

# Alternative Dispute Resolution & Alternative Regulatory Practices

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# Agenda

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- ❑ 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
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# Alternative Dispute Resolution (ADR)

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

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- 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
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# ADR Consensual Processes: Mediation

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- 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
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# Where mediation may not be appropriate

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- ❑ 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
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# ADR Informational Processes

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- ☐ 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
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# ADR Informational Processes

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## ☐ 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
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# ADR Informational Processes

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## □ 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
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# ADR Adjudicatory Processes: Arbitration (conventional)

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- ☐ Voluntary: arbitration agreement
  - ☐ Binding: court order to enforce
  - ☐ Finality of award
    - Exception: power of court to review on specific limited grounds
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# Conventional arbitration vs. trials

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- ❑ 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
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# ADR Adjudicatory Processes:

## Final-offer arbitration

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- ❑ 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
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# Assessment of arbitration

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- ❑ 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
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# ADR hybrid processes

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- 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
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# ADR Hybrid processes

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- ❑ 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
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# Alternative Regulatory Practices (ARP)

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

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- 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
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# ARP: Negotiated Rulemaking

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- 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
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# Conditions for Negotiated Rulemaking

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- ☐ 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
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# Conditions for Negotiated Rulemaking

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

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- Focus on interests, not initial positions
  - Seek options that allow mutual gain
  - Define objective criteria
    - Fisher & Ury (1981) '*Getting to yes*'
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# ARP: Joint Problem-Solving Workshops (Collaboratives)

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- ❑ 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
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# ARP: Task Forces (Collaboratives)

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- 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
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# Due Process & Natural Justice Concerns

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- ☐ Make Alternative Regulatory Practices legally valid
  - ☐ Non-compliance results in Appeals and reversals
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# Due Process & Natural Justice Concerns

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## □ 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
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# ADR & ARP: Benefits

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- ☐ 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
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# ADR & ARP: Benefits

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

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- ❑ 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*)
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# Additional Resources

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- ❑ 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
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