Chapter III
Theoretical Framework of Dispute Resolution

Introduction

The occurrence of disputes in human society is endemic since the time immemorial. Divergence of interests has been causative of such disputes in different spheres of human activity. Human ingenuity has led to crafting of modalities to address disputes of different types and at different levels. Dispute resolution was not a serious factor when the society did not have to grapple with complex issues. Disputes of personal nature were amenable to resolution through an informal process something akin to what now carries the label of negotiation or mediation or even some kind of arbitration through a mutually acceptable third party. Disputes of a serious nature would land in some formal forum for resolution. According to John Dunlop\(^2\) (1984), in western societies, “give and take of market place” and “government regulatory mechanism established by the political process” ranging from courts to administrative tribunals constituted “two approved arrangements over the past 200 years” for resolution of disputes among groups and organizations. The inability of market place mechanism to achieve social purpose and a general dissatisfaction of the stakeholders with government’s regulatory role prompted the policy makers to seek alternatives that led to the establishment of an independent regulatory and dispute settlement mechanisms. Even with these institutions, the question remains as to how do we assess the quality of dispute systems and how do we rate one against the other. Scholars have variously described the attributes of an efficient dispute system. Susskind\(^3\)(1987) lays stress on attributes such as fairness of the process and judiciousness of the outcome. Ury, Brett and Goldberg\(^4\)(1988) view the efficacy of the process in terms of cost, outcome and durability of conflict resolution. The other views lay stress on providing for multiple options, involvement of the stakeholders in the dispute system design, flexibility available to the parties to choose a particular process

\(^3\) Lawrence Susskind & Jeffrey Cruishank, Breaking the Impasse: Consensual Approaches to Resolving Disputes (1987)
and then move over to another process and features like transparency and accountability of the process. Since all these attributes are not uniformly present in a dispute system, and a trade-off between different attributes is usually seen, the task of determining an appropriate process becomes difficult to that extent. Hence, it is important to analyze the framework of a sound practice. The framework should address some key elements like the objective behind the system, its structure, identification of parties that have a stake in the system, resources available to them and the nature of its accountability.

Managing Contingencies and Flexibility in Telecommunications

Telecommunications' domain has been ever widening with an expanding list of partners and management strategy. This brings the challenge of addressing varying types of disputes from being very technical to being extremely community rights oriented with roots in sociological theory of poverty reduction.

Contingency theorists like Vroom, discussing ingredients of decision making process, highlight the importance of two factors, namely, quality decisions and acceptance. In their view, apart from the quality of decisions, a participatory process contributes towards acceptance of such decisions. Goldhaber lays stress on communication effectiveness and discusses the extent to which internal contingencies, such as, structural contingencies, output and external contingencies, having economic, technological and environmental dimensions affect communication needs. Contingency theories of leadership, including that of Fiedler relates leadership to organizational needs under different situations. Contingency theorists emphasize the importance of environment in designing an organization and advocate an appropriate between the two.

Cybernetics has emerged as a tool to hone up organizations through a better understanding of the functions and processes of various systems and helps organizations to adapt to changing situations through the mechanism of feedback. Cybernetics has influenced a wide range of disciplines Louis Couffignal, a known authority on

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cybernetics, describes cybernetics as "the art of ensuring the efficacy of action". John D. Steinbruner\(^8\) explains how formulation and implementation of public policy are influenced by "organized behavior" and how new perspectives on decision making pose a challenge to established theory of decision making which "underlies general understanding of political events". According to him, technological advances and shrinking of distance through rapid communication networks and other factors associated with modern societies have seen the emergence of interactive societies, generation of new political issues and new demands on government for a positive response and provided occasions for increased governmental intervention. Such a situation, invested with "complex decision problems and with government performance" call for a better understanding of decision processes than one offered by the prevailing paradigm of rational thesis which accords high degree of importance to man's propensity "to maximize his values under the constraints he faces". However, the theory of decision under rational paradigm is under challenge and a "theoretical base fundamentally different from rational theory has been constructed" and it is being applied in a wide range of disciplines such as information theory and the psychology of learning. This new process is cybernetic paradigm which holds promise in "understanding how men and organizations comprised of men actually operate in complex environments....... And does promise a more realistic and more appropriate analysis of the requirements of change".

When we test these attributes against the dispute resolution practice in the telecommunications sector, particularly, in India, it fails the test in many respects. First, the involvement of the stakeholders (operators and consumers) is almost negligible in designing an appropriate practice. It is the prerogative of the government and the legislature to enact appropriate legislation for creation of a regulatory and dispute settlement bodies. These institutions lack the requisite measure of flexibility being bound by the provisions under the statute. The accountability is there to institutions that created these bodies but not to the stakeholders or consumers. Telecommunications is an important infrastructure sector and a life line for a country's economy. Disputes have now become ubiquitous threatening the equanimity of this sector. It is, therefore,

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important to analyze the framework of dispute resolution in the telecommunications with reference to the processes used to manage or resolve disputes and whether the structure of such a body supports the nature of responsibilities entrusted to it. These are the issues that we will discuss in the chapters dealing with cross country practices and features of a sound practice. At this stage we discuss the various other theories of disputes to help our understanding of the subject in order to appropriately address disputes arising in the telecommunications sector..

Leonard Riskin et al\(^9\) (2005) defines disputes as manifestations of conflict arising from “a clash of interest or aspirations, actual or perceived”. Professor Schellenberg\(^10\) (1996) seeks to explain sources of conflict in three sets of theories. These are i) Individual Characteristics theories; ii) Social Process theories; and iii) Social Structure theories. The first theory explains conflict as something ingrained in human nature arising from unfulfilled needs. Abraham Maslow explains human needs in terms of a hierarchy ranging from physical to psychological to self-actualization and conflict arises if any of these needs are not met. Social process theorists maintain that competition for resources lead to conflict. There is more emphasis here on distributional aspect in social relationship. Social structure theorists, among whom Karl Marx is a prominent example, put the onus for conflicts on the nature of social system. Social Structure theories are akin to critical theory which point to disparities in social framework as the main source of conflict. These theories help in a better understanding of various dimensions of conflict. If a conflict is not resolved it usually assumes the form of a dispute. Bernard Meyer\(^11\) (2000) maintains that a human being experiences conflict along three dimensions which are based on his perception of the situation, the feeling it generates within him and finally impels him to react. At the root of conflict and disputes lie asymmetric information which a disputant possesses about his adversary and which makes him over confident about his position thereby reducing the prospect of a settlement. These theories are equally applicable in the telecom sector where disputes arise due to a clash of interests among the parties involved and an urge to gain greater market share on the part

\(^10\) James A. Schellenberg, Conflict Resolution, Theory, Research and Practice, State University New York Press, 1996
of telecom service providers and equally great determination on the part of consumers to obtain a fair deal.

**Approaches to Dispute Resolution**

The concepts of *interest-based, rights-based and power-based* approaches to dispute resolution advocated by Ury, Brett and Goldberg\(^\text{12}\)\(1998\)) further provide an insight into how a combination of these approaches impact the dispute resolution process in the telecom sector. Interest-based approach essentially relies on mutual interest of the parties in a dispute to seek mutually satisfactory resolution of the problem directly or by involving a third party. This process focuses on vital issues concerning the parties; is cost-effective, flexible and less time consuming. Jeremy D. Fogel\(^\text{13}\)\(2006\) maintains that the evolution of the interest-based approach is “in large part because of the persistent client dissatisfaction with the costs and limitations of the traditional approach” which accounts for the emergence of “a paradigm of interests” in court-annexed ADR programmes during the nineties. This approach provides an alternative to traditional court-based adjudication. Rights-based approach emphasizes more on procedural aspect of justice and legality of action in resolution of a dispute. This approach is amenable to court system where the parties in a dispute focus on the legal aspects of the dispute and whether the parties have adhered to due procedure. In some cases, rights and interests of the parties may not be mutually exclusive. The operation of contracts and agreements is an apt example in this respect. The parties in a contract have an inherent right to pursue a particular course of action and also have an inherent interest in deriving benefits in terms of a contract. The power-based approach determines the outcome of a dispute on the basis of relative strengths of the parties. It assumes that the decision is likely to be favourable for the party who prevails on the basis of its strength. It is more expensive than opting for interest-based processes.

Choice of a particular approach depends much on the type of dispute and the kind of outcomes which the parties seek. An increasing trend among the large telecom


companies in India is to secure the desired outcome, say, bigger market share and discourage entry of smaller players in the field, by using financial muscle or indulging in protracted litigations on issues like interconnection, infrastructure sharing. In the telecommunications sector, which is capital intensive and gives good returns on investments, the stakes are usually high. Therefore, interests of big and small players or even among the big players do not necessarily converge. In such cases, recourse to interest-based approach does not really work. This may work better in situations where the relative strengths of the parties are more or less evenly balanced.

Furthermore, it is generally seen in the telecom sector that the litigants use a combination of these three approaches in the legal process as a matter of strategy to secure the desired outcome. The Indian telecom scene is no different in this respect. While advocating their case, the litigants often take a normative approach to focus on the need to settle disputes in larger public interest, and at the same time try to provide evidence how the opposite party’s case does not hold water on the ground of non-adherence to due procedure, which is the essence of rights based approach. While using these two approaches, they also try to subdue the opposite party or compel it to seek out a compromise through use of their financial power and greater influence. The power-based approach is much in evidence in the ability of a party to engage top lawyers on exorbitant fees to plead its case and also try to bring in extraneous considerations and influence to secure a decision in its favour.

As in the case of general disputes, both formal and informal methods are used for resolving telecom disputes that result in decisions of a binding or non-binding nature. A study\textsuperscript{14}(2004) commissioned by the International Telecommunications Union (ITU) and the World Bank on dispute resolution in telecommunications sector has identified three chief methods of dispute resolution. These are court-based and regulatory-based adjudication, that according to this study, come under the category of formal methods and

\textsuperscript{14} Dispute Resolution in Telecommunications Sector- Current Practices and Future Directions, ITU-World Bank-Geneva, 2004
arbitration, mediation and negotiation (alternative dispute resolution mechanism) coming under the category of informal methods. Mediation has come to be regarded as a highly flexible process which can be used in a variety of contexts. It is fast emerging as a powerful tool for dispute resolution due to the capability of this process to “integrate on line and other electronic communication technologies”\textsuperscript{15}. Arbitration, though less flexible than the mediation process, has features such as procedural flexibility, disputants’ involvement in the selection of an arbitrator, that make it less adversarial than court proceedings. Many arbitration proceedings have become quite formalized with specified hearing and decision procedures and these have added efficacy to such proceedings. Changes are also being incorporated in arbitration practice to turn it into an effective tool for dispute resolution. A case in point is India’s Arbitration and Conciliation Act, 1996 which attempts to harmonize Indian arbitration law with international practice. Under section 30 of the Act, it is not deemed incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute with the agreement of the parties. The arbitral tribunal is competent to use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement. Each of these methods, formal or informal, has its advantages and disadvantages that will be discussed later.

Goldberg, Sander, Rogers, and Cole\textsuperscript{16}(2003) have described the concept of “Hybrid dispute resolution processes” that involve the usage of existing methods in different combinations, such as ombudsman with “the summary jury trial” or arbitration with adjudication. They maintain that these hybrid processes improve the efficacy of dispute resolution processes and are cost-effective and less time consuming and also reduce the burden of case loads on judiciary. Thus, there are multiple approaches that are employed for dispute resolution, some of which are stand-alone and some of which can be employed in combination with others.

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Some important considerations need to be kept in view while opting for a particular method. These are: a) the nature of dispute; b) issues involved; c) the resources and time available; d) strategies of disputants and e) the outcome that is sought to be achieved. Other important variable in this regard is whether the process subscribes to the principle of natural justice. Disputants repose more confidence in such processes where they have an opportunity to air their point of view and where they feel that their concerns would be taken into account while rendering a decision on the issue. Emphasizing the importance of perceptions of procedural justice for the disputants, Prof. Nancy Welsh\(^{17}\) (2001) maintains that this enhances their confidence in the process and facilitates acceptance of outcomes.

According to Riskin et al\(^{18}\) (2005) "each dispute resolution process threatens or promotes different values or interests and within each process we find many variations".

Formal method of adjudication places more emphasis on interpretation of statutes. Where the case requires a formal method of adjudication, the disputants seek out courts for this purpose. This process has two main advantages: a) Proceedings are open and the public can participate; and b) decisions of courts create precedents for the future. It serves a wider social purpose of keeping the people apprised of general implications of such decisions. As opposed to this, a settlement process is essentially private in nature with focus on the mutual interests of the parties involved. One of the major disadvantages, however, of the court process is its adversarial character which does not contribute towards building long term commercial relationships between the disputing parties which happens in a settlement process.

In telecommunications, too, disputants seek such processes which ensure them a fair outcome in a speedy manner and save on cost. They would generally prefer not to engage in an adversarial process unless no other options are available to resolve the issue or if they feel that a permanent resolution of the dispute is possible only through an adversarial process.


The efficiency of dispute settlement mechanism, in general, depends on many factors. The efficacy of each of the processes depends upon the quality of dispute resolver and his ability to effectively discharge the assigned role in different processes. For example, in the case of regulatory based adjudication, the efficacy to a large extent depends upon whether the regulatory body is structurally and functionally independent; whether its independence is secured through a statute and independent funding; whether it enjoys enforcement powers and whether its apex functionaries are qualified, possess the requisite experience and enjoy tightly secured tenure and whether it has a trained pool of staff in requisite number matching functions and responsibilities assigned to it. Even if all these ingredients are present, the growth of telecommunications will be impaired if the dispute resolution process is not efficacious, speedy and transparent. A speedy resolution of a dispute is impeded broadly for two reasons: first, telecom disputes have become varied and very complex in the wake of liberalization and advancements in technology. Secondly, it has become a lawyers’ paradise, since high stakes are involved and vested interests are at play to delay or hinder timely resolution of disputes or to subvert the process of mutually acceptable outcome. Hence, efficacy of dispute resolution mechanism has become a necessity for the growth of the sector. Conversely, an ineffective and sluggish dispute settlement process is a matter of growing concern to all stakeholders alike. The critical attributes of an efficient dispute resolution mechanism are degree of independence it enjoys, transparency of the process, quality of personnel manning the system, cost and time involved in securing a fair outcome.

**Dispute Systems Design:**

In the context of these attributes, the design of a dispute system as discussed earlier, is of critical importance. Kent Arnold,19(1994) identifies factors that should be taken into account while designing a dispute system. These are “contents of various types of disputes, why they recur, how they impact the system, how they are handled, and why certain conflict management procedures are used and others abandoned.” Moore et

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al. 20 (1992) focus on identification of the nature and recurring theme of disputes and relating the disputes to appropriate resolution procedures and favor interest-based approach on two parameters i) its stress on reconciliation of mutual interests of the parties involved and ii) delivery of resolution of a durable nature. Hence, an appropriate dispute system design should have two features, namely, i) whether it offers multiple choices to disputants and ii) whether it focuses on reconciling interests of concerned parties. Equally important is to keep in view factors like availability of resources and skilled and trained personnel to operate the system and provide for accountability through periodic performance evaluation.

Each of the variables identified above by scholars holds good for dispute system design in the telecom sector also. The special features obtaining in the telecom sector, warrant a design that provides multiple choices to disputants, and also takes into account the interests of consumers, considerations for telecom growth and reasonable returns to regulated companies on their investment. The need for cost and time effective procedures to address telecom disputes can not be over-emphasized in the context of the existing practice which takes unusually long time to resolve disputes and involves high cost. The existing procedures in some countries also do not identify disputes that may be better resolved through a particular process or provide options to the disputants in this regard. Although there is usually a time frame for resolution of disputes, but that is generally not adhered to. Periodic performance evaluation is also not provided for which makes it difficult to assess the efficacy of the system. Employing processes for pre-empting a dispute and exploring processes for containing a dispute should receive due attention in designing a dispute resolution system in the telecom sector.

The role of regulatory institutions entrusted with the dispute resolution responsibility is circumscribed, according to David Baron 21, by various factors, such as, “the limits of the authority delegated to it,” “procedural requirements” and “procedures established by the regulatory body itself” and added to these are the companies’ pursuit to maximize their profits and the regulatory concern with broader “distributional” objective such as

"maximizing the surplus of consumers." Therefore, the challenge involved in designing an effective system for the telecom sector is to find an appropriate fit between the two concerns notwithstanding regulatory constraints.

**Two distinct trends** are discernible in the evolving telecommunications environment. First, telecommunications sector has witnessed a phenomenal growth due to advancements in technology. Secondly, it has given rise to complex issues leading to a variety of disputes, previously unknown, in the sector. The disputes arising in the sector present a mixed bag. Predominantly, issues, such as, parameters for regulation of new technology based services, issues of infrastructure sharing, interconnection and methodology for spectrum allocation, to name a few, afflict the sector. Resolution of such issues require a dispute resolution system that has neutral and technically qualified decision makers. As to the question of judging neutrality, one of the standards could be non-affiliation with commercial interest in telecommunications sector for, say, five years. Similarly, one of the standards for measuring technical expertise may be proven experience of technical issues in telecommunications at senior level for five years or so.

Secondly, dispute resolution process should have certain key features, such as, procedural flexibility, multiple options for the disputants, time and cost effectiveness, adherence to the principle of natural justice, and a process that is transparent and provides an assurance of a fair outcome. Here also, the issue will be how to measure speed and time taken for resolution of a dispute and what should be a reasonable time-frame for resolution. Then again, the question will be regarding the cost involved in settling a dispute. These are the issues for which it is difficult to provide a rigid norm. Much will depend on the complexity of the issue, cooperation of the disputants and the nature of dispute resolution system. These will vary from countries to countries. Despite these limitations, one can lay down some guidelines in this respect drawing from country practices. For instance, certain timeframe for settling disputes emerges from the European Commission’s directive which provides a limit of four months. This practice can be replicated in other countries also where cases drag on for considerably longer period. On cost-effectiveness, also introducing new features like judicial mediation or court-annexed mediation or involving industry in dispute resolution process would reduce litigation time and cost currently being incurred through regulatory or tribunal or court
processes. The theories of dispute discussed earlier and discussion on dispute system design have given an insight into factors that are causative of disputes and efficacy or otherwise of different approaches to dispute resolution. In the telecommunications sector, a combination of such approaches may need to be adopted since no single approach can provide the answer for all the issues. Hence, there will be a need to categorize disputes and provide a linkage to the most workable approach, as also keeping in view the strength of contending parties.

A system based on attributes, discussed above, would contribute towards achieving the objective of consumer protection, fair competition, and strengthening telecom industry. Conflict of interest is inevitable in a high stake industry like telecommunications but conflicts should not be allowed to acquire the dimension of a dispute. The Indian practice does have some attributes of a sound practice like adherence to the principle of natural justice and providing an assurance of a fair outcome through its non-partisan character, but some other features, though equally important, are missing. This will be obvious when we discuss various aspects of the Indian practice in detail later in this chapter and in chapter iv. It is equally important to appreciate that an ideal dispute resolution process having all the requisite features, has not yet become a reality and there may also be no such possibility in the near future. Hence, one has to think in terms of trade-offs between different attributes of a sound practice. For example, such trade-offs could be between speedy decisions and cutting cost on the one hand and decisions arrived through compliance with due procedure and adherence to the principle of natural justice which may take longer time in rendering a decision. The trade-offs have to relate to issues in a country specific situation and there is no universal practice in this regard.

**Summing Up**

This chapter discusses dispute theories and modality for assessing the quality of dispute systems and in this context, views of various scholars have been highlighted. Scholars have variously described dispute theories and the attributes of an efficient dispute system. Susskind (1987) lays stress on attributes such as fairness of the process and judiciousness of the outcome. Ury, Brett and Goldberg (1988) view the efficacy of the process in terms of cost, outcome and durability of conflict resolution. The other views lay stress on
options, involvement of the stakeholders in the dispute system design, flexibility available to the parties to choose a particular process and then move over to another process and features like transparency and accountability of the process. Since all these attributes are not uniformly present in a dispute system, and a trade-off between different attributes is usually seen, the task of determining an appropriate process becomes difficult to that extent. Hence, it is important to analyze the framework of a sound practice. The framework should address some key elements like the objective behind the system, its structure, identification of parties that have a stake in the system, resources available to them and the nature of its accountability. There is also a discussion on various approaches to dispute resolution, such as, interest based, rights-based and power-based approaches to dispute resolution advocated by Ury, Brett and Goldberg (1998)) and the critical importance of dispute systems design and important factors that should be taken into account while designing a dispute system. The factors identified by Kent Arnold, (1994) in this context are: “contents of various types of disputes, why they recur, how they impact the system, how they are handled, and why certain conflict management procedures are used and others abandoned.”

The special features obtaining in the telecom sector, warrant a design that provides multiple choices to disputants, and also takes into account the interests of consumers, considerations for telecom growth and reasonable returns to regulated companies on their investment.