

# Alternative Dispute Resolution & Alternative Regulatory Practices

---

Rohan Samarajiva

[samarajiva@lirne.net](mailto:samarajiva@lirne.net)

[www.lirneasia.net](http://www.lirneasia.net)



**LIRNEasia**

Learning Initiatives on Reforms for Network Economies

[www.lirneasia.net](http://www.lirneasia.net)

# Agenda

---

- What are ADR and ARP?
- Alternative Dispute Resolution (ADR)
  - Consensual processes
  - Informational processes
  - Adjudicatory processes
  - Hybrid processes
- Alternative Regulatory Practices (ARP)
  - Negotiated cases & rulemaking
  - Collaboratives
- Natural justice concerns
- Costs and benefits



# Alternative Dispute Resolution (ADR)

---

- Out-of-court resolution or settlement of disputes
  - Alternative to traditional litigation
- Less resource intensive (time & money)
- Less harmful to relationships that must continue



# ADR & ARP

---

- Resolution or settlement of disputes (medicine)
  - Regulator-Operator disputes
  - Operator-Operator
  - Operator-Consumer
- Preempting disputes (preventive health)
  - Use of Alternative Regulatory Practices (ARP) with ADR at the core



# ADR Consensual Processes: Mediation

---

- Essentially negotiation with assistance from mediator
- Mediator
  - Neutral with no preference for any party or term of settlement
  - Cannot impose outcome on parties
- Parties in control of process
  - There may be no outcome



# Where mediation may not be appropriate

---

- Matters affecting the public interest
- Where outcome is zero sum, e.g.,
  - Setting the revenue requirement in a tariff proceedings is zero sum between the utility and customers (as a whole)
- “Too early” stage of a dispute, e.g.,
  - The model and assumptions in one party’s demand forecasts are not known by the other



# ADR Informational Processes

---

- Help focus issues & induce agreement
  - Neutral evaluation
    - Assessment of case by experienced neutral person based on presentations by both parties
  - Informational arbitration
    - Non binding
    - Only advisory



# ADR Informational Processes

---

## □ Mini-trial

- Settles scientific/technical issues in business disputes
- Panel with neutral advisor & both parties' representatives
- Parties attempt settlement based on neutral advisor's help



# ADR Informational Processes

---

- Technical conference
  - For disputes with technical aspects
  - Experts & representatives of parties discuss
  - Preview of parties' positions
  - A step in settlement process
  - Smoothens adjudication/rule-making process



# ADR Adjudicatory Processes: Arbitration (conventional)

---

- Voluntary: arbitration agreement
- Binding: court order to enforce
- Finality of award
  - Exception: power of court to review on specific limited grounds



# Conventional arbitration vs. trials

---

- Outside conventional legal system and its delays
  - Toll road that allows faster movement than congested highway
- Less expensive to parties; no cost to the public
- Arbitrator selection different
  - May have expertise
- Procedures may be less rigid
- Grounds for appeals circumscribed



# ADR Adjudicatory Processes: Final-offer arbitration

---

- ❑ Variation: Remove power of arbitrator to fashion a remedy
- ❑ Has to pick one or the other of the solutions proposed by the parties
- ❑ Corrects polarization incentives of conventional arbitration



# Assessment of arbitration

---

- ❑ Fast-track trial, with some expertise thrown in
- ❑ Adversarial, not cooperative
- ❑ Neither variety addresses the cognitive and emotional dimensions of the conflict
  - They may get addressed if arbitrator is skilful
  - Not optimal for long-term cooperation



# ADR hybrid processes

---

- Mediation-Arbitration (Med-Arb)
  - Combination of two processes
    - Mediation first, arbitration upon failure
    - Same neutral
- Advantage: efficiency
- Disadvantage: possible damage to mediation dynamics
  - Information will not be disclosed in phase one



# ADR Hybrid processes

---

- Arbitration-Mediation (Arb-Med)
  - Mitigates Med-Arb disadvantages
  - Arbitration in first instance, decision kept in sealed envelope (BATNA)
  - Mediation follows
    - If successful, envelope is not opened
    - If unsuccessful, arbitral decision is binding
- Recommended for adoption by report on PUC of Sri Lanka ADR Manual



# Alternative Regulatory Practices (ARP)

---

- Use one/more ADR techniques to
  - Preempt imminent disputes
  - Address prospective policy issues
  - Build a non-adversary regulatory culture



# ARP: Negotiated Cases

---

- Tariff cases, consumer complaints, other disputes that are not purely zero-sum
- Larger US Commission approach
  - Separate settlement judge as mediator
  - If parties fail, a normal judge determines
- Smaller US Commission approach
  - Normal judge (not separate) encourages settlement at pre-hearing conference(s)
  - Failure leads to determination



# ARP: Negotiated Rulemaking

---

- Differs from traditional notice-and-comment based rulemaking where
  - Parties do not sit together
  - Draft rule is issued initially for comment
- Negotiated rulemaking
  - Only notice served (without draft rule)
  - Parties/representatives sit together, negotiate and make rules
  - Subsequent truncated notice-and-comment stage



# Conditions for Negotiated Rulemaking

---

- No party can win
- Limited number of parties
- Issues have crystallized
- If no agreement, others will decide
- Potential for win-win
- No fundamental values at stake
- Multiple issues
- One party does not control information



# Conditions for Negotiated Rulemaking

---

- ❑ Ground rules established at start
- ❑ Prevent adoption of adversarial roles
- ❑ Periodic reminder: Objective is not victory, but solution
- ❑ Confidentiality rules
- ❑ Harvard principles



# Harvard Principles

---

- Focus on interests, not initial positions
- Seek options that allow mutual gain
- Define objective criteria
  - Fisher & Ury (1981) '*Getting to yes*'



# ARP: Joint Problem-Solving Workshops (Collaboratives)

---

- Process where prospective policy issues are tackled by interested party representatives
- Used for integrated resource planning (supply-side & demand side) and forecasting
- Resulting reports may form bases of policies/rules



# ARP: Task Forces (Collaboratives)

---

- For complex, polycentric issues with technical aspects
  - Usually involve two/more Joint Problem-Solving Workshops on distinct sub-issues
  - Task Force balances socio-economic trade-offs raised by Workshops



# Due Process & Natural Justice Concerns

---

- ❑ Make Alternative Regulatory Practices legally valid
- ❑ Non-compliance results in Appeals and reversals



# Due Process & Natural Justice Concerns

---

## □ Guidelines

- Have a rational choice of procedures
- Issue an initial notice of the process with opportunity to be heard afforded to all parties
- Provide for representation of all interested parties
- Have/obtain necessary data
- Have a record/advisory report
- Announce the final decision



# ADR & ARP: Benefits

---

- Benefits compared to litigation
  - Less resource intensive (time & cost saving)
  - Cuts-off litigation: saves money & relationships between parties
  - Buy in by stakeholders
  - Less deviant from Pareto optimality?
    - Meets goal of economic regulation



# ADR & ARP: Benefits

---

- Win-win-win solutions
  - All stakeholders win, while solutions are also in the public interest
- Parties have more choices re decision-maker & forum



# ADR & ARP: Costs

---

- ❑ Less transparent (so as to build trust between parties)
- ❑ Compromised awards: less likely to be strictly bound by “the law”
- ❑ Decisions (arbitral) have no value as precedent (*stare decisis*)



# Additional Resources

---

- ❑ ITU & WB (2004). Dispute resolution in the telecommunication sector: Current practices & future directions. [http://www.itu.int/ITU-D/treg/publications/ITU\\_WB\\_Dispute\\_Res-E.pdf](http://www.itu.int/ITU-D/treg/publications/ITU_WB_Dispute_Res-E.pdf)
- ❑ Fisher, R. & Ury, W. (1981) *Getting to yes* (Boston: Houghton Mifflin)
- ❑ Mayer, B. (2000). *The dynamics of conflict resolution: A practitioner's guide* (San Francisco: Jossey-Bass)
- ❑ National Regulatory Research Institute reports 87-12; 96-17; 96-24
- ❑ NRRI Manual on ARP & ADR for Public Utilities Commission of Sri Lanka, August, 2003

