Telecommunications arbitration

Paul E Mason, of counsel with the law firms Global Expansion Group and Bastos-Tigre, Coelho da Rocha e Lopes Advogados, where he serves as international counsel and commercial arbitrator; and **Pedro Batista Martins**, of counsel with Barbosa, Müssnich & Aragão Advogados discuss telecommunications arbitration in Latin America

The telecommunications industry has enjoyed explosive growth in Latin America during the last decade. Privatisation of the fixed-line subsector along with extensive build-out of cellular networks have been the engines generating this growth. The privatisations have brought large investments from European and North American (US and Canadian) companies. The large presence of these foreign investors has, in turn, encouraged the use of arbitration clauses in a variety of contracts involving the telecommunications sector in Latin America.

Many telecom companies, especially the larger ones from outside Latin America, prefer arbitration to the local courts for the usual reasons which favour arbitration in general: impartiality, speed, confidentiality, industry expertise and lower cost. Because the telecom industry in Latin America has received so much foreign investment during the last decade of extensive privatisation, arbitration has been favoured by these foreign investors, be they financial institutions or operating companies. The specialised and technical nature of many telecom transactions and operations also makes arbitration—with its use of industry-knowledgable arbitrators—especially attractive for the telecom industry.

Widespread privatisation and use of 'special arbitration' by national regulatory authorities are two distinguishing features of telecommunications arbitration in Latin America that may not be present to the same extent in other regions of the world.

Arbitration clauses: Because of the confidential nature of arbitration and the difficulty in obtaining information on a large scale across so many countries in Latin America, there is no way to accurately track the number and type of arbitration clauses inserted into telecommunications related contracts in the region. However, the authors' own professional experience indicates extensive use of these clauses in all types of telecommunications related transactions. The table of cases appearing in this article indicates use of arbitration by companies in the telecom equipment, fixed-line, cellular, undersea cable, long distance, phone card and public phone subsectors. Just to provide a glimpse, in a Central American M&A transaction handled by one of the authors of this article, the Latin target companies had some 50 pre-existing contracts of all kinds with governments, service providers and equipment manufacturers. Of these 50 contracts, 48 had arbitration clauses. Most called for sponsored arbitration, with only two or three clauses providing for unsponsored arbitration under the UNCITRAL Rules.

Every rule has exceptions, though. Not all large multinational companies favour arbitration. While Nortel has used arbitration in a very large case in Colombia (see table of cases) with success, its competitor Lucent prefers not to use arbitration generally because of an unfavourable decision it received in a case outside the region.

Special Arbitration by National Regulatory Agencies (NRAs): This aspect may be more peculiar to the telecommunications industry than many other industries which are not similarly regulated by national authorities. It may also be used more widely in Latin America than elsewhere. It will be described in this article at a later stage.

Legislation and regulations: We are not aware of any special legislation or regulations in the region dealing with arbitration of telecommunications related matters, aside from the NRAs described above. It can be said that the updating of national arbitration legislation by many Latin American countries occurred at the same time the telecom sector was expanding, which was very helpful.

Industry rules: Certain industries have created their own arbitration rules suited to the peculiarities of that industry, administered by or more arbitral institutions. See for example, the special Canadian 'RED' sports rules from the Canadian Commercial Arbitration Centre, the US baseball industry salary arbitration rules from the American Arbitration Association (AAA), and the Independent Film & Television Alliance Rules from that industry association. These rules contain special procedures (eg, baseball) or special remedies (eg, film).

The only telecommunications industry-specific arbitration rules that we found are the AAA's Wireless Industry Arbitration Rules (effective 15 July 1997). These rules do not have any geographical scope or limitation. Their main feature is to encourage the parties to choose arbitrators from the AAA's Telecommunications Panel. However, the authors are informed by a reliable source within the AAA that these special rules are seldom used.

Case patterns in the region

Accurate case statistics are hard to find, for the same reasons of confidentiality and wide geography mentioned earlier with reference to arbitration clause statistics.

We were informed by Emmanuel Jolivet, legal counsel to the International Chamber of Commerce (ICC) Court of Arbitration in Paris, that 18 cases involving the telecommunications sector in Latin America were submitted to the ICC for arbitration, as of the end of October 2004. No decisions have been published by the ICC in this area, however.

It has been possible to compile a table of some representative telecom arbitration cases in the region (see below). It is based solely on published secondary sources, many of which are rather sketchy in nature. Nevertheless, as can be seen from this table, these cases can be classified in a number of ways.

The countries involved are from the Southern Cone (Argentina, Brazil, Chile), the Andean group (Colombia, Ecuador, Peru), Central America (El Salvador, Guatemala, Nicaragua, Panama) and the Caribbean (Dominican Republic). Foreign entities

involved come from Europe (France, Italy, Spain, UK) and North America (Canada, US). Many of the arbitrations involved Latin American governments or parastatal telecommunications entities as respondents. Most of the European entities are sizeable national telecom companies (France Telecom, Telecom Italia, Telefónica, Cable & Wireless). Some of the North American companies are large, traditional ones (Nortel, IDT), while others are newer, smaller firms focused on Latin America and based in Miami.

As noted earlier, cases invoved telecom equipment, fixed-line, cellular, undersea cable, long distance, and public phone subsectors. Issues arbitrated included matters related to foreign investment, privatisation, joint ventures, interconnection, and call termination relationships. A number of the arbitration claims were made to correctly calculate profits and/or tariffs due under concession agreements. One Guatemalan party went so far as to appeal the calculation of an arbitration award to the national Supreme Court, asking to recalculate the amount of damages stemming from a breached interconnection agreement. The Court accepted the case.

Arbitration forums included the AAA, ICC, the International Centre for Settlement of Investment Disputes (ICSID), local chambers or arbitration tribunals and NRAs. In several instances the awards were appealed to the national courts—generally not a good trend for the progress of arbitration in the region.

The Supreme Courts of Brazil and Panama were asked to recognise or deny recognition to both domestic and foreign arbitral awards in telecom cases. The case from the Dominican Republic went on for years, and included conciliation attempts by the Church and appeals to the United Nations.

Overall, we can see that in almost all of the cases, the arbitrations were instituted by the foreign participant against the local host entity. Claims varied in size, from the large US$7.65 billion combined claims and counterclaims made by service company IDT and Telefónica against each other on a pan-regional undersea cable project (the largest claim in the AAA International Center for Dispute Resolution's history), to smaller ones in the US$1–$2 million range. While several cases were settled (eg *IDT v Telefónica*) and others are pending (the large ICSID cases against the Argentine government), very few awards issued were made public. Even with knowledge of size of the awards issued, it is not readily discernible if the amount awarded was close to what the claimants asked for. Of the four cases in the table with published award amounts, we can see that multinationals won two of them against parastatals, while local companies won two against foreign companies. Based on this small sample alone, it is still too early to draw any reliable, definitive conclusions about the trend of awards in Latin American telecom arbitrations.

Special arbitration by telecom regulatory agencies

This aspect may be more peculiar to the telecommunications industry in Latin America than many other industries which are not similarly regulated by national administrative authorities. While the table of cases (below) includes special arbitrations from the Dominican Republic and Peru, this section will focus on Brazil as Latin America's largest market and one with which the authors are most familiar.

Special arbitration has increased the power of regulators to resolve disputes among telecom players. The high level of complexity involving telecom matters and the need for fast decisions have driven national legislators to transfer to regulatory authorities the competence to resolve telecommunications conflicts. This is all the more so because the regulators are in the best position to understand the overall national scenario and hence avoid any negative impact which a single decision between two parties may cause to the market.

Even though these premises are true, many companies do not feel confident in the so-called 'special arbitration' process in front of the regulatory authorities.

The first reason is because this kind of special arbitration is not the 'pure' process that experienced lawyers are used to applying to solve their clients' disputes. It is much more an administrative procedure than any other means of conflict resolution. The arbitrators are appointed by the regulator, the award is subject to appeal at the agency level and the final award is not binding on the parties. It can be, and commonly is, challenged in the ordinary courts.

Second, after years of frequent contacts with regulatory authorities to discuss points of particular interest to their business and their conflicting relationships with competitors, companies lack confidence in the appointed arbitrators, primarily because they are either employees of the agency or closely linked to the regulators.

As a result, the companies use the regulatory agency as an administrative step where on one hand, they preserve the image of the regulator as the watchdog of the telecom market and hence avoid future bad relationships and on the other, test the possibility of success or at least some positive understanding that may help them to support their case in court. And that is the point—the vast majority of the awards are challenged in the courts.

Among other duties, Brazil's National Telecommunication Agency (ANATEL) is charged with maintaining free competition in the sector, protecting the users of services, supervising the performance of operators' obligations and deciding on claims and complaints.

ANATEL is an independent governmental agency and was founded on the premises of administrative independence and financial autonomy, without subordination within the governmental hierarchy. Its officers may only be removed for cause.

However in practice these principles are not always respected, given the government's attempts to intervene directly or indirectly, because of disputes over jurisdiction between the Ministry of Communications and ANATEL, or the government's dissatisfaction with measures adopted by ANATEL, namely those that have a negative impact on the economy (eg inflation control) or on consumers.

For example, in 2003 fixed-line and long distance telecom companies had the right to monetarily adjust their tariffs based on an index contractually agreed to in their concession agreements. However, during that year the previously agreed index reached its highest rate ever compared with other official price/tariff adjustment indices.

Afraid of the impact on inflation and the citizenry, the government put pressure on ANATEL to disallow these adjustments. However, no measures could be taken without the concurrence of the telecom companies, since they were legally protected by the terms and conditions of their concession agreements.

In the end, ANATEL complied with the agreements and authorised the tariff adjustments, but the minister of communications—extremely dissatisfied—went on television and encouraged the population to go to court and challenge the tariff increases.

Public attorneys and citizens all over the Brazil went to court to challenge the ANATEL decision. Months later, the Superior Court confirmed the validity of the ANATEL decision based on the concession agreements, but the President of ANATEL resigned.

For the purpose of resolving industry related conflicts, the Telecommunications Law (Law No. 9,472/97), clearly accepts and moreover induces disputes to be resolved by negotiation, mediation or arbitration.

Under this Law, ANATEL can resolve disputes involving (i) telecom service providers on matters related to interconnection and infrastructure sharing; (ii) users of telecom services and concession holders; and, to some extent, (iii) matters arising out of shared infrastructure among petroleum, telecom, and electrical energy service providers.

In such disputes ANATEL holds a function similar to those of mediation and arbitration chambers.

The ANATEL procedures on disputes over interconnection and infrastructure sharing between telecom service providers depart significantly from the principles that govern arbitration generally. Arbitrators are appointed by ANATEL, the decision is subject to appeal, and is only binding within the sphere of administrative jurisdiction. The losing party almost always appeals at the second administrative level and even reopens the case de novo in the ordinary courts.

Apart from the issues where the regulator acts as an arbitral institution, questions arising out of the concession agreements may be solved by arbitration. In these cases the arbitration is a true arbitral procedure. The arbitrators must be independent and the arbitral award is not subject to appeal, but only to a lawsuit for nullity based on violation of applicable rules of public order, as established in the Brazilian Arbitration Law.

Nevertheless, the conflicts subject to arbitration under concession agreements are quite limited and restricted to: a) violation of the operator's rights in relation to protection of its contractual economic interests; b) review of tariffs, and c) damages owed on termination of the agreement, including the payment related to reversion of assets.

Having said this, we are not aware of any arbitration brought to resolve a dispute between the regulator itself and a telecom concession holder. However, if an arbitration proceeding were brought against the regulator to solve a tariff-related conflict, it would not be surprising if the public attorney's office were to raise the issue of whether it could be subject to arbitration.

Although we do understand such issues to be arbitrable as mentioned above, when ANATEL has adjusted the fixed-line and long distance tariffs upward in the past, public attorneys who have the legal authority to protect public 'inalienable' rights (*direitos indisponíveis*, which are those that may not be freely alienated or dispensed with via arbitration, eg), have challenged ANATEL's decision in the courts.

Another problem here is the enforceability of an arbitral award against ANATEL itself. If ANATEL is found liable to pay money to a concession holder, it may face a constitutional obstacle. The creditor must take a place in line in order to get payment of the regulator's debt, since payment depends on inclusion of the debt in the government's annual budget. And the Brazilian Constitution (Article 100) does not authorise seizure of assets of public entities such as ANATEL.

The procedure that is closest to 'pure' arbitration is the one applicable to issues that arise out of shared infrastructure among petroleum, telecom and electrical energy services providers. Those arbitrations are subject to rules on bias and challenge of arbitrators. Arbitrators have the duty to disclose any lack of independence or impartiality. The absence of a party will not impair the normal course of the arbitration.

However, non-compliance with the arbitral award only allows the regulator to impose penalties on the defaulting party.

Private telecom arbitration in Brazil without the regulator

As described earlier, new telecom agreements in Brazil as well as other Latin American countries contain a very large number of arbitration clauses. Parties have more confidence now in the validity of arbitration clauses under Brazil's Arbitration Law No. 9,307 than was previously the case, where a post-arbitral compromise (*compromisso*) was legally necessary but usually impossible to obtain from both parties in dispute.

The new reality ushered in by privatisation dramatically increased the number of players in the Brazilian telecom market, resulting in growing competition and hence, a variety of disputes. Conflicts occur often and range from claims of inadequate performance or non-performance of various agreements to controversies related primarily to regulatory matters, such as interconnection or rights-of-way. Specific telecom issues suitable for arbitration include indemnification and limitation of liability, force majeure, applicability of contractual loss and damages rules and provisons, leasing and use of transponders, software malfunctioning, failure of signal transmission, assessment of fault (very slight, slight, serious), and termination of contracts involving public interests. Corporate issues related to telecom companies, such as capitalisation, reduction of stock capital, share buy-backs, and veto rights, are also subject to arbitration.

The legal, business and technical nuances of these disputes have led the parties to seek arbitrators with specialised knowledge. Procedural flexibility and confidentiality in a highly competitive market are two other factors which augur well for private arbitration of these kinds of telecom disputes.

Even though most telecom conflicts in Brazil have been submitted to ANATEL and/or the ordinary courts, because of related regulatory matters and the need for an urgent response (via injunctions or pre-emptive measures), a few years ago several private arbitrations were initiated to resolve disputes of interconnection, rights-of-way and violation of a transponder lease agreement. A very large arbitration was also instituted to resolve issues of control of Brasil Telecom, the third largest fixed-line company in the nation (see the following case table for more information).

The courts in Brazil have been supportive of telecom arbitration. For instance, a lawsuit filed in an interconnection controversy was rejected by a state judge and remanded to arbitration due to the existence of an arbitration agreement. In an interesting private arbitration that is now before the Brazilian Supreme Court (STF), Embratel (a long distance company which was a former parastatal entity) was a party to an ICC arbitration carried out in São Paulo under Brazilian law, in Portuguese, with a panel of three Brazilian arbitrators. However the 'seat' of the arbitration according to the ICC was Paris. When the winning party sought to homologate (ratify) the award in the STF, Embratel raised the point that for the award to be duly ratified as a foreign award, it should have been signed by the panel in Paris. The case is still pending. Due to a recent constitutional change (Judiciary Reform) which will vest responsibility for homologation of foreign arbitral awards in the Superior Court rather than the Supreme Court, this case may end up in the Superior Court.

The arbitration trend in the Brazilian telecom industry has benefited from strengthening of the overall arbitration regime in the country, as well as by Brazil's ratification just a few years ago of the New York Convention on Enforcement of Foreign Arbitral Awards. Since the enactment of the Brazilian Arbitration Law and the Supreme Court ruling upholding its constitutionality, the judiciary has granted supportive and adequate measures to the main provisions of the Arbitration Law No. 9,307/96.

As two examples, we refer to Brazilian Supreme Court jurisprudence granting enforcement (exequatur) to foreign arbitral awards without the previous requirement of judicial homologation in the country of origin, and also its decision accepting service of process for arbitration upon a party domiciled in Brazil by any agreed means of notification other than via letters rogatory (a very long, cumbersome diplomatic process).

Also, many Brazilian courts have denied lawsuits based on conflicts that were subject to arbitration agreements instead. In other words, the legal effectiveness of these arbitration clauses has been confirmed by the courts.

From the state administrative and the legislative standpoint we also see that more and more, these bodies support and seek to introduce out-of-court mechanisms such as arbitration to resolve disputes. This tendency is encouraged by a variety of books, articles and seminars addressed to the benefits of arbitration in Brazil.

Conclusions

The growth of arbitration is keeping pace with the expansion of the telecom industry as a whole in Latin America. While there are no individual telecom industry arbitration rules, the specialised nature of telecom conflicts along with the usual advantages of arbitration have fuelled its use as a primary method

to resolve telecom disputes in the region.

One of the advantages of arbitration is its confidentiality. However this does make it more difficult to collect and analyse case data to draw meaningful conclusions. Nevertheless, based on our table of cases we can see that telecom arbitration in Latin America covers wide geographical and subject-matter swaths.

Most arbitrations have been launched by foreign entities against host govenments or parastatals, using a variety of arbitral fora, with mixed outcomes. As such, there seems to be no evidence of bias in the decisions one way or the other.

Special arbitration by telecom regulators may be useful but has defects as well, at least in the Brazilian scenario analysed here. The nature of the regulator's dispute resolution power is administrative and subject to challenge in the courts. The arbitrators are or were members of the ANATEL staff which undermines impartiality.

The regulator is generally considered a political entity more concerned with the interests of the government than the technical improvement of the telecom sector, profitable development of the market, fair investment payout and many other business concerns.

The expansion of the telecom market with ever-increasing competition,the slow pace and perceived bias of regulatory authorities, judicial overload, and concurrent strengthening of arbitration legislation in many Latin American countries all add to the prominent advantages of arbitration as a rapidly growing means of conflict resolution for the telecom sector. Arbitration has come to the Latin American telecom sector at the right time, and is here to stay.

Territory	Country/ claimant	Country/ respondent	Subsector	Issue	Forum	Year	Claim value/status	Winner	Loser
Latin America	US/IDT	Spain/ Telefónica	undersea cable		AAA	2004	$3.15 billion claim $4.50 billion counter-claim settled		
Argentina	France/France Telecom	Argentina/ state			ICSID	2004	pending		
Argentina	Spain/ Telefonica	Argentina/ state	fixed line	investment: on promise of fixed, dollarised tariffs	ICSID	2003	pending		
Brazil	Italy/Telecom Italia	Brazil/Banco Opportunity	fixed line	Brasil Telecom joint venture share buyback	London	2003	case may be rendered moot due to shareholder reorganisation 3/11/05		
Brazil	Brazil/Embratel (ex-state entity)			domestic vs foreign award	ICC/ Supreme Federal Tribunal	2005	pending		
Colombia	Canada/Nortel	Colombia/Telecom (state entity)	fixed line	joint venture: sales financials	Bogotá Chamber of Commerce	2001	$73million to Nortel Appeal by Telecom	multi-national	parastatal
Dominican Republic	DR-US/Tricom	Dom Rep./Codetel (state entity)	fixed line privatisation	interconnection	Telecom Regulator	1991			
Ecuador	US/Latin Am Telecom	Ecuador/ Pacifictel	long dist.	call terminations	Guayaquil Arbitral Tribunal	2004	$14 million to Pacifictel challenge in US Federal Court Miami	local co.	US co.
Ecuador	U.S./Uniplex Tel.Tech.	Ecuador/ Pacifictel	fixed line	interconnection fees	ICC	2002	$7million claim, but $691,000 to respondent	local co.	US co
El Salvador	France/France Telecom	El Salvador/	cellular	joint venture: ?	ICC	2002	$200million+ claim settled		
Guatemala	Chile/Americatel	Guatemala/Telgua (state entity)	fixed line	interconnection agreement: formula for calculation of damages	Guatemala Supreme Court	2004	pending $2 - $4million		
Nicaragua	US/TCN-Bellsouth	Nicaragua/ ENITEL (state entity)	cellular	interconnection agreement: failure of ENITEL to pay for certain calls & charges		Oct 2004	TCN awarded $11.8 million	US co.	parastatal
Panama	US?/Telephone & Technology, SA	Panama/Cable & Wireless of Panama (ex-INTEL state entity)	fixed line public phones w/ smart cards	calculation of lost profits	Center of Conciliation & Arbitration of Panama Panama Supreme Court	2000 2001	4.9 Billion Balboas Arbitral award upheld; motion by Respondentto to stop arbitration denied (2000)		
Panama	US?/Spur Enterprises	Panama/C&W (state entity)	fixed line public phones	joint venture: lost profits	same as above	2003	Arbitral award upheld		
Panama	Panama/ Petrocom	Panama/C&W (state entity)		recognise Mexican arbitral award	ICC	2001	Award recognised		
Peru	US/Nextel (local unit)	Peru/Telefónica Móviles	cellular	interconnection fees	Osiptel (Telecom Regulator)	2005			