at the lowest conflict level, avoiding adversarial procedures. Parties can enjoy the benefit of negotiation as it may give rise to a solution that is favourable to all parties to the dispute, which can go a long way to any ongoing business relations. However, it should be in good-faith and the dispute should resolve in a reasonable amount of time.

3.3. Mediation and Conciliation:

In the case of mediation, which is a consensual method, with the help of a neutral third-party facilitator the dispute is resolved. The mediator facilitates the communication between the parties and tries to meet the needs of all the parties so it is a win-win situation. Conciliation is quite similar to mediation, involving a more formal approach, in this process the third party plays a greater role, being actively involved to suggest solutions. There is more invention by the third party in conciliation as compared to mediation. Conciliation is governed by the A&C Act, 1996.

All these different techniques can be slowly incorporated to settle disputes in the telecom sector pertaining to commercial matters as they rely on mutual consent of the parties and cause minimum delay unlike in the case of litigation and are fairly inexpensive. A committee should be set up by the Government of India in this regard to give useful suggestions to further the goal of a speedier, cost-efficient system of dispute resolution in the telecom sector and for these methods to see the light of the day in this sector and according to the requirements of the sector, they could be improvised and a new statute or amendment in the existing legislation is required.⁶

4. International Recognition of Dispute Settlement Mechanisms in Telecom Sector

The regulatory boards in countries like the USA, the U.K, Canada and Malaysia, have proved to be a great example of having good governance in the telecom sector in respective countries. The Indian regulatory authority in telecom sector has been established based on the experiences of the above-mentioned countries, however Indian regulatory has proved to be unique by evolving its own mechanisms of dispute settlement. There is not much emphasis on the establishment of dispute settlement tribunals which are only focused on matters related to the telecom sector in countries like Australia and Malaysia. In Malaysia, the Minister sets up the Tribunal on an ad hoc basis and thus the independence of the Tribunal is compromised to certain extent. The

⁶www.legalservicesindia.com/article/224/ADR-Mechanism-in-India.html, Last Visited at 15th October, 2020.

MCMC⁷Act, 1998 has granted certain dominating rights to the Minister, authorizing him for appointment and dismissal of the Chairman and other members. Additionally, in countries like the USA and Canada, usually the controversial issues land in courts despite the fact that one can easily witness the endeavors being made by the regulatory authority in Canada to facilitate the mechanism of dispute settlement. In the U.K., Office of Communications (OFCOMs) elaborated recommendations in the dispute resolution sector combined with its accentuation on ADR strategies provide a sound methodology towards rapid resolution of disputes. The appeals process in several European nations consist of various levels that may ruin and cause delay in speedy decision-making mechanisms.⁸

5. Conclusion

In a rapidly advancing telecom environment, speed & efficiency should be the primary principles of dispute resolution. Both the appellate authority and the regulatory body will be able to become more credible & robust foundations in context of having an effective hand in dispute resolution if the characteristics of a truly independent authority having required powers of enforcement are provided in the statutes responsible for their establishment.

With the help of sufficient flexibility and maintaining transparency in the processes, the enforcement powers granted to the authority for dispute resolution if adequately applied is suitable to steer the course of telecommunications development in the right direction. The practice of ADR mechanisms in countries like U.K. and France, for dispute resolution before resorting to the regulator can go a long way in Indian context if tried properly, positively impacting the sector with reduced workload of TDSAT to a certain length & also bring a change in the culture of attempting to approach tribunals/courts at first instance to seek relief/remedies.

⁷Malaysian Communications and Multimedia Commission Act 1998.

⁸R.U.S Prasad, "Dispute Resolution Mechanism in the Telecom Sector: Relating International Practices to Indian Experience", kingcenter.stanford.edu/sites/default/files/publications/372wp.pdf, Last Visited at 7 PM on 10th October, 2020.