



# THE GUIDE TO TELECOMS ARBITRATIONS

Editor  
Wesley Pydiamah

# **The Guide to Telecoms Arbitrations**

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**Editor**  
Wesley Pydiamah

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# Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to Telecoms Arbitrations*.

For newcomers, GAR is the online home for the international arbitration specialists everywhere. We tell them all they need to know about everything that matters in their chosen niche.

GAR is perhaps best known for our daily news. But we also have a growing range of other output, including our technical library (our Guides series); our retrospective annual regional reviews; our GAR Live events; workflow tools such as our Arbitrator Research Tool (ART), which maps the connections of 30,000-plus names, and Primary Sources, which connects you to the original texts of decisions and judgments from GAR's unique archive; and (coming soon) our new GAR online Academy where newcomers can learn advocacy and other IA ringcraft at the foot of various masters. Please visit [www.globalarbitrationreview.com](http://www.globalarbitrationreview.com) if you are interested in finding out more.

As the unofficial 'official journal' of international arbitration, we occasionally become aware of gaps in the literature before others. This guide to telecoms arbitrations is a prime example. Few industries seek the counsel of arbitration specialists so regularly. And yet there has been no definitive book for either counsel or client on some of the practicalities of those disputes – until now.

On this occasion, however, the joy of accomplishment is tempered with pretty serious embarrassment. GAR has been writing about telecoms disputes since our inception in 2006. In fact, if I had to pick one industry that regularly produces large shareholder disputes, it would be telecoms. We should have thought of this one long ago.

Still, better late than never. And the timing may in fact be apposite. As editor Wesley Pydiamah notes in his introduction, demand for international arbitration from telecoms clients is only likely to increase as the industry goes through a series of technology releases and system upgrades.

As with most of our other sector-specific guides, this is not a complete toolbox (the exception here is our guide to IP arbitration); rather, it assumes a certain knowledge of the process on the part of the reader and jumps you straight to the practical points that are current and pertinent for telecoms.

We trust you will find it a useful addition to your library. If so, you may be interested in the other books in the GAR Guides series. They cover energy, construction, IP disputes, mining, M&A, challenging and enforcing awards, investor-state arbitration and the use of evidence in the same practical way. We also have a book on advocacy in arbitration and one on how to become better at thinking about damages – as well as a handy citation manual (*Universal Citation in International Arbitration* (UCLA)).

We're delighted to have worked with so many leading names in creating *The Guide to Telecoms Arbitrations*. My thanks to all of them. And last, special thanks to Wesley Pydiamah for spotting not only the gap in the literature but also in GAR's own foresight, and for his elan in developing the vision. And as always to my Law Business Research colleagues in production for creating such a polished work.

**David Samuels**

July 2022

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# Introduction

**Wesley Pydiamah<sup>1</sup>**

The idea of this guide, *The Guide to Telecoms Arbitrations*, came about during the covid-19 pandemic. With the world entering a new paradigm of lockdowns and working from home policies, the need for enhanced telecommunication services has never been so acute. This is undoubtedly true of mobile and data services, both of which are core services offered by any telecoms operator, and demand for these services is unlikely to slow down. Coupled with the advent of new technologies such as 5G, the telecoms sector is undergoing radical changes and is expected to revolutionise ways in which we live, work and interact in society. It has already impacted arbitration usages, with the ever-increasing reliance on technology for legal research, document management and virtual hearings.

Predictably, a rise in arbitrations could result from this new paradigm and the changing landscape. As telecoms operators embark on their development spree, states will also want to regulate the sector to preserve their essential interests. Frictions between telecoms operators and foreign governments are inevitable in light of the massive investments involved in existing and new roll-out projects. Both domestic and international legal frameworks will naturally evolve to keep track of developments in the sector.

This guide is not intended to be a comprehensive toolbox for any kind of arbitration that arises in the telecoms sector. But since we must start somewhere, this first edition will cover both general and specific themes that will hopefully bring more insight to the arbitration community.

It may sound trite, but is arbitration really the preferred option to resolve telecoms disputes? The first port of call is to see what the end users of arbitration think. The guide therefore starts with an in-house perspective from Paul Werné,

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<sup>1</sup> Wesley Pydiamah is a partner at Eversheds Sutherland.

the former general counsel at one of the most prominent telecoms operators.<sup>2</sup> A chapter on the suitability of arbitration to new technologies by Nasser Ali Khasawneh, Maria Mazzawi and Ricardo Christie of Eversheds Sutherland LLP then follows.<sup>3</sup>

However, even when arbitration is preferred, the nature of the telecoms sector and its far-reaching and overlapping effects on a whole range of matters may give rise to issues of arbitrability, which may become important and relevant in the context of enforcement of arbitral awards.<sup>4</sup> This is addressed in a chapter by Emily Hay of Hanotiau & van den Berg.

When it comes to commercial arbitration in the telecoms sector, it is fair to say that this has been primarily driven by M&A disputes that can arise in a variety of scenarios.<sup>5</sup> While the governing law to these arbitrations will be subject to what the parties agreed to in their contract, a chapter by Will Hooker, Rosalind Axbey, Rachel Ong and James Newton of Pallas Partners LLP also looks at whether there is a different approach under common law as compared to civil law. Equally important are the valuation approaches most predominantly used in commercial arbitrations to assess damages, and this is explored by Kai F Schumacher and Christoph Wilmsmeier of AlixPartners.<sup>6</sup>

As for oil, gas and other natural resources, spectrum is the new scarce resource, one may say. Most of the telecoms infrastructure in use, such as towers, can be found on land. However, undersea cables have proliferated in recent times, which is not without posing difficulties when it comes to disputed maritime zones, as Michael J Stepek of Winston & Strawn LLP explains.<sup>7</sup> Further, the terrestrial nature of that infrastructure is by no means the end of the story. The satellite industry has now emerged as a direct competitor to telecoms operators, and this is likely to entail a rise of satellite disputes that may be subject to arbitration.<sup>8</sup> This is covered in detail by Laura Yvonne Zielinski, president of the Space Arbitration Association.

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2 See Chapter 1, 'An In-House Perspective on Telecoms Arbitrations'.

3 See Chapter 2, 'Arbitration and the Advent of New Technologies'.

4 See Chapter 3, 'Issues of Arbitrability in Telecoms Arbitrations'.

5 See Chapter 4, 'M&A Arbitrations in the Telecoms Sector'.

6 See Chapter 5, 'Valuation Approaches in Telecoms Arbitrations: Commercial Arbitrations'.

7 See Chapter 6, 'Claims in Disputed Maritime Areas: Resolving International Disputes Arising from Activities Relating to Submarine Cables in Disputed Maritime Areas'.

8 See Chapter 7, 'The Rise of Satellite Arbitrations'.

Part II of the guide is devoted to investment treaty arbitration in the telecoms sector. There is self-evidently a tension between the state's sovereign right to regulate and the protection of the investor's rights. The chapters in this part of the guide, authored by Reza Mohtashami QC, Leilah Bruton and Farouk El-Hosseny at Three Crowns LLP, and Babatunde Fagbohunlu and Inyene Robert of Aluko & Oyeboode respectively, revisit the jurisprudence of the right to regulate and its limits<sup>9</sup> and also look more closely at the obligations of the investor and how these obligations have been revamped in more recent investment treaties.<sup>10</sup>

There are then two chapters that focus on recent developments. The Huawei saga has brought a new light to the defence of necessity,<sup>11</sup> as explored by David Hunt and Ben Love at Boies Schiller Flexner (UK) LLP, whereas armed conflict and civil unrest in different parts of the world have posed further challenges to the sector, as Michael Darowski and Romilly Holland of McDermott Will & Emery set out.<sup>12</sup> The final chapter, by Lucrezio Figurelli and Richard Caldwell of Brattle, deals with issues of compensation and the approach taken by investment treaty tribunals in recent cases.<sup>13</sup>

The final part of the guide gives a geographical perspective to telecoms arbitrations, with an overview of telecoms arbitrations in Africa by Magda Cocco, Tiago Bessa, Carla Gonçalves Borges, Marília Frias and Catarina Carvalho Cunha, and Bernardo Kahn at Vieira de Almeida,<sup>14</sup> and an overview of Latin America by Eduardo Silva Romero, José Manuel García Represa and Catalina Echeverri Gallego of Dechert LLP.<sup>15</sup> Other regions will be covered in the online edition.

This guide brings together leading arbitration practitioners who have a wealth of experience in telecoms arbitrations. It is hoped that, by focusing on a sector that will be impacting the world of arbitration in the coming years, this guide will be helpful for the arbitration community.

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9 See Chapter 8, 'Standards of Protection: The State's Sovereign Right to Regulate and its Limits'.

10 See Chapter 9, 'Standards of Protection and the Obligations of the Investor'.

11 See Chapter 10, 'Is the People's Good the Highest Law? The Concept of Necessity in Investor-State Protections'.

12 See Chapter 11, 'Civil Unrest and Investor-State Claims in the Telecommunications Sector'.

13 See Chapter 12, 'Valuation Approaches: Investment Treaty Arbitrations'.

14 See Chapter 13, 'A Look at the Future: the Growth of Telecoms Arbitrations in Africa'.

15 See Chapter 14, 'Telecommunications Arbitration in Latin America'.

I would like to warmly thank all the persons who have made this project a reality, starting, of course, with the contributors and the teams that have assisted them. I also express gratitude to the team at Global Arbitration Review including David Samuels, Mahnaz Arta, Hannah Higgins, Jack Levy and Georgia Goldberg.

**Wesley Pydiamah**

July 2022

# Part III

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## A Geographical Perspective

## CHAPTER 13

# A Look at the Future: the Growth of Telecoms Arbitrations in Africa

**Magda Cocco, Tiago Bessa, Carla Gonçalves Borges, Marília Frias, Catarina Carvalho Cunha and Bernardo Kahn<sup>1</sup>**

### **Arbitration in Africa: general considerations**

Arbitration has been on the rise in Africa over the past two decades. This is clear from the relevant legislative updates across the continent; statistics made public by the most prominent international arbitration institutions, such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the International Centre for Settlement of Investment Disputes (ICSID), which have documented a steady increase in African parties to arbitration proceedings managed by these institutions; the upsurge of the accession by African countries to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention); and the proliferation of arbitral centres and institutions across the African continent.

Although only 10 Member States of the African Union had adopted the UNCITRAL Model Law in 2013, at the time of writing:

- these states have been joined by South Africa, arguably one of the most robust and powerful economies in the continent;
- the Organisation for the Harmonization of Business Law in Africa (OHADA) has updated its Uniform Act on Arbitration in 2017, bringing it closer to the Model Law (having continued to engage in the capacity-building in OHADA Member States); and

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<sup>1</sup> Magda Cocco, Tiago Bessa and Carla Gonçalves Borges are partners, Marília Frias and Catarina Carvalho Cunha are managing associates, and Bernardo Kahn is an associate at Vieira de Almeida e Associados.

- various Member States have updated their arbitration legislation, adopting some of the solutions envisaged in the UNCITRAL Model Law.<sup>2</sup>

However, the developments registered are not limited to the legislative updates made to the instruments governing arbitration. In fact, in 2010, the ICC reported that ‘over the last ten years, the number of African parties involved in cases filed with the ICC Court has grown by 82%’, thus confirming an increasing participation of African parties in arbitration proceedings. And where cases filed with the ICC in 2010 involved a record of 133 African parties, by 2020 the number had increased to 171 parties (with Nigeria and Egypt taking the lead).<sup>3</sup> The LCIA, on the other hand, registered a similar pattern in cases dealing with African parties. Accordingly, where, in 2010, only 3.75 per cent of parties to the proceedings submitted to the LCIA were from Africa, in 2020, these represented 11.7 per cent of the total sum (with Nigeria, once again taking the lead).<sup>4</sup>

Investment disputes involving African states have also increased over the last two decades. In 2020, ICSID registered a record of 58 cases of which nine involved an African state: Algeria, Benin, Cameroon, Egypt, Nigeria, South Sudan, Tanzania and Zambia.<sup>5</sup> In its recent caseload statistics,<sup>6</sup> ICSID reported on 13 cases launched in 2021 involving African states (three involving Egypt and three involving the Republic of Congo).

Despite this increase in African parties to (both investment and commercial) arbitration proceedings, the truth is that to date and at least in proceedings launched with the above referenced institutions, proceedings (especially those linked with high-value projects) are still seldomly seated in Africa. The fact that this is so seemingly stems from the fathomable resistance that parties have in relying on local courts (where there is still progress to make with regard to celerity,

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2 Kenya (in 2015), Sudan (in 2016), Madagascar (in 2017), Tanzania (in 2021) and Ethiopia (also in 2021). See Lisa Bosman (ed), *Arbitration in Africa: A Practitioner's Guide*, 2nd edition (©Kluwer Law International; Kluwer Law International 2021) p. xxxiv.

3 As per data extracted from the 2010 and 2020 ICC annual statistics reports available at <https://iccwbo.org>.

4 As per data extracted from the 2010 and 2020 LCIA annual casework reports available at [www.lcia.org](http://www.lcia.org).

5 As per data extracted from the 2020 ICSID caseload statistics available at <https://iccwbo.org>.

6 As per data extracted from the 2021 ICSID caseload statistics available at <https://iccwbo.org>.



independence and arbitration expertise) to provide assistance throughout arbitration proceedings and more so, to rule on subsequent challenges of the relevant arbitral awards.

On the contrary, when possible (and this is not always possible since local laws often provide for mandatory seats in arbitration proceedings dealing with disputes in specific economic sectors found vital to the underlying economies), parties to international contracts still tend to seat their disputes in the most preferred seats for arbitration, such as London, Singapore, Hong Kong, Paris or Geneva, postponing contact with African courts to when enforcing the arbitral awards with local courts proves essential, or at least advantageous. As to recognising and enforcing foreign arbitral awards in Africa, it is worth highlighting that the increase of referral of disputes to arbitration has risen lengthways with the number of African countries acceding to or ratifying the New York Convention.

With Malawi's accession to the New York Convention on 4 March 2021, 42 of Africa's 54 states are now state parties to the Convention. The remaining 12 non-parties are Chad, Congo (Brazzaville), Equatorial Guinea, Eritrea, Eswatini, Gambia, Guinea-Bissau, Libya, Namibia, Somalia, South Sudan and Togo.

The steady uptake of the New York Convention across Africa is undeniably valuable to those investing in the continent since it is widely regarded as a key factor to boost economic growth and international investment. A recent study focused on scrutinising foreign direct investment inflows before and after a country accedes to or ratifies the New York Convention has concluded that accession or ratification increased foreign investment in the relevant country by approximately 10 per cent in the first four years and 11 per cent in the eight years after joining.<sup>7</sup>

Yet, even with local courts' intervention mostly reduced to this stage of proceedings and circumscribed to a set of requirements known to all, there have been examples of loose interpretations, by local courts, of the concept of (breaches of) public policy for the purposes of the Convention's article V, 2(b)). This means that a given award may ultimately not be recognised and subsequently enforced against the defeated party. While it is not possible to anticipate from the outset how local courts will construe the concept of public policy – which in its own nature, is vague and manifests itself on a case-by-case basis – parties should be advised on this underlying risk when negotiating arbitration clauses.

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7 'Does International Commercial Arbitration Promote Foreign Direct Investment?' *The Journal of Law and Economics*, Vol. 59, No. 3 (uchicago.edu).

To add to that, as African markets mature, governments and arbitration practitioners have been pushing for disputes to be settled in Africa and with resort to African institutions. Yet, while it is not clear whether these efforts will be fruitful in the long run – bearing in mind the above referenced concerns with the local judicial systems – the fact is that the number of arbitral centres or institutions across the continent has been growing sturdily. According to the updated list of African Arbitration Centers and Institutions as at 4 April 2020,<sup>8</sup> Africa currently holds over 91 arbitral centres and institutions.

Having said this, and while the 2020 Arbitration in Africa Survey Report<sup>9</sup> identified the Arbitration Foundation of Southern Africa (South Africa), Cairo Regional Centre for International Commercial Arbitration (Egypt), the Kigali International Arbitration Centre (Rwanda), Lagos Court of Arbitration (Nigeria) and the Nairobi Centre for International Arbitration (Kenya) as the most popular arbitral centres in Africa, the truth is that not all centres are active or functioning.

Looking at Angola, for instance, by the end of 2020, only the Centro de Resolução Extrajudicial de Litígios (CREL) was active and, according to local information, had hosted only five arbitrations. In Cabo Verde, since the setting-up of the Centro de Arbitragem e Conciliação da Câmara de Comércio Norte de Cabo Verde, and again according to local sources, only one case was launched and administered a dispute between two national companies regarding a lease agreement. In reality, local parties seemingly prefer to resort to ad hoc arbitrations in the belief that this will reduce the adjacent costs. Contrastingly, Mozambique's Centro de Arbitragem, Conciliação e Mediação, instituted in 2001 – the only center functioning in Mozambique, with headquarters in Maputo and offices in Nampula and Beira – conducts an average of 15 cases per year, the gross majority of which are between local parties.

Although there has been an undeniable effort put into developing and increasing arbitration across the African continent in the past two decades, this tendency does not seem to be reflected yet end-to-end with a rise in disputes referred to arbitration in the telecommunications sector. This tendency could, in any case, change significantly in the near future given the significant changes the sector has been experiencing across the continent over the past decade, as is delved on below.

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<sup>8</sup> [www.researcharbitrationafrica.com](http://www.researcharbitrationafrica.com).

<sup>9</sup> Microsoft Word – 2020 Arbitration in Africa Survey Report v4 EO [FINAL 29.06.20].docx (soas.ac.uk).

## Overview of the telecommunications market in Africa

According to an ITU report,<sup>10</sup> 'Africa is the region where regulatory frameworks have evolved most over the past 10 years.' In fact, G3 countries have increased steadily in numbers from 5 per cent to 52 per cent of African countries in slightly over a decade and whereas in 2007, more than 40 per cent of African countries were of G1 category, in 2018, only two LDCs (least developed countries) remained in this lowest tier.<sup>11</sup> 5G also seems to be closer than it ever did. South Africa launched it in 2020 and 'more deployments, although in infancy, are beginning to pop up elsewhere on the continent with trials conducted in Gabon, Kenya, Nigeria and Uganda. Lesotho, prior to the COVID-19 pandemic, was the only country with limited commercial 5G services.'<sup>12</sup> Also, recently, according to the Angolan Regulatory Authority, licences to use frequencies with a view to implementing 5G technology were granted to three mobile operators (Unitel, Movicell and Africell).<sup>13</sup> Africa has also been a fertile ground for mobile money. Nigeria, Ethiopia and Angola are examples of countries where mobile money has been launched.<sup>14</sup>

Now, while this is the case, one must keep in mind that Africa is a continent composed of more than 50 countries, and each of them has distinct levels of development. This is naturally reflected in the telecommunications sector. To illustrate this, we may look at the mobile penetration market. Although the mobile subscriptions rate has increased in most African countries (from 2015-2019), each mobile market differs from one country to another. For instance, the average of the mobile cellular subscriptions in Africa was, in 2019, 82.3 per 100 inhabitants. However, certain African countries – such as South Africa, Cabo Verde, Ivory Coast, Namibia and Senegal – exceed 100 per 100 inhabitants, while other countries – such as Equatorial Guinea, Angola, South Sudan and Ethiopia

10 ITU Global ICT Regulatory Outlook 2020, page 20 ([https://www.itu.int/dms\\_pub/itu-d/opb/pref/D-PREF-BB.REG\\_OUT01-2020-PDF-E.pdf](https://www.itu.int/dms_pub/itu-d/opb/pref/D-PREF-BB.REG_OUT01-2020-PDF-E.pdf)).

11 ITU Global ICT Regulatory Outlook 2020, page 20 ([https://www.itu.int/dms\\_pub/itu-d/opb/pref/D-PREF-BB.REG\\_OUT01-2020-PDF-E.pdf](https://www.itu.int/dms_pub/itu-d/opb/pref/D-PREF-BB.REG_OUT01-2020-PDF-E.pdf)).

12 Digital trends in Africa 2021, 'Information and communications technology trends and developments in the Africa region 2017-2020', ITU, p. 27.

13 Cfr. <https://www.inacom.gov.ao/ao/noticias/angola-licencia-primeiras-tres-empresas-para-implantacao-da-tecnologia-5g/>.

14 Omole, Ayobami, 'Africa telecoms: This year's highlights and the trends to watch in 2022', 28 December 2021 (<https://tellimer.com/article/africa-telecoms-this-years-highlights-and-the>).

– have less than 50 subscriptions per 100 inhabitants.<sup>15,16</sup> This means that there is so much diversity in Africa that the trends of certain African countries will not necessarily be followed by the remaining countries in the continent and this, of course, makes it difficult to anticipate trends globally.

In fact, the level of maturity of each country's telecommunications market will differ depending on the stage of liberalisation it is at.

In broad terms, the initial stage of the telecommunications market was typically that of a public monopoly, where the government owned the operator and regulated its activities. After this initial stage, three waves of reform and liberalisation could be verified. The first wave was meant to privatise the national operators (a regulatory authority eventually being created at this stage). In the second wave (which could occur simultaneously with the first one), governments authorised the entry of new service providers and new services into the telecommunications' market. This generally also involved the modification of the relevant licensing framework regulating the entry of new players, as well as the rules of the market. The third wave occurred when the incumbent operator's exclusivity period finished and the market became fully competitive.<sup>17</sup>

As mentioned above, each African country's telecommunications market is at its own specific stage of development, and in some cases, this combines features of more than one of the above-mentioned stages. Below, we provide the example of three African telecommunications markets: Angola, Cabo Verde and Sao Tome and Principe.

In 2016, a new strategic plan for the licensing of the electronic communications operators<sup>18</sup> was approved in Angola. According to such plan, there would be two main types of licences: (1) concession agreements for the provision of services and networks deemed 'of special importance to the State'; and (1) licences for all other situations. The concessions were designed to generally function as global unified titles that would allow the provision of all services and networks,

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15 Digital trends in Africa 2021, 'Information and communications technology trends and developments in the Africa region 2017-2020', ITU, p. 5.

16 Moreover, the African continent, is in various aspects behind the world average. For instance, African active mobile broadband subscriptions per 100 inhabitants was 33.1 in 2019, 'trailing far behind the world average of 75 per 100 inhabitants'. Also, Africa 'compared with other regions, has one of the lowest fixed broadband subscriptions' and has high prices for telecommunications and ICT services. (cfr. Digital trends in Africa 2021, Information and communications technology trends and developments in the Africa region 2017-2020, ITU, pp. 5 and 15.)

17 *Telecommunications Regulation Handbook*, pp. 9 and 10.

18 Presidential Decree 122/16, of 9 June 2016.

irrespective of the adjacent technology. Further to this, a new General Regulation for Electronic Communications was approved<sup>19</sup> and, besides the issuance of concession agreements for operators already acting in the market, a new international public tender was opened for the fourth operator. According to the Angolan electronic communications' regulatory authority, currently, there are three operators or service providers in the cellular mobile market, four operators or service providers in the fixed telephony market, four operators or service providers in the subscription TV market and five operators or service providers in the internet market.<sup>20</sup> It is also worth highlighting that, recently, the frequencies 3.3-3.7GHz were allocated to the mobile operators specifically for the development of 5G.<sup>21</sup> Although the state is still present in the share capital of certain operators, considering that (1) there is a regulatory authority; (2) there are various operators in each market; (3) various rules have been approved regarding not only licensing, but also many other aspects related to the functioning of the telecommunications' market,<sup>22</sup> (4) a recent international public tender was launched for a new operator, it seems that the market is heading to full competition, that is, to the above-identified third wave of liberalisation.

In Cabo Verde, the liberalisation process was initiated mainly by a 2005<sup>23</sup> statute that approved the general framework applicable to electronic communications services and networks and to related resources and services, as well as the powers of the national regulatory authority. Although still in force, this statute has been thoroughly amended three times. Currently, Cabo Verde has (1) an independent multisectoral regulatory authority;<sup>24</sup> (2) a 'general authorization' as a rule for the provision of services and networks irrespective of the technology used or the service provided; (3) various rules directed to the regulation of the market; and (4) a number of operators in each market. According to the regulatory authority, there are three operators on the fixed telephony market, two operators on the mobile telephony market, two operators on the mobile internet market, one operator on the fixed internet market and four operators on the subscription

19 The General Regulation for Electronic Communications was approved by Presidential Decree 108/16, of 25 May.

20 Cf. <https://www.inacom.gov.ao/ao/mercado/estatistica/quotas-de-subscricao>.

21 Presidential Dispatch 200/21, of 23 November 2021.

22 For instance, the infrastructure sharing regulation was recently reviewed by Presidential Decree 42/22, of 10 February 2022.

23 Cf. Legislative Decree 7/2005, of 28 November 2005.

24 Agência Reguladora Multisectorial da Economia – ARME (cfr. <https://www.ar.me.cv/>).

TV market. 4G public tender was launched in the end of 2019.<sup>25</sup> There is a clear intention to achieve a full competitive market, although the state still holds some shareholdings.

In the islands of Sao Tome and Principe, the first wave of liberalisation dates back to 2004 and included a telecommunications law;<sup>26</sup> the creation of the multi-sector regulatory authority<sup>27</sup> (in 2005); the concession of two licences to the incumbent operator<sup>28</sup> (a fixed and a mobile licence in 2007);<sup>29</sup> the approval of various rules applicable to the telecommunications market (mostly in 2007, 2009 and 2012); the opening of a public tender for a second operator<sup>30</sup> (2012) and the granting of a licence to a new private operator in 2013.<sup>31</sup> Additionally, at the end of last year, a public consultation for the introduction of 4G mobile communications networks<sup>32</sup> was launched. Considering the above, this market seems to have passed the first wave of liberalisation mentioned and to be somewhere in the second wave.

These waves of liberalisation have, of course, paved the way for several areas of potential disputes that a state monopoly was not prone to trigger, linked with the creation of regulatory authorities,<sup>33</sup> the enacting of innumerable statutes governing the new telecommunications markets, competition between public and private parties or only private parties, and the need for such parties to settle on certain areas (such as sharing of infrastructures and interconnection) and to comply with higher quality standards of the services provided to consumers.

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25 [https://www.arme.cv/index.php?option=com\\_content&view=article&id=419:arme-lanca-concurso-para-4g-em-cabo-verde&catid=96&Itemid=534](https://www.arme.cv/index.php?option=com_content&view=article&id=419:arme-lanca-concurso-para-4g-em-cabo-verde&catid=96&Itemid=534).

26 Cf. Law no. 3/2004, of 2 July 2004.

27 Cf. Decree-Law 14/2005, of 21 November 2005, that created AGER – Autoridade Geral de Regulação.

28 The incumbent operator is called Companhia Santomense de Telecomunicações or CST.

29 Decree 2/2007, of 4 September 2007 (fixed licence) and Decree 33/2007, of 7 December 2007 (mobile licence).

30 The public tender was approved by means of Decrees 37/2012 and 38/2012, of 12 November 2012.

31 Decree 6/2013, of 2 May 2013, that granted the licence to UNITEL STP.

32 Cf. regulatory authority website, <https://www.ager-stp.org/index.php/pt/actualidades/19-annonces/89-comunicado-2>.

33 As further explained in the Telecommunications Regulation Handbook, regulatory organisations may take various forms (including, single-sector regulator, converged regulator, multi-sector regulator) or may even be non-existent, in the cases where no entity is created and there is reliance on the competition rules. For further information, please refer to Telecommunications Regulation Handbook, pp. 14 et seq.

## Dispute log and trends in the african telecommunications sector

In 2010, the ICC reported that disputes in the telecommunications' sector as a whole represented a total of 8.2 per cent of all cases launched that year and in 2015 these dropped to 5 per cent, the same being said of 2020, heavily contrasting with the construction and engineering sector that has consistently accounted for around a quarter of the cases handled by the institution over the past decade. The same pattern is found at the ICSID level where only 7 per cent of total cases, to date, originate from the 'information and communication sector'.

On the other hand, of all the cases launched with ICSID that originate from the 'information and communication sector', only seven involve African states, namely, Algeria,<sup>34</sup> Cabo Verde,<sup>35</sup> the Democratic Republic of Congo,<sup>36</sup> Egypt,<sup>37</sup> Madagascar,<sup>38</sup> Senegal<sup>39</sup> and Sudan.<sup>40</sup> Other than this, given that not all cases are accessible, there is data of a few other (non-ICSID) cases stemming or linked with this sector and involving African parties or states.<sup>41</sup>

On this, it is worth pointing out that while these cases involve companies from the sector, their subject matters are not all linked with telecommunications per se. This is the case, for instance, with the dispute between Senegal's Wari and the Luxembourg based Millicom International Cellular over a deal to sell the latter's subsidiary in Senegal, Tigo, to the former and this was also the case with the ICC shareholder dispute opposing PT Ventures and the Cabo Verde State (though closely knitted with the ICSID case No. ARB/15/21 where PT Ventures claimed compensation for expropriatory measures, including the extinction of the exclusivity rights in the telecommunications concession agreement, and for other breaches of the Portugal-Cabo Verde BIT – including claims of breach

34 *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35.

35 *PT Ventures, SGPS, S.A. v. Republic of Cabo Verde* (ICSID Case No. ARB/15/12).

36 *AAN Digital Services Holding Company (KSC) v. Democratic Republic of the Congo* (ICSID Case No. ARB/19/24).

37 *Al Jazeera Media Network v. Arab Republic of Egypt* (ICSID Case No. ARB/16/1).

38 *LTME Mauritius Limited and Madamobil Holdings Mauritius Limited v. Republic of Madagascar* (ICSID Case No. ARB/17/28).

39 *Millicom International Operations BV and Sentel GSM SA v. The Republic of Senegal*, ICSID Case No. ARB/08/20.

40 *Michael Dagher v. Republic of the Sudan* (ICSID Case No. ARB/14/2).

41 Angola (*PT Ventures SGPS SA v. Vidatel Ltd, Mercury – Serviços de Telecomunicações SA and Geni SA*, ICC Case No. 21404/ASM/JPA (C-21757/ASM)) / Senegal (*Millicom International Cellular SA v. Wari Group SA*) / *PT Ventures SGPS SA v. Vidatel Ltd, Mercury – Serviços de Telecomunicações SA and Geni SA*, ICC Case No. 21404/ASM/JPA (C-21757/ASM).

of the FET standard and discriminatory treatment – with negative impacts on PT Ventures’ investment in Cabo Verde). This is also the case with the dispute opposing PT Ventures SGPS, SA against Vidatel Ltd, Mercury – Serviços de Telecomunicações SA and Geni SA where PT Ventures began ICC arbitration proceedings pursuant to an arbitration agreement contained in the shareholders’ agreement, arguing that over the years, Vidatel, Mercury and Geni had conspired to side-line it from the management of Unitel. In particular, PT Ventures objected to being excluded from the board of Unitel and to the withholding of payment of dividends by the other three shareholders.<sup>42</sup>

In any event, the growing liberalisation of the telecommunications markets across Africa and the fast-paced technological changes are undeniable incentives to the increase of disputes. According to ITU and the World Bank,<sup>43</sup> ‘In the rapid formation of these new relationships [among service providers, network operators and end users] and deployment of new technologies, it is inevitable that some relations and technologies will fail’ and therefore, disputes will arise. Also, ‘turbulent changes . . . resulting . . . from a cycle of rapid market growth, followed by sudden, nearly catastrophic, financial collapse’ also brings disputes.<sup>44</sup>

Accordingly, several sorts of disputes linked with the telecommunications’ market and all its players are expected to surface as the African markets mature. And whereas several sorts of disputes that usually surface in the underlying telecommunications’ sector are expected – and consequently, are likely to emerge in Africa – such as (1) disputes related to liberalisation such as the one that arose between PT Ventures and the Cabo Verde state (ICSID case No. ARB/15/21), (2) investment disputes, (3) interconnection disputes (4) radio frequency disputes (5) disputes between service providers or between these and regulators, (6) disputes with consumers among others,<sup>45</sup> those linked with international gateways are also susceptible of surfacing in the long-run. This will typically occur when the underlying governments grant the monopoly of the international gateway operation to a

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42 Thomson Reuters Practical Law, Paris Court of Appeal upholds ICC award rendered by five-member panel appointed by ICC accessed on 20.04.2022: [https://uk.practicallaw.thomsonreuters.com/w-029-5172?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-029-5172?transitionType=Default&contextData=(sc.Default)&firstPage=true).

43 Dispute Resolution in the Telecommunications Sector: current practices and future directions, cfr. [https://www.itu.int/ITU-D/treg/publications/ITU\\_WB\\_Dispute\\_Res-E.pdf](https://www.itu.int/ITU-D/treg/publications/ITU_WB_Dispute_Res-E.pdf).

44 Dispute Resolution in the Telecommunications Sector: current practices and future directions, page 1 of the report, page 15 of the pdf.

45 Dispute Resolution in the Telecommunications Sector: current practices and future directions available at [www.itu.int](http://www.itu.int).



single operator, leaving all international traffic to be routed via such international gateway and the relevant operator to be the sole entity allowed to negotiate and enter into international interconnection agreements with international carriers.

Naturally, though not all disputes emerging from this sector in Africa will be dealt with by arbitration – and in some cases, resorting to arbitration will be limited from the onset – it is worth pointing out, for instance, that the Cabo Verdean electronic communications' law specifically mentions arbitration as a dispute resolution mechanism between operators and consumers<sup>46</sup> and the licences issued for the two operators in Sao Tome and Principe (which were approved by a legal statute) also contain provisions governing potential arbitrations for certain types of disputes.

There is much effort being put into fomenting investment in the continent. With the advent of the Pan-African Investment Code in 2016, which will likely build momentum for African states to engage further in investment promotion, investment protection, investment facilitation and, perhaps, all the three combined, and the Agreement Establishing the Continental Free Trade Agreement, which entered into force on 30 May 2019, expectations are high for Africa's already steady course on both the arbitration and the telecommunications' fronts.

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46 Cf. Legislative Decree 7/2005, of 28 November 2005.

## APPENDIX 1

# About the Authors

### Magda Cocco

Vieira de Almeida e Associados

Magda Cocco is the head of the information, communication and technology practice, the Digital Frontiers practice and also head of the firm's aerospace sector. Magda has in-depth knowledge and experience in the electronic communications industry and innovative technological projects across several jurisdictions and regions, notably Europe and Africa.

Having led multidisciplinary teams in different ICT projects and transactions and assisted governments and regulatory entities in connection with the definition of regulatory policies and legislative drafting, she has also advised various international organizations such as International Telecommunications Union, the World Bank and the European Investment Bank.

Magda has provided expert advice to companies and public entities across different industries on several digital economy legal issues, from electronic and postal communications to information and emerging technologies, such as AI, robotics, blockchain, nanotechnology, big data and internet of thing.

Magda also advises clients on data protection and cybersecurity. In this context, she has assisted several entities in connection with governance matters and data related strategies, coordinated several GDPR compliance programmes and assisted public and private entities in connection with cybersecurity threats.

Finally, Magda has been involved in various Space sector projects, including negotiating contracts for satellite construction and launch and for the installation of ground stations, and assisted governments in connection with the definition and drafting of space-related strategies and legislation.

Magda has penned or co-authored several articles published in national and international specialized publications and was a featured speaker at various ICT conferences. Magda holds several teaching chairs in national and international universities, in her fields of expertise.

## **Tiago Bessa**

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Tiago Bessa is a partner with the information, communication and technology practice group at VdA. His work focuses mainly on communications, media and entertainment, electronic commerce, online betting, copyright and consumer law, in Portugal and abroad. Over the last years, Tiago has worked in major operations (domestic and international) which raised complex and intricate issues across legal and regulatory areas, together with renowned organizations such as the ITU, the World Bank and the European Investment Bank.

He has expanded his activity in African countries (including Mozambique, Angola, Cabo Verde and São Tome e Príncipe), either by providing assistance to local governments, regulators or operators or by being involved in several capacity building formations concerning the regulation of the telecommunication market, among other relevant roles.

Tiago Bessa holds a postgraduate degree in competition law and regulation from the Faculty of Law of the University of Lisbon and has taken part in an advanced programme on law and the economics of regulation at the School of Economics and Business Administration of the Catholic University of Portugal. He has also completed a master's degree in business law at the Faculty of Law of the University of Lisbon, with a thesis focused on copyright and Information Society Services, and holds a training certification from DGERT. He has also published several academic works on regulation, copyright and the information society.

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Carla is a partner with VdA's litigation and arbitration practice. She focuses on civil and commercial litigation and arbitration. She has been involved in some of the most high-value and complex cases in Portugal and leading several cases related to venture capital operations and respective shareholders disputes. Carla has been developing a niche in sports disputes, representing one of the leading funds in the sports industry, clubs and others. Among a variety of clients and sectors, she handles cases of private enforcement of competition law, real estate and banking disputes, and is always very active in commercial arbitration.

Carla is one of the youngest arbitrators ever to be listed with the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (CAC) and other Portuguese arbitration centres, having been appointed also by the ICC.

Carla is a Member of the Boards of the CAC, the Portuguese Chapter of Club Español del Arbitraje (CEA), Concórdia – Conciliation and Mediation of Disputes Centre and VdAcademia. Carla integrates the CEA Commission for the drafting of a code of best practices in sports arbitration.

Carla is regularly invited to lecture on topics related to arbitration and litigation and has published several works on these matters.

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Marília joined the firm in 2015. She is a managing associate of the information, communication and technology practice and is a member of the cluster aviation, space and defense. She has a wide experience in advising clients in various jurisdictions, in particular Portugal and Angola, with special focus in electronic communications, technology and aviation matters. Before joining the firm, she worked at Miranda Correia Amendoeira & Associados, Sociedade de Advogados, RL, from 2008 to 2015, and focused her practice on the energy sector (mainly oil and gas and electricity), mining sector, as well as in corporate and commercial law.

Marília got her Law degree from University of Coimbra, Faculty of Law, having participated in the Erasmus Programme at the Université de Poitiers, France. She also has a master's degree in corporate law from the Lisbon Law School, as well as a LLM in International Business Law from the Lisbon Catholic University. She obtained the International Air Law Diploma from the International Air Transport Association (IATA) and she has completed the Aviation Fundamentals course from the ICAO (International Civil Aviation Organization) and University of Waterloo. Marília is author of various articles and has been lecturer in various courses and conferences.

## **Catarina Carvalho Cunha**

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Catarina Carvalho Cunha joined the firm in 2015. She is a managing associate with the firm's litigation and arbitration practice. Her work is focused on assisting and representing clients from a wide range of industries dealing with civil and commercial disputes, both at pre-litigation and litigation stages, international and national commercial arbitration, and corporate restructuring and insolvency.

Catarina advises clients involved in disputes in Portugal as well as the Portuguese-speaking jurisdictions of Angola, Mozambique, Guinea-Bissau, Equatorial Guinea, Cabo Verde and East Timor. Catarina's work also extends to OHADA jurisdictions, such as the Democratic Republic of Congo and Cameroon.

She has advised several clients in the oil and gas, shipping, aviation, hotel management and telecommunications sectors, among others.

Catarina holds a degree in law from the Portuguese Catholic University of Lisbon, Faculty of Law, and has attended a postgraduate course on energy law administered by the same faculty.

### **Bernardo Kahn**

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Bernardo Kahn joined VdA in 2019. He is an associate with the firm's litigation and arbitration area of practice. Bernardo Kahn has an LLM in International Business Law awarded by the London School of Economics and Political Science (LSE) and is a course convenor of refugee law in the annual post-graduate course in International humanitarian law and human rights law in situations of conflict at the University of Lisbon, Faculty of Law.

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