AN APPRAISAL OF THE LEGAL FRAMEWORK FOR DISPUTE RESOLUTION AND ENFORCEMENT IN THE TELECOMMUNICATION INDUSTRIES IN NIGERIA

By

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INTRODUCTION

The global telecommunications sector is in the midst of a transformation caused by privatization, liberalization, and technological change. These trends have dramatically changed the way the sector functions. The number of service providers has increased substantially, as has the range of services they offer. Old business models and commercial arrangements are being abandoned or bypassed while new ones emerge. An era characterized by regional telephone monopolies that provided "plain old telephone service" is yielding to an era characterized by multiple providers of information and communications technology (ICT) services using Internet protocol (IP), wireless, and broadband technologies. Some disputes **U. D. IKONI, Ph. D** Senior Lecturer, Department of Private and Public Law Faculty of Law, Benue State University, Makurdi-Nigeria are inevitable by-products of these changes, as new interests clash with traditional ones. Policy-makers and regulators are recognizing that effective dispute resolution is an increasingly important objective of telecommunications policy and regulation. Failure to resolve disputes quickly and effectively can:

a. Delay the introduction of new services and infrastructure;
b. Block or reduce the flow of capital from investors;
c. Limit competition, leading to higher pricing and lower service quality; and
d. Retard liberalization – and with it, general economic, social and technical development.

Ultimately, the test of successful dispute resolution – as with regulation generally – is its impact on investment, growth, and development in the sector. Successful dispute resolution is important for all countries that seek to facilitate the rapid diffusion of new communications infrastructure and ICT services. It is particularly crucial for Nigeria that has historically experienced a lack of investment and growth. Rapid and effective resolution of disputes is a key component in bridging the "digital divide". The experience in the industry so far indicates that existing regulatory and legal institutions are not always well equipped to resolve disputes efficiently and effectively. The lack of resources, expertise, and time often lead to delays or suboptimal results in resolving disputes. Policy-makers, regulators and courts, therefore, are adopting a range of alternative approaches to dispute resolution.

The objectives of this paper is, inter alia, to analyse the major traditional and alternative approaches to dispute resolution in telecommunication industries, with a view to providing policy-makers and regulators with a better base of understanding to make decisions on resolving different types of disputes. This paper also seeks to identify ways in which policy-makers can narrow the circumstances in which they must intervene to resolve disputes and how they can create an environment in which industry players have incentives to act in ways that obviate the need for overt regulatory intervention. Furthermore, the paper seeks to examine the various techniques to increase consensus, decrease the scope of the dispute resolution process, and encourage more negotiation-driven and cooperative conduct in the telecommunication industries sector. Finally, the paper seeks to examine the current state of dispute resolution under the Nigerian telecommunications law, and to compare our laws with those of other jurisdictions with a view to suggesting measures to harmonise our laws to conform to the contemporary trends in other jurisdictions of the world.

II. MEANING OF DISPUTE AND DISPUTE PROCESSES

At the outset, it is helpful to establish a working definition of the terms dispute and dispute process. Traditional definitions of dispute can be narrow. For example, "a dispute may be viewed as a class or kind of conflict which manifests itself in distinct, justiciable issues. It involves disagreement over issues capable of resolution by negotiation, mediation or third-party adjudication. The differences inherent in a dispute can usually be examined objectively, and a third party can take a view on the issues to assess the correctness of one side or the other."[1] Another example states that, "An 'actual' dispute will not exist until a claim is asserted by one party which is 'disputed' by the other..."[2] This paper relies on a broader notion of disputes that permits insights specific to a regulated industry. In such an industry, the relations and interests among private parties often affect other parties, with implications for public policy. Consequently, this paper does not limit its exploration to disputes occurring only where one party has filed

[1]. Brown and Marriot, <u>*ADR Principles & Practice*</u> 2nd edn. (London: Sweet & Maxwell, 1999) p. 2
[2]. Foskett, D., Q.C. in The Law and Practice of Compromise, quoted in Brown and Marriott, Ibid

a formal claim against another. It goes further, exploring situations where conflicting interests among parties are blocking sector development, even though no formal dispute process is under way. Moreover, in addition to examining how disputes play out among operators, this paper also considers the "vertical" elements of dispute resolution. These are the levels of the decision-making and review that start with "self-regulatory" or informal dispute-resolution efforts, then build up to regulatory agency decisions, then internal reviews of such decisions, and finally, judicial review by administrative courts and by other government authorities.

Dispute processes on the other hand, is the overall regulatory policy and legal procedures for the regulation of disputes between pairs of disputants. It includes not only the scope of the dispute and remedies available to the parties involved but also extend to related policy and market issues. In other words, dispute processes involve ways or processes that policy-makers can intervene to resolve disputes and how they can create an environment in which industry players have incentives to act in ways that obviate the need for overt regulatory intervention in dispute resolution.

III. TYPES OF DISPUTES IN THE TELECOMMUNICATIONS SECTOR

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.

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 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.[3] In recent years, for example, an increasing issue regarding mobile interconnection has been the often high rates charged by mobile

[3] . See section 97(2) Nigerian Communications Act (NCA), 2003

providers to terminate traffic on their networks. As a result, many regulators have made determinations that mobile providers have a monopoly over their networks and should be regulated. 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.[4]

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) "slamming";[5] (v) quality and terms of service; (vi) violation of privacy; and (vii) false or deceptive advertising.[6] To ensure effective resolution of consumer disputes, regulators are using a variety of mechanisms, ranging from requiring service providers and consumers to initially resolve disputes themselves (the case of the United States and Botswana); using ombudsmen type institutions (as the telecommunications industry Ombudsman in Australia and even employing the broadcast media (as is the case of the Nigerian "Consumer Parliament" evidences).

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

4. Ibid, section 99(1) & (2)

5. Slamming is the practice of changing a consumer's service provider without the consumer's authorization. In other words, slamming is when one service provider "steals" a customer from another service provider, without asking the customer.

6. Robert, R. Bruce, et.al., *Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions*, World Bank/International Telecommunication Union, October 2004. P. 40

private-sector interests. 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. 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 GATS and related documents.[7] Finally, radio frequency allocation and assignment disputes are dealt with internationally through mechanisms available through the International Telecommunications Union (ITU), particularly the Radio-communications Bureau (ITU-R). Domestically, disputes may arise from interference, licence conditions, and pricing.[8]

IV. APPROACHES TOWARDS DISPUTE RESOLUTION

Dispute resolution can be addressed from two separate approaches, namely through official and non-official mechanisms. Governmental authorities, statutory bodies and courts commonly discharge official functions in dispute resolution, their authority deriving principally from the constitutional, legislative and regulatory framework applicable to the telecommunications sector. Non-official dispute resolution – or alternative dispute resolution (ADR) – consists of mechanisms such as arbitration, mediation, and negotiation, where the individuals associated with these processes do not discharge any executive or judicial duties.

A well-resourced "official" sector, utilizing regulatory adjudication and the courts, is crucial to a successful dispute resolution environment. Alternative approaches, however, are often useful to deal with the lack of available regulatory or judicial resources, or where less formal techniques offer particular advantages.[9] Therefore, it is important to identify those circumstances in which the use of each mechanism is more appropriate.

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[7]. *See, e.g.*, Procedures carried out under the World Intellectual Property Organisation (WIPO) Arbitration and Mediation Centre, 2008. Available at: http://arbiter.wipo.int/center/index.html. Visited May 6th, 2010

[8]. See Available at: http://www.icann.org/udrp/#udrp. Visited on May 6th, 2010

[9]. Robert R. Bruce, et.al., op.cit, at p. viii.

In Nigeria both methods are provided for in the telecommunications statute. Section **73** of the Nigerian Communications Act, 2003 gave the Commission powers to resolve disputes between persons who are subject to the Act ("**the parties**") regarding any matter under the Act or its subsidiary legislation. According to section 76(1) of the Act, the Commission may resolve the dispute in such manner including but not limited to Alternative Dispute Resolution (ADR) processes and upon such terms and conditions as it may deem fit.

ADR mechanisms, such as arbitration and mediation, traditionally have been associated with solving private and commercial disputes, while regulatory adjudication has been understood as best suited for public policy issues. In the case of interconnection disputes in the United States and Jordan evidence, regulators are increasingly using arbitration tools, either informally or formally. Moreover, in light of the rapid changes in the telecommunications sector, countries such as Saudi Arabia have instituted highly flexible approaches to determine which mechanisms (*i.e.*, mediation, arbitration, or regulatory adjudication) to adopt for resolving specific disputes.[10] In deciding whether to accept a request for consensual resolution or to proceed by way of a rulemaking proceeding, the Saudi regulator must take into account: (i) whether the dispute will have regulatory or precedent-setting value, and whether a consensual proceeding likely will be accepted as an adequately authoritative precedent; (ii) whether the dispute raises policy issues that extend beyond the interests of the parties involved and that may require additional comment from other concerned parties before a final resolution may be made; and (iii) whether the dispute might have a material effect on persons who are not parties.[11]

From a different perspective, other countries, as is the case of the United Kingdom, take the position that ADR techniques can be employed where disputing parties have similar levels of market power, since in that case parties are more likely to negotiate solutions that meet their mutual or on-going needs. Similarly, in Nigeria, when the regulator receives an appeal from an operator involved in interconnection negotiations, the regulator must intervene in the negotiations if no agreement has been reached within 30 days of the commencement of negotiations. This requirement only

[10]. Ibid, at p. 49.
[11]. See Saudi Telecommunications By-law, 2009; Article 45.8.

applies, however, when at least one of the negotiating parties is a dominant operator.[12] Where none of the parties are dominant operators, the regulator may decline to intervene, even if a party requests it. In such cases, regulatory intervention is more often considered necessary where disparities of market power mean that one party effectively requires the protection of the official sector from abuse of process by the other.[13]

Thus, when designing and evaluating the role of the official sector in dispute resolution processes, the concern should be:

I. *Less* about rigid lines between official and non-official sectors, and
II. *More* about seeking the roles in which the official sector can best use its efforts and presence to assist in the speedy resolution of disputes – and in a manner consistent with regulatory policy, the rule of law, and due process.[14]

Note that due to differences in social, legal, and commercial traditions the approach for selecting a method of dispute resolution varies considerably between jurisdictions; even with regard to similar types of disputes. The following are certain elements to consider when making such a determination:

1. ***Drawing on "non-official" resources:*** The commercial world's extensive experience with arbitration and other ADR techniques can help policy-makers and regulators encourage the use of non-official dispute resolution approaches in a regulated industry. Commercial arbitration illustrates how regulators can keep control over important policy issues and also ensure the usefulness of their dispute resolution systems – while easing their workload burdens.

2. ***Quality control over official and non-official processes:*** The type of dispute resolution process that is chosen influences what role regulators and courts will play in dispute resolution. Regulatory adjudication and arbitration require court oversight of procedures, because the parties have relinquished control over the outcome to the adjudicator or arbitrator. Regulatory adjudication also may be

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[12]. See Regulation 17, Telecommunications Networks Interconnection Regulations, 2007 (Nigeria)
[13]. Robert, R. Bruce. et. al., at p. 65.
[14]. Ibid, at P. viii.

subject to various levels of "internal" agency and "external" court review for substantive appeal.[15] It is important, however, not to undermine the credibility or timeliness of regulatory adjudication through over-use of review procedures. The success of voluntary negotiated processes depends on their freedom for official review. Even where doubts exist about the efficacy of voluntary negotiations, regulators may be able to provide incentives for good faith engagement in negotiations instead of imposing substantive decisions.

3.***Confidence factors in relying on non-official approaches:*** There are several important factors in gauging whether non-official dispute resolution approaches are as mature and suitable as regulatory adjudication or court action in any given setting. These factors include how professional the arbitration and mediation boards are, how well developed the arbitration and mediation institutions are, and the effective use of the oversight procedures. This requirement re-enforced the provisions of section 76(2) of the Act which provide in part that the Commission, in carrying out its functions..., shall always be guided by the objective of establishing a sustained dispute resolution process that is fair, just, economical and effective and that shall not be bound by technicalities, legal form or rules of evidence and that shall at all times act according to the ethics of justice and the merits of each case.

IV. FORMS OR METHODS OF DISPUTE RESOLUTIONS

A. Regulatory Adjudication

Regulatory adjudication refers to the legal powers exercised by regulators pursuant to the provision of the law for the resolution of the disputes brought before them. Currently, regulatory adjudication is recognized as the cornerstone of dispute resolution in telecommunications sector. However, regulatory adjudication is a relatively new mechanism since until recently, with the exception of a few countries, regulatory and policy-making responsibilities were concentrated in a single governmental structure. With liberalization and the introduction of competition in the telecommunications market, these functions were separated and regulatory authorities were created and charged with responsibility for overseeing and regulating the telecommunications sector.

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[15] . See sections 86-88, NCA, 2003

In the United States, a country with long-developed administrative tradition, the Federal Communications Commission (FCC) interprets, coordinates, and adjudicates policy issues, as well as disputes arising out of them. The FCC's internal processes for dispute resolution include a final decision handed out by a Commissioner or a panel of Commissioners. Such decisions may be subject to internal review by the agency within a prescribed period, and can also be appealed before the U.S. Court of Appeals. In Canada, the Canadian Radio and Telecommunications Commission (CRTC) follows court-like dispute settlement procedures. An Industry Committee consisting of parties and experts also has been established to resolve most telecommunications issues. Recourse to the CRTC is taken only when consensus cannot be reached by the Committee. In the United Kingdom, Office of Communications (Ofcom) follows a methodology for dispute settlement that involves the placing of evidence into a complaint before initiating a formal investigation. Investigation into the complaint involves clear identification of a relevant obligation or abuse under the Competition Act and deadlines are given for settlement of a complaint or dispute.[16]

Under the Nigerian Communications Act, 2003, section 3 established a commission to be known as the Nigerian Communications Commission with responsibility for the regulation of the communications sector. However, before the Commission intervene, an attempt shall first be made by the parties to resolve any dispute between them through "negotiation" before the involvement of the Commission. And if one of the parties to the dispute has provided an undertaking that is relevant to the subject matter of the dispute and the Commission has registered the undertaking, the parties may adopt the conditions of the undertaking for the purposes of resolving the dispute.[17] In fact, section 75(1) of the Act forbids the Commission from intervening except a party to a dispute, in writing, notify the Commission of the dispute and the Commission may only resolve a dispute if it is notified in writing of the dispute and requested by either or both parties to intervene thereon. Sections 86-88 of the Act, allows for review of decisions made by the Commission.

[16]. Robert R. Bruce, et.al., at p. 65

[17]. See section 74(1)&(2), NCA, 2003

When effectively and efficiently applied, regulatory adjudication has these distinct advantages:

i. It can draw upon the legitimacy of the official sector, as well as the benefits of its enforcement mechanisms;

ii. A well-staffed regulatory agency can access staff resources with different expertise (*e.g.*, technical, economic, and legal) to provide input into decisions. Where a regulator lacks such internal expertise to analyse technical, economic, and legal issues, it may retain external consultants to supplement its analytical capabilities;[18]

iii. The adjudication process can give the public a channel to provide input into the decision-making process.

However, the potential drawbacks to regulatory adjudication can be significant, and thus warrant paying close attention to the alternative approaches of dispute resolution. Some of these disadvantages are the following:

i. It can result in lengthy and cumbersome procedures;

ii. Possibility of misuse of regulatory intervention by market-players, particularly incumbent operators, as part of a strategic response in order to hinder competitive conditions;

iii. Legislative mandates dealing with issues of sector development, such as convergence, can reduce the regulator's flexibility in confronting significant disputes and sector issues; and

iv. A tendency of regulatory bodies to fragment or compartmentalize decisions into separate proceedings, as regulatory adjudication is the response of a single regulatory body, based on a narrow jurisdictional mandate and limited enforcement powers, to individual claims defined by parties on specific legal grounds.

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18 . *See* Robert Bruce and Rory Macmillan, Botswana Mini-Case Study 2003, *Recent Experience in Interconnection Disputes*, ITU, *available at* http://www.itu.int/ITU-D/treg/Case_Studies/Disp-Resolution/Botswana.pdf.

A. Alternative Dispute Resolution(ADR)

Alternative Dispute Resolution (ADR) encompasses different processes and procedures directed at settling disputes by means other than litigation and administrative adjudication. ADR methods include arbitration and mediation, and several other hybrids and variations.[19] ADR is based on the general premise that, where possible, it is more beneficial for private parties to settle disputes by private process and negotiated agreement as opposed to contentious litigation or regulatory adjudication. These methods have the benefit of preserving and, in some cases even enhancing, business relations that otherwise may be negatively affected by an adversarial process. Moreover, ADR can aid in saving costs associated with litigation. ADR procedures may either take the place of formal adjudication or complement adjudication and litigation by producing settlements within those fields. Flexibility is thus another principal advantage of ADR, as it usually allows parties to address different kinds of disputes through different procedures and approaches.

These mechanisms also may serve to alleviate the burden on official institutions in charge of settling disputes, by redirecting many types of disputes away from traditional courts and regulatory authorities. In Europe, for instance, the EU Framework Directive explicitly contemplates that national regulatory authorities should encourage the use of ADR mechanisms, such as mediation, where they are available.[20] Pursuant to such initiatives, the Office of the Telecommunications Adjudicator was created in the United Kingdom to facilitate swift implementation of the processes necessary to enable competitors to gain access to the local loop. The Telecommunications Adjudicator also has the function of bringing all parties together to find prompt, mediated resolution of working-level implementation disputes. The scheme is a private contractual mechanism for dispute resolution agreed between the parties, and in this respect is similar to arbitration.[21]

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19 . See section 76, NCA, 2003
20 . See Article 20 (2) of the EU Framework Directive
21 . See the Office of Telecommunications Adjudicator website at http://www.offta.org.uk/.

ADR procedures fall into three primary categories: (i) negotiation; (ii) mediation and conciliation; and (iii) arbitration.[22]

Negotiation: Negotiation is the premise upon which all consensual ADR activity is based. It is a consensual process designed to allow parties to arrive at a mutually agreeable solution. Negotiations are usually held on a confidential basis and "without prejudice" to any legal recourse to which the parties may have a right. Negotiation differs from mediation because no third-party facilitator is usually involved. This provides additional flexibility because parties can generally schedule the process of negotiations on their own, avoiding adversarial processes present in other ADR mechanisms.

Mediation and Conciliation: Mediation is a consensual process involving a neutral third party whose role is to facilitate resolution of the dispute. Both regulators and private individuals not involved in the regulatory process may act as mediators.

In discharging its duties, the mediator must initially solicit the views of the parties on the nature of the dispute and its key issues. The objective here is to seek potential points of agreement between the parties and propose constructive "win-win" solutions. The mediator often serves as a neutral third party that conveys views of the dispute between the parties to facilitate communication, and potentially develop a direct negotiation. At the appropriate time in the mediation process, the mediator may be able to suggest potential solutions or views of the underlying issues to both sides. Mediation is best used to resolve interconnection disputes.

Conciliation is closely related to negotiation, but involves more formal procedures. Here, the parties do not meet together, as the conciliator assumes the role of an intermediary or liaison. The conciliator's primary function is to communicate each disputant's position to the other, relay settlement options, and sometimes suggest ways for settlement.

The United Nations has long encouraged conciliation and mediation to resolve disputes among states, and has recently recognized that mediation and arbitration are becoming common in commercial practice. On 19 November 2002, the United Nations General Assembly adopted a resolution

22. See NCC, Dispute Resolution Guidelines, 2004

encouraging all member states to give due consideration to enacting the Model Law on International Commercial Conciliation, which had been completed and adopted by the United Nations Commission on International Trade Law (UNCITRAL).

Mediation has many benefits. These include the following:

i. It may preserve long-term relationships upon which the telecommunications industry is based;

ii. Mediation costs are usually lower than adjudication or litigation;

iii. Parties can select a compatible mediator, usually without regulatory intervention;

iv. Mediation processes are more structured than negotiation (specific rules and procedures are available);

v. Professional organizations are available to assist;

vi. Mediation allows the selection of a mediator with specific technical experience on the issue;

vii. Mediation facilitates resolution without public adversarial processes; and

viii. In addition to regulatory support, the benefits of mediation have led to judicial support for established mediation services and institutions.[23]

Notwithstanding such benefits, mediation has certain drawbacks:

a. The success of this method depends on the willingness of the parties to work together in good faith; and

b. Mediation can also be subject to abuse by parties seeking to protract a dispute or obtain information that may be relevant at another stage of a dispute resolution process.

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[23]. Robert R. Bruce, et.al., at p. 15-16.

Various factors can contribute to the success of mediation:

i. The parties involved should be "willing" to arriving at an agreeable outcome;

ii. Mediators and the parties must be able to establish a successful rapport;

iii. While the parties have ultimate control over their participation in the process, the mediators' management of the discussion makes it more structured than negotiation;

iv. By diplomatic "reality checking" on the positions and assumptions of the parties, the mediator can enable parties to ease back from rigid, embedded, and unrealistic positions;

v. The mediator plays a critical role by focusing parties on their underlying interests rather than the abstract merits of their positions; and

vi. Good mediators demonstrate patience, insight, and psychological finesse to convince parties to modify their entrenched positions.[24]

Successful mediation in the regulatory context can depend on the role of regulatory officials. Involving regulatory staff as mediators, or having a neutral mediator report to the regulator, can discourage disputing parties from taking unreasonable positions during the mediation process. In some cases, however, involvement of regulatory staff may compromise the confidentiality of the dispute resolution process. Such confidentiality is a key element in the success of mediation because parties may wish to avoid potentially self-damaging consequences of changing their positions on important regulatory issues. In these cases, it may be preferable to use an outside neutral mediator, who can be trusted by both parties to maintain the confidentiality of the mediation process.[25]

Arbitration: Arbitration is a dispute resolution method that takes the place of conventional litigation. Through this consensual process, parties agree to submit a dispute to a neutral third party arbitrator or panel of arbitrators for

[24]. See NCC Dispute Resolution Guidelines, September, 2004
[25]. Ibid, see chapter 3 on mediation

resolution. The commitment to arbitrate may arise at the outset of commercial agreements through arbitration clauses that bind parties to seek arbitration for future disputes or it may derive from legal instruments or international agreements. Arbitration may also be chosen as an alternative to litigation or regulatory adjudication when a dispute arises. Note that arbitration are of two kinds, namely voluntary and compulsory arbitration. If voluntary as in Nigeria appeal can lie to a higher body but if compulsory it is final and binding. Arbitration is of particular importance in the international context, since arbitral awards are enforceable in a large number of different countries under the provisions of the New York Convention of 1958 on the Recognition and Enforcement of Arbitral Agreements and Awards.[26]

Arbitration has several advantages. First, since it is generally a private or non-official procedure, it can better assure privacy and secrecy, protecting against disclosure of a party's confidential business information. Parties can agree on the confidentiality of the information and documents disclosed during arbitration proceedings. In addition, the fear of a negative precedent may be reduced due to the private nature of ADR mechanisms. The flexibility of ADR mechanisms allows parties to combine arbitration with informal negotiations or mediation, thus resolving their dispute in a manner similar to an assisted negotiation. This helps foster a continuing working relationship which is valuable if the parties' dealings require ongoing interaction.

Arbitrations can sometimes take less time than conventional litigation or regulatory adjudication because of several factors, including the following:

i. ability to design and schedule the steps needed at an early stage of the proceedings;

ii. ability to reduce steps that are otherwise mandatory in conventional litigation; and

iii. increased availability and flexibility of arbitrators.

[26] *.Available at*
http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html.

From industry's perspective, the potential shorter timeframe offers commercial advantages, including reduced interference with business objectives. In the case of international arbitration, a considerable advantage is the availability of more neutral forums for adjudicators than parties would find in either party's national courts.[27]

Among some of the potential drawbacks of arbitration are the following:

i. Arbitration is an essentially adversarial process, thus when used in isolation, it generally does not create "win-win" solutions or improve relationships;

ii. Arbitration may be more expensive than litigation when the issues in dispute are complex and a considerable amount of time is required to hear the dispute; and

iii. Arbitration proceedings cannot be consolidated into one action without the consent of all the parties, thus they create a risk of contradictory decisions on closely related issues.

Although arbitration as a dispute resolution tool is generally agreed upon by the parties involved in a specific contractual relation, in certain instances arbitration is compulsory or encouraged either by regulatory policy or legislation. For example, in certain countries internal regulation require interconnection disputes to be resolved through arbitration. Such is the case in Brazil, where disputes pertaining to the application and interpretation of the regulations during interconnection contract negotiations must be resolved by Anatel through arbitration, which is conducted by an Arbitration Council composed of three members appointed by the President of Anatel. The arbitration process begins when a party submits a petition to the President of the Council. The petitioning party then must submit all relevant information and documentation within the next 10 days. The Council is required to arbitrate the interconnection conditions within 15 days.[28]

In some countries, the regulatory framework adopts a more flexible approach and allows disputants to select the type of dispute resolution

[27]. Robert R. Bruce, et.al., at p. 18
[28]. Ibid, at p. 34

method. This is the case of interconnection dispute resolution in Jordan, where after a dispute continues 20 working days after the parties have begun negotiating a solution, the parties may either: (i) ask the regulator to intervene; or (ii) seek the assistance of an arbitrator. The consent of both parties is necessary to send a dispute to arbitration, while a dispute may be referred to the regulator for resolution on the request of only one party. The Jordanian interconnection dispute resolution process also explicitly provides that referring a dispute to arbitration, or to the regulator for resolution, does not prejudice the rights of the parties to seek remedies through the courts.[29]

In addition, arbitration is also used in the context of consumer disputes in the telecommunications sector. For example, some privately-run ADR bodies have created specific programs resolving such disputes. This is the case of the The American Arbitration Association (AAA) Wireless Industry Arbitration Rules.[30]

Numerous issues arise out of the use of arbitration mechanisms in the telecommunications regulatory context, including: (i) the role of the regulatory authority in the arbitration process; (ii) whether the arbitrators will be regulatory officials or independent persons approved or appointed by the regulatory authority; and (iii) whether the results of the arbitration proceeding will be subject to public comment and ultimately approved by the regulatory authority.

Because of this, the use of arbitration techniques and tools in the telecommunications sector requires addressing several important public policy concerns such as:

i. potential limitations in the scope of proceedings (*i.e.*, dealing with the precedent-related aspects of a dispute or with implications for related issues);

ii. potential concerns about the enforceability of proceedings and about initiatives of the regulator to protect the integrity of its own jurisdiction at the expense of the credibility of the arbitration process;

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29 . Ibid, at p. 36.

30 . Ibid, at p. 20-21

iii. concerns about the expertise and experience of the arbitrator(s);

iv. concerns about the potential for conducting protracted proceedings in a quasi-judicial context without taking full advantage of opportunities for procedural streamlining;

v. concerns about confidentiality-related considerations versus the interest in transparency that is usually characteristic of public decision-making;

vi. concerns about the legitimacy of a private dispute resolution process as a venue for resolution of issues affecting public policy and government interests;

vii. concerns about costs (which can be similar to concerns about litigation); and

viii. concerns with respect to a party's limited rights of appeal.[31]

Where these concerns are successfully addressed, it may be possible to structure credible, efficient, and effective alternatives to regulatory agency adjudication through arbitration, thus possibly improving the overall quality of dispute resolution in the telecommunications sector.

A. Adjudication

Adjudication here refers to determination of dispute by the court of law. The Nigeria Communications Commission (NCC) to the exclusion of any other body regulates the telecommunications industry in Nigeria however, the Courts in Nigeria are constitutionally empowered to carry out judicial review of administrative actions of the Commission to ensure that they comply with the trite principle of public law that a statutory body while performing its statutory or administrative duty is enjoined to observe the rules of natural justice and is therefore subject to judicial review of its action.[32] The Act in section 138 therefore, gave the Federal High Court the exclusive jurisdiction over all matters, suits and cases howsoever arising out of or pursuant to or consequent upon the Act or its subsidiary legislation.

[31] . Ibid, at p. 21-22

[32] See W A.E.C v. Mbamadu (1992) 3 NWLR (Pt. 230) 481 at 496

The right to go to court is in the form of an application for judicial review of the Commission's decision or other action. Thus by section 88(1) of the Act, an aggrieved person may appeal to the Court for a judicial review of the Commission's decision or other action. In the case of **Moto-phone limited V. NCC & Fed. Min. of Communications,**[33] the Applicant brought an application before the Federal High Court Abuja, for an order of judicial review of NCC's action in withdrawing its Private Network Link license (PNL). The Court entered judgement in favour of the applicant.

Note however that the decision or direction of the Commission that is the subject matter of an application for judicial review shall subsist and remain binding and valid until it is expressly reversed in a final judgement or order of the Court.[34] Under section 88(3) of the Act, a person shall not apply to the Court for a judicial review unless that person has first exhausted all other remedies provided under the Act. Thus in **MTN V. NCC,**[35] the commission opposed an action brought by the applicant challenging its intervention to fix interconnect rates for all telecommunications operators on the grounds that the applicant had failed to exhaust the internal mechanisms for dispute resolution under the NCA before proceeding to court. The commission insisted that the import of section 88(3) is that no action shall lie at the suit of any person without first complying with sections 86, 87 and 88 in its entirety. The court held that *"It is settled law that where a statute creates a right to which a special procedure for remedy is attached, resort cannot be had to any other procedure or remedy."*

4. ENFORCEMENT OF DISPUTE RESOLUTION DECISIONS

One of the main attributes of effective regulation is the power to enforce compliance with sector policy, laws and regulatory decisions, including dispute resolution decisions. In all countries, most regulators have enforcement power. The differences in market and regulatory maturity, as well as legal and judicial practices, affect the enforcement practices and

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[33]. Unreported Federal High Court Suit No. FHC/ABJ.M/230/2004
[34]. See section 88(2) NCA, 2003
[35]. Unreported Suit Appeal No. CA/A/25/2004

procedures of individual countries. However, it is generally agreed that an effective enforcement system is essential in any economy in order to give effect to those rules necessary for maintaining growth, stability, development and as well as, deterring wrongdoings, for maximizing social and corporate welfare.[36] Generally, an effective enforcement system should be:

a) *fast* – enforcement decisions must be made quickly, decisively, and clearly to reduce uncertainty in the market and deter future violations;
b) *firm* - penalties must be severe enough to deter violations;
c) *fair* – the enforcement system should be perceived as fair and transparent, and decisions for enforcement action must be based on objective facts and evidence and made publicly available; and
d) *flexible* – the regulator should have other means aside from formal litigation or regulatory adjudication, such as alternative dispute resolution, to resolve complaints and disputes, as well as a wide variety of enforcement tools to ensure that the severity of the punishment matches the severity of the violation.[37]

Additionally, in order for the regulator to enforce its rules effectively, an enforcement regime should include the following minimum attributes:

i. Adequate resources for carrying out enforcement activities;
ii. An efficient mechanism for dealing with complaints of non-compliance with rules and regulations;
iii. A regulator with the authority to conduct investigations and enforce laws, rules, regulations, and decisions;
iv. Transparent procedures for investigations, judgment criteria, sanctions and appeals, as well as options for dispute resolution; and
v. An appeal mechanism to appeal a decision to a higher level, whether within the regulatory body or to the court system.[38]

[36] . Domestic Enforcement of Telecommunications Laws: Guidelines for the International Community – Report on ITU-D Question 18/1, 22 September 2005, at 4.

[37] . Lima Declaration, adopted in the Sixth APEC Ministerial Meeting on the Telecommunications and Information Industry (Telmin6), June 2005, at Annex C – Compliance and Enforcement Principles, *available at* http://www.apecsec.org.sg/. Visited on May 6th , 2010

[38] . Ibid; *see also Effective Compliance and Enforcement Guidelines and Practices*, APEC Telecommunications and Information Working Group, 31st Meeting, Document no. Telwg 31/LSG14, April 2005, at 5, *available at* http://www.apectelwg.org/. Visited on May 6th , 2010

Numerous regulators have developed detailed procedures to facilitate and verify compliance of the telecommunications legal framework. Such procedures are generally based on the powers given to regulators under their respective telecommunications laws and related implementing regulations. For example, in Nigeria, the power of the Commission to make regulations and guidelines has been conferred by Sections 4(1)(i) and 70 of Act. The need for enforcement regulations include: (i) to enforce decisions, determination, directions, rulings; (ii) to enforce provisions of the Act, Regulations and Licenses; (iii) to generally give full force and effect to the provisions of the Act with a view to: ensure that the performance of the functions of the Commission is not impeded and to harness the gains of market liberalization. In the Uganda Communications Commission (UCC) has authority under the Uganda Communications Act, licence provisions and UCC regulations to receive, investigate and act on complaints, and to impose fines for violations. The UCC has the power to appoint inspectors to verify compliance with the Uganda Communications Act, and to criminally prosecute offenses pursuant to permission from the Uganda Director of Public Prosecutions. In the United States, the Communications Act of 1934, as amended, gives the FCC broad authority to conduct investigations and take enforcement action.[39] Other regulators, such as the Tanzania Communications Regulatory Authority have included provisions in the licence specifying the power of the regulator to investigate breaches of the terms of the licence or violation of national laws. The Tanzania Communications Regulatory Authority may initiate investigations where the licensee fails to comply with installation and service requirements, or fails to provide information to the TCRA or when there has been a partial or total interruption of services for a continuous period of time.[40] Clear and published enforcement procedures are needed to ensure transparency and accountability, for example, that sanctions are issued after adequate investigation, and that the accused party is provided with proper notice of the alleged violation and an opportunity for defense. Transparency also facilitates and encourages voluntary compliance with rules and regulations,

[39] . See Domestic Enforcement of Telecommunications Laws: Guidelines for the International Community – Report on ITU-D Question 18/1, Section I, 22 September 2005.
[40] . See Four Steps to Enforcement, contribution from Tanzania to ITU-D, Question 18/1, 19 September 2002.

minimizing the need for intervention by the regulator and reducing regulatory costs for the government and industry players.[41]

To fully exercise their enforcement powers, regulators first must have the necessary organizational infrastructure and resources to support their activities. Enforcement activities require the regulator to have: (i) a sufficient number of skilled staff responsible for monitoring compliance and conducting investigations; (ii) adequate technical capacity such as spectrum management and radio monitoring systems; and (iii) the necessary funds. Regulators often devote a significant amount of their financial resources to support enforcement activities. For example, Anatel in Brazil, spends almost half of its financial and human resources on monitoring and enforcement activities.[42] In the United States, approximately 20 per cent of the FCC's staff works on enforcement issues.[43] In Lithuania, in 2003, approximately 56 out of the 135 employees at the Communications Regulatory Authority (CRA) staff were involved in enforcement work.[44] For new regulators, the resources required for enforcement purposes are sometimes underestimated and require modification. In Uganda, for example, only one person was initially responsible for enforcement. Between 2002 and 2004, the regulator installed a spectrum management system for monitoring spectrum usage and hired engineers and other trained professionals to supplement its staff in undertaking enforcement activities.[45]

Regulators, however, must not only have sufficient staff for enforcement, they also need staff with the proper authority and training to perform monitoring and enforcement duties, such as conducting inspections, searches and seizures, inquiries, and requesting the cooperation of police or judicial authorities as necessary. Many regulators have given broad powers to their officers allowing them to perform their enforcement functions appropriately. In carrying out its monitoring and enforcement duties and all other functions ancillary thereto the Nigerian Communications Commission

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41. See Effective Compliance and Enforcement Guidelines and Practices, APEC Telecommunications and Information Working Group, 31st Meeting, Document no. Telwg31/LSG14, April 2005, at 4-5.

42. International Telecommunication Union, Trends in Telecommunication Reform 2002: Effective Regulation, 2002, at 46.

43. Domestic Enforcement of Telecommunications Law: Guidelines for the International Community – Report on ITU-D Question 18/1, International Telecommunication Union, Telecommunication Development Bureau. 22 September 2005, at 43.

44. Contribution from Lithuania to ITU-D Question 18/1, 10 March 2003 at p. 2

45. See Addendum to Uganda's Contribution on the Enforcement of Laws, Rules and Regulations by National Regulatory Authorities, Uganda's contribution to ITU-D Question 18/, 12 January 2004.

shall exercise and rely and found upon relevant provisions of the Act and, in particular but without any limitation whatsoever, the provisions on its powers, processes and procedures and all other matters ancillary thereto; and may enlist and rely on the assistance of law enforcement agencies and other relevant departments, ministries and agencies of the Federal Government of Nigeria.[46] In Jordan, employees of the Telecommunications Regulatory Commission (TRC) are empowered under Articles 62 to 64 of the Telecommunications Act to act as "judicial police officers" when authorized to conduct searches and seizure of any unlicensed or illegal telecommunications equipment.[47] In Singapore, the Telecommunications Act grants the Infocomm Development Authority (IDA) and its officers the power to require information, have full and free access to all buildings and documents and to inspect, copy and take possession of such documents or equipment, to arrest and search without warrant in respect of certain offenses, and to compound offenses. Furthermore, any person who obstructs IDA officers in the execution of their duties is guilty of an offense.[48]

However, due to the intrusiveness of these investigatory powers, in some countries regulatory officials must sometimes obtain judicial warrants before exercising their search and seizure powers. In Jordan, TRC officers must obtain a warrant from the Public Prosecutor before entering private residences.[49] In Nigeria, officials and inspectors authorized by the NCC must obtain a warrant from a magistrate or judge before seizing, detaining or sealing off any building or premises when carrying out an investigation.[50]

Enforcement Procedure: Enforcement procedures generally include the following stages: (i) initiating enforcement procedures and investigations; (ii) providing notice of the alleged violation; (ii) providing an opportunity to respond; (iii) issuing interim decisions or orders; (iv) imposing sanctions; and (v) providing opportunity for appeals.

(a) Initiating the process: There are several ways that a regulator can become aware of an alleged breach or violation of laws and regulations – regulator initiated investigations, consumer complaints, or operator complaints. A regulator-initiated investigation can be started by the

[46]. See Regulation 4(b) and(d) of Nigerian Communications Commission Enforcement Regulations, 2004
[47]. Jordan, Telecommunications Law No. 13, as amended (Telecommunications Law of 1995), Articles 62-64.
[48]. Singapore Telecommunication Act of 1999, Part VIII.
[49]Telecommunications Law No. 13, as amended (Telecommunications Law of 1995), Article 62.
[50]. Enforcement Regulations 2004, issued pursuant to the Nigerian Communications Act 2003,

regulator for various reasons. For example, routine inspection of licensees' premises may reveal a violation, or a violation can be identified when objections are filed to licence applications. Some licensees also may voluntarily report their violations (*i.e.*, as part of industry self-regulation). In many countries, regulators have the authority to inspect facilities and equipment, and to request the submission of specific information or documentation to ensure compliance with legislation and licence conditions. In the United States, for example, the FCC can request information directly from a licensee through a letter of inquiry or through a legal order, or court-issued subpoena.[51] Many regulators also have fixed and/or mobile spectrum monitoring systems to monitor and enforce compliance with spectrum usage and non-interference requirements. In Hong Kong (SAR), OFTA also proactively gathers market information through monitoring media reports, advertisements, and sales literatures.[52]

A second mechanism for regulators to become aware of a possible violation is through the receipt of consumer complaints, usually submitted as "informal complaints" via telephone calls, letters or e-mails in order to allow for ease and simplicity in the filing of consumer complaints. In Brazil, consumers can submit complaints directly to Anatel, but also have the option of submitting complaints via Anatel's toll-free call centers.[53] Although in many fully liberalized telecommunications markets the operators are given primary responsibility for addressing consumer complaints, almost all regulators have some vehicle for consumer complaints, allowing consumers another avenue of redress for complaints that are not resolved directly with the operators.[54] Furthermore, operators are less likely to ignore a consumer complaint knowing that the regulator also may pursue the matter on its own motion. The level of complaints received against a particular operator or service provider also provides the regulator with a good indication on whether to undertake enforcement action.

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51 . See Enforcement of Telecom Laws and Regulation in the United States, contribution from the United States to ITU-D Question 18/1, 30 August 2002, at 9-10.
52 . Enforcement and Dispute Resolution under the Regulatory Framework in Hong Kong (SAR) for the Telecommunications Sector, presentation by M H Au, Deputy Director General of OFTA, to the Asia-Pacific Forum on Telecommunications Policy and Regulation, 17 May 2002.
53 . See Central de Atendimento da Anatel volta a funcionar, Anatel press release, 6 September 2005, available at http://www.anatel.gov.br/. Visited on May 6th , 2010
54 . See Know More About how OFTA Handles your Complaint against a Telecommunications Operator, OFTA, available athttp://www.ofta.gov.hk/en/enq_help/complaints.html. visited on May 6th , 2010

In addition to consumer complaints, operators and service providers often file complaints with the regulator seeking enforcement action. These complaints often take the form of "formal complaints" and are similar to a lawsuit in the information it requires and in the fact that complainants can also pursue individual relief. Typically, a formal complaint is submitted in writing, and requires, in addition to the name, contact details of the complaining party and allegations of the violation, that the complaining party cite the specific provisions of the law or regulation that is contravened, provide supporting evidence of the allegations made, and submit a signed statement that the facts alleged are true and whether any steps were taken to address the complaint with the party against whom enforcement is sought.

To encourage the timely filing of complaints, some regulators have included a statute of limitations within which a complaint can be brought requesting enforcement action. For example, in Singapore, the IDA will not initiate any enforcement action if more than two years have lapsed since the date of occurrence of the action that constitutes the alleged offense.[55] In France, the Telecommunications Act of 1996 mandates that "matters dating back more than three years may not be referred to the telecommunications regulatory authority if no action has been taken in view of an inquiry, verification or penalty."[56]

(b) Due process consideration: The enforcement procedure generally provides for a certain degree of due process before sanctions are issued. The regulator usually provides notice of the alleged violation after it receives a complaint or before it undertakes an investigation on its own motion and allows an adequate time period for a party to provide a response or defence. Generally, the notice of alleged violation notifies the parties that a complaint has been filed, specifies the provisions of legislation that have allegedly been breached, and provides details of the regulator's intended actions. Notices may also contain instructions on how the respondent may remedy the situation or provide instructions on how it may present its defence. In the event that an enforcement action is pursuant to a complaint, a copy of the complaint submitted to the regulator is usually sent to the respondent.

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55 . Singapore, Code of Practice for Competition in the Provision of Telecommunication Services 2005 ("Telecom Competition Code"), Section 11.4.6, 4 March 2005.

56 . France, Telecommunications Act of 1996, Art. L. 36-11(3).

Typically, respondents are given an opportunity to file a response to the allegations in the complaint, and regulators consider the response before making a final determination on sanctions. For example, the Malaysian Communications and Multimedia Commission (MCMC) will not make a finding adverse to a complainant or respondent in an investigation unless the parties are given a minimum of 30 days to make submissions in their defence.[57] In Brazil, Anatel gives the respondent 15 days to present its defence. In the United Kingdom, Ofcom will inform the complainant within 15 days whether it intends to open an investigation into the complaint, and the respondent is allowed 10 days to respond to Ofcom's notice of investigation.[58]

(c) Interim measures: During the course of conducting investigations, some regulators including the FCC in the United States, the IDA in Singapore, and Ofcom in the United Kingdom also have authority to impose interim measures to protect the public interest and prevent any serious or immediate harm that may result from the alleged violation. For example, the IDA has authority under the Telecom Competition Code to issue an interim cease and desist order at any time during an enforcement proceeding if it concludes that: (i) there is prima facie evidence if a contravention; (ii) continuation of the contravention is likely to cause serious harm to other licensees, end users or the general public; (iii) the potential anticompetitive harm from allowing the licensee to continue its conduct outweighs the burden on the licensee; or (iv) issuance of the order is in the public interest.

(d) Sanctions: Regulators should have a variety of sanctioning tools to enforce compliance, and to ensure that the severity of the sanction matches the severity of the violation. When determining the appropriate sanction to impose, regulators should consider aggravating and mitigating factors such as the severity of the violation, the resulting harm to users and service provision, the benefits that the offender derived from the violation, prior violations, repetition of violations, early admission of the violation, cooperation or refusal to cooperate with the investigation, and the economic and financial situation of the offender.

57 . Malaysia Communications and Multimedia Commission Act of 1998, Acts 588 and 589.

58 . Ofcom, Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions under the EU Directives, July 2004, available at http://www.ofcom.org.uk/bulletins/eu_directives/guidelines.pdf visited on May 6th, 2010

Almost all regulators impose monetary sanctions, or fines. The variety of sanctions available to a regulator may be constrained by the limits on the regulator's authority, in particular with regard to the ability to issue penal (criminal) sanctions. In some countries such as India,[59] and the United States,[60] the telecommunications legislation allows for criminal sanctions, and the regulators have the authority to impose prison sentences or refer violations for criminal prosecution to the courts or the proper authorities. Other sanctions used for enforcement include issuance of warnings, remedial orders or specific directions to do or refrain from doing specific activities, public apologies, seizure of illegal equipment, and suspension or revocation of licences.

(e) Appeals: To ensure that an enforcement system is fair, parties affected by a dispute resolution or enforcement decision should be able to seek an appeal of the initial decision to a higher level, even after the sanction has been issued. Appeals can be filed within the regulatory body to the next level in the hierarchy, or to outside bodies such as courts or an appropriate Ministry. In Singapore, parties appealing an IDA decision have 14 days to request the IDA to reconsider its decision or direction, or appeal to the Minister within 14 days of the IDA's decision on reconsideration.[61] Some regulators, such as the MCMC in Malaysia, also may require parties to first exhaust all other remedies available with the regulator before seeking judicial review.[62] Also in Nigeria the Act in section 88(1) allows an aggrieved person to appeal to the Court for a judicial review of the Commission's decision or other action. However, by section 88(3), of the Act, a person shall not apply to the Court for a judicial review unless that person has first exhausted all other remedies provided under the Act. In **MTN .v. NCC,**[63] the commission opposed an action brought by the applicant challenging its intervention to fix interconnect rates for all telecommunications operators on the grounds that the applicant had failed to exhaust the internal mechanisms for dispute resolution under the NCA before proceeding to court. The commission insisted that the import of section 88(3) is that no action shall lie at the suit of any person without first

[59] . ITU World Communication Regulatory Database 2005, Survey on Enforcement on licensees.
[60] . *Enforcement of Telecom Laws and Regulation in the United States*, contribution from the United States to ITU-D Question 18/1, 30 August 2002, at 8.
[61] . Singapore, Code of Practice for Competition in the Provision of Telecommunication Services 2005, Section 11.9.
[62] . Malaysia, Communications and Multimedia Act 1998, Section 121.
[63] . Supra

complying with sections 86, 87 and 88 in its entirety. The court held that "*It is settled law that where a statute creates a right to which a special procedure for remedy is attached, resort cannot be had to any other procedure or remedy.*" Consequently, most disputes in the industry especially consumer related disputes don't get to the Courts. A few operators' and some consumer related disputes have however been heard in Court, but none of the cases has attracted a landmark judicial intervention or at best are still pending, hence there is a limited body of local case law material on telecommunications dispute resolution. The judiciary in Nigeria has taken a very cautious approach to intervention in the work of the commission against the backdrop of the fact that telecommunications regulation is a relatively nascent field and certain key aspects of regulation may not accord with ordinary judicial logic, but upon deep reflection the inherent regulatory logic may come to fore.

The appeal procedure, however, should not be so extensive as to diminish the effectiveness of the enforcement decision. To this effect, many countries prohibit the parties from raising new arguments during an appeal process. New Zealand, for example, limits appeals of the regulator's decisions to questions of law.[64] Generally, appeals procedures do not impede the sanction entering into effect, although in many countries whether an enforcement or dispute decision is stayed or remains in force depends on the particular case.

Industry Self-regulation: As a complement to an enforcement regime some regulators are encouraging industry self-regulation by requiring the use of alternative dispute resolution to resolve disputes. Some regulators particularly in more liberalized and competitive economies, are also engaging in more light-handed regulation and encouraging voluntary compliance with industry codes and standards to minimize the need for regulatory intervention.[65] For example, in Malaysia, the MCMC is expressly required under the Malaysian Communications and Multimedia Commission Act to promote and encourage industry self-regulation. The MCMC has acted accordingly by establishing industry self-regulatory bodies, such as the Consumer Forum, Content Forum and Technical

[64]. New Zealand, Telecommunications Act 2001, Law No. 130, Article 60, 19 December, 2001.

[65]. Domestic Enforcement of Telecommunications Law: Guidelines for the International Community – Report on ITU-D Question 18/1, International Telecommunication Union, Telecommunication Development Bureau, 22 September 2005, at 17-18.

Standards Forum, composed of industry and consumer representatives working together to produce voluntary industry codes.[66] Such voluntary compliance frameworks are not substitutes for regulatory enforcement, as the regulator still may be required to intervene and enforce compliance where parties fail to comply with voluntary rules and where the interests of consumers and competition in the sector are adversely affected.[67] In Nigeria, the Commission has come up with Consumer Parliament to promote and encourage industry self-regulation.

4. CHALLENGES OF EFFECTIVE AND EFFICIENT DISPUTE RESOLUTION

The development of effective and efficient dispute resolution is an important policy goal in the telecommunications sector in Nigeria. But there are numerous challenges in reaching this goal.

1. Increasing Complexity: In recent years, the challenges of sectoral dispute resolution have become increasingly complex. The causes include: (i)Liberalization and rapid transformation of an increasingly wide range of telecommunications markets; (ii)Emergence of a multiplicity of new players in existing and new telecommunications markets, as well as the financial failure of many new players; (iii)Rapid technological change, particularly in wireless and Internet-related markets, including VoIP-related services; (iv)Increasing technical complexity of telecommunications services, particularly spectrum and interconnection-based services; (v)A sector-wide financial crisis that has undermined operators' abilities to roll out new services, sometimes resulting in increasingly aggressive commercial behavior; (vi)Asymmetry of market power, sometimes complicated by government ownership in dominant service providers and potentially conflicted regulatory authorities; (vii)"Gaming" (i.e. strategic abuse) of regulatory processes to gain market advantage, by both new entrants and incumbents; and (viii)Inadequate or insufficiently detailed regulations or license conditions on major issues such as interconnection charges, the scope of licensed services, and spectrum use.

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[66] . Malaysian Communications and Multimedia Commission Act 1998, Act 589, Section 16 (g). *See also* Ann Buckingham, Camilla Bustani, David Satola, and Tim Schwarz, *Telecommunications Reform in Developing Countries*, in Telecommunications Law and Regulation (Ian Walden and John Angel, eds., 2005), at 621.

[67] . *See Effective Compliance and Enforcement Guidelines and Practices*, APEC Telecommunications and Information Working Group, 31st Meeting, Document no. Telwg31/LSG14, April 2005, at 5.

2. Rapid Change from New Technologies: In addition to complexity, the sector is experiencing rapid change. New technologies and services are changing business models and value chains radically, affecting financing and market structures. The impact of IP and computer-related technologies, as well as the increasing dissemination of broadband services, are challenging competitive relationships and the financial dynamics of today's telecommunications sector. The Japanese market illustrates how new ISP-based competitors leasing broadband capacity from incumbent operators can make inroads in the traditional telephone service markets of incumbents. It will become increasingly important for regulators around the world to understand the new dynamics of what Japanese policy-makers refer to as "IP age" telecommunications regulatory challenges. As the impact of IP technology on industry structures increases, approaches to regulation also will have to become more flexible and better modelled on industry and consensus driven approaches to regulation. The lack of infrastructure to meet these new technologies in Nigeria is compounding the problems.

3. The Increasing Importance of Dispute Resolution: In addition to increased complexity and the rapidity of market change, there is more at stake in telecommunications sector dispute resolution than ever before. Policy-makers and regulators are increasingly realizing that dispute resolution procedures are not merely an arcane concern of legal specialists but have a central strategic significance for sector development. It is widely recognized that failure to resolve disputes quickly and optimally can: (i) Block or reduce the flow of capital from the financial community into the telecommunications sector; (ii) Delay the introduction of new services and infrastructure; (iii) Result in a lack of competition, higher pricing, and lower quality of service; and (iv) Retard sectoral liberalization, as well as the general economic and technical development of the sector. The importance of these issues is as relevant for developing markets like Nigeria. Indeed, making infrastructure and services available to massive unserved segments of the Nigeria's population depends on attracting and deploying capital without the hindrances of prolonged, unpredictable sector disputes.

4. Innovative Challenges: With more at stake in an increasingly complex sector, there is a greater focus today on concerns about the transparency, predictability, and speed of decision-making. The intensified speed of technological and market change is requiring faster-paced decision-making in disputes. Some consequences of this trend are:

a. Existing decision-making procedures, and the timing and scope of review procedures, have to be reconsidered so that an emphasis on due process does not result in losing sight of the imperative of quick and effective decision-making that allows the sector to progress.

b. The Commission must operate on the basis of more overt timetables for resolving disputes, such as those in the EU framework for dispute resolution.

c. The Commission have to draw increasingly on relevant experience of other regulators through better access to precedent, procedural timetables, and other operational and financial benchmarks.

5. Lack of available Resources: The Commission simply do not have enough resources to address all disputes efficiently and optimally. There are many reasons for this. Some include:

a) An excessive workload volume;
b) Insufficient budgets, staff and other human and technical resources;
c) Inadequate economic, legal, or technical expertise;
d) Dysfunctional or abusive regulatory actions taken by some stakeholders;
e) Poorly functioning formal regulatory dispute resolution processes; and
f) Lack of experience in telecommunications dispute resolution.

There are both long- and short-term solutions to many of these problems. In the longer run, improved regulatory frameworks and better formal dispute-resolution procedures can solve some of the problems.

Some problems, however, will remain difficult for regulators to resolve in either the long run or the short run, due to budget constraints and the other problems listed above. Given these problems, regulators are increasingly looking beyond the "official sector" for solutions to telecommunications sector disputes. The major "non-official" or alternative approaches being taken by regulators include: 1.ADR techniques such as arbitration, mediation, conciliation, and negotiation; 2.Industry steering groups and other self-regulatory mechanisms (i.e., for access and interconnection issues) and ombudsmen schemes (i.e., for consumer disputes); and 3.Use of outside consultants to supplement official staff where regulators lack expertise in reaching a decision. To build useful and credible alternative dispute resolution approaches, regulators will rely upon, and can help develop, the confidence factors that demonstrate the non-official sector's capacity to address disputes effectively.

In addition to developing and supporting alternative dispute resolution mechanisms, the paper has discussed a number of benefits of increased cross-fertilization between the non-official dispute resolution fields and telecommunications sector regulators. Exchanges of experience and information between the arbitration and mediation fields and telecommunications sector policy-makers and regulators would generate resources to assist in resolving disputes – formally or informally. Such cross-fertilization would introduce new techniques to stimulate efficient dispute resolution. It also would make the experience of non-telecommunications dispute resolution professionals available to telecommunications regulators. Experimenting with new approaches and encouraging a "market" in dispute resolution will likely improve the quality of competing dispute resolution mechanisms.

Sharing experiences among policy-makers and regulatory officials will be important to consolidate the benefits and lessons learned from such innovative approaches. Greater reliance on "networking" and consultative exchanges in real time among regulators can greatly enhance this process. Officials should incorporate the technologies they regulate into their dispute resolution practices.

Dispute prevention is as important as dispute resolution. Sectoral consensus-building measures can help to reduce the antagonisms generated in competitive markets and identify converging interests among market participants. Industry steering groups, stakeholder committees, and other non-official forums can identify fault lines in the sector and anticipate disputes. By participating in such forums, regulators or their staffs can obtain useful input to improve overall sector policy and regulation. The efficacy of dispute resolution depends fundamentally upon the behavior of disputing parties. A key issue for policy-makers and regulators, then, is to understand and work with the incentives of market players. The Commission must devise ways of structuring economic and procedural incentives to reduce capricious abuse of dispute processes and to increase the scope for consensus. The telecommunications sector will see significant long-term benefits if parties can move away from their disputed and entrenched positions in official disputes, and move toward alternative mechanisms where they can share in developing mutually acceptable approaches for the sector to move forward.

4. CONCLUDING REMARKS

The dispute resolution and enforcement procedures described in this paper are focused on the regulator's authority to enforce its own "official" decisions and the provisions of the Act. However, parties also rely on alternative "non-official" approaches to resolve disputes, such as arbitration and mediation, which may or may not involve the regulator's participation. All dispute resolution processes require some level of enforcement support from the official sector, whether from the regulator or from the courts.[68] Consensual processes such as mediation and negotiation rely upon courts to enforce settlement agreements. Decisions resulting from regulatory adjudication rely upon the enforcement power of the regulator, and sometimes the courts as well, depending on how enforcement powers have been allocated, and which entity has the ultimate authority to overturn the regulator's decision. Many countries' telecommunications laws give regulators authority to enforce regulatory decisions resolving disputes. In addition, regulators may use their enforcement powers as an alternative to ordinary civil enforcement mechanisms, such as courts and police systems, to support less official dispute resolution initiatives, such as performing functions similar to a court in arbitration cases.[69] Generally, after parties have started court proceedings and reached a negotiated settlement agreement, the court will stamp the agreement, giving it the force of a court order. Regulators can perform a similar role by giving voluntary settlement agreements the force of a regulatory order, making the regulator's enforcement powers available to ensure the implementation and compliance with the agreement.[70]

[68]. Robert R. Bruce, et.al., at p. 77
[69]. Ibid, at p. 78
[70]. Ibid.

In conclusion, there is need to stress that successful dispute resolution is increasingly important for attracting investment, competition, and development. Dispute resolution mechanisms in the telecommunications sector need to be as speedy as the networks and technologies they serve. Official dispute resolution mechanisms are important as a basic guarantee that sector policy will be implemented. Policy-makers and regulators should use minimal but well-focused regulatory intervention to create an environment where industry players have incentives to resolve disputes constructively; this is where the use of alternative dispute resolution mechanisms come into play. Disputes can be enormously destructive to the sector, and effective dispute resolution is increasingly central to successful deployment of modern information infrastructure. This is particularly so where it is necessary to encourage investment and to foster competition. This is the best way to reach the under-served millions of people on the wrong side of the digital divide in Nigeria.