

Alternative Dispute Resolution & Alternative Regulatory Practices

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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
- ❑ 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

