



The Guide to Telecoms Arbitration - Third Edition

Introduction

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Few clients seek arbitration counsel as often as those in telecoms, or have such high-stakes disputes when they do. And yet, to date, there has been no definitive book for either counsel or client on this fascinating genre of work

Global Arbitration Review's The Guide to Telecoms Arbitrations aims to change that. Written by some of the world's leading names, it covers the most pressing conceptual and practical aspects of telecoms arbitrations, from questions of arbitrability to topics such as the idiosyncrasies of space and satellite disputes, problems of performance caused by sanctions regimes, and how to deal with armed conflict. It concludes with a regional overview.

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Introduction

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The first edition of The Guide to Telecoms Arbitrations came to light in the aftermath of the covid-19 pandemic. Since then, the world has transitioned into a new normality with an ever-increasing reliance on the most advanced technologies, and with artificial intelligence at the heart of many of the recent developments. With the roll-out of 5G across the globe, the telecoms sector continues to witness radical changes, and this has already affected, in many respects, the ways in which we live, work and interact in society. U-turns and a return to the past are unlikely in this new paradigm, and while new legal challenges will arise, arbitration will continue to be one of the means to resolve those challenges.

This third edition has been enriched with insightful updates and actual trends on a range of topics that remain of significant relevance for arbitration in the telecoms sector. Predictably, and since the publication of the first edition, disputes in the sector have been on the rise.

Geopolitical tensions between world powers jostling for influence will continue to foster and exacerbate disputes in a sector that is now considered to be as strategic as the energy and defence sectors. For instance, some well-known 5G equipment suppliers have made good on their threats to take action against states that have prevented them from participating in a number of lucrative tenders. If states are said to have done so to preserve their national security interests, the legitimacy and proportionality of those measures will be scrutinised by arbitral tribunals applying international law and the corpus of jurisprudence developed during the past two decades to protect foreign investors from state interference.

The outcome of these high-profile 5G arbitrations will also have wider repercussions as the state of nationality of those 'banned' economic champions may end up taking countermeasures against other foreign companies operating in the same sector. The return of nationalism and protectionism, which were thought to belong to a bygone era, should not be understated.

The Guide continues to track both general and specific themes that are relevant to arbitration users in general, but not solely. The previous editions have indeed attracted a wider audience of general counsel and transactional in-house lawyers looking to familiarise themselves with the mechanics of arbitrating disputes in the telecoms sector, the types of disputes that may come their way and some of the issues that they need to be alert to, especially when they operate in complex jurisdictions.

One frequently asked question is whether arbitration should really be the preferred method to resolve telecoms disputes. The fact that the big five tech companies (Google, Apple, Facebook, Amazon and Microsoft) initially opted for court litigation (mainly in California) in their contracts implied that they were hostile to arbitration. However, as they have gained influence, prominence and global reach, arbitration is increasingly being provided for in their commercial contracts (although one pocket of resistance seems to prevail for patent and major intellectual property disputes, which, for enforceability purposes, still find their way into courts). The dichotomy between litigation, arbitration and risk management is still relevant, therefore, and 'Part I: General considerations' starts with a perspective from Paul Werné, former general counsel at one of the most prominent telecoms operators.

Even when arbitration is the preferred dispute resolution method, the nature of the telecoms sector, its far-reaching and overlapping effects on a whole range of matters, and the diversity of its actors (from businesses to consumers) may give rise to issues of arbitrability and its

corollary, the enforcement of arbitral awards. This important issue is addressed by Emily Hay of Hanotiau & van den Berg in 'Issues of arbitrability in telecoms arbitrations'.

Although commercial arbitration in the telecoms sector is primarily driven by M&A and corporate disputes arising in a variety of scenarios, in the recent past, there has been a surge in shareholder disputes, which are usually prompted by the need for foreign telecoms operators to dilute their shareholding, or even exit certain operations, because their continued presence in certain jurisdictions gives rise to reputational and compliance concerns (an increasingly decisive factor for a large number of telecoms operators). In this regard, assessment of damages in commercial arbitrations follows different approaches, and this is explored by Kai F Schumacher and Christoph Wilmsmeier of AlixPartners in 'Valuation approaches in telecoms arbitrations: commercial arbitrations'.

As for oil, gas and other critical minerals, spectrum,^[2] which is also a sovereign asset, is the new scarce resource that requires the presence of heavy infrastructure to meet the ever-increasing needs of the world economy. If, traditionally, most of the telecoms infrastructure that is in place, such as towers, was found on land, nowadays, commercial undersea telecommunications cables carry the vast majority of digital communications (including voice, data, internet and financial transactions) and form the backbone of the global internet. However, given the significant needs for telecommunications services these days, the satellite industry is now viewed as the solution to the problem of finding new terrestrial sites to erect towers or new maritime routes to instal undersea cables, both of which are far from satisfactory from an environmental perspective. The increasing presence of the satellite industry in the telecoms sector is very likely to entail new forms of disputes that may be subject to arbitration. This is covered in detail by Laura Yvonne Zielinski, senior counsel at Holland & Knight and president of the Space Arbitration Association, in 'The rise of satellite arbitrations'.

Part II of the Guide is devoted to investment treaty arbitration in the telecoms sector. There is self-evidently a tension between the state's sovereign right to regulate and the protection of investors' rights. The first two chapters in this part of the Guide, on standards of protection, from representatives of Three Crowns LLP and Aluko & Oyeboade, respectively, revisit the latest jurisprudence of the right to regulate and its limits and also look more closely at the obligations of the investor and how these obligations have been revamped in more recent investment treaties.

Recent developments appertaining to armed conflict, *coups d'état* and civil unrest in different parts of the world continue to pose challenges to the sector, as explained by Michael Darowski and Romilly Holland of McDermott Will & Emery in 'Civil unrest and investor-state claims in the telecommunications sector'.

Finally in Part II, Lucrezio Figurelli and Richard Caldwell of The Brattle Group provide a useful overview of issues of compensation and the approach taken by investment treaty tribunals in recent cases in 'Valuation approaches: investment treaty arbitrations'.

Part III provides the final chapter of the Guide, which offers a geographical perspective on telecoms arbitration in the European Union, contributed by me and Tejas Shiroor, both of Eversheds Sutherland.

This third edition brings together leading arbitration practitioners who have a wealth of experience in telecoms arbitrations. It is hoped that by focusing on a sector that will be affecting the world of arbitration in the coming years, the Guide will continue to be helpful

for the arbitration community, in-house counsel and anyone with an interest in telecoms arbitrations.

I warmly thank the contributors, all of whom have helped bring this initiative to fruition and have participated in this third edition. As always, I am very grateful to the team at Law Business Research, including David Samuels and Mahnaz Artta, for their continued support.

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ENDNOTES

^[1] Wesley Pydiamah is a partner at Eversheds Sutherland.

^[2] Spectrum means the radio frequencies allocated to the mobile industry and other sectors for communication purposes. At present, licensing and auction rounds for 5G spectrum are being held in numerous countries across the world.