TELECOM LAW AND TELECOM DISPUTE SETTLEMENT MECHANISM IN INDIA - A BIRD'S EYE VIEW

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"Mr. Watson come here. I want you", was the first complete sentence spoken on telephone by Alexander Graham Bell in March 1876.

INDIAN TELEGRAPH ACT

Close on the heels was the Indian Telegraph Act, 1885 giving exclusive privilege of establishing, maintaining and working "telegraphs" to Central Government. It also empowers the Government to grant a Licence, on such conditions and in consideration of such payments, as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India.

NATIONAL TELECOM POLICY 1994

All through the century, the Government continued to have monopoly on Telecom Services until early 1990's. Major developments in Telecom Technology resulted in faster changes and expansion in Telecom Sector. Government of India was not far behind and planned imaginative developments in Telecom. These naturally required huge investments as also proper regulation. To bridge the huge resource gap the Government decided to invite private participation and originally opened up the sub-sector of value added services to private investment in July 1992. The National Telecom Policy, 1994 also stated that suitable arrangements would have to be made to protect and promote the interest of consumers and to ensure fair competition. Several Licences were issued to private participants in the sectors of Paging and Cellular Mobile Services in 1994-95, later followed by Basic and other Licences.

REGULATORY AUTHORITY

Private entrepreneurs' entry into Telecom necessitated proper regulation of Telecom Sector as also an appropriate dispute resolution mechanism. Originally, the Government proposed to set up an independent Telecom Regulatory Authority as a non-statutory Body. However, the Standing Committee on Communications in its 22nd Report (Tenth Lok Sabha) held a view that statutory status should be given to the Regulatory Authority to enable it to function independently and effectively. Even the Supreme Court in Delhi Science Forum Case[1] has observed that:

> "The existence of a Telecom Regulatory Authority with the appropriate powers is essential for introduction of plurality in the Telecom sector. The National Telecom Policy is a historic departure from the practice followed during the past century. Since the private sector will have to contribute more to the development of the telecom network than DoT/ MTNL in the next few years, the role of an independent Telecom Regulatory Authority with appropriate powers need not be impressed, which can harness the individual appetite for private gains, for social ends. The Central government and the Telecom Regulatory Authority have not to behave like sleeping trustees, but have to function as active trustees for the public good".

TRAI ACT 1997

In 1997, the Telecom Regulatory Authority of India Act was enacted. This Act established a Telecom Regulatory Authority of India (TRAI), whose Chairperson was to be a sitting or retired Judge of the Supreme Court or a Chief Justice of a High Court. And the Members to be persons having special knowledge of, and personal experience in, telecommunication, industry, finance, accountancy, law, management and consumer affairs.

Apart from regulatory functions, TRAI was also empowered to adjudicate upon disputes among Service Providers or between the Service Providers and a group of Consumers on matters relating to technical compatibility and interconnection between the Service Providers, revenue sharing arrangement between Service Providers and quality of telecommunication services and interests of consumers. TRAI also possessed the power to issue directions to the Service Providers. TRAI is guided by the principle of natural justice. Appeals from the decisions of TRAI lay to the High Court.

[1] Delhi Science Forum & Ors. Vs. Union of India & Anr. (1996) 2 SCC 405

Appeals therefrom lay to the Supreme Court. Civil Court's jurisdiction was barred.

The adjudicatory powers of TRAI were challenged before the Delhi High Court on the ground, inter alia, that TRAI did not possess jurisdiction to issue directions to DoT in latter's capacity as Licensor. The Single Judge allowed the challenge, which was subsequently confirmed by a Division Bench of the Delhi High Court. The High Court held, inter alia, that TRAI does not possess the power to issue directions to the Government in latter's capacity as Licensor[2].

TRAI AS ARBITRATOR

The result of the above challenge was that no separate dispute settlement mechanism was available to adjudicate upon disputes between the Licensor and Licencees for quite some time. To rectify this situation, the Government stipulated in National Telecom Policy 1999 that TRAI will be assigned arbitration functions to resolve disputes between Government, in its role as Licensor, and the Licensees. Consequent thereto, the Government of India issued a Notification dated 03.06.1999 assigning TRAI the arbitration functions for resolution of disputes between the Central Government (in its capacity as Licensor) and any Licensee. This Notification never got implemented and was rescinded by the Government subsequently.

DISPUTE SETTLEMENT FORUMS IN INDIA

In Telecom Sector, the issues involved lead to several kinds of disputes which include disputes related to Licensing and other ancillary matters; to Policy and legitimate expectations; Interconnection; commercial agreements between Service Providers; competition / anti competitive practices; end user; Spectrum; disputes arising due to Regulatory actions, etc. Depending upon the nature of dispute, there are several Dispute Settlement Forums for adjudication thereof, though in almost all the cases it is TDSAT, which possess the requisite power to entertain and adjudicate these disputes. These Forums are:

- **Telecom Disputes Settlement and Appellate Tribunal**
- **MRTP Commission**

[2] Union of India vs. TRAI 74 (1998) DLT 282

- **Consumer Disputes Settlement Forums**
- **High Court**

A. TDSAT

Since there was a great demand for a separate dispute settlement mechanism from all quarters, the TRAI Act, 1997 was amended in January 2000 and Telecom Disputes Settlement and Appellate Tribunal (TDSAT / Tribunal) was established with both original and appellate jurisdictions. This specialized independent Tribunal was created to exclusively adjudicate upon disputes in the Telecommunication Sector, including disputes between the licensor and the licensee(s). In the context of the powers of TDSAT, the Supreme Court (Majority Judgement) has held[3], inter alia, that:

> "... we have no hesitation in coming to the conclusion that the power of Appellate Tribunal is quite wide, as has been indicated in the statute itself and the decisions of this Court dealing with the power of a Court, exercising appellate power or original power, will have no application for limiting the jurisdiction of the appellate tribunal under the Act."

The TRAI Act is a complete Code, which enacts the following, inter alia, provisions qua the Tribunal.

Composition of TDSAT:

The Tribunal consists of a Chairperson and not more than two Members appointed by the Central Government in consultation with the Chief Justice of India. The Chairperson should be or should have been a Judge of the Supreme Court or the Chief Justice of a High Court. A Member should have held the post of secretary to the Government of India or any equivalent post in the Central Government or the State Government for a period of not less than two years or a person who is well versed in the filed of technology, telecommunication, industry, commerce or administration.

Powers and Jurisdiction:

(i) **Substantive:** The Tribunal is empowered to adjudicate upon any dispute between the Licensor and a Licensee; two or more service

[3] Cellular Operators Association of India vs. Union of India (2003) 3 SCC 186

providers; and between a service provider and a group of consumers (original jurisdiction). It also has jurisdiction to hear and dispose of appeals against any direction, decision or order of the Telecom Regulatory Authority of India (appellate jurisdiction). These appeals can be filed within 30 days of TRAI's Order etc. The Tribunal however does not possess any jurisdiction over the matters relating to: the monopolistic trade practice, restrictive trade practice and unfair trade practice, which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission; the complaints of individual consumer are maintainable before a Consumer Dispute Redressal Forum or a Consumer Dispute Redressal Commission or the National Consumer Dispute Redressal Commission; and the dispute between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian Telegraph Act, 1885 . Since 9th January 2004, the Government has included broadcasting and cable services also within the purview of TRAI Act and thereafter the Tribunal possesses the power and jurisdiction to settle disputes in the cable and broadcasting sectors also.

In the context of TDSAT's power to adjudicate upon TRAI's Regulations, the Delhi High Court has held[4] that TDSAT, which has derived its jurisdiction under the specific statutory provisions of the TRAI Act and has not been created under any constitutional provisions, does not have the jurisdiction or the competence to decide on the constitutionality of a statutory provision, under which it has been created. And for the same reasoning, TDSAT would not have the competence to adjudicate on the vires of the subordinate legislation i.e. the Regulations framed and effectuated in exercise of power conferred under the TRAI Act.

The Delhi High Court has however further held that TDSAT is empowered to examine as to whether a Regulation, like Access Deficit Charge Regulation, is a piece of subordinate legislation or is in the nature of an administrative / executive decision, in order to decide whether TDSAT can adjudicate upon any lis arising therefrom. On the facts of the case, the High Court has held that ADC Regulation was in the nature of an executive act and not

[4] Telecom Regulatory Authority of India v. The Telecom Disputes Settlement and Appellate Tribunal & Anr. – WP (C) No: 2838 of 2005 – Order & Judgement dated 23.12.2005

legislative and therefore TDSAT had the power to adjudicate thereupon.

(ii) Procedural:

- The Tribunal is not bound by the procedure laid down by the Code of Civil Procedure, 1908;
- It has the power to regulate its own procedure;
- It is to be guided by the principles of natural justice;
- Tribunal has the same powers as are vested in a civil court under the CPC in respect of:
  (a) summoning and enforcing the attendance of any person and examining him on oath;
  (b) requiring the discovery and production of documents;
  (c) receiving evidence on affidavits;
  (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document, from any office;
  (e) issuing commissions for the examination of witnesses or documents;
  (f) reviewing its decisions;
  (g) dismissing an application for default or deciding it, ex parte;
  (h) setting aside any order of dismissal or any application for default or any order passed by it, ex parte; and
  (i) any other matter which may be prescribed.
- In addition, the Tribunal can call for the records relevant to disposing of a Petition or appeal, for the purpose of examining the legality or propriety or correctness of any dispute or of any order etc of TRAI.

Nature of proceedings:

- The Tribunal is the Court of first instance.
- Every proceeding before the Tribunal is deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code (45 of 1860);
- The Tribunal is deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974);

- Tribunal’s Orders are executable as a decree of civil court.

Civil Courts Jurisdiction Barred:

No civil court has jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal is empowered to determine and no injunction can be granted by any Court or other Authority in respect of any action taken or to be taken in pursuance of any power conferred by or under TRAI Act on the Tribunal.

Appeals:

The Tribunal's orders can be appealed to the Supreme Court but only on substantial questions of law. However, no appeal lies against an interlocutory order or against any decision or order made by the Tribunal with the consent of the parties. The appeal to Supreme Court can be preferred within 90 days from the date of the decision or order appealed against.

Penalty for Non-Compliance of Tribunal’s Orders:

Willful failure to comply with the order of the Tribunal is punishable with fine which may extend to one lakh rupees and in case of a second or subsequent offence it may extend to two lakh rupees and in case of continuing contravention with additional fine which may extend to two lakh rupees for every day during which such default continues.

All pending matters transferred to TDSAT:

- All cases pending for adjudication of disputes before TRAI prior to the said amendment of January 2000 stood transferred to the Tribunal on the date of establishment of the Tribunal;

- Similarly all appeals pending before the High Court stood transferred to the Tribunal on its establishment.

- It may be noted that writ petitions under Article 226 of the Constitution pending before the High Court were not transferred. These could not have been transferred because the High Court's powers and jurisdiction under Article 226 cannot be taken away by a Statute.

B. MRTP COMMISSION

Under the TRAI Act, 1997, the matters relating to the monopolistic trade practice, restrictive trade practice and unfair trade practice are subject matter of the jurisdiction of the Monopolies and Restrictive Trade Practices Commission.

The issue came up for consideration before TDSAT recently and the Tribunal has held,[5] inter alia, that while in regard to Monopoly and Restrictive Trade Practices, the MRTP Act generally applies in all sectors, TRAI is a Special Act covering the areas of disputes in Telecom, Broadcasting and Cable sectors and that too between the parties mentioned in the TRAI Act. Further that MRTP Commission cannot adjudicate a dispute based on the violation of a Regulation made under the TRAI Act even if the Regulation incidentally trenches on the subject of Monopoly and Restrictive Trade Practices. It was however clarified that TDSAT cannot try only such disputes which are not based on rights and liabilities arising out of TRAI Act or the regulations made thereunder and pertain solely to a complaint of monopolistic trade practice, restrictive trade practice and unfair trade practice.

C. CONSUMER DISPUTES

The Tribunal possesses jurisdiction on consumer disputes only when such dispute is between a service provider and a group of consumers. An individual complainant cannot approach the Tribunal for adjudication / redressal of his grievance. For redressal of individual consumer complaint, the consumer has to approach the redressal authorities under the Consumer Protection Act, 1986.

D. HIGH COURT

[5] Sea TV Network Ltd. Vs. Star India Pvt. Limited & Another – Petition No. 41(C) of 2005 dated 24.08.2005

The January 2000 amendment of the TRAI Act transferred all appeals pending before the High Court, immediately before commencement of the said amendment Act, to TDSAT. However, it is settled law that no Statute can take away or affect the writ jurisdiction of the High Courts under Article 226 of the Constitution[6] and therefore to the said extent the High Courts possess the powers and jurisdiction to deal with telecom matters / issues under their writ jurisdiction. But the High Courts have been disinclined to entertain telecom matters and have generally preferred to transfer telecom cases to TDSAT even if these are agitated in writ jurisdictions.

ARBITRATION

The original Telecom Licences provided for reference of disputes arising thereunder to the sole arbitration of the Director General, Telecommunications. It has been a contentious issue whether such an Arbitrator could entertain Telecom disputes. However, post January 2000 amendment of the TRAI Act, since TDSAT possesses exclusive jurisdiction over Licensor and Licencee disputes, the telecom licences (4th Cellular, Basic, Unified Access) provide that the dispute settlement between the licensor and licensee is within the jurisdiction of TDSAT.

This subject has been examined by TDSAT and it has held / observed[7], inter alia, that:

> "The Act is a complete code. TDSAT has exclusive jurisdiction to adjudicate any dispute between the parties and also exercises exclusive appellate jurisdiction against any direction, decision or order of the TRAI."
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> "TRAI Act is a special law, which will govern, and it overtakes general law, i.e. Arbitration Act, 1996. Also TRAI Act, being the latter Act (TDSAT was constituted by the Amending Act of 2000)

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[6] L. Chandra Kumar vs. Union of India & Ors (1997) 3 SCC 261
[7] Aircel Digilink India Ltd. Vs Union of India & Anr. - Petition No. 6 of 2003 – Judgement dated 06.01.2005

has precedence over the earlier Act which is the Arbitration Act, 1996.

The Tribunal has observed that if reference is made to the provisions of the Act, particularly Section 15, it will be quite clear that the only exception is when there is arbitration under Section 7B of the Indian Telegraph Act, 1885 and in no other dispute within the jurisdiction of TDSAT the matter can go to the arbitration... And that even otherwise jurisdiction of arbitration is barred by necessary implication.

The Tribunal has therefore held that "... arbitration is barred in respect of the matters which are within the exclusive jurisdiction of the TDSAT under the provisions of Telecom Regulatory Authority of India Act, 1997." This issue was also subject matter of another Petition in Delhi High Court contending that arbitration proceedings can lie in case of Telecom disputes, where there is an arbitration clause in the license Agreement. However, the said Petition[8] was withdrawn on 21.07.2008, when it was conceded that TRAI Act would prevail over the Arbitration and Conciliation Act, being a special statute, in view of the Supreme Court judgment Gujarat Urja Vikas Nigam Ltd. V. Essar Power Ltd[9].

TRAI

Until January 2000, TRAI had adjudicatory powers also to settle disputes among Service Providers or between a Service Providers and a group of consumers on matters relating to technical compatibility, interconnection, and revenue sharing arrangement between service providers and quality of telecommunication services and interests of consumers. However, the January 2000 Amendment, which established TDSAT, divested TRAI of all its adjudicatory powers and transferred all cases pending before it to TDSAT. In a judgement, while dealing with a direction of TRAI issued under section 13 of the TRAI Act regarding disconnection of POIs, the TDSAT has held that

> "... when dispute arises if there has been any breach of the license agreement or of the terms of the interconnectivity between the service

[8] Reliance v. BSNL - FAO (OS) No. 232 / 2004 and C.M Appl. Nos. 13962 / 2004 & 428 / 2005

[9] (2008) 4 SCC 755

providers, it is appellant Tribunal (TDSAT) which is the sole judicial authority to decide the dispute on a complaint field by the service providers, ... Functions of TRAI and Appellate Tribunal are in altogether different planes."[10]

Powers and Functions of TRAI:

(i) Recommendatory Functions

(a) TRAI is empowered to make recommendation, either suo motu or on a request form the licensor, on the following matters, namely:

- (i) need and timing for introduction of new service provider;
- (ii) terms and conditions of licence to a service provider;
- (iii) revocation of licence for non-compliance of terms and conditions of licence;
- (iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;
- (v) technological improvements in the services provided by the service providers;
- (vi) type of equipment to be used by the service providers after inspection of equipment used in the network;
- (vii) measures for the development of telecommunication technology and any other matter relatable to telecommunication industry in general;
- (viii) efficient management of available spectrum;

(b) These recommendations are not binding on the Central Government. In respect of need and timing for introduction of new service provider and terms and conditions of licence to a service provider, it is mandatory for the Central Government to seek TRAI's recommendations. However, the Central Government can issue a licence to a service provider if no recommendations are received from TRAI within the specified period.

[10] Appeal No. 2 of 2004 - Bharat Sanchar Nigam Limited vs. TRAI & Ors. dated 25.04.2004

(c) It needs to be noted that if the Central Government comes to a prima facie conclusion that TRAI's recommendation cannot be accepted or needs modifications, the Government is obliged to refer it back to TRAI for its reconsideration.

(ii) Other Functions

TRAI is to discharge the following functions, namely:

(i) ensure compliance of terms and conditions of licence;
(ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, the fix the terms and conditions of inter-connectivity between the service providers;
(iii) ensure technical compatibility and effective inter-connection between different service providers;
(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;
(v) lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;
(vi) lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;
(vii) maintain register of inter-connect agreements and of all such other matters as may be provided in the regulations;
(viii) keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;
(ix) ensure effective compliance of universal service obligations;

(iii) Tariff Fixation

TRAI is empowered to notify the rates at which the telecommunication services within India and outside India are to be provided. TRAI is empowered to notify different rates for different persons or class or persons for similar telecommunication services and where different rates are fixed, TRAI has to record the reasons therefor. TRAI can fix ceilings or floors for Tariffs or may even forbear from prescribing Tariffs. TRAI's power to fix tariffs for Broadcasters under section 11 (2) of the TRAI Act was subject matter of challenge in a Writ Petition[11] in Delhi High Court on the ground, inter – alia, that TRAI's tariff fixation powers infringes Article 19 of the Constitution. Vide its order and judgment dated 09.07.2007, the Delhi High Court has held that fixation of tariffs by TRAI is within their competence even in regard to Broadcasters and that the devising of an upper limit of pay channels will have the effect of a wider dissemination and viewership thereby safeguarding the pre –eminent right of the citizenry in the context of freedom of speech and expression. This judgment has been challenged[12] in the Supreme Court and leave has been granted on 08.02.2008 by the Supreme Court confined to the maintainability of the Writ Petition under Article 226 of the Constitution qua Articles 19 (1) (a) and 19 (1) (g) of the Constitution. This was so because one of the issues before High Court was whether a non – citizen can maintain a Writ Petition under Article 226 and the High Court had rejected the contention. Thus, with respect to TRAI's tariffs fixation power, the High Court's judgment dated 09.07.2007 attains finality.

(iv) Issuance of Directions

TRAI is empowered to issue directions to the Service Providers on the matters specified in section 11(1)(b) i.e. matters referred to in sub para (ii) above. In this context, TDSAT has held[13] that TRAI cannot issue any directions etc., which has the effect of amending / overriding the terms of a License issued by the Central Government. This issue is pending consideration of the Supreme Court.[14]

(v) Calling for Information

TRAI is empowered to call upon any Service Provider at any time to furnish in writing such information or explanation relating to its affairs as it may require; or appoint one or more persons to make an inquiry in

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[11] Star India Pvt. Ltd. V. Telecom Regulatory Authority of India and others - Writ Petition No. 24105 (c) of 2005 and connected cases

[12] SLP (c) Nos. 2158-2159 of 2008

[13] BSNL Vs. TRAI in Appeal No. 31 of 2003 dated 03.05.2005

[14] Telecom Regulatory Authority of India v. BSNL – Civil Appeal No. 3298 of 2005 and connected matters

relation to the affairs of any service provider; and direct any of its officers or employees to inspect the books of account or other documents of any service provider.

(vi) Regulation making power

(a) TRAI is empowered to notify such regulations as are consistent with TRAI Act and the rules made thereunder by the Central Government to carry out the purposes of the Act. Without prejudice to the generality of this power, TRAI can make regulations regarding the times and places of meetings of TRAI and the procedure to be followed at such meetings including quorum necessary for the transaction of business; the transaction of business at the meetings; matters in respect of which register is to be maintained; levy of fee, etc.

(b) Every regulation made by TRAI has to be laid before each House of Parliament. If both Houses of Parliament agree in making any modification in such regulation or both Houses agree that such regulation should not be made, the regulation will thereafter have effect only in such modified form or be of no effect, as the case may be. However, any such modification or annulment is without prejudice to the validity of anything previously done under that regulation.

(c) In this context however, the Delhi High Court has held[15] that TRAI can validly make regulations in respect of only such subject matters, which have been specifically specified under Section 36 of the TRAI Act. And that TRAI was fully competent to issue directions in respect of the access deficit charges for which it has been statutorily empowered. Merely because TRAI has notified its decision as a regulation and may even have followed the same procedure to give effect to the same, it cannot have the effect of converting such directions into statutory regulations.

Obligations of TRAI:

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[15] Telecom Regulatory Authority of India v. The Telecom Disputes Settlement and Appellate Tribunal & Anr. – WP (C) No: 2838 of 2005 Order & Judgement dated 23.12.2005

- TRAI is obliged to ensure transparency while exercising its powers and discharging its functions.

- TRAI cannot act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality while discharging its functions under Section 11 (1) and (2) of TRAI Act.

Violation of TRAI's Directions punishable:

Violation of TRAI's directions is punishable with fine which may extend to one lakh rupees and in case of second or subsequent offence with fine which may extend to 2 lakh rupees and in case of continuing contravention with additional fine which may extend to 2 lakh rupees for every day for which the default continues.

CABLE & BROADCASTING

A. Cable Television Networks (Regulation) Act, 1995

Considering it necessary to regulate the operation of Cable Television network in the entire Country so as to bring about uniformity in their operations the Cable Television Networks (Regulation) Act, 1995 was enacted on 25.03.1995, which replaced the earlier Ordinance.

This Act provides for a mandatory registration of the Cable Operators desiring to operate a Cable TV Network, with the Registering Authority namely Head Post Master of a Head Post Office of the area within whose territorial jurisdiction the office of the concerned Cable Operator is situated. The Act prohibits transmission or re-transmission of any programme unless such programme is in conformity with the prescribed Programme Code (read with relevant Rules). The Programme Code prohibits carrying of such programmes which, inter alia, offends against good taste or decency; contains criticism of friendly countries; contains attack on religions or communities; contains anything obscene, defamatory; contains anything affecting the integrity of the Nation, etc. The said Act also prohibits transmission or re-transmission of any advertisements unless such advertisements are in conformity with the prescribed Advertisement Code. It is laid down that advertising carried in the Cable Service shall be so designed as to conform to the laws of the Country and should not offend morality, decency and religious susceptibility of the Subscribers. It is further laid down that no advertisements shall be permitted which, inter alia, derides any race, caste, colour, creed and nationality; is against any provisions of the Constitution of India; tends to incite people to crime, cause disorder or violence or breach of law or glorifies violence or obscenity in any way; exploits the national emblem, etc.

This Act was amended with effect from 01.09.2000 to make it mandatory for every Cable Operator to re-transmit at least two Doordarshan terrestrial channels and one regional language channel of a State in the prime band, in satellite mode on frequencies other than those carrying terrestrial frequencies.

The said Act was further amended with effect from 31.12.2002 to empower the Central Government to make it obligatory for every Cable Operator to transmit or re-transmit programme of any pay channels through an addressable system [popularly known as Conditional Access System (CAS)] with effect from a specified date, if the Central Government was satisfied that it is necessary in public interest to do so. Pursuant to the said powers, the Central Government issued a Notification dated 14.01.2003 making it obligatory for every Cable Operator to transmit / re-transmit programmes of every pay channels through an addressable system in Chennai Metropolitan area, Municipal Council of Greater Mumbai area, Kolkatta Metropolitan area and National Capital Territory of Delhi within six months from 15th day of January, 2003. The dates of implementation of CAS have been deferred several times. The issue of introduction of CAS has been mired with controversies and continued litigation. In fact, on 23.02.2003 even TRAI chose to recommend, inter alia, that the introduction of CAS be kept in abeyance for at least three months. However, a Division Bench of the Delhi High Court had on 20.07.2006[16] directed the Central Government to implement CAS, pursuant whereto the Government has notified implementation of CAS with effect from 01.01.2007.

[16] LPA No. 985 of 2006

Cable Television Networks (Second Amendment) Rules, 2006 dated 31.07.2006 provides, inter alia, that on issue of any notification under section 4 A of the Act by the Central Government, TRAI may take appropriate decisions on the following aspects and duly notify the:

(a) standard interconnection agreement to be used for entering into commercial agreements for distribution in the notified areas, of pay or free-to-air channels among (i) broadcasters and multi - system operators; and (ii) multi-system operators and local cable operators;

(b) the maximum limits of security deposit and monthly rental for supply, maintenance and servicing of set top boxes of prescribed specifications to the subscribers on rental basis by multi-system operators in the notified areas;

(c) tariff for the basic service tier along with the minimum number of free-to-air channels to be provided by the multi-system operators or local cable operators to the subscribers in the notified areas;

(d) regulations for quality of service to be provided by the multi- system operators or local cable operators to the subscribers in the notified areas;

The said amendment also provides that no programme shall carry advertisements exceeding twelve minutes per hour, which may include up to ten minutes per hour of commercial advertisements, and up to two minutes per hour of a channel's self-promotional programmes.

Another mode of providing this service is Direct–to–Home (DTH) which refers to distribution of multi channel TV programmes in Ku Band by using a satellite system by providing TV signals directly to the subscribers' premises without passing through an intermediary such as cable operator. Earlier prohibition on DTH was withdrawn by the Government vide its Notification No. GSR 18 (E) dated 09.01.2001. A Licence is required from the Minister of Information and Broadcasting to provide DTH Broadcasting Service. Presently, there is no restriction on the total number of DTH Licenses. All these subjects are in the process of their respective developments.

In this regard, TRAI had issued a Press Release No. 39 of 2008 on 18.04.2008 stating that the Broadcasters will offer the same bouquets to the DTH operators as are being offered by them for non-CAS cable distribution. In addition, they are free to offer additional bouquets. The rates of bouquets and a-la-carte rates of pay channels so offered to the DTH operators will broadly be in consonance with the TDSAT's judgment dated 31st March, 2007 in petition no. 189(C) of 2006 and judgment dated 14th July, 2006 in petition no. 136(C) of 2006 wherein the rates were to be fifty per cent. of the rates at which these bouquets/ channels are being offered by them for non-CAS cable distribution i.e. non-addressable platform. All bouquet rates and the a-la-carte rates must satisfy the provisions of the afore-said Interconnection regulations.

In case of HITS the guidelines are yet to be finalized. Some issues relating to HITs arose in a case[17] before TDSAT, wherein the TDSAT held/observed that the TRAI and Government's keenness that HITS technology should be operationalised remains only on paper till the Guidelines are amended or the Government issues authoritative instructions that providing signals/content by broadcasters to HITS operators will not be taken as violation of the existing Guidelines. High time that the Government immediately takes a decision on this aspect in consumer interest

B. TRAI Act: Cable and Broadcasting Sectors

1. The Parliament had already amended the TRAI Act, and had inserted a Proviso to the definition of "telecommunication service" by its Amendment Act of 2000 with effect from 24.01.2000 to the effect that the Central Government may notify other services to be "telecommunication services" including broadcasting services within the purview of TRAI Act, 1997. However, this amendment was subject matter of challenge in the Delhi High Court on the ground, inter –alia, that the proviso to

[17] **WWIL and Dish TV India Limited V/s Star Den Media Services (P) Ltd. and Star India Pvt. Ltd. Petition No.114(C) of 2008**

section 2 (1) (k) of the TRAI Act empowering the Central Government to notify other services to be telecommunication service including broadcasting services was ultra – vires the main provision. The contention has been rejected by the Delhi High Court.[18]

2. Absence of proper regulation in the field of Cable and Broadcasting Sectors led the Government to issue a Notification No. 39 dated 09.01.2004 [S.O. 44(E)] notifying "broadcasting" and "cable" services to be "telecommunication services" under the TRAI Act.

3. After having issued the above Notification, on the same day, i.e. 09.01.2004, the Government, by its Order being S.O. 45(E), also entrusted certain additional functions to TRAI in respect of broadcasting and cable services i.e.:

   (a) with respect to TRAI's recommendatory functions: to make recommendations regarding the terms and conditions on which the "Addressable systems" shall be provided to customers; and to recommend the parameters for regulating maximum time for advertisements in pay channels as well as other channels; and

   (b) with respect to TRAI's Tariff fixation powers: to specify standard norms for, and periodicity of, revision of rates of pay channels, including interim measures.

4. Thus, several major developments took place on 9th of January, 2004 in the Broadcasting and Cable sectors i.e.:

   (a) Broadcasting and Cable Services were brought within the purview of TRAI Act thereby extending the applicability of the relevant provisions of the TRAI Act to the said two services also;

   (b) the said amendment entrusted the above mentioned additional functions to TRAI; and

[18] Writ Petition (C) No. 24105 of 2005 - Star India Pvt. Ltd. Vs Telecom Regulatory Authority of India

(c) TDSAT was empowered to entertain disputes in Cable and Broadcasting Sectors also.

Service Provider

5. With respect to TDSAT's powers to adjudicate upon disputes relating to broadcasting and cable sectors, an issue was raised as to whether a Cable Operator is a Service Provider or not, within the meaning of the definition of "Service Provider" contained in Section 2(1)(j) of the TRAI Act. In this regard, TDSAT has held[19], inter-alia, that:

> "...taking note of the beginning words of the Section 2 of the TRAI Act i.e. "in this Act unless the context otherwise requires" and the power of the Government under proviso to Section 1(k) to include other services to be telecommunication service under which power a notification dated 9th January, 2004 has been issued and taking note of the power of the TRAI to make Regulations and the fact that these Regulations have the force of law, and the Regulations so made include a multi-system operator like petitioner or a cable operator as a service provider and bearing in mind the subject matter and the context in which the definition clause has been used in the TRAI Act and the object underlying the Act and principles, as laid down by the apex Court in the cases cited above, we must hold that for the purpose of Section 2(j) of the TRAI Act apart from the Government as a service providers and the licensee, even broadcaster, multi system operator, cable operators or distributors of TV channels will have to be construed to be service providers and if so construed, any dispute between them will be a dispute that has to be settled by this Tribunal under section 14 of the Act."

The Delhi High Court has also held that broadcasters are service providers under the TRAI Act.[20]

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[19] Sea T.V. Network Limited versus Star India Limited and Another in Petition No. 41(C) of 2005 dated 24.08.2005.

[20] See Star India Pvt. Ltd. V. Telecom Regulatory Authority of India and others - Writ Petition No. 24105 (c) of 2005 and connected cases

Consumer

6. On another issue as to who is a "Consumer", TDSAT had earlier held[21], that "Consumer" is the ultimate user of the goods and not an intermediary between the producer and the ultimate consumer, like the wholesaler and the retailer and therefore TDSAT had held that the "Hotels", who receive signals from the Broadcasters or their Agents directly or from Cable Operators directly and thereafter further transmit the same to the rooms for viewing by the occupants / guests, are not Consumers. On Appeal, however the Supreme Court[22] has held that making a provision for extending facilities and amenities like Television etc. to the boarders would not constitute a sale by a hotel to a guest; if a Television set is provided in all the rooms, as part of the services rendered by the hotel management by way of an amenity, wherefor the guests are not charged separately, the same would not convert a guest staying in hotels into consumers or subscribers; that the hotels *stricto senso* do not retransmit the signals to any other person, it merely make the services available to its own guests, which in other words, would mean to itself; and that the hotels are therefore consumers.

7. TRAI had also issued its 4th amendment dated 07.03.2006 to its 2nd Tariff Order, wherein it defined "ordinary subscriber" and "commercial subscriber".

A-La-Carte Pricing

There has been a long pending demand of some Operators that a-la-carte pricing of channels should be available so as to enable the Subscriber to choose the channels they wish to watch and pay for only so chosen channels. In this context, in case of CAS Areas, with effect from 31.12.2006, TRAI has mandated[23], inter alia, that:

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[21] Hotel Association of India & Anr. V. Set Discovery Private Ltd. & Ors. – Petition No. 32 (c) of 2005 dated 17.01.2006

[22] *Hotel & Restaurant Association and* Anr V. *Star India Private Ltd and Ors.* - Civil Appeal 2061 of 2006 – Order & Judgement dated 24.11.2006

[23] The Telecommunication (Broadcasting and Cable) Services (Third) (CAS Areas) Tariff Order, 2006 (6 of 2006)

(a) the broadcaster must offer pay channels on a-la-carte basis to multi system operators;

(b) the multi system operators must offer pay channels on a-la-carte basis to cable operators.

(c) multi system operators / cable operators must offer pay channels on a-la-carte basis to the subscribers.

(d) In addition to the a-la-carte offer, pay channels can also be offered in the form of bouquets.

(e) TRAI has further fixed a ceiling of five rupees per pay channel per month (exclusive of taxes) (MRP) payable by a subscriber to multi system operator / cable operator. TRAI has mandated that the maximum retail price for a pay channel within this ceiling can be fixed by the broadcaster. However, in cases where the subscriber has opted for a pay channel for a period less than four months then the subscriber will have to pay for four months of the MRP of the concerned pay channel. This ceiling on MRP is applicable to all the existing pay channels as well as to new pay channels. This power of TRAI to fix MRP has also been acknowledged by the Government in Rule 10 (3) of its Cable Television Networks (Second Amendment) Tules, 2006 dated 31.07.2006.

Subsequently, vide its The Telecommunication (Broadcasting and Cable) Services (Third)(CAS areas) Tariff (First Amendment) Order, 2006, (7 of 2006) dated 21.11.2006, TRAI prescribed that these ceilings will not apply to hotels with rating of three star and above, heritage hotels (as described in the guidelines for classification of hotels issued by Department of Tourism, Government of India) and any other hotel, motel, inn, and such other commercial establishment, providing board and lodging and having 50 or more rooms.

With respect to Non-CAS Areas, the TRAI has provided, inter alia, in its Tariff Order dated 04.10.2007[24] that every Broadcaster should

[24] Telecommunication (Broadcasting and Cable) Services (Second) Tariff (Eighth Amendment) Order, 2007 dated 04.10.2007

offer or cause to offered on non-discriminatory basis all its channels on a-la-carte basis to the multi system operator or the cable operator. Certain principles have been prescribed for charging on a-la-carte and bouquet systems. This provision is applicable even to addressable systems in Non CAS Areas.

Further, vide its said Tariff Order dated 04.10.2007, TRAI has also prescribed ceilings on charges payable by a subscriber to the Cable Operator or Multi System Operator transmitting or re-transmitting free-to-air channels and pay channels in non-CAS areas which range from Rs. 130/- to Rs. 260/-, depending upon the number of pay channels being provided and the Cities where the service is provided. However, minimum 30 free-to-air channels are prescribed in all the categories. Further, the said Tariff Order dated 04.10.2007 also prescribes maximum charges payable by a subscriber to Cable Operator or Multi System Operator transmitting or re-transmitting only free-to-air channels i.e. a minimum number of 30 free-to-air channels, in non-CAS Areas as Rs. 77/- per month for the first television connection. These are exclusive of all taxes. For second and subsequent television connections at the same premises, the charges are to be mutually agreed between the LCO / MSO and the Subscriber.

It may be mentioned here that some aspects of the Regulation are presently under challenge.

II. INTERCONNECT REGULATION

In the background that distribution of cable TV in India is characterized by a few dominant Broadcasters and large Multi System Operators (MSOs) and that some of these players have become even stronger as vertical integration has taken place and that last mile operations on the other hand are highly fragmented and therefore there are large disparities in the bargaining power of various players of the distribution chain, TRAI issued its "Telecommunication (Broadcasting and Cable Services) Interconnection Regulation, dated 10.12.2004, which lays down, inter alia,:

(a) **Must provide Clause**

That every Broadcaster has to provide its TV channels on non-discriminatory terms to all distributors of TV channels. It also provides that System Operators will also re-transmit signals received from a Broadcaster, on a non-discriminatory basis to Cable Operators. All these have to be provided upon a request of the concerned Operator. TRAI has laid down that this provision will not apply in the case of a distributor of TV channels having defaulted in payment.

In this context, TDSAT has held[25] that the seeker of signals must negotiate with the supplier of signals and if such negotiations fail, it is for the seeker of the signals to approach TDSAT for the redressal of its grievances.

(b) **No unreasonable terms**

TRAI has further laid down that any imposition of terms, which are unreasonable, shall be deemed to constitute a denial of request for channels. Though supply of signals is mandated under the Regulation on reasonable terms, the Regulation does not stipulate what that reasonable term should be. Therefore, TDSAT has held[26] that if a dispute arises between two contracting parties with regard to reasonableness of a term then in that case, the reasonableness of the term has to be decided by an authorised forum like TDSAT and not by any single party to the contract.

In another judgement[27] TDSAT has held that these Regulations are a mandate against the Broadcasters not to create exclusivity or monopoly of any one Service Provider and a contract between two Service Providers should be in conformity with them. Therefore, demanding similar sum towards Subscribers, which one MSO has agreed to pay based on his large Subscriber base, from another MSO who has much smaller Subscriber base, would amount to unreasonableness. And therefore, in a case

[25] Star India Private Ltd. v. IndusInd Media &Communication Ltd. – Petition No. 44(c) of 2004 dated 17.01.2006

[26] Star India Private Ltd. v. IndusInd Media &Communication Ltd. – Petition No. 44(c) of 2004 dated 17.01.2006

[27] Sea T.V. Network Ltd. v. Star India Private Ltd. – E.A. No: 2 of 2005 in Petition No. 41(c) of 2005 dated 17.01.2006

where there is no agreed lump sum subscription amount between the parties, the parties will have to agree for subscription being paid on the Subscriber base of the receiver of signals, otherwise it would amount to a denial of signals on unreasonable grounds. On the facts of the case TDSAT has also held that to compel one Operator to restrict its business to a part of a city would only amount to facilitating the business of another Operator, and will be detrimental to the interest of the first Operator, which again would only create monopoly of the second Operator, in areas where the first Operator is prevented from having Subscribers, which would also be contrary to the Regulations.

(c) **Standard Agreement**

Time and again, issues have arisen in respect to reasonableness of the terms of the Subscription Agreements. This issue was raised in a Petition[28], where TDSAT was pleased to observe[29] that most of the issues regarding unreasonableness of the terms should first be dealt with by the TRAI.

In this regard, TRAI has issued a Regulation[30], which provides, inter alia, that all broadcasters, multi system operators and cable operators should mutually negotiate and finalise their interconnection agreements in respect of CAS Areas and in case they are not able to arrive at a mutually acceptable interconnection agreement within a time-period to be specified by TRAI through a direction, then they will have to enter into interconnection agreements in terms of the specified standard interconnection agreements within a time period[31] to be specified by TRAI.

TRAI has however clarified that if the service providers have already entered into mutually acceptable interconnection

[28] Indusind Media & Communication Ltd vs STAR India Pvt. Ltd & Anr- Petition No. 54 (C) of 2006

[29] Order dated 10.05.2006 in Indusind Media & Communication Ltd vs STAR India Pvt. Ltd & Anr- Petition No. 54 (C) of 2006

[30] The Telecommunication (Broadcasting and Cable Services) Interconnection (Second Amendment) Regulation, 2006 (9 of 2006) dated 24.08.2006

[31] TRAI's Direction No. 11-13 / 2006 - B&CS dated 24.08.2006

agreements by the date specified in the direction issued by TRAI, then they need not sign standard interconnection agreements.

TRAI has further clarified that those service providers, who have a pre-existing interconnection agreement as on the date of issue of the said regulation, will also have the option, after the expiry of their existing agreement, to either enter into a mutually acceptable interconnection agreement, or failing which to enter into interconnection agreements as per the specified standard agreements.

The abovementioned Standard Agreement provides, inter alia, that the Subscription amount will be shared between the Broadcasters, MSOs and LCOs in the ratio of 45%, 30% and 25% (excluding FTA Charges and Channel Placement Fee - the former will be retained by the Local Cable Operator and the latter will be retained by the Multi System Operator).

This system of Standard Contract and revenue sharing has been subject of challenge[32] before TDSAT. In its Order and Judgement dated 27.02.2007, TDSAT has upheld the same. Even the Delhi High Court in its Judgement dated 09.07.2007[33] has held, inter alia, that TRAI is empowered to prescribe the Standard Interconnect Agreements.

(d) **Finalising Subscriber Base in Non-CAS Areas**

Numerous controversies have arisen, time and again, with respect to increase in the monthly subscription charges owing to, inter alia, changes in the subscriber base of the MSO's and the LCO's; and in order to put some regulation in place on these issues, TRAI has recently provided[34] for the methodology of accounting for such increases in non CAS areas in various situations as under:

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[32] SET Discovery Private Limited Vs. Telecom Regulatory Authority of India & Ors in Appeal No.10(C) of 2006 and other connected cases

[33] Writ Petition (C) No. 24105 of 2005 - Star India Pvt. Ltd. Vs Telecom Regulatory Authority of India

[34] The Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation, 2006 (10 of 2006) dated 04.09.2006

(i) In case of finalising Subscriber Base at the time of first agreement between Multi System Operator and Cable Operator, the parties have to take into account the subscriber base of the cable operator on the basis of the Subscriber Line Report (SLR) where such SLR exists and where such SLR does not exist, this shall be negotiated on the basis of the evidence provided by the two parties on the subscriber base, including the subscriber base of similarly placed cable operators and local survey. It was clarified that SLR is only an indicative basis for arriving at the subscriber base and the subscriber base as mutually agreed by the two parties could be more than or less than the number indicated by the SLR.

(ii) In case of finalising Subscriber Base at the time of first agreement between Multi System Operator and Broadcaster, the multi system operator is obliged to furnish a list of the cable operators who will be getting signals from its network along with their subscriber base and further that the parties are obliged to take into account the subscriber base of cable operators connected to the multi system operator while negotiating the subscriber base of the multi system operator. In this case, the TRAI has further laid down that for the consumers proposed to be directly served by the multi system operator, the procedure as laid down in sub-clause (a) above should be followed.

(iii) In case of variation of Subscriber Base during validity of agreement between Multi System Operator and Cable Operator, the TRAI has provided that the subscriber base agreed upon by the parties at the time of execution of the interconnection agreement between a multi system operator and a cable operator shall remain fixed during the course of the agreement except in exceptional circumstances that warrant an increase or decrease in the subscriber base. In such an eventuality, it is for the service provider seeking a change in the subscriber base to provide reasons and accompanying evidence including local survey for the proposed change.

(iv) In case of variation of Subscriber Base during validity of agreement between Multi System Operator and Broadcaster also, the subscriber base agreed upon by the parties at the time of execution of the interconnection agreement between a multi system operator and a broadcaster shall remain fixed during the course of the agreement except in exceptional circumstances that warrant an increase or decrease in the subscriber base. In such an eventuality, it is for the service provider seeking a change in the subscriber base to provide reasons and accompanying evidence including local survey for the proposed change. TRAI has further stated that the said provision will not apply to changes in the subscriber base of a multi system operator on account of any cable operator joining or leaving the multi system operator. Provided further that any change in the subscriber base of a multi system operator, which is the basis of payment to a broadcaster, on account of any cable operator joining or leaving the network of the multi system operator shall be equal to the subscriber base of the cable operator, joining or leaving the network.

(v) In case of finalising Subscriber Base at the time of renewal of agreement between Multi System Operator and Cable Operator, the TRAI has provided that, negotiations on revision of subscriber base at the time of renewal of interconnection agreement between a multi system operator and a cable operator will take into account the changes in subscriber base of the cable operator over the past three years, as well as the changes in subscriber base of other cable operators operating in the area in which the cable operator is operating and its adjoining areas for the current period.

(vi) In case of finalising Subscriber Base at the time of renewal of agreement between Multi System Operator and Broadcaster, the TRAI provides that negotiations on revision of subscriber base will take into account the changes in subscriber base of the multi system operator over the past three years, as well as the changes in subscriber base of other multi system operators operating in the area in which the multi system operator is operating and its adjoining areas for the current period.

(vii) In its said Regulation, TRAI has also mandated that the multi system operators should furnish the updated list of cable operators along with their subscriber base to the broadcasters on a monthly basis.

(e) RIO

In case of non-CAS Areas, TRAI has further provided[35] for issuance of a Reference Interconnect Offers (RIO) by all Broadcasters. It has provided that all broadcasters should submit copies of their RIO within 90 days of issue of the said Regulation, describing, inter-alia, the technical and commercial conditions for interconnection for non-addressable systems to TRAI. The broadcasters will publish the same and a copy of the RIO should also be put up on their websites after the terms and conditions of the draft reference interconnect offer are submitted to TRAI. Further that the RIO so published by the broadcaster will form the basis for all interconnection agreements to be executed thereafter. TRAI has also provided that a published RIO may undergo any change only after prior intimation to TRAI. TRAI has mandated that Interconnection agreements should be entered in to by all broadcasters based on the RIO so published, provided that by mutual agreement, the parties concerned may modify and/or add to the terms and conditions stipulated in the published RIO for entering into an

[35] The Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation, 2006 (10 of 2006) dated 04.09.2006

individualized agreement. Some issues re RIO are subject matter of proceedings before TDSAT.

(f) Minimum Guarantee

TRAI has also dealt with the subject of Minimum Guarantee. In its Interconnect Regulation[36] TRAI provides that where a distributor of TV channels uses a technology by which pay channels can be seen only through an addressable system, then no service provider will demand any minimum guaranteed amount from such a distributor.

(g) Period For Renewal Of Existing Agreements

With respect to time period for renewal of the existing agreements, the regulations[37] now provide, inter alia, that:

(a) Parties will start the process of negotiations for renewal of existing agreement at least two months before the due date of expiry of the existing agreement.

(b) If the negotiations for renewal of the interconnection agreement continue beyond the due date of expiry of the existing agreement then the terms and conditions of the existing agreement will continue to apply till a new agreement is reached or for the next three months from the date of expiry of the original agreement, whichever is earlier. But once the parties reach an agreement, the new commercial terms will become applicable from the date of expiry of the original agreement.

(c) And if the parties are not able to arrive at a mutually acceptable new agreement, then any party may disconnect the retransmission of TV channel signals at any time after the expiry of the original agreement after giving a three weeks notice in the manner specified in

[36] The Telecommunication (Broadcasting and Cable Services) Interconnection (Second Amendment) Regulation, 2006 (9 of 2006) dated 24.08.2006

[37] The Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation, 2006 (10 of 2006)

case of other disconnections. And that the commercial terms of the original agreement will apply till the date of disconnection of signals.

III. NO EXCLUSIVE CONTRACT

TRAI has also mandated that no Broadcaster of TV channels should engage in any practice or activity or enter into any understanding or arrangement, including Exclusive Contracts with any distributor of TV channels that prevents any other distributor of TV channels from obtaining such TV channels for distribution.[38]

On the subject of exclusivity, TDSAT has had the occasion of considering the subject in Sea TV Case[39], wherein the Tribunal has held, inter-alia, that:

(i) an agent or intermediary is a person who supplies TV channels of a broadcaster or a MSO, to a distributor of TV channels and therefore a distributor can not be an agent because he is the one who receives signals from the agent;

(ii) any person who is re-transmitting TV channels to general public either directly or indirectly is a distributor and that it includes among other an MSO also. Therefore, since a distributor cannot be an agent and that a distributor includes an MSO; by the same logic even an MSO cannot be an agent;

(iii) the definitions of the distributor and MSO show that both of them are placed in the same platform in the hierarchy of players in the cable sector and both can only receive signals of

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[38] 3.3 A broadcaster or his/her authorised distribution agency would be free to provide signals of TV channels either directly or through a particular designated agent or any other intermediary. A broadcaster shall not be held to be in violation of clauses 3.1 and 3.2 if it is ensured that the signals are provided through a particular designated agent or any other intermediary and not directly. Similarly a multi system operator shall not be held to be in violation of clause 3.1.and 3.2 if it is ensured that signals are provided through a particular designated agent or any other intermediary and not directly.
Provided that where the signals are provided through an agent or intermediary the broadcaster/multi system operator should ensure that the agent/intermediary acts in a manner that is (a) consistent with the obligations placed under this regulation and (b) not prejudicial to competition.

[39] Sea TV Network Limited Vs. Star India Private Limited & Another – Petition No. 41 (C) of 2005.

the broadcaster's channels either directly or through an agent of the broadcaster and they cannot be an authorized agent of the broadcaster;

(iv) therefore, keeping in mind the fact that the definition of distributor includes an MSO it is not open to a Broadcaster to appoint any distributor or MSO, as an exclusive agent and if done it would run counter to the prohibition of exclusivity contemplated in clause 3.1 of the Regulation.

Thus, the Tribunal has held that any Operator, who is providing signals to subscribers, either directly or indirectly, cannot be the exclusive agent of the Broadcaster for offering the same signals to other Operators.

On an Appeal[40] the Supreme Court, while upholding the TDSAT's Judgement, observed / held, inter alia, that:

In providing signals to a distributor through an agent who is also in turn a distributor is per se discriminatory.

Every contract under the Interconnection Regulations has two aspects. One concerns the commercial side whereas the other concerns the technical side. There is no difficulty for the commercial side. If the broadcaster appoints an agent on the commercial side to collect the statistics of the number of subscribers or for distribution of Decoders there is no dispute. On the commercial side when an agent is appointed by the broadcaster that agent need not be from the Operation Network. Such an agent normally is not a technical service provider. The difficulty arises when the broadcaster appoints or enters into an agreement with a distributor, who in turn is an MSO and who in turn has his own business because in such a case such an agent-cum-distributor is also a competitor of the MSO who seeks signals from the broadcaster.

If under the Interconnection Regulations an MSO is entitled to receive signals directly from a broadcaster, if directed to approach

[40] Star India Pvt. Ltd. Vs. Sea T.V. Network Ltd. & Another - (2007) 4 SCC 656 - Judgement dated 03.04.2007

his competitor MSO then discrimination comes in. The reason is obvious. The exclusive agent of a broadcaster has his own subscriber base. His base is different from another MSO in the same territory. If that another MSO has to depend on the Feed to be provided by the exclusive agent of the broadcaster then the very object of the Interconnection Regulation stands defeated.

That even technically the quality of signals receivable through the Decoders is different from the quality of signals receivable through cable feed. If one Operator carries on business in competition with another Operator and if it is to depend on the Feed provided by its competitor and if the quality of the signals available through that Feed is poorer than the quality of the signals available through Decoders, then the Tribunal is right in holding that the above arrangement is per se discriminatory.

It is important to note that under the Interconnection Regulations exclusivity of contracts stands eliminated. The object of Interconnection Regulation is to eliminate monopoly.

That although a broadcaster is free to appoint its agent under the proviso to clause 3.3 such an agent cannot be a competitor or part of the network, particularly when under the contract between the broadcaster and the designated agent-cum- distributor exclusivity is provided for in the sense that the signals of the broadcaster shall go through the cable network owned and operated by such an agent-cum- distributor.

The Apex Court has however also observed that in cases of functional overlap - in every matter the Tribunal will examine the written contracts between the parties and ascertain actual prejudice / discrimination and not decide the matter on conceptual basis.

IV. NO DISCONNECTION WITHOUT NOTICE

Earlier TRAI had mandated, inter alia, that no broadcaster or multi system operator should disconnect the TV channel signals to a distributor of TV channels without giving one month notice indicating the brief reasons for the proposed action. These provisions have been subsequently amended and the new regulations[41] provide, inter alia, that:

(a) It is mandatory for a broadcaster or multi system operator to give three weeks prior notice to a distributor of TV channels before disconnecting the TV channel signals clearly giving the reasons for the proposed action.

(b) Such a notice is required to be given before disconnection of signals to a distributor of TV channels, if there was an agreement, written or oral, permitting the distribution of the broadcasting service, which has expired due to efflux of time.

(c) However, no notice is required if there is no agreement, written or oral, permitting the distribution of the signals

(d) Similarly, it is mandatory for a distributor of TV channels also to give three weeks prior notice before disconnecting the re-transmission of any TV channel to the broadcaster or multi system operator clearly giving the reasons for the proposed action.

(e) The Regulation further provides that in addition to the above notice, the broadcaster / multi system operator / distributor of TV channels will also inform the consumers about such dispute to enable them to protect their interests. Such a notice will give reasons in brief for the disconnection. Further, that the said notice to disconnect signals will have to be given in two local newspapers out of which at least one notice will be given in local language in a newspaper which is published in the local language, in case the distributor of TV channels is operating in one district and in two national newspapers in case the distributor of TV channels is providing services in more than one district.

(f) The period of three weeks mentioned in all the above cases will start from the date of publication of the notice in the

[41] The Telecommunication (Broadcasting and Cable Services) Interconnection (Third Amendment) Regulation, 2006 (10 of 2006)

newspapers or the date of service of the notice on the service provider, whichever is later.

Thus, it appears that the Telecom Law[42] in India has progressed from infancy to graduation to hopefully a pre-maturity stage though it still has a long way to go.

Date: 11.11.2008

[42] No such Article on Telecom Laws in India can ever be complete.