

UNIVERSITY of the
WESTERN CAPE



ALTERNATIVE DISPUTE RESOLUTION IN THE BRICS NATIONS:

A COMPARATIVE LABOUR LAW PERSPECTIVE.

A MINI-THESIS TO BE SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS: LABOUR LAW IN THE DEPARTMENT OF MERCANTILE AND LABOUR LAW IN THE FACULTY OF LAW OF THE UNIVERSITY OF THE WESTERN CAPE.

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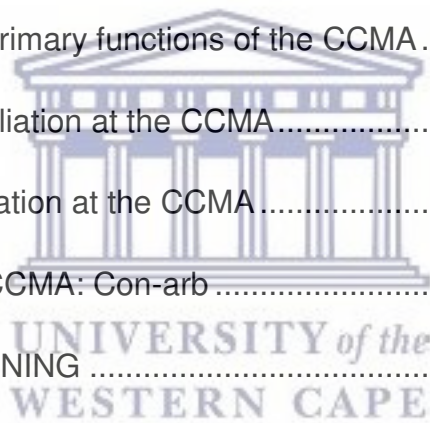
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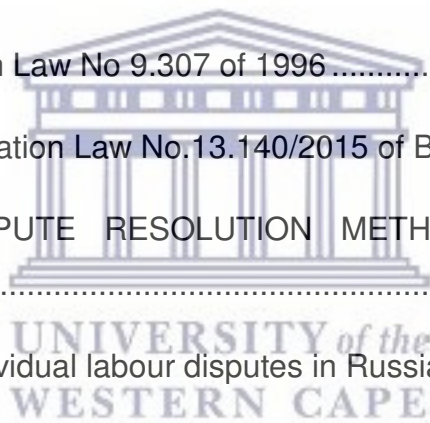
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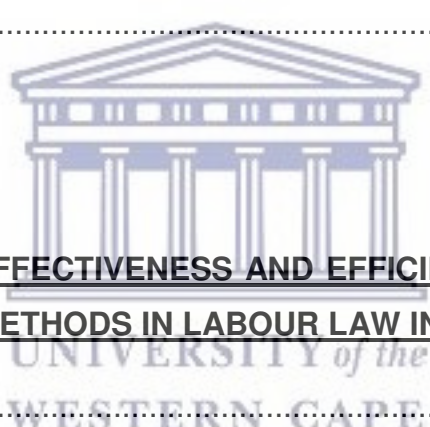


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PLAGIARISM DECLARATION

I declare that *Alternative Dispute Resolution in the BRICS Nations: A Comparative Labour Law Perspective* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete reference.

Marcel Gerber

April 2019

Signed:



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DEDICATION & ACKNOWLEDGEMENTS

I dedicate this mini-thesis to two important people in my life. First, to my late father Abrie Gerber who has provided me with many opportunities, including the opportunity to study law. Secondly, to my grandmother Annice Stoffberg whose support, encouragement and mentorship throughout my life has been and still is, invaluable.

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KEY WORDS

- Access to Justice
- Adversarial System
- Alternative Dispute Resolution
- Arbitration
- Arbitration Agreement
- Arbitration Award
- Civil Litigation
- Collective Labour Law
- Conciliation
- Conflict
- Constitution
- Convention
- Disputant
- Dispute Resolution
- Employment Law
- Employers' Organisation
- Government
- Individual Labour Law
- Industrial Labour Disputes
- Labour Disputes
- Labour Law
- Legislation
- Mandatory Court Based Litigation
- Mediation
- Rights
- Rules
- Settlement
- Tribunal
- Trade Union



ABSTRACT

Alternative dispute resolution refers to forms of dispute resolution, other than traditional and formal court based litigation. A notable benefit of alternative dispute resolution is that different processes are available for resolving a particular dispute in the most effective and efficient manner possible. Alternative dispute resolution includes but is not limited to arbitration, mediation, negotiation, conciliation and facilitation.

The Constitution of the Republic of South Africa, 1996, lists human dignity, equality and the advancement of human rights and freedoms as the founding values of the Republic of South Africa. In terms of section 9(1) of the Constitution everyone is regarded as equal before the law and has the right to equal protection and benefit of the law in South Africa.

Often it is however argued that traditional court based litigation hinders the full enjoyment of these rights by individuals. Consequently, alternative dispute resolution is attractive as an alternative to court based litigation as it is regarded as less expensive, more time effective and results in less conflict when it comes to resolving disputes in the most accessible, effective and efficient manner possible, in both developed and developing countries.

The study will first focus on the pitfalls to traditional court based litigation in South Africa. The relevant legislation and processes which provide for alternative dispute resolution processes in South Africa, with specific focus on alternative dispute resolution in labour disputes, will be considered. Consideration will be given to the provision of alternative dispute resolution as contained in the Constitution, the Labour Relations Act 66 of 1995, the Rules for the Conduct of Proceedings before the CCMA of 2003 and the Arbitration Act 42 of 1965.

The study will thereafter proceed to consider the use of alternative dispute resolution in labour disputes in Brazil, Russia, India and China, who, together with South Africa, are collectively referred to as BRICS. These five nations are considered the world's leading emerging economies, with similar economic capabilities and demographics.

Finally, this study will compare alternative dispute resolution methods used in labour disputes in South Africa, with alternative dispute resolution methods used in labour disputes in the remaining BRICS nations. This comparative assessment will consider the quality, accessibility, efficiency and effectiveness of alternative dispute resolution in each of the BRICS nations and will consequently draw insightful conclusions and provide recommendations on the most efficient and effective implementation of alternative dispute resolution methods in South African labour disputes.



ABBREVIATIONS / ACRONYMS

AA	:	Arbitration Act 42 of 1965
ADR	:	Alternative Dispute Resolution
AJ	:	Acting Justice
BLLR	:	Butterworths Labour Law Reports
BRICS	:	Brazil, Russia, India, China and South Africa
BRL	:	Brazilian Real
CCMA	:	Commission for Conciliation, Mediation and Arbitration
CC	:	Constitutional Court
CJ	:	Chief Justice
GSJ	:	South Gauteng High Court, Johannesburg
ILJ	:	Industrial Labour Journal
ILO	:	International Labour Organisation
LAC	:	Labour Appeal Court
LC	:	Labour Court
LRA	:	Labour Relations Act 66 of 1995
SA	:	Republic of South Africa
SCA	:	Supreme Court of Appeal

CHAPTER 1

INTRODUCTION

1.1. PROBLEM STATEMENT

A dispute arises where the parties to the dispute have differing goals, yet there is a level of interdependence between each of the disputants in order to realise their goals through available scarce resources.¹ Various methods exist through which an aggrieved individual can seek to resolve a dispute, most notably the use of traditional court based litigation.² Court based litigation unfortunately has many disadvantages attached to it. Most often these include long and unreasonable delays which result in court backlogs, high costs, complexity of the litigation process, and the general breakdown in relationships between disputant parties.³ The high cost of court based litigation results in many parties not being able to access the justice system.⁴ The use of Alternative Dispute Resolution (hereinafter referred to as ADR) as an alternative to court based litigation can drastically reduce the cost of resolving a dispute.⁵

Traditional court based litigation is therefore not the only available method for a disputant to resolve his or her dispute. Alternative, less adversarial, methods of dispute resolution exist, including, arbitration, conciliation, mediation, facilitation and adjudication.⁶ These methods for dispute resolution are most commonly referred to as alternative dispute resolution systems. Through the use of ADR disputants can resolve conflict through processes and procedures that are best suited for their disputes and needs.⁷ It is for this reason that the South African Law Commission also refers to ADR as appropriate dispute resolution.⁸

¹ Anstey M *Managing Change - Negotiating Conflict* 3 ed (2006) 167.

² Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 1.

³ Hurter E 'Seeking the truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation' (2007) 2 *Tydskrifvir die Suid-Afrikaanse Reg* 248.

⁴ Hoffman D 'ADR: An Opportunity to Broaden the Shadow of the Law' (1994) 21 *Human Rights* 20.

⁵ Hoffman D 'ADR: An Opportunity to Broaden the Shadow of the Law' (1994) 21 *Human Rights* 20.

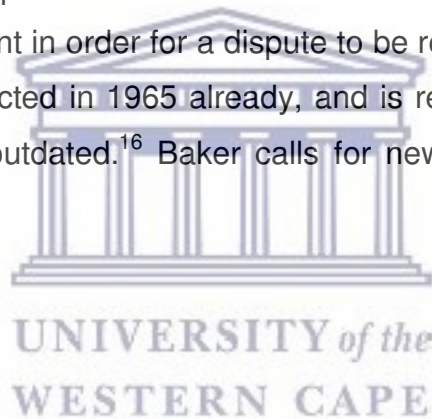
⁶ Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 1.

⁷ South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) 13.

⁸ South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) 13.

The research will specifically focus on understanding the accessibility, quality, efficiency and effectiveness of ADR methods used in labour disputes specifically in Brazil, Russia, India, China and South Africa (collectively and hereinafter referred to as BRICS).⁹ The BRICS nations are all emerging economies, which makes a comparative study of ADR methods used in labour law and labour disputes in these countries feasible.¹⁰ Leaders of each of these nations come together on an annual basis in order to discuss economic and political matters and to advance cooperation between member states.¹¹ One of the aims of the BRICS grouping is to advance cooperation between these nations in a variety of sectors, including finance, agriculture, trade, science, education, health and technology.¹²

In South Africa, unless legislation in an area of law regulates ADR separately,¹³ arbitration is regulated through the Arbitration Act 43 of 1965 (hereinafter referred to as the AA).¹⁴ One of the requirements of the AA is that the parties must have entered into an arbitration agreement in order for a dispute to be referred to arbitration.¹⁵ The AA, as amended, was enacted in 1965 already, and is regarded by many as being not detailed enough and outdated.¹⁶ Baker calls for new and improved arbitration



⁹ BRICS 'What is BRICS?' available at <http://www.brics2018.org.za/en/what-brics> (accessed 22 April 2018).

¹⁰ BRICS 'What is BRICS?' available at <http://www.brics2018.org.za/en/what-brics> (accessed 22 April 2018).

¹¹ BRICS 'Information about BRICS' available at <http://www.brics.itamaraty.gov.br/about-brics/information-about-brics> (accessed 15 May 2018).

¹² BRICS 'Information about BRICS' available at <http://www.brics.itamaraty.gov.br/about-brics/information-about-brics> (accessed 15 May 2018).

¹³ Such as the case with the Labour Relations Act 66 of 1995, which provides detailed ADR processes in labour law disputes.

¹⁴ The Arbitration Act 42 of 1965.

¹⁵ Section (1) of the Arbitration Act 42 of 1965.

¹⁶ Baker T 'Overhauling arbitration in South Africa' available at <http://www.nortonrosefulbright.com/knowledge/publications/121382/overhauling-arbitration-in-south-africa> (accessed 25 May 2018).

legislation as a means to bring South Africa in line with international standards.¹⁷ The AA also only caters for arbitration as a form of ADR.¹⁸

Mediation is another form of ADR through which labour disputes can be resolved. Mediation in South Africa includes the use of an objective third party in order to assist disputants to resolve their disputes.¹⁹ Unlike arbitration, mediation in South Africa is however not governed by a dedicated piece of legislation.²⁰

In terms of section 9(1) of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution) every person is to be regarded as equal before the law and is entitled to equal protection and benefit of the law.²¹ Section 23(1) of the Constitution further states that *'[e]veryone has the right to fair labour practices'*.²²

One of the purposes of the Labour Relations Act 66 of 1995 (hereinafter referred to as the LRA) is to give effect to the fundamental rights contained in the Constitution.²³ Based on section 1(d)(iv) of the LRA, a further purpose of the LRA is to promote the effective resolution of labour disputes.²⁴ The LRA provides for four main procedures through which disputants can resolve a labour dispute,²⁵ namely, mediation, conciliation, arbitration and adjudication.²⁶ In terms of the LRA the Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as the CCMA), bargaining councils and the Labour Courts have been tasked as the institutions

¹⁷ Baker T 'Overhauling arbitration in South Africa' available at <http://www.nortonrosefulbright.com/knowledge/publications/121382/overhauling-arbitration-in-south-africa> (accessed 25 May 2018).

¹⁸ The Arbitration Act 42 of 1965.

¹⁹ Wolter G et al 'South Africa' in Cotton J (ed) *The Dispute Resolution Review* 8 ed (2016) 594.

²⁰ Wolter G et al 'South Africa' in Cotton J (ed) *The Dispute Resolution Review* 8 ed (2016) 594.

²¹ Section 9(1) of the Constitution of the Republic of South Africa, 1996.

²² Section 23(1) of the Constitution of the Republic of South Africa, 1996.

²³ Section 1(a) of the Labour Relations Act 66 of 1995.

²⁴ Section 1(d)(iv) of the Labour Relations Act 66 of 1995.

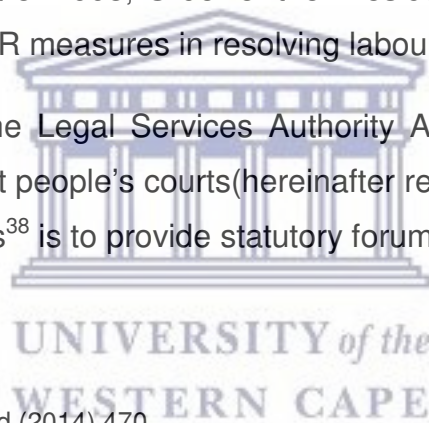
²⁵ Grogan J *Workplace Law* 11 ed (2014) 470.

²⁶ Grogan J *Workplace Law* 11 ed (2014) 470.

through which disputants can resolve their labour disputes.²⁷ The Rules for the Conduct of Proceedings before the CCMA of 2003²⁸ (hereinafter referred to as the CCMA Rules) further regulate the conciliation, mediation and arbitration of labour disputes in South Africa.²⁹

Mediation in China is governed under the Mediation Regulations of 1989,³⁰ which contain guidelines and notions from both Confucian and Maoist ideology, encouraging mediators to educate the public and apply rules and government policies.³¹ Mediators in China are also required to comply with relevant codes of ethics.³² Chinese mediation has consistently thrived through the years as a successful alternative remedy to litigation.³³ In China labour disputes are regulated through the Labour Law of the People's Republic of China of 1995, Order of the President No. 28,³⁴ and the Labour Dispute Mediation and Arbitration Law of the People's Republic of China of 2008, Order of the President No. 80.³⁵ Both of these acts regulate the use of ADR measures in resolving labour disputes.

In India, section 22B of the Legal Services Authority Act 1987³⁶ provides for the establishment of permanent people's courts (hereinafter referred to as Lok Adalats).³⁷ The essence of Lok Adalats³⁸ is to provide statutory forums to disputants as a means



²⁷ Grogan J *Workplace Law* 11 ed (2014) 470.

²⁸ The Rules for the Conduct of Proceedings before the CCMA of 2003.

²⁹ The Rules for the Conduct of Proceedings before the CCMA of 2003.

³⁰ Mediation Regulations of 1989.

³¹ Clark K 'The philosophical underpinning and general workings of Chinese mediation systems: What lessons can American mediators learn?' (2002) 2 *Pepperdine Dispute Resolution Law Journal* 128.

³² Clark K 'The philosophical underpinning and general workings of Chinese mediation systems: What lessons can American mediators learn?' (2002) 2 *Pepperdine Dispute Resolution Law Journal* 128.

³³ Clark K 'The philosophical underpinning and general workings of Chinese mediation systems: What lessons can American mediators learn?' (2002) 2 *Pepperdine Dispute Resolution Law Journal* 126.

³⁴ The Labour Law of the People's Republic of China of 1995 (Order of the President No. 28).

³⁵ The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80).

³⁶ Section 22B of the Legal Services Authority Act 1987.

³⁷ Agrawal K 'Justice Dispensation through the Alternative Dispute Resolution System in India' (2014) 2 *Russian Law Journal* 66.

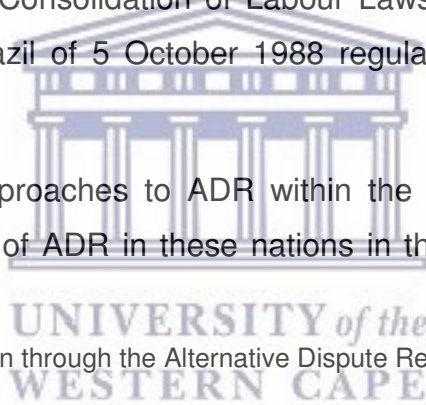
³⁸ Lok Adalats is an Indian term, which refers to people's courts.

to attempt to settle a dispute through counselling and conciliation, prior to litigation.³⁹ ADR measures to resolve labour disputes are regulated in terms of the Industrial Disputes Act of 1947 in India.⁴⁰

In Russia, a variety of institutions exist which provide for dispute resolution, such as Arbitrazh Courts, Courts of General Jurisdiction, a Constitutional Court and Arbitration Tribunals.⁴¹ Labour Code of the Russian Federation of 2002 as amended regulates the resolution of labour disputes in Russia.⁴² The Labour Code of the Russian Federation of 2002 as amended further provides for the available ADR measures available in Russia for disputants to use in resolving their labour disputes.⁴³

Mediation in Brazil is governed by the Mediation Law 13.140/2015 and provides for mediation of court cases, mediation of cases outside of the court and self-resolution mediation.⁴⁴ The Brazilian Consolidation of Labour Laws of 1 May 1943⁴⁵ and the Federal Constitution of Brazil of 5 October 1988 regulate the resolution of labour disputes in Brazil.⁴⁶

With all these different approaches to ADR within the BRICS nations, this study seeks to compare the use of ADR in these nations in their respective employment



³⁹ Agrawal K 'Justice Dispensation through the Alternative Dispute Resolution System in India' (2014) 2 *Russian Law Journal* 66.

⁴⁰ The Industrial Disputes Act 1947.

⁴¹ Reynolds S *Handbook on Commercial Dispute Resolution in the Russian Federation: A Guide for Businesses on Navigating the Russian Legal System for Resolution of Business Disputes* (2000) 29.

⁴² Kukushkina E, Mzhavanadze G & Mogutova N 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: Russia' available at <http://www.thelawreviews.co.uk/editions/the-labour-and-employment-disputes-reviews---edition-1/1167309/russia> (accessed 27 August 2018); Federal Law No. 197-FZ of 2001.

⁴³ Kukushkina E, Mzhavanadze G & Mogutova N 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: Russia' available at <http://www.thelawreviews.co.uk/editions/the-labour-and-employment-disputes-reviews---edition-1/1167309/russia> (accessed 27 August 2018); Federal Law No. 197-FZ of 2001.

⁴⁴ Mason P & Simões A 'Brazil's New Mediation Law and the Impact on International Business disputes' (2015) 70 *Dispute Resolution Journal* 13.

⁴⁵ Brazilian Consolidation of Labour Laws of 1 May 1943.

⁴⁶ The Federal Constitution of Brazil of 5 October 1988.

law fields specifically to assess whether ADR in South Africa and the remaining BRICS nations is accessible and functioning effectively and efficiently.⁴⁷

1.2. SIGNIFICANCE OF THE RESEARCH

During 1997 the South African Law Commission summarised the main goals of ADR as follows:

- 'a) to relieve court congestion, as well as prevent undue cost and delay;
- b) to enhance community involvement in the dispute resolution process;
- c) to facilitate access to justice; and
- d) to provide more effective dispute resolution.⁴⁸

Calls for new and improved general arbitration legislation in South Africa are an indication that the current AA is outdated and not substantive enough.⁴⁹ The AA, as amended, is 54 years old in 2019 and only caters for arbitration as a method of ADR.⁵⁰ Apart from the general application of the AA, detailed ADR provisions in South Africa is mainly found in labour law and family law matters, through legislation which specifically regulate ADR in these areas of law.⁵¹

While not unique to the field of labour law, the general pitfalls to court based litigation as mentioned earlier are, most notably, court congestion and delays, high costs, and a complete breakdown in relationships. The pitfalls all contribute to the significance of a study on the efficiency of ADR methods used in labour law in South Africa, compared to ADR processes used in labour law and labour disputes in the other

⁴⁷ See Chapter 5 of this research for the relevant comparative study.

⁴⁸ South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) 17.

⁴⁹ Baker T 'Overhauling arbitration in South Africa' available at <http://www.nortonrosefulbright.com/knowledge/publications/121382/overhauling-arbitration-in-south-africa> (accessed 25 May 2018).

⁵⁰ The Arbitration Act 42 of 1965.

⁵¹ The Labour Relations Act 66 of 1995 as discussed in Chapter 2 of this research services as an example in this instance.

BRICS nations.⁵² All the BRICS nations have legislation which provides for ADR measures and procedures used in labour disputes, albeit to different extents.⁵³

This research will therefore consider the existing forms of ADR available in South Africa and in the other BRICS nations in the area of labour law. The aim is to investigate whether ADR in this field of law is currently functioning at an optimal level, or what South Africa could perhaps learn from the use of ADR in labour law and labour disputes in the other BRICS nations, with a view of providing the most effective, efficient and accessible use of ADR to South African employees and employers in modern times. Such an investigation on the best implementation of ADR in the labour law field will provide a summary of the quality of ADR methods in South Africa and the remaining BRICS nations.⁵⁴

This research is significant in that it will further investigate and compare the implementation of ADR in labour disputes in South Africa with the implementation of ADR in labour disputes in the other BRICS nations. As such a holistic contextualisation of ADR methods used in labour disputes in the various BRICS nations will be provided.⁵⁵

This research will ultimately provide an overview of the quality of ADR in labour disputes as a means to provide South African employees and employers with access to justice as well as indicate whether ADR as regulated through the LRA and CCMA Rules in South Africa fulfils the obligations imposed on it through the Constitution and the International Labour Organisation (hereinafter referred to as the ILO).⁵⁶

⁵² South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) 17.

⁵³ The Arbitration Act 42 of 1965.

⁵⁴ See Chapter 2, 3 and 4 of this research for a contextualisation of alternative dispute resolution methods in Brazil, Russia, India, China and South Africa.

⁵⁵ See Chapter 5 of this research for a comparative study on the use of alternative dispute resolution methods in Brazil, Russia, India, China and South Africa.

⁵⁶ Article 8(1) of the International Labour Organisation Termination of Employment Convention, 1982 (No.158); Section 115(1) of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 49; Section 39(1) of the Constitution of the Republic of South Africa, 1996; Section 233 of the Constitution of the Republic of South Africa, 1996.

1.3. RESEARCH QUESTION

This research seeks to answer the following question:

Should existing ADR methods in the field of labour law in South Africa be reconsidered and updated in line with ADR practises used in the respective labour law fields of the remaining BRICS nations, or is ADR as used in labour law in South African already functioning at an optimal?

1.4. AIM/S OF THE RESEARCH

The research will first aim to illustrate the pitfalls to traditional court based litigation in South Africa.⁵⁷

Secondly, the research will provide insight into the use of ADR systems in labour disputes in the various BRICS nations. The research will consider a holistic contextualisation of the labour legislation applicable and regulating ADR methods in labour disputes in each of the BRICS nations.⁵⁸

Thirdly, the research aims to identify the strengths and weaknesses of ADR methods used in labour dispute in South Africa. Consideration will be given to the quality, accessibility, effectiveness and efficiency of ADR in South Africa by observing the manner in which ADR fulfils its obligations to resolve labour disputes as regulated and required in terms of the Constitution, the LRA, the CCMA Rules and by the ILO.⁵⁹

Fourthly, the research will compare the structure, processes and implementation of ADR measures in Brazil, Russia, India and China to the position in South Africa, with specific focus on labour law and disputes.⁶⁰

Finally, the research aims to assess and recommend ways in which South Africa could potentially better implement and use ADR measures in labour disputes

⁵⁷ See Chapter 2 of this research.

⁵⁸ See Chapter 2 - 4 of this research.

⁵⁹ See Chapter 5 of this research.

⁶⁰ See Chapter 5 of this research.

consequent upon the insights gained from the use of ADR in labour disputes in Brazil, Russia, India and China.⁶¹

1.5. LITERATURE REVIEW

Labour law can be defined as a set of rules to regulate the relationship between employees and employers. Through considering practical challenges labour law faces, Le Roux highlights that the law entails more than a textbook definition.⁶² It is therefore important to analyse whether or not existing legislation and procedures provided for in labour law are functioning at an optimal level in modern times.

Indeed, one of the biggest challenges law, and particularly labour law, is faced with is achieving its purpose in modern times.⁶³ Hepple calls for modernisation and reinvention of labour law when considering the original tasks of labour law as described by Kahn-Freund.⁶⁴ This research agrees with the view of Hepple and believes that the application of labour law, and in fact all laws in the 21st century, need to be modernised and adapted to current conditions and realities in order to not only keep track of rapid changes taking place globally, but also of changes in the South African labour market.

As one of the main purposes of the LRA is to promote the effective and efficient resolution of labour disputes the importance of continuously assessing the quality, accessibility, efficiency and effectiveness of ADR methods used to resolve labour disputes becomes evident. This research thus acts as a means to assess the effectiveness of labour law measures as required and envisioned by Kahn-Freund and Hepple.

⁶¹ See Chapter 5 of this research.

⁶² Le Roux R 'The purpose of labour law: Can it go green?' in Malherbe K & Sloth-Nielsen J (eds) *Labour Law into the Future: Essays in honour of D'Arcy du Toit* (2012) 231.

⁶³ Hepple B 'The future of labour law' (1996) 17 *Comparative Labor Law & Policy Journal* 646.

⁶⁴ Hepple B 'The future of labour law' (1996) 17 *Comparative Labor Law & Policy Journal* 646.

In a 2011 speech on enhancing access to justice, Ngcobo CJ stated that:

‘A justice system that does not function efficiently and effectively has a substantial negative impact on the delivery of justice, particularly for those who are vulnerable. Access to justice suffers when court users, such as children, have to contend with poor and inadequate services; it suffers when the cost of litigation are prohibitive; when the procedures and processes are unduly complicated or burdensome; and the delay too long for the average person.’⁶⁵

When comparing the goals of ADR with the vision of access to justice as described by Ngcobo CJ, it becomes clear that ADR provides a feasible alternative to traditional court based litigation. ADR methods when utilised efficiently are generally regarded as less expensive, disputes get resolved more efficiently and less conflict exists.⁶⁶ This remains equally true in the field of labour law disputes. The research illustrates that the use of ADR methods in labour disputes in South Africa contributes to the fulfilling of the LRA’s duty to give effect to the fundamental right of access to justice as contained in the Constitution and described by Ngcobo CJ.⁶⁷

The South African courts are encouraging the use of ADR methods in resolving labour disputes, as well as disputes in other fields of the law, as a means to assist in resolving the issues currently experienced by the traditional court system in South Africa, and globally.⁶⁸ In the matter of *Hofmeyr v Network Healthcare Holdings (Pty) Ltd*⁶⁹ the labour court highlighted the benefit, functions and importance of the use of ADR in labour dispute as follows:

⁶⁵ Chief Justice Ngcobo S ‘Enhancing access to justice: The search for better justice’ available at <http://www.constitutionallyspeaking.co.za/wp-content/uploads/2011/07.Speech-of-the-Chief-Justice-2011.pdf> (accessed 22 May 2018).

⁶⁶ South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) 15.

⁶⁷ Section 1(a) of the Labour Relations Act 66 of 1995.

⁶⁸ See Chapter 2 of this research with regards to the pitfalls to the traditional court system in South Africa.

⁶⁹ *Hofmeyr v Network Healthcare Holdings (Pty) Ltd* [2004] 3 BLLR 232 (LC).

- '(1) Conciliation proceedings are private and confidential and are conducted on a without prejudice basis. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing or as ordered otherwise by a court of law.
- (2) No person, including a commissioner, may be called as a witness during any subsequent proceedings in the Commission or in any court to give evidence about what transpired during conciliation unless ordered by a court of law.'⁷⁰

ADR as a means to resolve disputes is further not unique to the field of labour law. Although this research investigates the use of ADR in labour disputes in the BRICS nations, the importance and essence of a study on ADR methods can be seen through practical examples from other fields of law. Together with labour law, ADR processes in South Africa are most frequently encountered in family law disputes. In the case of *MN v NB*⁷¹, Brassy AJ stated the following regarding the use of mediation in divorce matters:

'The success of the process lies in its very nature. Unlike settlement negotiations between legal advisers, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interest, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser.'⁷²

While the study will focus on the use of ADR methods in South Africa in the labour law environment, Wiese however highlights the important use of ADR processes in

⁷⁰ Rule 16(1) of the Rules for the Conduct of Proceedings before the CCMA of 2003; Rule 16(2) of the Rules for the Conduct of Proceedings before the CCMA of 2003; *Hofmeyer v Network Healthcare Holdings (Pty) Ltd* [2004] 3 BLLR 232 (LC) para 5 - 6.

⁷¹ *MB v NB* 2010 (3) SA (GSJ).

⁷² *MB v NB* 2010 (3) SA (GSJ) para 50.

other areas of law, particularly commercial law.⁷³ Wiese confirms that there is an increasing trend to use ADR processes in commercial dispute resolution in South Africa.⁷⁴ Both mediation and arbitration is commonly used to resolve commercial disputes in South Africa. Wiese also highlights the use of ombudsmen to resolve commercial disputes.⁷⁵ It is apparent from the aforesaid that ADR has a definite role to play in many, if not all, areas of law.

This research proceeds from the stance that South Africa can learn from the ways in which ADR is applied in labour law in the remaining BRICS nations as a means through which to effectively protect the constitutional guarantees of equality, benefit of and access to the law.⁷⁶

1.6. PROPOSED CONTENT / CHAPTER OUTLINE

Chapter one of the research will provide an introduction to the study. This chapter will include the problem statement, the significance of the research, the research question, the aims of the research, a literature review, the proposed chapter outline and the research methodology. It will set the scene for the chapters to follow.

Within chapter two consideration will be given to the shortcomings of traditional court based litigation in South Africa. An introduction will be provided on the various dispute resolution methods available in South African labour law. The chapter will then proceed to provide an overview of ADR in South Africa in the 21st century by considering the regulations regarding access to justice and fair labour practices as per the Constitution, the regulation of labour disputes as per the LRA and the main functions of the CCMA and the provision for the regulation of conciliation, mediation and arbitration proceedings as per the CCMA Rules. Private arbitration proceedings

⁷³ Wiese T 'The use of Alternative Dispute Resolution Methods in Corporate Disputes: The Provisions of the Companies Act of 2008' (2014) 26 *SA Mercantile Law Journal* 668.

⁷⁴ Wiese T 'The use of Alternative Dispute Resolution Methods in Corporate Disputes: The Provisions of the Companies Act of 2008' (2014) 26 *SA Mercantile Law Journal* 668.

⁷⁵ Wiese T 'The use of Alternative Dispute Resolution Methods in Corporate Disputes: The Provisions of the Companies Act of 2008' (2014) 26 *SA Mercantile Law Journal* 669.

⁷⁶ Section 9(1) of The Constitution of the Republic of South Africa, 1996.

in accordance with the AA and mediation will also be considered. The chapter will also provide insight into negotiation proceedings.

Chapter three of the research will firstly provide a brief introduction to the use of ADR in labour disputes in Brazil and Russia. The chapter will focus on the ADR methods and procedures used in labour disputes in Brazil and Russia. Consideration will be given to the applicable legislation, structures and processes providing for ADR methods to be used in the settlement of labour law disputes in these two jurisdictions. Brazil and Russia have been grouped together in one chapter as ADR methods in these nations are less developed than ADR methods in the remaining BRICS nations. Labour legislation in these countries are extremely rigid.

Similar to chapter three, chapter four will critically analyse ADR methods used in labour law in the jurisdiction of China and India. China and India have been grouped together in the chapter as ADR methods in these two nations are more developed than those methods found in Brazil and Russia.

Chapter five will serve as the conclusion to the study and will commence with a brief introduction. The chapter will provide an assessment of the effectiveness and efficiency of ADR methods provided for in the LRA and CCMA Rules. Specific emphases will be placed on the requirements of the ILO and the Constitution. Consideration will be given to the most notable differences between ADR processes used in labour law in South Africa and the other BRICS nations. Recommendations on how ADR methods used in South African labour disputes can be better implemented and updated in accordance with ADR practises used in labour law in the other BRICS nations will be considered.

1.7. RESEARCH METHODOLOGY

This research will be conducted by reviewing and evaluating South African literature on ADR methods used in labour law and labour disputes. For introduction purposes, a summary on the shortcomings to traditional court based litigation will be provided as well as a brief description on the various ADR practices used in South African labour law. The research will then consider the applicable legislation regulating ADR in South Africa, as it aims to address modern issues such as labour law concerns. In

order to provide a holistic overview of ADR methods used in labour law in South Africa, secondary sources such as journal articles, academic books and websites will be reviewed. Research will also be conducted through the use of primary sources such as policies, legislation, international conventions and treaties.

A comparative study will be conducted in order to examine how the other BRICS nations make use of ADR in labour law, as alternative to traditional court based litigation in order to resolve labour disputes. Legislation from the various BRICS nations and case law from South Africa will be used for comparison purposes as a means to examine how ADR methods used in labour law differs in each of the applicable jurisdictions. The comparative analysis will provide a framework within which South Africa can learn from the respective BRICS jurisdictions and their implementation of ADR in labour disputes. Academic books, case law, journal articles, legislation, theses and websites from the various BRICS nations will be evaluated.

Finally, this research will seek to assess the use of ADR in labour disputes in South Africa and in the remaining BRICS nations as well as propose recommendations on how existing ADR measures can be better implemented, used and accessed in order to answer current employment law issues in South Africa.



CHAPTER 2

ALTERNATIVE DISPUTE RESOLUTION IN SOUTH AFRICAN LABOUR LAW

2.1. INTRODUCTION

South Africa inherited an adversarial civil justice system from English law, with traditional court based litigation being the primary means for dispute resolution.⁷⁷

In terms of Alternative Dispute Resolution (ADR), mechanisms such as negotiation, mediation and arbitration exist through which disputant parties can resolve their disputes without having to engage in adjudication before a court.⁷⁸ The research question to this study asks whether existing ADR methods in the field of labour law in South Africa are sufficient, or is perhaps in need of development, when compared with best ADR practises used in the respective labour law fields of the remaining BRICS nations. Chapter 2 of this study will investigate the current use of ADR in South Africa, with specific focus on the various forms of ADR in labour law specifically.

The chapter will commence with a discussion on the shortcomings of traditional court based litigation in South Africa. This will be followed by a contextualisation of the various forms of ADR in South African labour law. Throughout this chapter emphasis will be placed on the underlying importance of the Constitution as well as the workings of the LRA and the CCMA in South African labour law and labour disputes. Although this chapter will focus on the LRA it is worth noting that the Basic Conditions of Employment Act 75 of 1997,⁷⁹ Employment Equity Act 55 of 1998,⁸⁰ Skills Development Act 97 of 1998⁸¹ and the Unemployed Insurance Act 63 of 2001⁸² also provide for instances where the CCMA may arbitrate disputes. Relevant case law will also be discussed to illustrate the workings of the various ADR processes available to resolve labour disputes in South Africa.

⁷⁷ Van Loggerenberg D 'Civil Justice in South Africa' (2016) 3 *BRICS Law Journal* 126.

⁷⁸ Van Loggerenberg D 'Civil Justice in South Africa' (2016) 3 *BRICS Law Journal* 146.

⁷⁹ Sections 41(6) of the Basic Conditions of Employment Act 75 of 1997; Sections 74(2) of the Basic Conditions of Employment Act 75 of 1997.

⁸⁰ Section 10(6)(aA) of the Employment Equity Act of 55 of 1998.

⁸¹ Section 19 of the Skills Development Act 97 of 1998.

⁸² Section 37(2) of the Unemployment Insurance Act 63 of 2001.

2.2. THE INTERNATIONAL LABOUR ORGANISATION (ILO)

The first step towards assessing the effectiveness of labour dispute resolution processes in South Africa is considering South Africa's obligations as a member state of the ILO.

Section 39(1) of the Constitution reads as follows:

- '(1) When interpreting the Bill of Rights, a court, tribunal or forum-
- (a) Must promote the values that underlie an open democratic society based on human dignity, equality and freedom;
 - (b) Must consider international law; and
 - (c) May consider foreign law.'⁸³

Section 233 of the Constitution is also relevant in as far as the interpretation of foreign and international law in South Africa and reads as follows:

'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'⁸⁴

In terms of section 1(b) of the LRA one of the main purposes of the Act is to give effect to the various obligations South Africa has as a member state of the ILO.⁸⁵

Mphahlele highlights two important instruments of the ILO with respect to labour disputes in South Africa.⁸⁶ The first is Convention No.158 (the Termination of Employment Convention of 1982), which has as yet not been ratified by South Africa.⁸⁷ Article 8(1) of Convention No.158 reads as follows:

⁸³ Section 39(1) of the Constitution of the Republic of South Africa, 1996.

⁸⁴ Section 233 of the Constitution of the Republic of South Africa, 1996.

⁸⁵ Section 1(b) of the Labour Relations Act 66 of 1995.

⁸⁶ Mphahlele W *The Labour Relations Disputes Resolutions system: Is it effective?* (unpublished LLM thesis, University of Pretoria, 2016) 4.

⁸⁷ International Labour Organisation Termination of Employment Convention, 1982 (No.158); Mphahlele W *The Labour Relations Disputes Resolutions system: Is it effective?* (unpublished LLM thesis, University of Pretoria, 2016) 5.

- '(1) A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body such as a court, labour tribunal, arbitration committee or arbitrator.'⁸⁸

While Convention No.158 has not been ratified by South Africa yet, when comparing the wording of the LRA and the CCMA Rules to that of article 8 of the Convention it is clear that the LRA fulfils its purpose of giving effect to the obligations incurred by South Africa as a member state to the ILO. Both the LRA and CCMA Rules provide for methods through which a disputant can access conciliation, mediation, arbitration and the courts to present case and review (or appeal where allowed) decisions reached during the dispute resolution process.⁸⁹

The second relevant instrument is Recommendation No.92 (the Voluntary Conciliation and Arbitration Recommendation).⁹⁰ Section 1 of Recommendation No. 92 reads as follows:

- '1. Voluntary conciliation machinery, appropriate to national conditions, should be made available to assist in the prevention and settlement of industrial disputes between employers and workers.'⁹¹

The LRA and the CCMA Rules further give effect to the Constitution and the fulfilment of South Africa's obligations as a member state of the ILO by providing the option of conciliation⁹² and arbitration to disputants as an alternative to court litigation in settling labour disputes.⁹³

⁸⁸ Article 8(1) of the International Labour Organisation Termination of Employment Convention, 1982 (No.158).

⁸⁹ Section 115(1) of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 49.

⁹⁰ International Labour Organisation Voluntary Conciliation and Arbitration Recommendation, 1951 (No.92).

⁹¹ Section 1 of the International Labour Organisation Voluntary Conciliation and Arbitration Recommendation, 1951 (No.92).

⁹² Van Niekerk A et al *Law@Work* 3 ed (2015) 449.

⁹³ Van Niekerk A et al *Law@Work* 3 ed (2015) 451.

2.3. THE SHORTCOMINGS OF TRADITIONAL COURT BASED LITIGATION IN SOUTH AFRICA

The role of traditional court based litigation should be to provide the general public with access to justice within a reasonable period in order to resolve disputes.⁹⁴ Hurter however highlights long and unreasonable delays, high costs, a complex litigation process and the breakdown in relationships between disputant parties as some key pitfalls to court based litigation.⁹⁵ These shortcomings to traditional court based litigation prevent many parties from having sufficient access to justice.⁹⁶

Shortcomings such as the aforesaid to the civil litigation system in South Africa are not new or unknown in the South African legal context.⁹⁷ During 1983, the Hoexter Commission of Inquiry into the Structure and Functioning of Courts stated the following with regards to the pitfalls to traditional court based litigation:

‘Civil litigation in provincial and local divisions of the Supreme Court [now High Court] is characterised by cumbersome, complex and time-consuming pre-trial procedures; overloaded case rolls which necessitate postponements [and] delay the actual process of trial...; protracted trials; and high costs of litigation. The above-mentioned facts all conspire to create a situation in which the Supreme Court as a forum for adjudication of contested matters is no longer accessible to the average citizen’⁹⁸

Section 34 of the Constitution stipulates that:

‘Access to courts

⁹⁴ Foundation for Human Rights ‘Access to Justice’ available at <http://www.fhr.org.za/programmes/access-justice/> (accessed 6 September 2018).

⁹⁵ Hurter E ‘Seeking the truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation’ (2007) 2 *Tydskrifvir die Suid-Afrikaanse Reg* 248.

⁹⁶ Hurter E ‘Seeking the truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation’ (2007) 2 *Tydskrifvir die Suid-Afrikaanse Reg* 248.

⁹⁷ Hoexter Commission of Inquiry into the Structure and Functioning of Courts (1983) 20.

⁹⁸ Hoexter Commission of Inquiry into the Structure and Functioning of Courts (1983) 20; Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014) 44.

34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.⁹⁹

It is therefore important to explore the shortcomings in traditional court based litigation in South Africa within the scope of section 34 of the Constitution. Long trial proceedings and excessive delays make resolving a dispute difficult, which leads to frustration on the part of the general public in accessing justice.¹⁰⁰ This dampens the confidence of the general public in the South African justice system.¹⁰¹

Long trial delays and court backlogs can also have adverse consequences on evidence as witnesses may pass away, become ill or emigrate to a different country before the trial is finalised.¹⁰² Harpur argues that as time passes, the testimony of a witness can also become unreliable and vulnerable to attack.¹⁰³ Consequently, Harpur states that justice delayed amounts to justice denied within the ambit of section 34 of the Constitution.

The high cost of civil litigation in South Africa is a further concern for disputants. Paleker argues that because of the high costs associated with court based litigation, the constitutional guarantee of access to justice is not available for all citizens.¹⁰⁴ It is argued that civil litigation in South Africa is currently only reserved for those who can afford to make use of attorneys and advocates.¹⁰⁵ With the South African civil litigation system being an adversarial legal system, the relevant rules and procedures of the courts are complex.¹⁰⁶ When considering the high levels of poverty

⁹⁹ Section 34 of the Constitution of the Republic of South Africa, 1996.

¹⁰⁰ Harpur G 'How to Resolve Civil Cases and Impress the Public' (2009) 22 *Advocate* 38.

¹⁰¹ Harpur G 'How to Resolve Civil Cases and Impress the Public' (2009) 22 *Advocate* 38.

¹⁰² Harpur G 'How to Resolve Civil Cases and Impress the Public' (2009) 22 *Advocate* 39.

¹⁰³ Harpur G 'How to Resolve Civil Cases and Impress the Public' (2009) 22 *Advocate* 39.

¹⁰⁴ Paleker M 'Court Connected ADR in Civil Litigation: The Key to Access to Justice in South Africa' (2003) 6 *ADR Bulletin* 48.

¹⁰⁵ Paleker M 'Court Connected ADR in Civil Litigation: The Key to Access to Justice in South Africa' (2003) 6 *ADR Bulletin* 48.

¹⁰⁶ Paleker M 'Court Connected ADR in Civil Litigation: The Key to Access to Justice in South Africa' (2003) 6 *ADR Bulletin* 48.

and illiteracy in South Africa it is clear that civil litigation in general is not available or accessible to all.¹⁰⁷ Paleker further argues that although legal professionals are encouraged to participate in pro bono work, and the Legal Aid program seeks to provide access to justice for the impoverished, the incorporation of ADR in the South African justice system is needed to more comprehensively address issues associated with traditional court based litigation.¹⁰⁸

Finally, Hurter and Maclons both highlight that traditional civil litigation can lead to a breakdown in the relationship between disputing parties.¹⁰⁹ As court litigation is generally an open process, i.e. generally open to public attendance, there is very little, if any, privacy for the parties involved, which could have negative repercussions on the reputations of the disputants.¹¹⁰ According to Maclons, because of the adversarial nature of civil litigation, hostile behaviour during the court proceedings often leads to a permanent breakdown of the relationship between disputants.¹¹¹ This is especially prevalent in cases where a clear winner and loser is identified.¹¹²

The pitfalls highlighted above to court based litigation are experienced in many countries, and therefore not unique to South Africa alone. Issues such as court backlogs are alarmingly high in many countries and hinders economic progress and

¹⁰⁷ Paleker M 'Court Connected ADR in Civil Litigation: The Key to Access to Justice in South Africa' (2003) 6 *ADR Bulletin* 48.

¹⁰⁸ Paleker M 'Court Connected ADR in Civil Litigation: The Key to Access to Justice in South Africa' (2003) 6 *ADR Bulletin* 48.

¹⁰⁹ Hurter E 'Seeking the truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation' (2007) 2 *Tydskrifvir die Suid-Afrikaanse Reg* 248; Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014) 47.

¹¹⁰ Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014) 47.

¹¹¹ Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014) 47.

¹¹² Hurter E 'Seeking the truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation' (2007) 2 *Tydskrifvir die Suid-Afrikaanse Reg* 248; Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014) 47-48.

development and access to justice for many parties across the globe.¹¹³ Bielen highlights high backlogs in various European jurisdictions, particularly in Italy, Slovenia and Greece.¹¹⁴ In the Italian context, studies have shown that lengthy delays in civil court litigation negatively impact on the country's economy, with estimates that court backlogs potentially shrink the Italian GDP by as much as 1% annually.¹¹⁵

It is well known that the civil justice system in South Africa is continuously scrutinised and criticised by corporate companies, labour groups and communities alike, who all seek more effective and less expensive alternative manners in which disputes can be resolved.¹¹⁶

2.4. A BRIEF INTRODUCTION TO THE VARIOUS DISPUTE RESOLUTION PROCESSES IN SOUTH AFRICAN LABOUR LAW

Labour Court adjudication forms part of dispute resolution in South African labour law. Labour Court adjudication is however part of, what is throughout this research referred to as, traditional court based litigation. Although not an alternative dispute resolution method, it is worth noting that Labour Court adjudication plays an integral role in South African labour law. This process is compulsory in nature and entails that a judge acts as the adjudicator who ultimately determines the outcome of the matter between the disputants.¹¹⁷ In contrast to the alternative dispute resolution processes, Labour Court adjudication is subject to review, and appeal in the Labour

¹¹³ Bielen et al 'Backlogs and litigation rates: Testing congestion equilibrium across European judiciaries' (2018) 53 *International Review of Law and Economics* 9.

¹¹⁴ Bielen et al 'Backlogs and litigation rates: Testing congestion equilibrium across European judiciaries' (2018) 53 *International Review of Law and Economics* 9.

¹¹⁵ The Economist 'Europe's Civil Courts: The Wheels of Justice Grind Slow' available at <http://www.economist.com/Europe/2016/02/18/the-wheels-of-justice-grind-slow> (accessed 25 August 2018).

¹¹⁶ South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) 13.

¹¹⁷ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 39.

Appeal Court(hereinafter referred to as the LAC).¹¹⁸ Section 157(1) of the LRA reads as follows:

- ‘(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.’¹¹⁹

Section 173(1) of the LRA deals with the jurisdiction of the LAC and reads as follows:

- ‘(1) Subject to the Constitution and despite any other law, the Labour Appeal Court has exclusive jurisdiction-
- (a) to hear and determine all appeals against final judgements and the final orders of the Labour Court; and
- (b) to decide any question of law reserved in terms of section 158(4).’¹²⁰

Each of the alternative, less adversarial, dispute resolution processes which exists in South African labour law will briefly be summarised below.¹²¹ Guidance and control during these processes are provided by the CCMA, bargaining and statutory councils, accredited agencies and relevant labour courts.¹²² The processes which will be considered are statutory conciliation, statutory arbitration, con-arb, facilitation, non-binding fact-finding, binding fact-finding, con-opinionand negotiation.

During statutory conciliation within labour law (in terms of the LRA and CCMA Rules), the appointment of a conciliator is not at the voluntary discretion of the disputing parties.¹²³ Brand highlights that the CCMA, a bargaining council or a statutory council can appoint a conciliator.¹²⁴ In most instances of statutory conciliation one of the parties will refer a dispute to conciliation which will require the

¹¹⁸ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 40.

¹¹⁹ Section 157(1) of the Labour Relations Act 66 of 1995.

¹²⁰ Section 173(1)(a)-(b) of the Labour Relations Act 66 of 1995.

¹²¹ Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 1.

¹²² Grogan J *Workplace Law* 11 ed (2014) 470.

¹²³ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 39.

¹²⁴ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 39.

other disputant to attend the conciliation.¹²⁵ Section 135 of the LRA regulates the resolution of a dispute through conciliation.¹²⁶ Section 135(3) reads as follows:

- ‘(3) The commissioner must determine a process to attempt to resolve the dispute, which may include
- (a) mediating the dispute;
 - (b) conducting a fact-finding exercise; and
 - (c) making a recommendation to the parties, which may be in the form of an advisory arbitration award.’¹²⁷

Statutory arbitration can be defined as a compulsory process where the parties present their case to an appointed arbitrator who then decides on the matter.¹²⁸ As with statutory conciliation, the CCMA, a bargaining council, a statutory council or a relevant agency is mandated to appoint an arbitrator to hear the matter between the parties.¹²⁹ Brand highlights that the process of statutory arbitration can only be reviewed in the Labour Court and not appealed.¹³⁰ Section 138 of the LRA regulates the general provisions for arbitration proceedings.¹³¹ Section 138(1) reads as follows:

- ‘(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.’¹³²

Con-arb can be described as the process through which parties to a dispute decide to make use of an objective third party to assist the parties with conciliation. Where

¹²⁵ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 39.

¹²⁶ Section 135 of the Labour Relations Act 66 of 1995.

¹²⁷ Section 135(3)(a)-(c) of the Labour Relations Act 66 of 1995.

¹²⁸ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 39.

¹²⁹ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 39.

¹³⁰ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 39.

¹³¹ Section 138 of the Labour Relations Act 66 of 1995.

¹³² Section 138(1) of the Labour Relations Act 66 of 1995.

no agreement is reached during the conciliation phase the same objective third party will immediately proceed to the process of arbitration.¹³³

While the above ADR processes are the ones most often encountered in labour law, there are other ADR processes also to the disposal of parties. The parties to a dispute can also make use of facilitation as a process to assist in resolving disputes. A facilitator also assists the parties in attempting to reach mutual and fair consensus.¹³⁴ Brand highlights that facilitation is provided for in the LRA in the establishment and workings of workplace forums and statutory councils.¹³⁵

Non-binding and binding fact-finding exercises are further examples of processes of dispute resolution in South African labour law.¹³⁶ Non-binding fact finding entails the use of a specialist fact finder who in his capacity as an objective third party determines the differences in facts. The specialist does not however provide the disputants with possible solutions to the issue at hand.¹³⁷ In contrast to non-binding fact finding, binding fact-finding entails the process through which an objective third party fact finder determines differences in facts and provides the disputants with a binding determination.¹³⁸

Brand also highlights the process of con-opinion.¹³⁹ During this process of dispute resolution, disputants make use of an objective third party who will act as a conciliator in the matter between them.¹⁴⁰ Should the conciliation not lead to an agreed solution between the parties, the conciliator will furnish the disputants with an opinion regarding the matter and how to proceed in going forward in attempting to resolve the relevant issues. This decision is however non-binding on the parties.¹⁴¹

¹³³ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 42.

¹³⁴ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 43.

¹³⁵ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 43.

¹³⁶ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 43.

¹³⁷ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 43.

¹³⁸ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 43.

¹³⁹ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 44.

¹⁴⁰ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 44.

¹⁴¹ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 44.

In negotiation proceedings parties to a dispute seek to resolve a dispute through informal discussions.¹⁴² What makes negotiation unique from arbitration and mediation is that no independent third person acts as facilitator, mediator, arbitrator or commissioner.¹⁴³ Negotiation will be regarded as final and successful once the parties agree to a settlement and reach mutual consensus.¹⁴⁴

The most commonly used of these methods of ADR in labour law disputes, that is, conciliation, mediation, arbitration, collective bargaining and Labour Court adjudication, will be discussed below.

2.5. ALTERNATIVE DISPUTE RESOLUTION IN SOUTH AFRICAN LABOUR: A LEGISLATIVE APPROACH

2.5.1. The Constitution of the Republic of South Africa, 1996

The Constitution is the supreme law of the Republic of South Africa.¹⁴⁵ This consequently means that any law or conduct which is not consistent with the Constitution is to be regarded as invalid.¹⁴⁶ The supremacy of the Constitution further means that any obligations imposed by the Constitution must be fulfilled.¹⁴⁷

Chapter 2 of the Constitution is known as the Bill of Rights and covers sections 7 to 39 of the Constitution. The significance of chapter 2 of the Constitution can be seen from the following quote from the Bill of Rights:

‘Rights

7. (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.¹⁴⁸

¹⁴² Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 23.

¹⁴³ Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 23.

¹⁴⁴ Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 23.

¹⁴⁵ Section 2 of the Constitution of the Republic of South Africa, 1996.

¹⁴⁶ Section 2 of the Constitution of the Republic of South Africa, 1996.

¹⁴⁷ Section 2 of the Constitution of the Republic of South Africa, 1996.

¹⁴⁸ Section 7(1) of the Constitution of the Republic of South Africa, 1996.

Section 9 of the Constitution, known as the Equality Clause, states that everyone is to be regarded as equal before the law and that everyone should have equal protection and benefit of the law.¹⁴⁹ Section 23 of the Constitution regulates labour relations in South Africa specifically.¹⁵⁰ Section 23(1) states that '[e]veryone has the right to fair labour practices'.¹⁵¹

The Constitution further provides for three spheres of government, namely, the legislature, the executive authority and the judicial authority.¹⁵² The national, provincial and local spheres of government are to be distinctive, interdependent and interrelated.¹⁵³

It is of importance that the laws of South Africa and the legal system as a whole should be developed in order to give effect to the rights contained in the Constitution.¹⁵⁴ Section 39(2) of the Constitution reads as follows:

'39. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.¹⁵⁵

In light of the Constitutional right to access to justice,¹⁵⁶ the importance of ADR can be viewed as ancillary methods through which to fulfil the constitutional right of access to justice.

Consideration will now be given to the use of ADR in labour law in South Africa specifically.

¹⁴⁹ Section 9(2) of the Constitution of the Republic of South Africa, 1996.

¹⁵⁰ Section 23 of the Constitution of the Republic of South Africa, 1996.

¹⁵¹ Section 23(1) of the Constitution of the Republic of South Africa, 1996.

¹⁵² Section 40(1) of the Constitution of the Republic of South Africa, 1996; Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014) 24.

¹⁵³ Section 40(1) of the Constitution of the Republic of South Africa, 1996.

¹⁵⁴ Section 39(1)-(2) of the Constitution of the Republic of South Africa, 1996.

¹⁵⁵ Section 39(2) of the Constitution of the Republic of South Africa, 1996.

¹⁵⁶ Section 34 of the Constitution of the Republic of South Africa, 1996.

2.5.2. The Labour Relations Act 66 of 1995 (LRA)

Labour disputes can be resolved by a variety of institutions.¹⁵⁷ Globally such institutions include specialised courts (such as labour courts), tribunals and administrative boards.¹⁵⁸

In South Africa, the LRA provides for the CCMA, bargaining and statutory councils and the Labour Courts to resolve labour disputes in an efficient, affordable and easily accessible manner.¹⁵⁹ For the purpose of this study consideration will be given to the functioning of the CCMA and its use of alternative methods to dispute resolution.

2.5.3. The Commission for Conciliation, Mediation and Arbitration (CCMA)

The CCMA is a statutory dispute resolution body established through section 112 of the LRA.¹⁶⁰ The CCMA is a dispute resolution body which functions independently from the state, trade unions and employers' organisations and which has the necessary jurisdiction to act in its relevant capacity in all nine of the provinces in South Africa.¹⁶¹ The primary function of the CCMA is to conciliate and arbitrate labour disputes as per the jurisdiction of the commission in terms of the LRA.¹⁶²

2.5.3.1. The primary functions of the CCMA

In terms of section 115 of the LRA, the CCMA has four primary functions.¹⁶³ First, the CCMA must strive to conciliate relevant disputes referred to it in terms of the

¹⁵⁷ Van Niekerk A et al *Law@Work* 3 ed (2015) 443.

¹⁵⁸ Van Niekerk A et al *Law@Work* 3 ed (2015) 443.

¹⁵⁹ Van Niekerk A et al *Law@Work* 3 ed (2015) 443.

¹⁶⁰ Section 112 of the Labour Relations Act 66 of 1995.

¹⁶¹ Section 113-114 of the Labour Relations Act 66 of 1995.

¹⁶² Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 4.

¹⁶³ Section 115 of the the Labour Relations Act 66 of 1995.

LRA.¹⁶⁴ Secondly, the CCMA must arbitrate unresolved disputes as provided for in the LRA, or where not so provided for, where the disputants agree to arbitration.¹⁶⁵ Thirdly, the CCMA must seek to assist in the establishment of workplace forums.¹⁶⁶ Fourthly, the CCMA is required to compile and publish relevant and timely information and statistics regarding its activities.¹⁶⁷ The Rules for the Conduct of Proceedings before the Commission for CCMA¹⁶⁸ (hereafter the CCMA Rules) are the guidelines which provide disputants and commissioners with the necessary information to effectively and efficiently resolve labour disputes. The CCMA Rules provide information on the serving and filing of relevant documentation, conciliation proceedings, con-arb proceedings, arbitration proceedings and application proceedings.¹⁶⁹

The CCMA's duties in terms of conciliation and arbitration as forms of ADR will be discussed below.

2.5.3.2. Conciliation at the CCMA

Where so provided for in the LRA, conciliation by an independent third party commissioner as appointed by the CCMA must first take place before a matter can be arbitrated.¹⁷⁰ The aim of conciliation is to provide the disputants with an opportunity to reach an agreement through a process facilitated by a CCMA

¹⁶⁴ Section 115(1) of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 49.

¹⁶⁵ Section 115(1) of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 49.

¹⁶⁶ Section 115(1) of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 49.

¹⁶⁷ Section 115(1) of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 49.

¹⁶⁸ CCMA 'Rules for the Conduct of Proceedings before the CCMA' available at <http://www.ccma.org.za/Advice/Knowledge-Hub/Downloads/Rules-Legislation> (accessed 10 January 2019).

¹⁶⁹ The Rules for the Conduct of Proceedings before the CCMA of 2003.

¹⁷⁰ Van Niekerk A et al *Law@Work* 3 ed (2015) 449.

commissioner.¹⁷¹ This process of facilitation can take on a variety of forms, including, mediation, fact-finding and recommendations, which also includes the possibility of an advisory arbitration award.¹⁷² The CCMA commissioner will decide on the process which will be followed and the exact process will be conducted in a confidential manner and without prejudice.¹⁷³

Van Niekerk highlights the benefits of requiring conciliation before arbitration. First, through conciliation the parties to a dispute can possibly resolve their dispute by mutual agreement and without having the burden of a final decision and consequently a winner and loser.¹⁷⁴ Secondly, conciliation assists in reducing the number of arbitration cases which the CCMA is required to deal with, consequently preventing unnecessary delays to the detriment of other disputants.¹⁷⁵

Conciliation is initiated when the referring party completes the CCMA referral of a dispute form, known as form 7.11, and subsequently serving copies of this form to the other party and the CCMA.¹⁷⁶ Thereafter the CCMA has the duty to inform both parties to the dispute of the relevant matter to be conciliated and furnishing the parties with the date, time and place where conciliation proceedings will take place.¹⁷⁷ This notice period given to the disputants of the impending conciliation must be at least 14 calendar days.¹⁷⁸ The CCMA has the duty to appoint a commissioner¹⁷⁹ to oversee the conciliation process. The commissioner must attempt to resolve the dispute by means of a conciliation process within 30 days of

¹⁷¹ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 89.

¹⁷² Van Niekerk A et al *Law@Work* 3 ed (2015) 449; Rule 16(1) of the Rules for the Conduct of Proceedings before the CCMA of 2003.

¹⁷³ Van Niekerk A et al *Law@Work* 3 ed (2015) 449.

¹⁷⁴ Van Niekerk A et al *Law@Work* 3 ed (2015) 450.

¹⁷⁵ Van Niekerk A et al *Law@Work* 3 ed (2015) 450.

¹⁷⁶ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 89.

¹⁷⁷ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 89.

¹⁷⁸ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 89.

¹⁷⁹ Van Niekerk A et al *Law@Work* 3 ed (2015) 450.

the matter having been referred to the CCMA.¹⁸⁰ The parties to the dispute can however agree to extend the period of 30 days in order to effectively and efficiently resolve their dispute through conciliation.¹⁸¹

Section 142 of the LRA provides for the powers which a commissioner may exercise during conciliation and subsequent arbitration proceedings.¹⁸² These powers include the following:

- (1) A commissioner who has been appointed to attempt to resolve a dispute may-
- (a) subpoena for questioning any person who may be able to give information or whose presence at the conciliation or arbitration proceedings may help to resolve the dispute;
 - (b) subpoena any person who is believed to have possession or control of any book, document or object relevant to the resolution of the dispute, to appear before the commissioner to be questioned or to produce that book, document or object;
 - (c) call, and if necessary, subpoena, any expert to appear before the commissioner to give evidence relevant to the resolution of the dispute;
 - (d) call any person present at the conciliation or arbitration proceedings or who was or could have been subpoenaed for any purpose set out in this section, to be questioned about any matter relevant to the dispute;
 - (e) administer an oath or accept an affirmation from any person called to give evidence or be questioned;
 - (f) at any reasonable time, but only after obtaining the necessary written authorisation-
 - (i) enter and inspect any premises on or in which any book, document or object, relevant to the resolution of the dispute is to

¹⁸⁰ Section 135(2) of the Labour Relations Act 66 of 1995.

¹⁸¹ Section 135(2) of the Labour Relations Act 66 of 1995.

¹⁸² Section 142(1)(a)-(f) of the Labour Relations Act 66 of 1995.

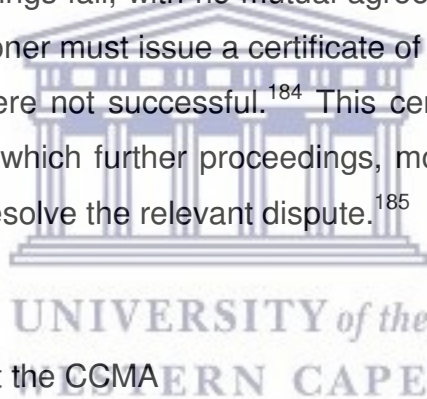
be found or is suspected on reasonable grounds of being found there; and

(ii) examine, demand the production of, and seize any book, document or object that is on or in those premises and that is relevant to the resolution of the dispute; and

(iii) take a statement in respect of any matter relevant to the resolution of the dispute from any person on the premises who is willing to make a statement, and

(g) inspect, and retain for a reasonable period, any of the books, documents or objects that have been produced to, or seized by, the Commission.¹⁸³

Where conciliation proceedings fail, with no mutual agreement reached between the parties, a CCMA commissioner must issue a certificate of outcome indicating that the conciliation proceedings were not successful.¹⁸⁴ This certificate signals the start of specified time limits within which further proceedings, most notably arbitration, must take place as a means to resolve the relevant dispute.¹⁸⁵



2.5.3.3. Arbitration at the CCMA

Van Niekerk highlights instances where the CCMA will arbitrate unresolved disputes.¹⁸⁶ First, the CCMA must proceed to arbitrate an unresolved dispute if an employee indicated that the reason for his or her dismissal was due to the conduct or capacity of the employee.¹⁸⁷ Secondly, the CCMA must proceed with arbitration proceedings if an employee is of the view that the dismissal was unfair as the employer made continued employment intolerable or where the employer provided

¹⁸³ Section 142(1)(a)-(g) of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 450.

¹⁸⁴ Van Niekerk A et al *Law@Work* 3 ed (2015) 451.

¹⁸⁵ Van Niekerk A et al *Law@Work* 3 ed (2015) 451.

¹⁸⁶ Van Niekerk A et al *Law@Work* 3 ed (2015) 451.

¹⁸⁷ Section 191(5)(a)(i) of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 451.

substantially less favourable conditions or circumstances at work after the transfer of a business in terms of section 197 of the LRA.¹⁸⁸ Thirdly, the CCMA must proceed with arbitration if the employee does not know the reason for the dismissal.¹⁸⁹ Fourthly, the CCMA must proceed with arbitration if the dispute is alleged to be one of an unfair labour practise.¹⁹⁰ The CCMA must further arbitrate over unresolved disputes regarding the exercise of organisational rights,¹⁹¹ the interpretation of collective agreements which do not provide for relevant dispute resolution procedures,¹⁹² as well as instances where parties to workplace forums have been unable to reach consensus regarding matters set out for joint decision-making.¹⁹³

The applicant party to the procedure must complete and sign the relevant CCMA arbitration referral form, known as Form 7.13. Similar to the requirements discussed above for referring a matter to conciliation, Form 7.13 needs to be served on all parties to the dispute as well as to the CCMA. Form 7.13 must be served within 90 days as of the date on which the referring party received the certificate of failed conciliation.¹⁹⁴

An arbitrator will start the arbitration proceedings by introducing himself and will also establish who is appearing on behalf of each of the disputant parties. During this phase of the arbitration proceedings, the arbitrator will inform the disputants regarding his role, how the process is going to proceed, as well as the rights of the

¹⁸⁸ Section 191(5)(a)(ii) of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 451.

¹⁸⁹ Section 191(5)(a)(iii) of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 451.

¹⁹⁰ Section 191(5)(a)(iv) of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 451.

¹⁹¹ Section 21 of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 451.

¹⁹² Section 24(1)-(2) of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 451.

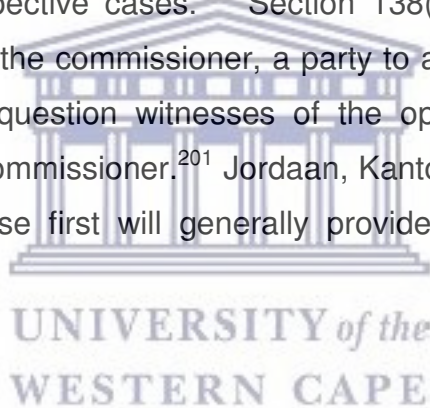
¹⁹³ Section 86(7) of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 451.

¹⁹⁴ Van Niekerk A et al *Law@Work* 3 ed (2015) 452.

disputants.¹⁹⁵ After the introduction the arbitrator will allow for preliminary issues to be raised, such as issues regarding the CCMA's jurisdiction to hear the matter. The arbitrator must provide each party with an opportunity to make submissions before making a finding on any preliminary issues.¹⁹⁶

After finalising introductory and preliminary issues, the arbitrator must afford each of the disputants the opportunity to make a short opening statement regarding their respective cases.¹⁹⁷ This step in the arbitration proceedings is advantageous to the arbitrator as it provides him with the necessary information, and sets the context, to understand what exactly the dispute is.¹⁹⁸ This will further assist the arbitrator in speeding up the proceedings and gaining clarity regarding what is being claimed and challenged.¹⁹⁹

The next step in the process of arbitration proceedings entails that each party to the dispute presents their respective cases.²⁰⁰ Section 138(2) of the LRA states that subject to the discretion of the commissioner, a party to a dispute is allowed to give evidence, call witnesses, question witnesses of the opposing party and provide closing arguments to the commissioner.²⁰¹ Jordaan, Kantor and Bosch state that the party who presents its case first will generally provide all evidence and call all



¹⁹⁵ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 93.

¹⁹⁶ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 93.

¹⁹⁷ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 93.

¹⁹⁸ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 93.

¹⁹⁹ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 93.

²⁰⁰ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 94.

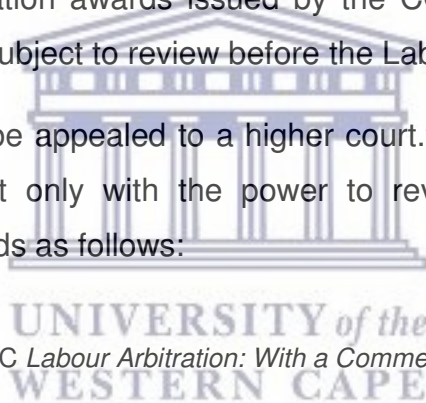
²⁰¹ Section 138(2) of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 453.

witnesses, which will then be followed by cross-and re-examination before the other party gets the opportunity to do the same.²⁰²

After the parties have stated their respective cases, section 138(2) of the LRA stipulates that the disputants will have the opportunity to present concluding arguments to the arbitrator.²⁰³ The party who presented its case first, typically the employer, will proceed to argue the success of its case on a balance of probabilities.²⁰⁴ The other party, typically the employee, will then have the same opportunity.²⁰⁵

The arbitrator will thereafter proceed to consider the evidence and relevant legislation as he attempts to make a decision regarding the dispute at hand.²⁰⁶ The arbitrator's decision is known as an arbitration award.²⁰⁷ In terms of section 138(7)(a) of the LRA the arbitrator is required to provide the parties with brief reasons for the arbitration award.²⁰⁸ Arbitration awards issued by the CCMA are final and binding and such awards are only subject to review before the Labour Court.²⁰⁹

Arbitration awards cannot be appealed to a higher court.²¹⁰ Section 145 of the LRA provides the Labour Court only with the power to review arbitration awards.²¹¹ Section 145 of the LRA reads as follows:



²⁰² Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 94.

²⁰³ Section 138(2) of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 453.

²⁰⁴ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 97.

²⁰⁵ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 97.

²⁰⁶ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 98.

²⁰⁷ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 98.

²⁰⁸ Section 138(7)(a) of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 453.

²⁰⁹ Van Niekerk A et al *Law@Work* 3 ed (2015) 453.

²¹⁰ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 100.

‘145. Review of arbitration awards

- (1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-
 - (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or
 - (b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.
- (1A) The Labour Court may on good cause shown condone the late filing of any application in terms of subsection (1)
- (2) A defect referred to in subsection (1), means-
 - (a) that the commissioner-
 - (i) *committed misconduct in relation to the duties of the commissioner as an arbitrator;*
 - (ii) *committed a gross irregularity in the conduct of the arbitration proceedings; or*
 - (iii) *exceeded the commissioner's powers; or*
 - (b) that an award has been improperly obtained.
- (3) The Labour Court may stay the enforcement of the award pending its decision.
- (4) If the award is set aside, the Labour Court may-
 - (a) determine the dispute in the manner it considers appropriate, or

²¹¹ Section 145 of the Labour Relations Act 66 of 1995.

(b) make any order it considers appropriate about the procedures to be followed to determine the dispute.²¹²

In the matter of *Sidumo & another v Rustenburg Platinum Mines Ltd & others*²¹³ the Constitutional Court stipulated the test for review of arbitration awards. The Constitutional Court held that in order to determine whether an arbitration award should be reviewed the court must ask itself whether the decision by the arbitrator was one which a reasonable decision-maker could not reach.²¹⁴ In the subsequent case of *Heroldt v Nedbank Ltd*²¹⁵ the Supreme Court of Appeal provided further clarity on the determination as to whether a reasonable decision maker could not have reached a certain decision. The Supreme Court of Appeal held that:

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'²¹⁶

²¹² Section 145(1)-(4) of the Labour Relations Act 66 of 1995.

²¹³ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 4205 CC.

²¹⁴ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 101.

²¹⁵ *Heroldt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA).

²¹⁶ *Heroldt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA) para 25.

2.5.3.4. The CCMA: Con-arb

As briefly described above, the process of con-arb as a means to resolve a dispute entails the commencement of arbitration proceedings directly after conciliation failed.²¹⁷ Section 191(5A) of the LRA reads as follows:

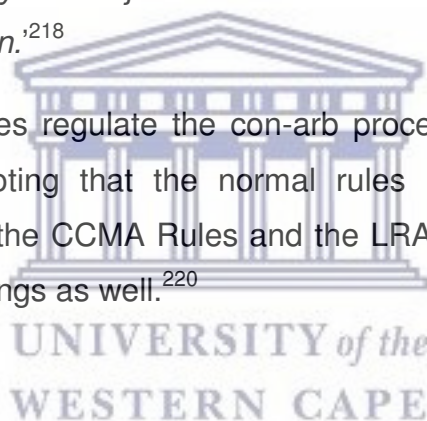
‘(5A) Despite any other provisions in the Act, the council or Commission must commence the arbitration immediately after clarifying that the dispute remains unresolved if the dispute concerns -

(i) the dismissal of an employee for any reason relating to probation;

(ii) any unfair labour practice relation to probation;

*(iii) any other dispute contemplated in subsection (5)(a) in respect of which no party has objected to the matter being dealt with in terms of this subsection.*²¹⁸

Rule 17 of the CCMA Rules regulate the con-arb process as a means to resolve disputes.²¹⁹ It is worth noting that the normal rules regarding conciliation and arbitration as contained in the CCMA Rules and the LRA, and as discussed above, applies to con-arb proceedings as well.²²⁰



2.6. COLLECTIVE BARGAINING

Collective bargaining may be defined as the primary means through which employers, employees, trade unions and employers' organisations bargain over labour matters relating to, to name a few, remuneration and the terms and conditions of employment.²²¹ Such matters are generally referred to as matters of mutual interest.

²¹⁷ Van Niekerk A et al *Law@Work* 3 ed (2015) 454.

²¹⁸ Section 191(5A) of the Labour Relations Act 66 of 1995.

²¹⁹ Rule 17 of the Rules for the Conduct of Proceedings before the CCMA of 2003.

²²⁰ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 92.

²²¹ Du Toit D 'Collective Bargaining and Worker Participation' (2000) 21 *ILJ* 1544.

Section 23 of the Constitution regulates the right to fair labour practices. This includes regulating both individual labour rights as well as the right to collective bargaining.²²² Section 23(5) of the Constitution reads as follows:

‘(5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that legislation may limit a right in this Chapter, the limitation must comply with section 36(1).’²²³

Du Toit²²⁴ argues that the constitutional right to collective bargaining, and in particular the right of employees and trade unions to partake in strike action, should be defined in line with the below dictum in the matter of *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996*.²²⁵

‘Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lockout.) The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out.’²²⁶

²²² Steenkamp A, Stelzner S & Badenhorst N ‘The Right to Bargain Collectively’ (2004) 25 *ILJ* 944.

²²³ Section 23(5) of the Constitution of the Republic of South Africa, 1996.

²²⁴ Du Toit D ‘The Right to Equality versus Employer ‘Control’ and Employee ‘Subordination’: Are Some More Equal Than Others?’ (2016) 37 *ILJ* 20.

²²⁵ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC).

²²⁶ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) para 66.

In terms of section 1 (d)(i)-(iv) of the LRA, a core purpose of the LRA is to promote the effective and efficient regulation of collective bargaining. The section reads as follows:

‘(d) to promote-

- (i) orderly collective bargaining
- (ii) collective bargaining at sectoral level;
- (iii) employee participation in decision-making in the workplace; and
- (iv) the effective resolution of labour disputes.²²⁷

The LRA regulates collective bargaining rights in sections 11 to 22.²²⁸

2.7. PRIVATE ARBITRATION AND THE ARBITRATION ACT 42 OF 1965 (AA)

Private arbitration differs from arbitration done at the CCMA in terms of the LRA and the CCMA Rules (statutory arbitration).²²⁹ The main difference between private arbitration in terms of the AA and arbitration in terms of the CCMA and LRA is that the referral of a dispute to private arbitration is agreed to in an arbitration agreement between the disputant parties.²³⁰ In the arbitration agreement the disputants agree to refer their dispute to arbitration, as well as reaching agreement over issues such as who will act as the arbitrator and the powers of the arbitrator.²³¹

Private arbitration provides disputant parties with the means to voluntarily make use of an objective third party who will act as arbitrator as a means to assess each

²²⁷ Section 1 (d)(i)-(iv) of the Labour Relations Act 66 of 1995.

²²⁸ Sections 11 - 22 of the Labour Relations Act 66 of 1995.

²²⁹ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 5.

²³⁰ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 5.

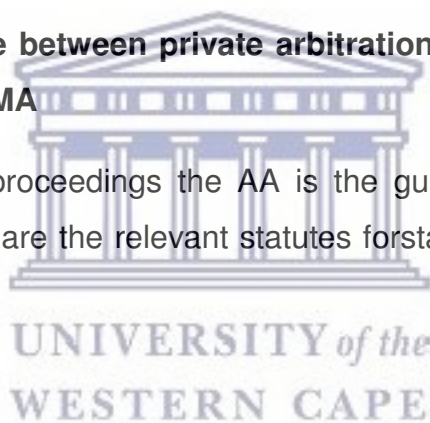
²³¹ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 5.

disputants case.²³² Brand highlights that the process of private arbitration is subject to review before the Labour Court and cannot be appealed.²³³

It is argued that the AA in its current form is inadequate and outdated.²³⁴ The South African Law Commission submits that the AA was designed to deal with domestic arbitration disputes,²³⁵ and does not adequately provide for the arbitration of a range of disputes, such as, international disputes.²³⁶ The South African Law Commission further states that the AA in its current form allows parties to involve the court as a tactic to delay arbitration proceedings.²³⁷ It is argued that the AA must be updated to afford an arbitral tribunal with the power to effectively and efficiently resolve disputes through arbitration outside of the court.²³⁸ The process of arbitration should be cost-effective and should take place in an expeditious manner.²³⁹

2.7.1. The difference between private arbitration and arbitration in terms of the LRA and CCMA

During private arbitration proceedings the AA is the guiding statute, whereas the LRA and the CCMA Rules are the relevant statutes for statutory arbitration in labour



²³² Brand J et al *Labour Dispute Resolution* 2 ed (2009) 39.

²³³ Brand J et al *Labour Dispute Resolution* 2 ed (2009) 39.

²³⁴ South African Law Commission (Project 94) *Arbitration: An International Arbitration Act for South Africa* (1998) 23.

²³⁵ South African Law Commission (Project 94) *Arbitration: An International Arbitration Act for South Africa* (1998) 23.

²³⁶ South African Law Commission (Project 94) *Arbitration: An International Arbitration Act for South Africa* (1998) 23.

²³⁷ South African Law Commission (Project 94) *Arbitration: An International Arbitration Act for South Africa* (1998) 23.

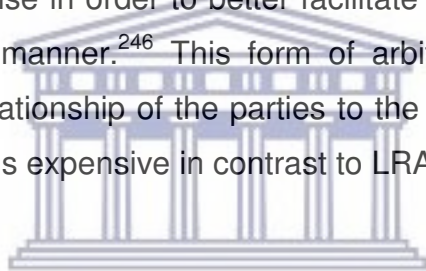
²³⁸ South African Law Commission (Project 94) *Arbitration: An International Arbitration Act for South Africa* (1998) 23.

²³⁹ South African Law Commission (Project 94) *Arbitration: An International Arbitration Act for South Africa* (1998) 23.

disputes.²⁴⁰ Section 146 of the LRA deals with the exclusion of the AA from the functioning of arbitration in terms of the LRA.²⁴¹

Under the AA the powers of arbitrators are derived from the arbitration agreement between the disputants.²⁴² The parties to the dispute determine who will be appointed as the arbitrator, the venue, time and the date of the arbitration. This is different from arbitration under the LRA, where the CCMA determines the appointment of the arbitrator and decides on a venue, time and date.²⁴³ The parties to private arbitration personally pay for the arbitration proceedings whereas the State is responsible for the payment of arbitration in terms of the LRA.²⁴⁴ One similarity between private arbitration and LRA arbitration is that an arbitration award made in either of these proceeding can only be reviewed and is not subject to appeal.²⁴⁵

The benefit of private arbitration is that the parties can choose an arbitrator with the necessary skills and expertise in order to better facilitate the arbitration proceedings in a speedy and efficient manner.²⁴⁶ This form of arbitration is also sensitive in protecting the long-term relationship of the parties to the dispute.²⁴⁷ A disadvantage of private arbitration is that is expensive in contrast to LRA arbitration.²⁴⁸



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²⁴⁰ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 5.

²⁴¹ Section 146 of the Labour Relations Act 66 of 1995.

²⁴² Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 5.

²⁴³ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 5.

²⁴⁴ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 5.

²⁴⁵ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 5.

²⁴⁶ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 5.

²⁴⁷ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 5.

²⁴⁸ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 5.

The benefits of arbitration in terms of the LRA and CCMA Rules include the lower cost involved, the accessibility to the CCMA for all disputants and compulsory conciliation proceedings before arbitration takes place.²⁴⁹ Disadvantages of arbitration in terms of the LRA and CCMA include case overloads, the fact that the parties do not select the arbitrator themselves and subsequently a lack of expertise by the arbitrator in certain matters when compared to the selection of a skilled arbitrator by the parties during private arbitration proceedings.²⁵⁰

2.7.2. Matters which are not subject to arbitration

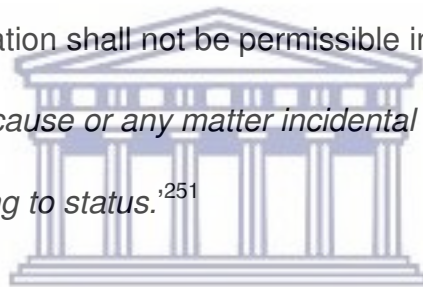
Section 2 of the AA reads as follows:

'2 Matters not subject to arbitration

A reference to arbitration shall not be permissible in respect of-

(a) any matrimonial cause or any matter incidental to any such cause; or

(b) any matter relating to status.²⁵¹



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2.7.3. The arbitration agreement, relevant parties and appointment of arbitrators

Section 1 of the AA defines an arbitration agreement between disputant parties as an agreement in writing which contains a reference to the arbitration of existing or future disputes over matters as specified in the agreement.²⁵² Section 1 of the AA further states that it is irrelevant whether the arbitrator has been named in the arbitration agreement or not.²⁵³

²⁴⁹ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 5.

²⁵⁰ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 5.

²⁵¹ Section 2 of the Arbitration Act 42 of 1965.

²⁵² Section 1 of the Arbitration Act 42 of 1965.

²⁵³ Section 1 of the Arbitration Act 42 of 1965.

The parties to the arbitration agreement include the parties as identified in the agreement. On the question of who constitutes a party to an arbitration agreement, section 1 of the AA states:

‘in relation to an arbitration agreement or a reference means a party to the agreement or reference, a successor in title or assign of such a party and a representative recognized by law of such a party, successor in title or assign;’²⁵⁴

In terms of sections 9 and 10 of the AA, the parties to an arbitration agreement can agree to appoint a single arbitrator or a number of arbitrators.²⁵⁵

2.8. MEDIATION

Mediation can be defined as the use of an independent individual who acts in his or her capacity as a neutral person with the aim to mediate or facilitate a possible solution in a dispute.²⁵⁶ This neutral third party is known as a mediator.²⁵⁷ It is the role of the mediator to help facilitate discussions between the disputants in order for them to better understand the issues in dispute.²⁵⁸ The mediator also assists the disputants in attempting to reach a final agreement on their own terms.²⁵⁹ Unsuccessful mediation, parties agree to a mutual resolution without identifying a winner or loser.²⁶⁰ Should mediation not be successful the disputants can choose to make use of formal litigation proceedings or any of the other available alternative

²⁵⁴ Section 1 of the Arbitration Act 42 of 1965.

²⁵⁵ Section 9 of the Arbitration Act 42 of 1965; Section 10 of the Arbitration Act 42 of 1965.

²⁵⁶ Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 2.

²⁵⁷ Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 2.

²⁵⁸ Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 2.

²⁵⁹ Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 2.

²⁶⁰ Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 2; Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014) 12.

dispute resolution methods as discussed in this chapter and applicable to the relevant dispute in question.²⁶¹

2.8.1. Mediation compared to arbitration

Mediation is characterised through the use of a neutral third party who acts as a facilitator during the negotiation proceedings.²⁶² A mediator does not furnish the disputants with a final decision.²⁶³ Mediation rules are less rigid and more informal when compared to the rules and legislation which guides arbitration in South African labour disputes.²⁶⁴ Mediation allows for flexibility in the sense that the mediator may seek to speak to each of the disputant parties separately and privately.²⁶⁵ An arbitration award results in a winner and loser. During mediation proceedings there is no winner and loser since the parties to the negotiations agree to a possible mutual outcome or settlement.²⁶⁶ It is further worth noting that evidence provided during the mediation proceedings are to be regarded as privileged and may not be disclosed during subsequent arbitration proceedings.²⁶⁷

2.8.2. Mediation before the Magistrates' Courts

The Amendment of Rules regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa, published in GN 183/GG 37448 of 18 March 2014 (the Amended Magistrate's Court Rules) now makes it possible for a matter to be referred to mediation before a magistrate's court and during any time before the start of litigation proceedings, or even after litigation proceedings have already

²⁶¹ Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 2; Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014) 12.

²⁶² Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 3.

²⁶³ Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 3.

²⁶⁴ Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 3.

²⁶⁵ Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 3.

²⁶⁶ Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 3.

²⁶⁷ Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) 3.

commenced. Such referral must be done with the necessary consent of the court.²⁶⁸ Based on rule 75(2) of the Amended Magistrate's Court Rules, there is a duty on a judicial officer to enquire into the possibility of mediating the matter instead of relying on traditional court based litigation.²⁶⁹ Such enquiry into the possibility of mediation needs to take place before judgement is handed down by the court.²⁷⁰

It can be argued that these rules promote access to justice,²⁷¹ promotes restorative justice,²⁷² prevents the relationship of the disputants from breaking down²⁷³ and provide disputants with a cost-effective measure to resolve their disputes.²⁷⁴ The rules further assist the disputants in deciding whether litigation or mediation is in their

²⁶⁸ Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014; Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014) 123.

²⁶⁹ Rule 75(2) of the Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014; Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014) 124.

²⁷⁰ Rule 75(2) of the Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014; Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014) 124.

²⁷¹ Rule 71(a) of the Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014; Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014) 124.

²⁷² Rule 71(b) of the Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014; Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014) 124.

²⁷³ Rule 71(c) of the Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014; Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014) 124.

²⁷⁴ Rule 71(d) of the Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014; Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014) 124.

best interest²⁷⁵ and provides the disputants with possible solutions to their disputes.²⁷⁶

2.9. CONCLUSION

A variety of ADR methods and procedures, both statutory and voluntary in nature, exist within the South African legal framework. In this chapter consideration was given to the benefits of ADR when compared to the use of traditional court based litigation in resolving labour disputes. The benefits of using ADR to resolve labour disputes include the timely resolution of a dispute, cost-effectiveness, confidentiality, privacy and flexibility.²⁷⁷

Parties can further agree to appoint an arbitrator as a means to resolve their dispute through private arbitration. This chapter considered the effectiveness of the AA, which regulates private arbitration in South Africa. It was argued that the AA in its current form provides inadequate means through which to arbitrate disputes as the act is outdated and does not provide an international perspective.²⁷⁸

The chapter also considered the LRA and the CCMA Rules, which provide disputants with alternative channels to resolve their labour disputes. The relevant sections of the LRA and the CCMA Rules which provide for conciliation, arbitration and con-arb were considered. Collective bargaining as a means to resolve a collective labour dispute was also discussed.

²⁷⁵ Rule 71(e) of the Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014; Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014) 124.

²⁷⁶ Rule 71(f) of the Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014; Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014) 124.

²⁷⁷ South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) 17.

²⁷⁸ South African Law Commission (Project 94) *Arbitration: An International Arbitration Act for South Africa* (1998) 23.

Mediation provides disputants with a further cost-effective method through which a labour dispute can be resolved in South Africa. It is safe to say that the umbrella term, ADR provides South Africans with a variety of alternative methods to effectively and efficiently resolve labour disputes.

In the next two chapters consideration will be given to the use of ADR in labour disputes in each of the BRICS nations. Chapter three will focus on the use of ADR in labour disputes in Brazil and Russia and chapter four will focus on the use of ADR in labour disputes in China and India. Chapter 5 will serve as conclusion to the research.



CHAPTER 3

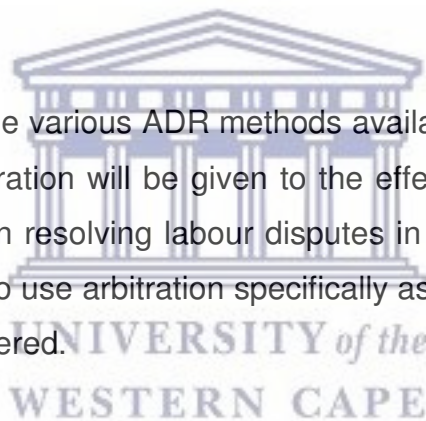
ALTERNATIVE DISPUTE RESOLUTION METHODS AND PROCESSES IN BRAZILIAN AND RUSSIAN LABOUR LAW

3.1. INTRODUCTION

Chapter 3 will consider how ADR methods are provided for in selected laws and regulations with regards to labour disputes in the BRICS members of Brazil and Russia. A contextualisation of the different ADR processes in both Brazil and Russia will be considered, which will include recent developments within ADR in these jurisdictions.

3.2. ALTERNATIVE DISPUTE RESOLUTION METHODS WITHIN BRAZILIAN LABOUR LAW

This section will consider the various ADR methods available to parties in labour law disputes in Brazil. Consideration will be given to the effectiveness and efficiency of the various forms of ADR in resolving labour disputes in Brazil. Reasons as to why Brazilians remain hesitant to use arbitration specifically as a means to resolve labour disputes will also be considered.



3.2.1. Introduction to legislation regulating labour disputes in Brazil

The Brazilian legal system limits the capacity of disputants to negotiate and settle labour disputes outside of the formal court system as legislation rarely includes ADR mechanisms as a way through which to resolve such matters.²⁷⁹ The Brazilian Consolidation of Labour Laws of 1 May 1943²⁸⁰ and the Federal Constitution of

²⁷⁹ Maia A 'Mediation Could Well be a Solution to a More Modern, Agile, and Efficient Framework for Resolving Labour Disputes' available at

<http://www.mediationblog.kluwerarbitration.com/2012/07/25/mediation-could-well-be-a-solution-to-a-more-modern-agile-and-efficient-framework-for-resolving-labour-disputes/> (accessed 27 August 2018).

²⁸⁰ Brazilian Consolidation of Labour Laws of 1 May 1943 available at

<http://www.equalrightstrust.org/ertdocumentbank/Decree->

Brazil of 5 October 1988 both regulate labour disputes in Brazil.²⁸¹ These laws restrict the capacity of disputants to utilise ADR methods to resolve relevant labour disputes as the Brazilian legal system favours the use of traditional court based litigation over the use of ADR in resolving labour disputes.²⁸² These laws have been criticised for contributing to increased labour cost, the number of court cases courts are required to determine, and rendering the resolution of a labour dispute outside of the courts difficult.²⁸³ Article 9 of the Brazilian Consolidation of Labour Laws prevents employees from negotiating individual labour law issues through mediation or arbitration.²⁸⁴

3.2.2. The Brazilian Consolidation of Labour Laws of 1943

The Brazilian Consolidation of Labour Laws of 1943 was enacted with the aim to regulate both individual and collective labour relations in Brazil.²⁸⁵ The Brazilian Consolidation of Labour Laws provides for basic conditions of employment in Brazil, including aspects pertaining to work hours, wages and leave.²⁸⁶ The scope of the Consolidation of Labour Laws in Brazil covers both employees and employers,

Law%20No.%205%2C452 Consolidation%20of%20Labour%20Laws.pdf (accessed 6 November 2018).

²⁸¹ The Federal Constitution of Brazil of 5 October 1988 available at https://www.constituteproject.org/constitution/Brazil_2014.pdf (accessed 6 November 2018).

²⁸² Maia A 'Mediation Could Well be a Solution to a More Modern, Agile, and Efficient Framework for Resolving Labour Disputes' available at <http://www.mediationblog.kluwerarbitration.com/2012/07/25/mediation-could-well-be-a-solution-to-a-more-modern-agile-and-efficient-framework-for-resolving-labour-disputes/> (accessed 27 August 2018).

²⁸³ Maia A 'Mediation Could Well be a Solution to a More Modern, Agile, and Efficient Framework for Resolving Labour Disputes' available at <http://www.mediationblog.kluwerarbitration.com/2012/07/25/mediation-could-well-be-a-solution-to-a-more-modern-agile-and-efficient-framework-for-resolving-labour-disputes/> (accessed 27 August 2018).

²⁸⁴ Article 9 of the Brazilian Consolidation of Labour Laws of 1 May 1943.

²⁸⁵ Demirkol S 'What is the Consolidation of Labour Laws' available at <http://www.braziannr.com/2015/02/15/consolidation-labor-laws/> (accessed 6 November 2018).

²⁸⁶ Demirkol S 'What is the Consolidation of Labour Laws' available at <http://www.braziannr.com/2015/02/15/consolidation-labor-laws/> (accessed 6 November 2018).

though it excludes certain groups of employees such as legal entities, civil servants and self-employed individuals.²⁸⁷ Prior to the amendments to the Consolidation of Labour Laws, which will be discussed below, the Consolidation of Labour Laws did not provide for arbitration as method to resolve a labour dispute.

Substantive changes were introduced to the Consolidation of Labour Laws of Brazil through the amendment law, Law No. 13467/2017.²⁸⁸ One notable change brought about by the amendment law was the opportunity for employers and employees to include an arbitration clause in the employment contract between them.²⁸⁹ It is submitted that this amendment to the Consolidation of Labour Laws is a victory for ADR in Brazil as it encourages agreements between disputants instead of litigation before court.²⁹⁰ Arbitration between employees and employers is however limited to those workers who earn more than twice the maximum amount of the Brazilian General Social Security System, that is BRL 11 000, which is approximately R41 630,60.²⁹¹

3.2.3. The Arbitration Law No. 9.307 of 1996

The most popular method of alternative dispute resolution in Brazil, and specifically within the field of labour disputes, is the use of arbitration proceedings.²⁹² The

²⁸⁷ Demirkol S 'What is the Consolidation of Labour Laws' available at

<http://www.braziliannr.com/2015/02/15/consolidation-labor-laws/> (accessed 6 November 2018).

²⁸⁸ Mazzillo L 'Huge Labour Law Reforms In Brazil' available at

<http://www.ggiform.com/law/corportate-and-commercial/1125-huge-labour-law-reforms-in-brazil-2.html> (accessed 28 August 2018).

²⁸⁹ Mazzillo L 'Huge Labour Law Reforms In Brazil' available at

<http://www.ggiform.com/law/corportate-and-commercial/1125-huge-labour-law-reforms-in-brazil-2.html> (accessed 28 August 2018).

²⁹⁰ Mazzillo L 'Huge Labour Law Reforms In Brazil' available at

<http://www.ggiform.com/law/corportate-and-commercial/1125-huge-labour-law-reforms-in-brazil-2.html> (accessed 28 August 2018).

²⁹¹ Mazzillo L 'Huge Labour Law Reforms In Brazil' available at

<http://www.ggiform.com/law/corportate-and-commercial/1125-huge-labour-law-reforms-in-brazil-2.html> (accessed 28 August 2018).

²⁹² Lacombe A & Brandão L 'Labour Dispute Resolution in Brazil' 2015 *Labour & Employment Law Newsletter* 9.

Constitution of Brazil also encourages the use of the arbitration in collective labour law disputes. The Consolidation of Labour Laws as amended in 2017 and discussed above provides for the limited regulation of arbitration in individual labour disputes. Arbitration in Brazil is largely regulated through the Arbitration Law No. 9.307 of 1996 (as amended in 2015) which provides for the establishment of arbitration agreements, the appointment of an arbitrators and the regulation of arbitration awards as it aims to increase the use of arbitration as a means to assist an already clogged court system.²⁹³

A level of uncertainty however remains over whether or not an individual labour rights issues can be arbitrated in Brazil in terms of the Arbitration Law. Article 4 of the 2015 amendment to the Brazilian Arbitration Law provides for the inclusion of an arbitration clause in an agreement where a dispute may arise in respect of such an agreement.²⁹⁴ Paragraph 4(4) states that the individual labour contract of a manager and a statutory director may include an arbitration agreement, which would then require the employee to initiate the arbitration proceedings if a dispute were to arise.²⁹⁵ Despite the provision having been approved by the Brazilian Senate and House of Representatives, it was subsequently vetoed by the Brazilian president.²⁹⁶ Sperandio highlights the existing confusion since Brazilian legislation currently states that labour disputes cannot be arbitrated, whilst the Superior Labour Court has concluded that labour disputes are in fact open to arbitration.²⁹⁷ The Superior Labour Court case of 1475/2000-193-05-00.²⁹⁸ serves as an example in this regard where

²⁹³ Arbitration Law No. 9.307 of 1996.

²⁹⁴ Lexis PSL Arbitration 'The Brazilian Arbitration Act 2015 - what's changed?' available at [http://www.clydeco.com/uploads/Files/Updates/The_Brazilian_Arbitration_Act_2015-whats_ch_\(2\).pdf](http://www.clydeco.com/uploads/Files/Updates/The_Brazilian_Arbitration_Act_2015-whats_ch_(2).pdf) (accessed 7 November 2018).

²⁹⁵ Lexis PSL Arbitration 'The Brazilian Arbitration Act 2015 - what's changed?' available at [http://www.clydeco.com/uploads/Files/Updates/The_Brazilian_Arbitration_Act_2015-whats_ch_\(2\).pdf](http://www.clydeco.com/uploads/Files/Updates/The_Brazilian_Arbitration_Act_2015-whats_ch_(2).pdf) (accessed 7 November 2018).

²⁹⁶ Lexis PSL Arbitration 'The Brazilian Arbitration Act 2015 - what's changed?' available at [http://www.clydeco.com/uploads/Files/Updates/The_Brazilian_Arbitration_Act_2015-whats_ch_\(2\).pdf](http://www.clydeco.com/uploads/Files/Updates/The_Brazilian_Arbitration_Act_2015-whats_ch_(2).pdf) (accessed 7 November 2018).

²⁹⁷ Lexis PSL Arbitration 'The Brazilian Arbitration Act 2015 - what's changed?' available at [http://www.clydeco.com/uploads/Files/Updates/The_Brazilian_Arbitration_Act_2015-whats_ch_\(2\).pdf](http://www.clydeco.com/uploads/Files/Updates/The_Brazilian_Arbitration_Act_2015-whats_ch_(2).pdf) (accessed 7 November 2018).

²⁹⁸ TST-AIRR-1574/2000-193-05-00 of 2008.

it was held that a labour case can be arbitrated. In the prevailing case of *144300-80.2005.5.02*²⁹⁹ Levanhagen J stated that individual labour rights cannot be resolved through the use of arbitration as this would result in a waiver of labour rights, which can only happen before a judge and not during any form of ADR proceedings.³⁰⁰ The use of arbitration in labour disputes in Brazil therefore remains limited.³⁰¹

Critics of arbitration in Brazil are concerned that increased utilisation of arbitration as an ADR method would replace the labour courts.³⁰² Although this fear is perhaps understandable given the history of dictatorship and oppression in Brazil, it must be argued that the use of arbitration as an alternative means to resolve disputes, in particular labour disputes, will reduce the court backlogs currently being experienced by the Brazilian civil justice system.³⁰³ It is further worth noting that the Brazilian constitution expressly encourages the use of arbitration as a means to resolve collective labour disputes.³⁰⁴

3.2.4. The new Mediation Law no.13.140/2015 of Brazil

In June of 2015 the Brazilian congress approved new legislation regarding mediation and how mediation is to be regulated in Brazil.³⁰⁵ The Mediation Law no.

²⁹⁹ *TST-RR-144300-80.2005.5.02* of 2010.

³⁰⁰ *TST-RR-144300-80.2005.5.02* of 2010.

³⁰¹ Lexis PSL Arbitration 'The Brazilian Arbitration Act 2015 - what's changed?' available at [http://www.clydeco.com/uploads/Files/Updates/The_Brazilian_Arbitration_Act_2015-whats_ch_\(2\).pdf](http://www.clydeco.com/uploads/Files/Updates/The_Brazilian_Arbitration_Act_2015-whats_ch_(2).pdf) (accessed 7 November 2018).

³⁰² Lacombe A & Brandão L 'Labour Dispute Resolution in Brazil' 2015 *Labour & Employment Law Newsletter* 9.

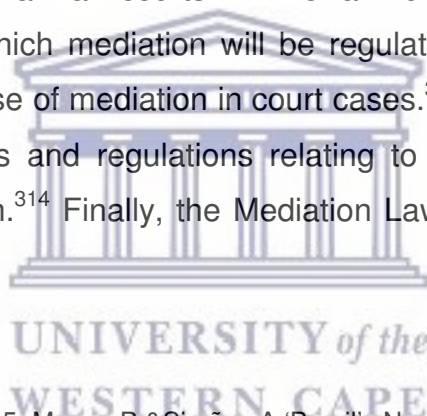
³⁰³ Maia A 'Mediation Could Well be a Solution to a More Modern, Agile, and Efficient Framework for Resolving Labour Disputes' available at <http://www.mediationblog.kluwerarbitration.com/2012/07/25/mediation-could-well-be-a-solution-to-a-more-modern-agile-and-efficient-framework-for-resolving-labour-disputes/> (accessed 27 August 2018).

³⁰⁴ Lacombe A & Brandão L 'Labour Dispute Resolution in Brazil' 2015 *Labour & Employment Law Newsletter* 9.

³⁰⁵ Mason P & Simões A 'Brazil's New Mediation Law and the Impact on International Business disputes' (2015) 70 *Dispute Resolution Journal* 13.

13.140/2015 was sanctioned by the Brazilian president on the 26th of June 2015.³⁰⁶ The introduction of this law was largely welcomed by Brazilians as it marked the first piece of legislation approved in Brazil with a focus solely on mediation as a dispute resolution mechanism.³⁰⁷ Mason and Simões argue that the introduction of the Mediation Law is a victory for ADR in Brazil as many prior attempts to approve legislation on mediation have been unsuccessful.³⁰⁸ Unfortunately this new law specifically excludes the use of mediation in labour disputes as it is believed that existing methods provide the best solutions to labour disputes.³⁰⁹ Article 42 states that labour relations shall be governed by specific laws, i.e. the Brazilian Consolidation of Labour Laws of 1943 and the Federal Constitution of Brazil of 1988.³¹⁰ It is still however worth noting a few interesting aspects of this law.

The main aim of the new Brazilian Mediation Law is to reduce the high levels of court backlogs experienced by Brazilian courts.³¹¹ The law further aims to provide three different means through which mediation will be regulated in Brazil.³¹² The first is through the discretionary use of mediation in court cases.³¹³ Secondly, the Mediation Law will provide guidelines and regulations relating to the mediation of disputes outside of the court system.³¹⁴ Finally, the Mediation Law deals with self-resolution



³⁰⁶ Mediation Law no. 13.140/2015; Mason P & Simões A 'Brazil's New Mediation Law and the Impact on International Business disputes' (2015) 70 *Dispute Resolution Journal* 13.

³⁰⁷ Mason P & Simões A 'Brazil's New Mediation Law and the Impact on International Business disputes' (2015) 70 *Dispute Resolution Journal* 13.

³⁰⁸ Mason P & Simões A 'Brazil's New Mediation Law and the Impact on International Business disputes' (2015) 70 *Dispute Resolution Journal* 13.

³⁰⁹ Article 42 of the Mediation Law no. 13.140/2015.

³¹⁰ Article 42 of the Mediation Law no. 13.140/2015.

³¹¹ Mediation Law no. 13.140/2015; Mason P & Simões A 'Brazil's New Mediation Law and the Impact on International Business disputes' (2015) 70 *Dispute Resolution Journal* 14.

³¹² Mediation Law no. 13.140/2015; Mason P & Simões A 'Brazil's New Mediation Law and the Impact on International Business disputes' (2015) 70 *Dispute Resolution Journal* 13.

³¹³ Mediation Law no. 13.140/2015; Mason P & Simões A 'Brazil's New Mediation Law and the Impact on International Business disputes' (2015) 70 *Dispute Resolution Journal* 13.

³¹⁴ Mediation Law no. 13.140/2015; Mason P & Simões A 'Brazil's New Mediation Law and the Impact on International Business disputes' (2015) 70 *Dispute Resolution Journal* 13.

disputes where one of the disputants is a legal entity in terms of Brazilian public law.³¹⁵

Article 7 of the new Brazilian mediation law states that a mediator may not act as an arbitrator or as a witness in legal or arbitration proceedings following the mediation session.³¹⁶ In contrast to the workings of the LRA and the rules of the CCMA, a mediator in Brazil will thus not be allowed to act as a commissioner in both conciliation and arbitration of the same dispute, as would be the case in certain methods of ADR in South Africa, such as con-arb in terms of the LRA.³¹⁷

Article 30 of the new Brazilian mediation law states that information regarding the mediation proceedings are to be dealt with in a confidential manner and that no information regarding the mediation proceedings may be disclosed during subsequent arbitration proceedings or in a court of law.³¹⁸ The only instance where a party is allowed to disclose information regarding the mediation proceedings is where the disputants agreed that the information may be so disclosed, or where it is required by law that such information must be fully disclosed.³¹⁹ Mason and Simões state that the exceptions to article 30 include the reporting of criminal activities and matters regarding tax regulation.³²⁰ Similarly, article 31 prohibits a mediator from disclosing any information gathered during the mediation proceedings unless the mediator has been authorised by the relevant parties to disclose such information.³²¹

³¹⁵ Mediation Law no. 13.140/2015; Mason P & Simões A 'Brazil's New Mediation Law and the Impact on International Business disputes' (2015) 70 *Dispute Resolution Journal* 13.

³¹⁶ Article 7 of the Mediation Law no. 13.140/2015.

³¹⁷ Article 7 of the Mediation Law no. 13.140/2015.

³¹⁸ Article 30 of the Mediation Law no. 13.140/2015.

³¹⁹ Article 30 of the Mediation Law no. 13.140/2015.

³²⁰ Mason P & Simões A 'Brazil's New Mediation Law and the Impact on International Business disputes' (2015) 70 *Dispute Resolution Journal* 17.

³²¹ Article 31 of the Mediation Law no. 13.140/2015.

3.3. ALTERNATIVE DISPUTE RESOLUTION METHODS WITHIN RUSSIAN LABOUR LAW

In this section of the research consideration will be given to the various ADR methods available to parties in labour disputes in Russia. A variety of laws regulate labour relations in Russia.³²² The main law in this regard is the Labour Code of the Russian Federation of 2002, as amended.³²³

3.3.1. Resolving individual labour disputes in Russia

Individual labour disputes in Russia can be resolved in two ways in terms of the Labour Code of the Russian Federation of 2002 (the Labour Code).³²⁴ The first option, which is available to either an employee or an employer, is to make use of the commission on labour disputes.³²⁵ This option as a means to resolve a labour dispute can be compared to those disputes referred to the CCMA in South Africa. Generally a party can choose to settle any labour dispute through the commission on labour disputes, with the exception of those disputes included in article 394 of the Labour Code.³²⁶ Issues regarding the reinstatement of work, job transfers, personal

³²² Kukushkina E, Mzhavanadze G & Mogutova N 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: Russia' available at <http://www.thelawreviews.co.uk/editions/the-labour-and-employment-disputes-reviews---edition-1/1167309/russia> (accessed 27 August 2018).

³²³ Kukushkina E, Mzhavanadze G & Mogutova N 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: Russia' available at <http://www.thelawreviews.co.uk/editions/the-labour-and-employment-disputes-reviews---edition-1/1167309/russia> (accessed 27 August 2018); Federal Law No. 197-FZ of 2001.

³²⁴ Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at <http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

³²⁵ Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at <http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

³²⁶ Article 394 of the Federal Law No. 197-FZ of 2001.

data breaches and compensation claims by an employer for damages caused by an employee cannot be referred to the commission and must be referred to a court.³²⁷

The second option available to disputants involved in individual labour disputes is through the court of general jurisdiction.³²⁸ This option entails that an aggrieved party directly approaches the court for assistance in litigating a particular labour dispute, thereby not making use of the commission on labour disputes. A disputant can choose which channel to follow as a means to resolve a dispute and should the choice be to use the commission on labour disputes, the latter's decisions may be appealed in court.³²⁹

The commission on employment disputes in Russia is formed through representatives from both employees and employers.³³⁰ A disputant has three months to refer a dispute to the commission from the time that he or she became aware of the violation of a right.³³¹ The commission in return then has 10 days to consider the application. The hearing takes place in the presence of both the employee and the employer.³³² A decision by the commission on employment

³²⁷ Article 394 of the Federal Law No. 197-FZ of 2001.

³²⁸ Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at <http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

³²⁹ Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at <http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

³³⁰ Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at <http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

³³¹ Kukushkina E, Mzhavanadze G & Mogutova N 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: Russia' available at <http://www.thelawreviews.co.uk/editions/the-labour-and-employment-disputes-reviews---edition-1/1167309/russia> (accessed 27 August 2018); Federal Law No. 197-FZ of 2001.

³³² Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at

disputes in Russia can be appealed in a court of general jurisdiction and must be done within 10 days after receiving the decision of the commission.³³³ Individual labour disputes however seldom get resolved through the use of the commission on employment disputes as disputants seem to favour the use of courts.³³⁴

When individual labour disputes are resolved in a court of general jurisdiction, a disputant generally has three months from the time his or her rights were infringed to apply to court to have his or her case heard.³³⁵ When the dispute deals with dismissal issues, the dispute must be referred to the court within one month of the dismissal notification.³³⁶ An employee who seeks to claim compensation for the non-payment of salaries or other compensation benefits has one year as of the payment date to apply to the court to have his or her dispute heard.³³⁷ When an employer wants to claim for damage caused by an employee such an application to the court

<http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

³³³ Kukushkina E, Mzhavanadze G & Mogutova N 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: Russia' available at

<http://www.thelawreviews.co.uk/editions/the-labour-and-employment-disputes-reviews---edition-1/1167309/russia> (accessed 27 August 2018); Federal Law No. 197-FZ of 2001.

³³⁴ Kukushkina E, Mzhavanadze G & Mogutova N 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: Russia' available at

<http://www.thelawreviews.co.uk/editions/the-labour-and-employment-disputes-reviews---edition-1/1167309/russia> (accessed 27 August 2018).

³³⁵ Article 392 of the Federal Law No. 197-FZ of 2001; Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at

<http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

³³⁶ Article 392 of the Federal Law No. 197-FZ of 2001; Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at

<http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

³³⁷ Article 392 of the Federal Law No. 197-FZ of 2001; Kukushkina E, Mzhavanadze G & Mogutova N 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: Russia' available at <http://www.thelawreviews.co.uk/editions/the-labour-and-employment-disputes-reviews---edition-1/1167309/russia> (accessed 27 August 2018).

must be brought within one year as of the date the employer became aware of the damage.³³⁸

3.3.2. Resolving collective labour disputes in Russia

In Russia collective labour disputes are disputes between employees, employee representatives, employers and employer groups regarding working conditions, salaries and issues pertaining to collective agreements.³³⁹ Collective labour disputes can be resolved through conciliation proceedings, the use of a mediator and through labour arbitration in terms of the Labour Code.³⁴⁰

The first step in the resolution of a collective labour dispute in Russia entails the use of mandatory conciliation in terms of article 401 of the Labour Code.³⁴¹ The conciliation committee consists of representatives of both the employee and employer parties.³⁴² A decision made by the conciliation committee is binding on the disputants.³⁴³ Only where the conciliation proceedings are unsuccessful can the

³³⁸ Article 392 of the Federal Law No. 197-FZ of 2001; Kukushkina E, Mzhavanadze G & Mogutova N 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: Russia' available at <http://www.thelawreviews.co.uk/editions/the-labour-and-employment-disputes-reviews---edition-1/1167309/russia> (accessed 27 August 2018).

³³⁹ Kukushkina E, Mzhavanadze G & Mogutova N 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: Russia' available at <http://www.thelawreviews.co.uk/editions/the-labour-and-employment-disputes-reviews---edition-1/1167309/russia> (accessed 27 August 2018).

³⁴⁰ Articles 401-404 of the Federal Law No. 197-FZ of 2001.

³⁴¹ Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at <http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

³⁴² Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at <http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

³⁴³ Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at

disputants seek to settle their dispute through the use of mediation or labour arbitration.³⁴⁴

Article 403 of the Labour Code deals with the mediation of collective labour disputes in Russia.³⁴⁵ Article 403 states that it is the members of the conciliation committee who determine and appoint the mediator who will assist in resolving the collective labour dispute. Where the relevant parties to the collective labour dispute fail to appoint a mediator within three calendar working days, the parties will automatically resort to arbitration.³⁴⁶

Labour arbitration is the final step in the process of resolving collective labour disputes in Russia.³⁴⁷ The labour arbitration committee is formed by employees, employers and the state who is represented through the Service for Settlement of Collective Industrial Disputes.³⁴⁸ This formation must take place no later than three calendar work days after conciliation and mediation was unsuccessful.³⁴⁹ The disputants will be provided with binding, mandatory written recommendations on the settlement of the collective labour dispute.³⁵⁰



<http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

³⁴⁴ Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at

<http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

³⁴⁵ Articles 403 of the Federal Law No. 197-FZ of 2001.

³⁴⁶ Articles 403 of the Federal Law No. 197-FZ of 2001.

³⁴⁷ Articles 404 of the Federal Law No. 197-FZ of 2001.

³⁴⁸ Articles 404 of the Federal Law No. 197-FZ of 2001.

³⁴⁹ Articles 404 of the Federal Law No. 197-FZ of 2001.

³⁵⁰ Articles 404 of the Federal Law No. 197-FZ of 2001.

3.3.3. Draft legislation aiming to change the landscape of employment disputes resolution in Russia

Kukushkina, Mzhavanadze and Mogutova highlight anticipated changes to the field of labour law in Russia as of 2018/2019.³⁵¹ The Draft Bill No. 323191-7 is of significance to this study as it effects individual labour disputes and the possibility of disputants being allowed to use ADR methods as a means to resolve their individual labour disputes outside of the Russian courts.³⁵²

The Draft Bill makes provision for individual labour disputes to be settled through mediation.³⁵³ Kukushkina, Mzhavanadze and Mogutova state that although mediation has been regulated in Russia since 2010 in terms of the Federal Law on Alternative Dispute Resolution Procedure Involving a Mediator No. 193-FZ³⁵⁴ and the Federal Law on Amendments to Certain Legislative Acts of the Russian Federation Following the Adoption of the Federal Law on Alternative Dispute Resolution Procedure Involving a Mediator No. 194-FZ³⁵⁵, labour disputes have been excluded from the workings of these mediation procedures and regulations.³⁵⁶ Kukushkina, Mzhavanadze and Mogutova further highlight the importance of the possible referral of an individual labour dispute for mediation as the draft bill allows for a pause in the period within which a matter must be referred to court while the matter is being

³⁵¹ Kukushkina E, Mzhavanadze G & Mogutova N 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: Russia' available at <http://www.thelawreviews.co.uk/editions/the-labour-and-employment-disputes-reviews---edition-1/1167309/russia> (accessed 27 August 2018).

³⁵² Kukushkina E, Mzhavanadze G & Mogutova N 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: Russia' available at <http://www.thelawreviews.co.uk/editions/the-labour-and-employment-disputes-reviews---edition-1/1167309/russia> (accessed 27 August 2018); Draft Bill No. 323191-7.

³⁵³ Draft Bill No. 323191-7.

³⁵⁴ The Federal Law on Alternative Dispute Resolution Procedure Involving a Mediator No. 193-FZ.

³⁵⁵ The Federal Law on Amendments to Certain Legislative Acts of the Russian Federation Following the Adoption of the Federal Law on Alternative Dispute Resolution Procedure Involving a Mediator No. 194-FZ.

³⁵⁶ Kukushkina E, Mzhavanadze G & Mogutova N 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: Russia' available at <http://www.thelawreviews.co.uk/editions/the-labour-and-employment-disputes-reviews---edition-1/1167309/russia> (accessed 27 August 2018); Draft Bill No. 323191-7.

mediated.³⁵⁷ Mediation will be an attractive alternative to traditional court based litigation as it is generally less expensive, disputes get resolved quicker and helps to reduced court backlogs.³⁵⁸

3.4. CONCLUSION

In this chapter the relevant labour laws and regulations dealing with ADR in labour disputes in both Brazil and Russia were considered. A variety of ADR methods and procedures exist within both these jurisdictions. When compared to the workings of ADR in South Africa, the conclusion can be reached that ADR remains much less developed in both Brazil and Russia when compared to South Africa, where disputants still rely heavily on the traditional court system to resolve disputes. It is argued that in both Brazil and Russia predominantly require labour disputes to be resolved in court. In both Brazil and Russia ADR within the field of labour law is still in the early stages of development.



³⁵⁷ Kukushkina E, Mzhavanadze G & Mogutova N 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: Russia' available at <http://www.thelawreviews.co.uk/editions/the-labour-and-employment-disputes-reviews---edition-1/1167309/russia> (accessed 27 August 2018); Draft Bill No. 323191-7.

³⁵⁸ Hurter E 'Seeking the truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation' (2007) 2 *Tydskrifvir die Suid-Afrikaanse Reg* 248.

CHAPTER 4

ALTERNATIVE DISPUTE RESOLUTION METHODS AND PROCESSES IN CHINESE AND INDIAN LABOUR LAW

4.1. INTRODUCTION

Chapter 4 of the research further seeks to consider the best ADR practices used in labour law in the various BRICS nations so as to assess the effectiveness of ADR methods used in South African labour disputes. Throughout chapter 4 consideration will be given to the various ADR laws and regulations with regards to labour disputes in the jurisdictions of China and India.

4.2. ALTERNATIVE DISPUTE RESOLUTION METHODS IN CHINESE LABOUR LAW

In this section of the research consideration will be given to the various ADR methods available to disputants to resolve labour disputes in China. Specific consideration will be given to the effectiveness and efficiency of the process of voluntary mediation and compulsory arbitration.³⁵⁹



4.2.1. Legislation regulating labour disputes in Chinese labour law

Labour law, including labour disputes, in China are regulated through the Labour Law of the People's Republic of China of 1995, Order of the President No. 28 (hereinafter referred to as the Labour Law of China).³⁶⁰ Labour dispute resolution is further regulated through the Labour Dispute Mediation and Arbitration Law of the People's Republic of China of 2008, Order of the President No. 80 (hereinafter referred to as the Labour Dispute Mediation and Arbitration Law).³⁶¹

³⁵⁹ Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 583.

³⁶⁰ The Labour Law of the People's Republic of China of 1995 (Order of the President No. 28).

³⁶¹ The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80).

The aims of the Labour Dispute Mediation and Arbitration Law is to provide disputants with fair proceedings, to resolve labour disputes in a timely manner, to make it easier for employees to resolve labour disputes outside of the court and to simplify the process through which labour disputes are resolved in China.³⁶²

4.2.2. The resolution of labour disputes in China

Chinese laws do not provide for separate dispute resolution methods and regulations for individual and collective labour disputes.³⁶³ As such all labour disputes have to go through the same judicial procedures.³⁶⁴

The first step in resolving a labour dispute in China entails mediation through the Enterprise Labour Dispute Mediation Committee or the People's Mediation Committee.³⁶⁵ These committees are set up in terms of The Labour Dispute Mediation and Arbitration Law of 2008.³⁶⁶

In terms of the Labour Dispute Mediation and Arbitration Law either an employee or an employer is allowed to make use of voluntary mediation as a method to resolve a labour dispute.³⁶⁷

Article 10 of the Labour Dispute Mediation and Arbitration Law stipulates that a disputant may approach either Labour Dispute Mediation Commissions of

³⁶² Young J & Zhu L 'Overview of China's New Labor Dispute Mediation and Arbitration Law' available at

http://www.dwt.com/advisories/Overview_of_Chinas_New_Labor_Dispute_Mediation_and_Arbitration_Law_01_29_2008/ (accessed 28 August 2018).

³⁶³ Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 583.

³⁶⁴ Chinese legislation distinguishes collective labour disputes from individual labour disputes as labour disputes involving more than 10 workers. See Article 7 of The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80); Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 583.

³⁶⁵ Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 583.

³⁶⁶ The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80).

³⁶⁷ Article 10 of The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80).

Enterprises, People's Mediation Committees or mediation institutions in specific towns and neighbourhoods.³⁶⁸ Labour Dispute Mediation Commissions of Enterprises are made up of representatives of the employees and the business who then facilitate the subsequent mediation proceedings.³⁶⁹

Article 14 of the Labour Dispute Mediation and Arbitration Law states that once the disputants reach an agreement in the mediation proceedings, such a settlement must be in writing and must further be signed by both of the disputants as well as the mediator.³⁷⁰ Such a settlement is binding and enforceable on both the employee and the employer.³⁷¹

Mediation is however not compulsory and disputants may choose to not make use thereof for the relevant labour dispute.³⁷² Where disputants decide to not make use of mediation as aforesaid the second phase of dispute resolution as discussed below becomes relevant.

The second phase in the process of resolving labour disputes in China entails arbitration.³⁷³ In contrast to mediation the arbitration of a labour dispute is compulsory. This will be the case both where mediation proceedings failed or the disputants chose not to make use of mediation as discussed earlier.³⁷⁴ Hwang and Wang argue that the process of compulsory arbitration assists in limiting the number

³⁶⁸ Article 10 of The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80).

³⁶⁹ Article 10 of The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80).

³⁷⁰ Article 14 of The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80).

³⁷¹ Article 14 of The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80).

³⁷² Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 583.

³⁷³ Article 79 of the Labour Law of the People's Republic of China of 1995 (Order of the President No. 28); Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 583.

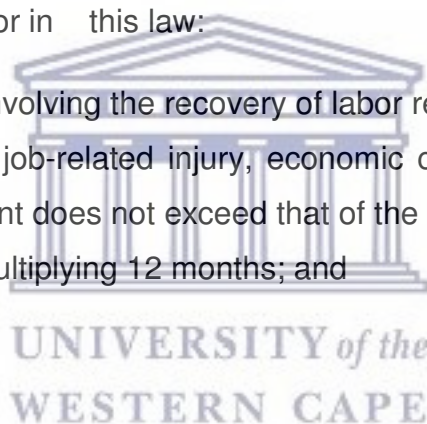
³⁷⁴ Article 79 of the Labour Law of the People's Republic of China of 1995 (Order of the President No. 28); Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 583.

of cases that serve before the court.³⁷⁵ Arbitration proceedings are done under the auspices of Labour Dispute Arbitration Committees who operate as arbitration agencies for the Chinese government.³⁷⁶

Young and Zhu highlight an interesting feature of the Labour Dispute Mediation and Arbitration Law which allows for two types of arbitration awards that become immediately effective and enforceable, known as expedited arbitration dispute awards.³⁷⁷ Any other type of arbitration decision does not become enforceable until 15 days after the decision was made or a decision has been made in a court of appeal.³⁷⁸ Article 47 of the Labour Dispute Mediation and Arbitration Law deals with expedited type of arbitration dispute decisions and reads as follows:

‘For the following labor disputes, the arbitral award shall be final and the award shall take legal effect from the date the award is made, unless otherwise provided for in this law:

(1) disputes involving the recovery of labor remuneration, medical expenses for job-related injury, economic compensation or damages, and the amount does not exceed that of the standard local monthly wage rates multiplying 12 months; and



³⁷⁵ Hwang K & Wang K ‘Labour Dispute Arbitration in China: Perspectives of the arbitrators’ (2015) 37 *Employee Relations* 584.

³⁷⁶ Hwang K & Wang K ‘Labour Dispute Arbitration in China: Perspectives of the arbitrators’ (2015) 37 *Employee Relations* 584.

³⁷⁷ Young J & Zhu L ‘Overview of China’s New Labor Dispute Mediation and Arbitration Law’ available at http://www.dwt.com/advisories/Overview_of_Chinas_New_Labor_Dispute_Mediation_and_Arbitration_Law_01_29_2008/ (accessed 28 August 2018).

³⁷⁸ Young J & Zhu L ‘Overview of China’s New Labor Dispute Mediation and Arbitration Law’ available at http://www.dwt.com/advisories/Overview_of_Chinas_New_Labor_Dispute_Mediation_and_Arbitration_Law_01_29_2008/ (accessed 28 August 2018).

(2) disputes arising over working hours, the period of rest and vacation, and social insurance, etc., in the course of applying the occupational standards of the State.³⁷⁹

The third step in the resolution of labour disputes in China entails having the dispute heard in a court.³⁸⁰ When a disputant is not satisfied with the decision of the arbitration committee made during the arbitration proceedings, the party can appeal such a decision to a local court.³⁸¹ Where a disputant is unhappy with a decision of the local court, the appeal court may be approached, who will then make a final ruling over the dispute.³⁸²

Article 50 of the Labour Dispute Mediation and Arbitration Law deals with a disputant's objection to an arbitration award, other than those disputes and awards discussed under article 47(1)-(2) of the applicable law.³⁸³ Article 50 reads as follows:

'Where a party has objection to the arbitral award of a labor dispute case, other than the ones prescribed in Article 47 of this Law, it may initiate a litigation to a people's court within 15 days from the date it receives the award. If no litigation is initiated at the expiration of the prescribed time limit, the award shall take legal effect.'³⁸⁴

Young and Zhu highlight the difference with regards to litigation proceedings for employees and employers with regards to an expedited type of dispute.³⁸⁵ Regarding

³⁷⁹ Article 47(1)-(2) of The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80).

³⁸⁰ Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 584.

³⁸¹ Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 584.

³⁸² Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 584.

³⁸³ Article 50 of The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80).

³⁸⁴ Article 50 of The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80).

³⁸⁵ Young J & Zhu L 'Overview of China's New Labor Dispute Mediation and Arbitration Law' available at

the appeal of an award in terms of article 47 of the law by an employee, article 48 stipulates that an employee may initiate the necessary litigation in a people's court within 15 days of the date on which the employee received the award.³⁸⁶ With regards to the possibility of an appeal by an employer against an arbitration award based on article 47 of the law, article 49 reads as follows:

'Where an employing unit has evidence to prove that the arbitral award prescribed in Article 47 of the Law falls under one of the following circumstances, it may, within 30 days from the date it received the award, apply for revocation of the award to an intermediate people's court at the place where the labour-dispute arbitration commission is located:

- (1) It is definite that Laws and regulations are applied erroneously;
- (2) The labor-dispute arbitration commission has no jurisdiction over the dispute;
- (3) The statutory procedure is contravened;
- (4) The evidence on which the award is based is forged;
- (5) The other party has concealed evidence, which is sufficient to affect an impartial award; or
- (6) When arbitrating the case, the arbitrator extorts or accepts bribes, engages in malpractices for personal gain, or perverts the law in making the award.³⁸⁷

If the relevant court of the people find any of the accusations as described in article 49(1)-(6) to be true, the relevant arbitration award will be revoked.³⁸⁸ In this instance both disputants may initiate litigation proceedings with a people's court.³⁸⁹

[http://www.dwt.com/advisories/Overview of Chinas New Labor Dispute Mediation and Arbitration Law 01 29 2008/](http://www.dwt.com/advisories/Overview_of_Chinas_New_Labor_Dispute_Mediation_and_Arbitration_Law_01_29_2008/) (accessed 28 August 2018).

³⁸⁶ Article 48 of The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80).

³⁸⁷ Article 49 of The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80).

In terms of article 29 a disputant is allowed to initiate litigation proceedings in instances where an arbitration commission has failed to make a decision in the prescribed time or in instances where an arbitration application was rejected.³⁹⁰

4.3. ALTERNATIVE DISPUTE RESOLUTION METHODS IN INDIAN LABOUR LAW

In this section of the research consideration will be given to the various ADR methods available to disputants to resolve labour disputes in India. In India the Code of Civil Procedure of 1908 provides for the procedures through which most disputes are to be resolved within the civil court system.³⁹¹ Labour disputes are however regulated in terms of a separate Act, which Act also specifically regulates the use of ADR in labour law.³⁹² Consideration will also be given to the role of central and state governments in India in facilitating ADR processes.³⁹³

4.3.1. Legislation regulating labour disputes in Indian labour law

The Industrial Disputes Act of 1947 (hereinafter referred to as the Industrial disputes Act)³⁹⁴ provides for the investigation and the settlement of labour disputes in India.³⁹⁵ Raghavan, Swarnima and Chinmaye describe the Industrial Disputes Act as the primary means through which the relationship between an employee and an

³⁸⁸ Article 49 of The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80).

³⁸⁹ Article 49 of The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80).

³⁹⁰ Article 29 of The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80).

³⁹¹ Raghavan A, Swarnima&Chinmaye A 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: India' available at <https://www.thelawreview.co.uk/edition/the-labour-and-employment-disputes-review---edition-1/1167301/india> (accessed 28 August 2018).

³⁹² The Industrial Disputes Act of 1947.

³⁹³ Sections 2(a) of the Industrial Disputes Act of 1947.

³⁹⁴ The Industrial Disputes Act of 1947.

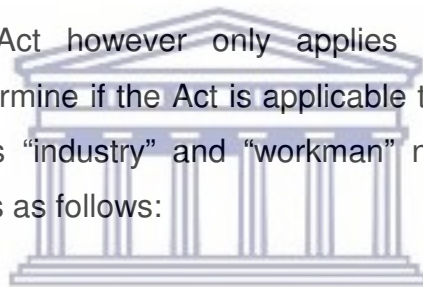
³⁹⁵ The Industrial Disputes Act of 1947.

employer is regulated.³⁹⁶ Section 2(k) of the Industrial Disputes Act defines an “industrial dispute” in India as follows:

‘(k) “industrial dispute” means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any persons;’³⁹⁷

It is worth noting that the Industrial Disputes Act applies to conciliation and adjudication of industrial labour disputes in the same manner as the LRA and CCMA Rules apply to labour disputes in South Africa.³⁹⁸ The Industrial Disputes Act expressly caters for labour disputes in contrast to the Code of Civil Procedure of 1908,³⁹⁹ which deals with traditional civil litigation of other disputes in India.⁴⁰⁰

The Industrial Disputes Act however only applies to certain industries and workers.⁴⁰¹ In order to determine if the Act is applicable to a specific labour dispute, the definition of the words “industry” and “workman” needs to be considered.⁴⁰² Section 2(j) of the Act reads as follows:



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³⁹⁶ Raghavan A, Swarnima&Chinmaye A ‘Business-focused legal analysis and insight in the most significant jurisdictions worldwide: India’ available at <https://www.thelawreview.co.uk/edition/the-labour-and-employment-disputes-review---edition-1/1167301/india> (accessed 28 August 2018).

³⁹⁷ Section 2(k) of the Industrial Disputes Act of 1947.

³⁹⁸ Raghavan A, Swarnima&Chinmaye A ‘Business-focused legal analysis and insight in the most significant jurisdictions worldwide: India’ available at <https://www.thelawreview.co.uk/edition/the-labour-and-employment-disputes-review---edition-1/1167301/india> (accessed 28 August 2018).

³⁹⁹ Code of Civil Procedure of 1908.

⁴⁰⁰ Raghavan A, Swarnima&Chinmaye A ‘Business-focused legal analysis and insight in the most significant jurisdictions worldwide: India’ available at <https://www.thelawreview.co.uk/edition/the-labour-and-employment-disputes-review---edition-1/1167301/india> (accessed 28 August 2018).

⁴⁰¹ Raghavan A, Swarnima&Chinmaye A ‘Business-focused legal analysis and insight in the most significant jurisdictions worldwide: India’ available at <https://www.thelawreview.co.uk/edition/the-labour-and-employment-disputes-review---edition-1/1167301/india> (accessed 28 August 2018).

⁴⁰² Raghavan A, Swarnima&Chinmaye A ‘Business-focused legal analysis and insight in the most significant jurisdictions worldwide: India’ available at <https://www.thelawreview.co.uk/edition/the-labour-and-employment-disputes-review---edition-1/1167301/india> (accessed 28 August 2018).

- (j) “industry” means any business, trade undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen;⁴⁰³

In *Bangalore Water Supply and Sewerage Board v R Rajappa*⁴⁰⁴ the term industry was interpreted in wide terms as follows:

(a) Where (i) systematic activity, (ii) organized by co-operation between employer and employee, (the direct and substantial element is chimerical) (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to, celestial bliss e.g. making, on a large scale, prasada or food), prima facie, there is an 'industry' in that enterprise.

(b) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint private or other sector.

(c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employer-employee relations.

(d) If the Organisation is a trade or business, it does not cease to, be one because of philanthropy animating the undertaking.⁴⁰⁵

Section 2(s) of the Act defines the term “workman” as follows:

- (s) “workman” means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, or whose dismissal, discharge or retrenchment had led to that dispute, but does not include such person-

⁴⁰³ Section 2(j) of the Industrial Disputes Act 1947.

⁴⁰⁴ *Bangalore Water Supply and Sewerage Board v R Rajappa* 1978 SCR (3) 207.

⁴⁰⁵ *Bangalore Water Supply and Sewerage Board v R Rajappa* 1978 SCR (3) 207 67.

- (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
- (ii) who is employed in the police service or as an officer or other employee of a prison; or
- (iii) who is employed mainly in a managerial or administrative capacity; or
- (iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the powers vested in him, functions mainly of managerial nature.⁴⁰⁶

In *Ved Prakash Gupta v Delton Cable India (P) Ltd*⁴⁰⁷ the court held that when an employee holds a managerial position or where the employee's duties are of a supervisory nature, the employee will not be considered a workman in terms of the Industrial Disputes Act.⁴⁰⁸

In *Bhaskaran v Kerala State Electricity Board*⁴⁰⁹ the court held that apprentices are to be regarded as trainees and that they are not to be regarded as workers. The court further held that apprentices cannot invoke any of the provisions of the Industrial Disputes Act as they do not fall within the ambit of the definition of workman.⁴¹⁰

⁴⁰⁶ Section 2(s) of the Industrial Disputes Act of 1947.

⁴⁰⁷ *Ved Prakash Gupta v Delton Cable India (P) Ltd* 1984 SCR (3) 169.

⁴⁰⁸ *Ved Prakash Gupta v Delton Cable India (P) Ltd* 1984 SCR (3) 169 2.

⁴⁰⁹ *Bhaskaran v Kerala State Electricity Board* (1986) IILLJ 346 KER.

⁴¹⁰ *Bhaskaran v Kerala State Electricity Board* (1986) IILLJ 346 KER 2.

4.3.2. The structure of labour dispute resolution in India

The Industrial Disputes Act of 1947 provides for a variety of role players such as conciliation officers,⁴¹¹ boards of conciliation,⁴¹² courts of Inquiry⁴¹³ and labour courts to oversee the settlement of industrial disputes.⁴¹⁴

Conciliation officers act as independent mediators in industrial dispute proceedings.⁴¹⁵ In terms of section 4(2) of the Industrial Disputes Act a conciliation officer can be appointed in a specified industry or area and may act as mediator on a permanent or temporary bases.⁴¹⁶ This process may be followed once the relevant Government has by notice in the Official Gazette appointed the officers.⁴¹⁷

A Board of Conciliation can be formed as a means to assist in the settling of industrial disputes in India.⁴¹⁸ The Board is appointed in terms of the Industrial Disputes Act. The formation of the Board of Conciliation will comprise of a chairman and a maximum of four other conciliation officers.⁴¹⁹ When authorities appoint a Board of Conciliation, the chairman of the Board must be an independent third person, while the rest of the board members will be representatives of the disputants.⁴²⁰ If a party does not appoint a relevant representative to the board, the governing authority will have the power to make such an appointment on behalf of the relevant disputant.⁴²¹ This process will be followed once the appropriate Government has appointed the Board of Conciliation in the Official Gazette.⁴²²

⁴¹¹ Section 4 of the Industrial Disputes Act of 1947.

⁴¹² Section 5 of the Industrial Disputes Act of 1947.

⁴¹³ Section 6 of the Industrial Disputes Act of 1947.

⁴¹⁴ Section 7 of the Industrial Disputes Act of 1947.

⁴¹⁵ Section 4(1) of the Industrial Disputes Act of 1947.

⁴¹⁶ Section 4(2) of the Industrial Disputes Act of 1947.

⁴¹⁷ Section 4(1) of the Industrial Disputes Act of 1947.

⁴¹⁸ Section 5(1) of the Industrial Disputes Act of 1947.

⁴¹⁹ Section 5(2) of the Industrial Disputes Act of 1947.

⁴²⁰ Section 5(3) of the Industrial Disputes Act of 1947.

⁴²¹ Section 5(3) of the Industrial Disputes Act of 1947.

⁴²² Section 5(1) of the Industrial Disputes Act of 1947.

The Government in India further has the power to appoint a Court of Inquiry as a means to inquire into relevant industrial disputes.⁴²³ This process will be followed once the appropriate Government has appointed a Court of Inquiry by notification in the Official Gazette.⁴²⁴ Such a Court of Inquiry can consist of numerous members, of which one must be an independent individual.⁴²⁵

Section 7 of the Industrial Disputes Act further allows for labour disputes to be settled in labour courts under the guidance of a presiding judge.⁴²⁶ This process is followed once a notice of intention of using the labour court as a means to resolve the labour dispute has been placed in the Official Gazette.⁴²⁷

Section 10A of the Industrial Disputes Act allows for the disputants to agree to arbitration in certain instances before a matter is referred to a court or relevant tribunal.⁴²⁸

4.3.3. Resolving labour disputes in India

It is the duty of a disputant to apply to the appropriate government to have his or her industrial dispute settled through one of the methods discussed above.⁴²⁹ The appropriate government will consider the application, decide whether an industrial dispute exists and then decide in terms of the manners as prescribed in sections 4 to 7 of the Industrial Disputes Act and discussed above, on how the matter should be dealt with.⁴³⁰

Section 2(a) of the Industrial Disputes Act specifically deals with the definition of an appropriate government stating that it entails a government in relation to any

⁴²³ Section 6(1) of the Industrial Disputes Act of 1947.

⁴²⁴ Section 6(1) of the Industrial Disputes Act of 1947.

⁴²⁵ Section 6(2) of the Industrial Disputes Act of 1947.

⁴²⁶ Section 7(1)-(2) of the Industrial Disputes Act of 1947.

⁴²⁷ Section 7(1) of the Industrial Disputes Act of 1947.

⁴²⁸ Sections 10A of the Industrial Disputes Act of 1947.

⁴²⁹ Raghavan A, Swarnima&Chinmaye A 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: India' available at <https://www.thelawreview.co.uk/edition/the-labour-and-employment-disputes-review---edition-1/1167301/india> (accessed 28 August 2018).

⁴³⁰ Sections 4-7 of the Industrial Disputes Act 1947.

industrial disputes concerning any industry carried on by or under the relevant authority of the Central Government or any other industrial disputes in relation to the state government.⁴³¹

During conciliation proceedings each party will submit and present their respective cases to the conciliation officer. The aim of conciliation is to move the parties towards reaching a collective bargaining agreement regarding the industrial dispute in question. Raghavan, Swarnima and Chinmaye argue that it is the duty of the conciliation officer to investigate the relevant industrial dispute and to lead the mediation proceedings as a means to get the parties to reach a settlement regarding the industrial dispute being heard.

Once the conciliation proceedings have come to a successful end, the conciliation officer is required to provide a written report and a memorandum of settlement to the appropriate government.⁴³² Section 16(1) of the Industrial Disputes Act requires a report of the award by a conciliation board to be in writing and signed by all of the members of the said board.⁴³³

If the conciliation proceedings was not successful the conciliation officer is required to provide the government with the steps taken during the mediation proceedings to assist the disputants in reaching a possible settlement as well as a report on his or her reasoning as to why no settlement agreement was reached.⁴³⁴

Raghavan, Swarnima and Chinmaye state that the government will consider the relevant report submitted by a conciliation officer after failed conciliation proceedings and then decide whether the industrial dispute should be referred to a labour court or industrial tribunal. If an industrial dispute is referred to the labour court or industrial tribunal, the labour court or industrial tribunal must make a decision and award in

⁴³¹ Sections 2(a) of the Industrial Disputes Act 1947.

⁴³² Raghavan A, Swarnima&Chinmaye A 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: India' available at <https://www.thelawreview.co.uk/edition/the-labour-and-employment-disputes-review---edition-1/1167301/india> (accessed 28 August 2018).

⁴³³ Section 16(1) of the Industrial Disputes Act 1947.

⁴³⁴ Raghavan A, Swarnima&Chinmaye A 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: India' available at <https://www.thelawreview.co.uk/edition/the-labour-and-employment-disputes-review---edition-1/1167301/india> (accessed 28 August 2018).

favour of one of the disputing parties and inform the appropriate government accordingly of its subsequent decision.⁴³⁵ Section 16(2) of the Industrial Disputes Act requires the labour court and industrial tribunals to provide the government with a written and signed copy of the award made by the presiding officer of each of these institutions.⁴³⁶

Section 17(1) and (2) of the Industrial Disputes Act deals with the publication of reports and awards and reads as follows:

- (1) Every report of a board or court together with any minute of dissent recorded therewith, every arbitration award and every award of a Labour court, Tribunal or National Tribunal shall within a period of thirty days from the date of its receipt by the appropriate Government, be published in such manner as the appropriate Government thinks fit.
- (2) Subject to the provisions of section 17A, the award published under sub-section (1) shall be final and shall not be called in question by any Court in any manner whatsoever.⁴³⁷

The publication of an award will be done by the government within 30 days of receipt of the said award.⁴³⁸

Section 10A of the Industrial Disputes Act regulates the voluntary reference of a dispute to arbitration.⁴³⁹ Section 10A(1) allows for the disputants to agree to have the relevant industrial dispute settled through arbitration and such arbitration agreement must take place before the dispute is referred to a labour court or relevant industrial tribunal.⁴⁴⁰ Such an arbitration agreement must be in writing.⁴⁴¹ The Industrial

⁴³⁵ Raghavan A, Swarnima&Chinmaye A 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: India' available at <https://www.thelawreview.co.uk/edition/the-labour-and-employment-disputes-review---edition-1/1167301/india> (accessed 28 August 2018).

⁴³⁶ Section 16(2) of the Industrial Disputes Act 1947.

⁴³⁷ Sections 17(1)-(2) of the Industrial Disputes Act 1947.

⁴³⁸ Raghavan A, Swarnima&Chinmaye A 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: India' available at <https://www.thelawreview.co.uk/edition/the-labour-and-employment-disputes-review---edition-1/1167301/india> (accessed 28 August 2018).

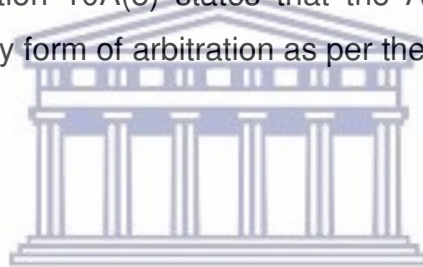
⁴³⁹ Sections 10A of the Industrial Disputes Act 1947.

⁴⁴⁰ Sections 10A(1) of the Industrial Disputes Act 1947.

Disputes Act requires each arbitration agreement to make provision for the possible appointment of another arbitrator, known as the umpire, if the original agreement only appoints an equal amount of arbitrators.⁴⁴² Section 10A(1A) states that it is the decision of the umpire which prevails if there is a tie amongst the arbitrators who were originally appointed.⁴⁴³ Section 10A(2) requires that a copy of the signed arbitration agreement be submitted to the relevant government and conciliation officer and further requires that the government publishes the agreement within 30 days of receipts thereof.⁴⁴⁴

In terms of Section 10A(4) of the Industrial Disputes Act an arbitrator shall investigate the industrial dispute before him or her and then present the appropriate government with the signed arbitration award after a decision on the matter has been reached.⁴⁴⁵

It is worth noting that section 10A(5) states that the Arbitration Act, 1940 (10 of 1940)⁴⁴⁶ will not apply to any form of arbitration as per the Industrial Disputes Act.⁴⁴⁷



4.4. CONCLUSION

In this chapter the relevant labour laws and regulations of both China and India were considered. A variety of ADR methods and procedures exist within both the Chinese and Indian labour law framework. First, the process of voluntary mediation followed by compulsory arbitration and litigation in China, was considered as a means to resolve labour disputes. The availability of voluntary mediation and compulsory arbitration where the disputants chose not to use mediation or where mediation failed is regarded as a strength of the Chinese legal system as it provides for a variety of alternatives along with traditional court based litigation as a means to resolve labour disputes. The availability of these ADR processes alleviates some of

⁴⁴¹ Sections 10A(1) of the Industrial Disputes Act 1947.

⁴⁴² Sections 10A(1A) of the Industrial Disputes Act 1947.

⁴⁴³ Sections 10A(1A) of the Industrial Disputes Act 1947.

⁴⁴⁴ Sections 10A(2) of the Industrial Disputes Act 1947.

⁴⁴⁵ Sections 10A(4) of the Industrial Disputes Act 1947.

⁴⁴⁶ Arbitration Act, 1940 (10 of 1940).

⁴⁴⁷ Sections 10A(5) of the Industrial Disputes Act 1947.

the issues faced by both parties and courts in traditional court based litigation in China, and in the rest of the world, as discussed throughout the research.

Secondly, consideration was given to the ADR methods used in India by considering the regulation of industrial disputes through the workings of the Industrial Disputes Act. A strength of Indian legislation is that it not only provides for specific labour legislation, but also for labour legislation which specifically regulates the use of ADR methods in resolving labour disputes.

When compared to the workings of ADR in Brazil and Russia, the conclusion can be reached that ADR is much more developed in both China and India. Both China and India have developed labour regulations regulating the use ADR in the resolution of labour disputes. The use of ADR in labour disputes in both China and India compares well with the use of ADR in labour disputes in South Africa.



CHAPTER 5

CONCLUSION ON THE EFFECTIVENESS AND EFFICIENCY OF ALTERNATIVE DISPUTE RESOLUTION METHODS IN LABOUR LAW IN SOUTH AFRICA

5.1. INTRODUCTION

This concluding chapter will assess the effectiveness of the LRA and CCMA Rules, as well as the strengths and weaknesses of the CCMA in utilising ADR methods in labour disputes in South Africa. The chapter will include a summary of the ADR methods utilised in South African labour law compared to those utilised in the remaining BRICS jurisdictions. This will serve to highlight the most significant similarities and differences in each of the nations and what South Africa could perhaps learn from ADR implemented in these nations.

5.2. LABOUR DISPUTE RESOLUTION IN TERMS OF THE LABOUR RELATIONS ACT 66 OF 1995 AND THE CCMA

The LRA provides for the establishment of the Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as the CCMA), bargaining councils and Labour Courts, as the institutions through which disputants can resolve their labour disputes.⁴⁴⁸ Benjamin argues that the CCMA must be seen as one of the most innovative developments in the post-apartheid reconstruction of labour law in South Africa.⁴⁴⁹ After considering the use of ADR in other leading emerging economies around the world, this study agrees with the view of Benjamin that the establishment of the CCMA serves as an example of innovative progression in labour disputes globally.⁴⁵⁰ The main aim of the CCMA is to reduce litigation costs for disputants and to reduce the amount of time it takes to resolve matters through court litigation.⁴⁵¹

⁴⁴⁸ Grogan J *Workplace Law* 11 ed (2014) 470.

⁴⁴⁹ Benjamin P 'Conciliation, Arbitration and Enforcement: The CCMS's Achievements and Challenges' (2009) 30 *ILJ* 26.

⁴⁵⁰ Benjamin P 'Conciliation, Arbitration and Enforcement: The CCMS's Achievements and Challenges' (2009) 30 *ILJ* 26.

⁴⁵¹ Benjamin P 'Conciliation, Arbitration and Enforcement: The CCMS's Achievements and Challenges' (2009) 30 *ILJ* 27.

This discussion below will further consider the strengths and weaknesses of the CCMA as a means through which to resolve labour disputes by way of ADR in South Africa.

5.2.1. The strengths and weaknesses of the CCMA as a platform to resolve labour disputes in South Africa

The effective use of ADR by the CCMA has a variety of benefits for disputants. By forcing disputants to refer a matter to conciliation and then arbitration as discussed in chapter 2 above, alleviates the burden on an already overburdened court system. Apart from offering conciliation and arbitration proceedings to disputants, the CCMA further provides facilitation functions (in retrenchment proceedings) and mediation processes (in collective labour disputes). As such the CCMA provides disputants with an array of methods through which to resolve labour disputes, as discussed in chapter 2 above.

The CCMA has compiled five strategic goals and objectives as part of their 2018/19 annual performance plan.⁴⁵² These goals and objectives include the following:

‘Implement the legislated mandate of the CCMA effectively and efficiently;

Enhance and expand the Employment Security mechanisms to save jobs and alleviate business distress;

Facilitate improved Collective Bargaining to promote orderly and healthy relationships;

Intensify Dispute Management and Prevention interventions to reduce conflict in the workplace and transform workplace relations;

Improve organisational and governance processes, strive for maximum compliance and mitigate risks in order to ensure maximum organisational performance.’⁴⁵³

⁴⁵² CCMA ‘2018/19 Annual Performance Plan’ available at http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com/1/CCMA_APP_2018_19A695.PDF (accessed 30 August 2018).

A strength of the CCMA as per the 2018/19 annual report include the recent performance in public interest disputes which helps to create trust and faith in the processes of the CCMA amongst the general public.⁴⁵⁴ The CCMA argues that although it experiences a growing caseload, the commission still strives to efficiently and effectively meet timeframes as a means to best resolve labour disputes in South Africa.⁴⁵⁵ The CCMA also indicates that through the use of outreach activities, there is an increase in awareness and publicity across South Africa regarding the products and services of the CCMA.⁴⁵⁶ The CCMA seeks to utilise social media to further educate South Africans regarding the relevant CCMA products and services.⁴⁵⁷ The CCMA will strive towards, and seek to compile and distribute, outreach material regarding CCMA products and services in all official languages of the Republic of South Africa.⁴⁵⁸

Problems faced by the CCMA include the increase in case referrals in the 2016/17 period, which puts immense strain on the effective and efficient functioning of the commission. The CCMA further highlights that the rise in mutual interest disputes have contributed to excessive dependence on statutory conciliation.⁴⁵⁹ Budget constraints further effect the CCMA's relevant monetary grant which also hinders the effective and efficiently resolution of labour disputes in South Africa.⁴⁶⁰ Litigation

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⁴⁵³ CCMA '2018/19 Annual Performance Plan' available at http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com/1/CCMA_APP_2018_19A695.PDF (accessed 30 August 2018).

⁴⁵⁴ CCMA '2018/19 Annual Performance Plan' available at http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com/1/CCMA_APP_2018_19A695.PDF (accessed 30 August 2018).

⁴⁵⁵ CCMA '2018/19 Annual Performance Plan' available at http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com/1/CCMA_APP_2018_19A695.PDF (accessed 30 August 2018).

⁴⁵⁶ CCMA '2018/19 Annual Performance Plan' available at http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com/1/CCMA_APP_2018_19A695.PDF (accessed 30 August 2018).

⁴⁵⁷ CCMA '2018/19 Annual Performance Plan' available at http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com/1/CCMA_APP_2018_19A695.PDF (accessed 30 August 2018).

⁴⁵⁸ CCMA '2018/19 Annual Performance Plan' available at http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com/1/CCMA_APP_2018_19A695.PDF (accessed 30 August 2018).

⁴⁵⁹ CCMA '2018/19 Annual Performance Plan' available at http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com/1/CCMA_APP_2018_19A695.PDF (accessed 30 August 2018).

⁴⁶⁰ CCMA '2018/19 Annual Performance Plan' available at http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com/1/CCMA_APP_2018_19A695.PDF (accessed 30 August 2018).

proceedings against the CCMA also puts strain on the budget which the CCMA could otherwise have used to resolve labour disputes.⁴⁶¹

5.3. COMPARISON BETWEEN ALTERNATIVE DISPUTE RESOLUTION METHODS IN LABOUR DISPUTES IN SOUTH AFRICA AND THE BRICS NATIONS

The rationale for the comparative study between South Africa and its BRICS counterparts was to see what South Africa could potentially learn from the way in which ADR is used in those nations with regards to labour disputes.⁴⁶²

5.3.1. Brazil

The rigid regulations contained in the Brazilian Consolidation of Labour Laws of 1 May 1943⁴⁶³ and the Federal Constitution of Brazil of 5 October 1988⁴⁶⁴ restrict the capacity of disputants to utilise ADR methods to resolve relevant labour disputes outside the court system.⁴⁶⁵ This is in contrast to the LRA and the CCMA Rules which provide, encourage and, in most cases, require without choice, the use of ADR methods in the settlement of labour disputes through the use of conciliation, mediation and arbitration.⁴⁶⁶ The laws of Brazil might further be criticised for increasing labour costs, increasing the amount of court cases before courts, and for

⁴⁶¹ CCMA '2018/19 Annual Performance Plan' available at http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com/1/CCMA_APP_2018_19A695.PDF (accessed 30 August 2018).

⁴⁶² BRICS 'What is BRICS?' available at <http://www.brics2018.org.za/en/what-brics> (accessed 22 April 2018); BRICS 'Information about BRICS' available at <http://www.brics.itamaraty.gov.br/about-brics/information-about-brics> (accessed 15 May 2018).

⁴⁶³ Brazilian Consolidation of Labour Laws of 1 May 1943.

⁴⁶⁴ The Federal Constitution of Brazil of 5 October 1988.

⁴⁶⁵ Maia A 'Mediation Could Well be a Solution to a More Modern, Agile, and Efficient Framework for Resolving Labour Disputes' available at <http://www.mediationblog.kluwerarbitration.com/2012/07/25/mediation-could-well-be-a-solution-to-a-more-modern-agile-and-efficient-framework-for-resolving-labour-disputes/> (accessed 27 August 2018).

⁴⁶⁶ Section 115(1) of the Labour Relations Act 66 of 1995; Van Niekerk A et al *Law@Work* 3 ed (2015) 49.

rendering the resolution of a labour dispute outside of the courts difficult. As such it effectively achieves the opposite of what labour dispute resolution and the LRA aspires to achieve in South Africa.⁴⁶⁷

A further concern regarding the use of ADR methods in resolving labour disputes in Brazil can be seen in article 9 of the Brazilian Consolidation of Labour Laws which prevents employees from negotiating individual labour law issues through mediation or arbitration.⁴⁶⁸ This is not the case in South Africa as the LRA provides for the settlement of both individual and collective labour law disputes through the use of ADR methods.⁴⁶⁹

5.3.2. Russia

Russia draws a distinction between the resolution of individual and collective labour disputes. In individual labour disputes, a disputant can first make use of the commission on labour disputes⁴⁷⁰ and then decide to use the court of general jurisdiction.⁴⁷¹ It must be noted that when a disputant uses the commission on labour disputes to resolve a dispute, any decision made by the commission can be appealed in court.⁴⁷² This differs from South Africa where CCMA awards can only be

⁴⁶⁷ Maia A 'Mediation Could Well be a Solution to a More Modern, Agile, and Efficient Framework for Resolving Labour Disputes' available at <http://www.mediationblog.kluwerarbitration.com/2012/07/25/mediation-could-well-be-a-solution-to-a-more-modern-agile-and-efficient-framework-for-resolving-labour-disputes/> (accessed 27 August 2018).

⁴⁶⁸ Article 9 of the Brazilian Consolidation of Labour Laws of 1 May 1943.

⁴⁶⁹ Section 115 of the the Labour Relations Act 66 of 1995.

⁴⁷⁰ Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at <http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

⁴⁷¹ Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at <http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

⁴⁷² Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at

reviewed before the labour courts. In South Africa a disputant has the choice whether to refer a matter for arbitration if no settlement was reached during conciliation proceedings. Once an award is made at arbitration, the arbitration award can only be reviewed, and not appealed, before a court.⁴⁷³ Collective labour disputes in Russia can be resolved through conciliation proceedings, the use of a mediator and through labour arbitration in similar fashion as is the case with the CCMA proceedings in South Africa.⁴⁷⁴

Conciliation proceedings in the resolution of collective labour disputes in Russia is mandatory⁴⁷⁵ and the decision by the conciliation committee is binding on the disputants.⁴⁷⁶ If conciliation was unsuccessful a disputant can seek to settle his or her dispute through the use of mediation and labour arbitration.⁴⁷⁷ This is in contrast to the situation in South Africa where a decision by the CCMA can be reviewed.⁴⁷⁸

The Russian Draft Bill No. 323191-7 calls for the possibility of disputants being allowed to use ADR methods as a means to resolve their individual labour disputes outside of the Russian courts.⁴⁷⁹ This is significant as the ADR proceedings

<http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

⁴⁷³ Section 158(1)(g) of the Labour Relations Act 66 of 1995.

⁴⁷⁴ Articles 401-404 of the Federal Law No. 197-FZ of 2001.

⁴⁷⁵ Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at

<http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

⁴⁷⁶ Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at

<http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

⁴⁷⁷ Jus Privatum Law Firm 'Russian Federation: Resolving Collective And Individual Labor Disputes In Russia' available at

<http://www.mondaq.com/russianfederation/x/638160/employment+litigation+tribunals/Resolving+Collective+and+Individual+Labor+Disputes+in+Russia> (accessed 28 August 2018).

⁴⁷⁸ Section 158(1)(g) of the Labour Relations Act 66 of 1995.

⁴⁷⁹ Kukushkina E, Mzhavanadze G & Mogutova N 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: Russia' available at

regarding labour disputes have up until now been largely governed by the courts in Russia and the Draft Bill No. 323191-7 will allow disputants to mediate their labour grievances.⁴⁸⁰ This draft legislation will bring ADR in Russia with regards to individual labour disputes in line with the practices used in South Africa and which are required by the ILO Recommendation No.92.⁴⁸¹

5.3.3. India

In India it is required that a disputant must apply to the appropriate government to have his or her industrial dispute referred for settlement proceedings.⁴⁸² In India it then further becomes the duty of the said appropriate government to consider whether an industrial dispute is relevant.⁴⁸³ Once the appropriate government is satisfied that an industrial dispute is present, the matter will be referred to a conciliation officer,⁴⁸⁴ a board of conciliation,⁴⁸⁵ a court of inquiry⁴⁸⁶ or a labour court to act in the promotion of settling the industrial disputes.⁴⁸⁷

This is in contrast to the practice of labour dispute referral in South Africa where one of the disputants refers the matter directly to the CCMA or an applicable court without first having to apply to the government for preliminary approval.⁴⁸⁸ It is worth noting that the Industrial Disputes Act in India applies to conciliation and adjudication

<http://www.thelawreviews.co.uk/editions/the-labour-and-employment-disputes-reviews---edition-1/1167309/russia> (accessed 27 August 2018); Draft Bill No. 323191-7.

⁴⁸⁰ Draft Bill No. 323191-7.

⁴⁸¹ Section 1 of the International Labour Organisation Voluntary Conciliation and Arbitration Recommendation, 1951 (No.92).

⁴⁸² Raghavan A, Swarnima&Chinmaye A 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: India' available at <https://www.thelawreview.co.uk/edition/the-labour-and-employment-disputes-review---edition-1/1167301/india> (accessed 28 August 2018).

⁴⁸³ Sections 4-7 of the Industrial Disputes Act 1947.

⁴⁸⁴ Section 4 of the Industrial Disputes Act 1947.

⁴⁸⁵ Section 5 of the Industrial Disputes Act 1947.

⁴⁸⁶ Section 6 of the Industrial Disputes Act 1947.

⁴⁸⁷ Section 7 of the Industrial Disputes Act 1947.

⁴⁸⁸ Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) 89.

of industrial labour disputes in the same manner as the LRA and CCMA Rules regarding ADR apply to labour disputes in South Africa.⁴⁸⁹ It can be argued that having to refer a dispute first to the government before referring it to the relevant commission, prolongs the settlement of labour disputes in India. In defence of this practice it may be argued that due to the strict application of the law to only certain industries and workmen, the effectiveness and efficiency of the dispute resolution process is protected by having the government screen and assess each application or referral before it is handed over to the relevant commission, court or tribunal for possible settlement. In South Africa the CCMA is independent from the state and acts as an autonomous statutory agency in terms of legislation.⁴⁹⁰

It is further worth mentioning that any disputant can easily enter the CCMA process and system in South Africa without first having to provide extensive details of the dispute to the CCMA.⁴⁹¹ The use of a governing authority to first assess the merits of each case, as is the practice in India, might contribute to the timely and efficient resolution of labour disputes and is something worth considering in the South African context. As the CCMA system currently functions, it allows disputants the opportunity to refer all issues in dispute, even where such dispute has little to no merit.⁴⁹² This hinders the effective and efficient functioning which the CCMA envisioned.⁴⁹³ In order to still provide disputants with access to justice, South Africa could possibly adopt the practice of parties proceeding at peril. This means that a referring disputant party will be informed that an adverse cost order will be applicable should the dispute proceed to the next stage of the ADR process only for it to be

⁴⁸⁹ Raghavan A, Swarnima&Chinmaye A 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: India' available at <https://www.thelawreview.co.uk/edition/the-labour-and-employment-disputes-review---edition-1/1167301/india> (accessed 28 August 2018).

⁴⁹⁰ Van Niekerk A et al *Law@Work* 3 ed (2015) 449.

⁴⁹¹ Van Niekerk A 'Speedy Social Justice: Streamlining the Statutory Dispute Resolution Processes' (2015) 36 *ILJ* 843.

⁴⁹² Van Niekerk A 'Speedy Social Justice: Streamlining the Statutory Dispute Resolution Processes' (2015) 36 *ILJ* 843.

⁴⁹³ Van Niekerk A 'Speedy Social Justice: Streamlining the Statutory Dispute Resolution Processes' (2015) 36 *ILJ* 843.

dismissed.⁴⁹⁴ Such a cost order should however only be issued where it was clear that the matter was likely to fail.

5.3.4. China

The resolution of labour disputes in China entails three steps, that is, mediation, arbitration and having the dispute heard by a court.⁴⁹⁵ This is similar to the ADR methods provided for in the CCMA as discussed in the second chapter to this study. The first method which a disputant can use to resolve a labour dispute in China entails mediation through an enterprise labour dispute mediation committee or the people's mediation committee.⁴⁹⁶ Mediation is not compulsory.⁴⁹⁷ This practice of voluntary mediation is different from the first step in the ADR process of resolving labour disputes in South Africa where the process starts with mandatory conciliation.⁴⁹⁸ In South Africa a labour dispute must be heard through conciliation proceedings before the matter can be arbitrated.⁴⁹⁹ It can be argued that the practice of voluntary conciliation and mediation in China allows for a disputant to resolve a labour dispute in a more timely manner, especially in instances where arbitration is better suited, such as the case where the relationship between the disputants is of such nature that conciliation would prove pointless.

⁴⁹⁴ Van Niekerk A 'Speedy Social Justice: Streamlining the Statutory Dispute Resolution Processes' (2015) 36 *ILJ* 844.

⁴⁹⁵ Article 7 of The Labour Dispute Mediation and Arbitration Law of 2008 (Order of the President No. 80); Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 583.

⁴⁹⁶ Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 583.

⁴⁹⁷ Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 583.

⁴⁹⁸ Van Niekerk A et al *Law@Work* 3 ed (2015) 449.

⁴⁹⁹ Van Niekerk A et al *Law@Work* 3 ed (2015) 449.

This study shares the view of Mphahlele that the removal of mandatory conciliation proceedings in the CCMA for certain disputes could result in saving time and valuable resources where the matter proceeds directly to arbitration.⁵⁰⁰

The second phase in the process of resolving labour disputes in China entails compulsory arbitration.⁵⁰¹ The introduction of mandatory arbitration in the possible settlement of labour disputes prevents unnecessary case overloads before the Chinese courts.⁵⁰²

The final step in the labour dispute resolution process in China entails having the dispute heard in a court.⁵⁰³ A big difference between the processes in China and South Africa is that arbitration awards are only subject to review in a South African court, whereas an aggrieved disputant in China can appeal an arbitration award to a local court.⁵⁰⁴ The decision by the court can then further be appealed to a Chinese court of appeal.⁵⁰⁵



5.4. CONCLUSION

After considering the use of ADR methods in labour disputes in the remaining BRICS nations it may be argued that the ADR system in South African labour disputes provide disputants with a variety of means to effectively and efficiently resolve disputes outside of the South African civil court system. This does not however mean

⁵⁰⁰ Mphahlele W *The Labour Relations Disputes Resolutions system: Is it effective?* (unpublished LLM thesis, University of Pretoria, 2016) 55.

⁵⁰¹ Article 79 of the Labour Law of the People's Republic of China of 1995 (Order of the President No. 28); Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 583.

⁵⁰² Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 584.

⁵⁰³ Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 584.

⁵⁰⁴ Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 584.

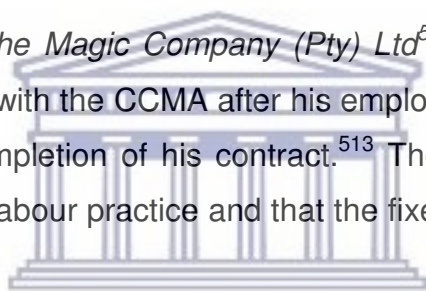
⁵⁰⁵ Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 584.

that labour dispute resolution through ADR in South Africa is without problems though.

Leeds and Wöcke call for changes to the functioning of the CCMA as a means to enhance rather than limit rights.⁵⁰⁶ Through the implementation of stricter case screening, the high levels of frivolous cases without any merit currently being heard by the CCMA, may be reduced and possibly prevented.⁵⁰⁷ Screening should focus on the jurisdiction of the CCMA to hear the matter as well as the merits of the dispute.⁵⁰⁸

In *Simani vs Coca Cola Furtune*⁵⁰⁹ the arbitrator held that the employee had known he was guilty of dishonesty when he lodged an unfair dismissal case against his employer with the CCMA.⁵¹⁰ The CCMA dismissed the case and ordered the applicant to pay the respondent's costs.⁵¹¹

Similarly, in *Ndwalane v The Magic Company (Pty) Ltd*⁵¹² an employee lodged an unfair labour practice case with the CCMA after his employer had asked him to leave the company upon the completion of his contract.⁵¹³ The arbitrator held that there was no proof of any unfair labour practice and that the fixed term of employment had



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⁵⁰⁶ Leeds C & Wöcke A 'Methods of reducing the referral of frivolous cases to the CCMA' (2009) 33 *South African Journal of Labour Relations* 38.

⁵⁰⁷ Leeds C & Wöcke A 'Methods of reducing the referral of frivolous cases to the CCMA' (2009) 33 *South African Journal of Labour Relations* 38.

⁵⁰⁸ Leeds C & Wöcke A 'Methods of reducing the referral of frivolous cases to the CCMA' (2009) 33 *South African Journal of Labour Relations* 38.

⁵⁰⁹ *Simani vs Coca Cola Furtune* (2006 10 BALR 1044).

⁵¹⁰ Israelstam I 'Dirty hands will be caned at CCMA' available at <https://www.labourlawadvice.co.za/dirty-hands-will-be-caned-at-ccma/> (accessed 27 November 2018).

⁵¹¹ Israelstam I 'Dirty hands will be caned at CCMA' available at <https://www.labourlawadvice.co.za/dirty-hands-will-be-caned-at-ccma/> (accessed 27 November 2018).

⁵¹² *Ndwalane v The Magic Company (Pty) Ltd* (2006, 5 BALR 497).

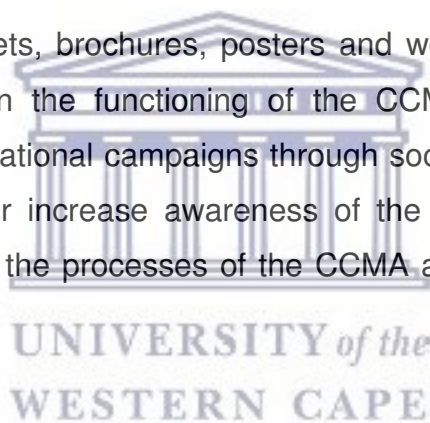
⁵¹³ Israelstam I 'There is a significant number of referrals based on facts that are misrepresented' available at <https://www.labourguide.co.za/information-ccma/158-bringing-trivial-case-to-ccma-could-cost-you> (accessed 27 November 2018).

come to an end.⁵¹⁴ The arbitrator further held that this was a frivolous case and ordered the employee to pay a portion of the employer's costs.⁵¹⁵

The more frequent use of cost awards⁵¹⁶ might contribute towards the prevention of frivolous cases being referred to the CCMA.⁵¹⁷ Another means through which the abuse of the CCMA system can be countered is by introducing a referral fee, which can be reduced or forego altogether should the case be of significance and in instances where the disputant cannot afford to pay such fee.⁵¹⁸

Although these preventative measures might be seen as limiting the rights of disputants, it can also be argued that such measures will enhance the rights of disputants. Appropriate measures may contribute to a more successful CCMA and provide more people access to justice through the elimination of cases which cause unnecessary backlogs at the CCMA.

The current usage of leaflets, brochures, posters and workshops by the CCMA to educate South Africans on the functioning of the CCMA is commendable. The intensification of such educational campaigns through social media, radio, television and print media will further increase awareness of the functioning of the CCMA, educate South Africans on the processes of the CCMA and make the CCMA more accessible.⁵¹⁹



⁵¹⁴ Israelstam I 'There is a significant number of referrals based on facts that are misrepresented' available at <https://www.labourguide.co.za/information-ccma/158-bringing-trivial-case-to-ccma-could-cost-you> (accessed 27 November 2018).

⁵¹⁵ Israelstam I 'There is a significant number of referrals based on facts that are misrepresented' available at <https://www.labourguide.co.za/information-ccma/158-bringing-trivial-case-to-ccma-could-cost-you> (accessed 27 November 2018).

⁵¹⁶ It is worth noting that although cost awards may be issued at times, this rarely occurs at the CCMA.

⁵¹⁷ Leeds C & Wöcke A 'Methods of reducing the referral of frivolous cases to the CCMA' (2009) 33 *South African Journal of Labour Relations* 38.

⁵¹⁸ Leeds C & Wöcke A 'Methods of reducing the referral of frivolous cases to the CCMA' (2009) 33 *South African Journal of Labour Relations* 38.

⁵¹⁹ Kwakwala BOK *A critical evaluation of the dispute resolution function of the Commission for Conciliation, Mediation and Arbitration (CCMA)* (unpublished Master of Commerce thesis, University of Stellenbosch, 2010) 107.

In conclusion, it seems safe to say that the use of ADR methods in labour disputes in South Africa are at the forefront when compared to the use of similar measures in the remaining BRICS nations.



BIBLIOGRAPHY

ARTICLES

Agrawal K 'Justice Dispensation Through the Alternative Dispute Resolution System in India' (2014) 2 *Russian Law Journal* 63-74.

Benjamin R 'Conciliation, Arbitration and Enforcement: The CCMA's Achievements and Challenges' (2009) 30 *ILJ* 40-8.

Bielen et al 'Backlogs and litigation rates: Testing congestion equilibrium across European judiciaries' (2018) 53 *International Review of Law and Economics* 9-22.

Clark K 'The philosophical underpinning and general workings of Chinese mediation systems: What lessons can American mediators learn?' (2002) 2 *Pepperdine Dispute Resolution Law Journal* 117-40.

Du Toit D 'Collective Bargaining and Worker Participation' (2000) 21 *ILJ* 1544-75.

Du Toit D 'The Right to Equality versus Employer 'Control' and Employee 'Subordination': Are Some More Equal Than Others?' (2016) 37 *ILJ* 1-27.

Harpur G 'How to Resolve Civil Cases and Impress the Public' (2009) 22 *Advocate* 38-40.

Hepple B 'The future of labour law' (1996) 17 *Comparative Labor Law & Policy Journal* 626-47.

Hoffman D 'ADR: An Opportunity to Broaden the Shadow of the Law' (1994) 21 *Human Rights* 20-1.

Hurter E 'Seeking the truth or seeking justice: Reflections on the changing face of the adversarial process in civil litigation' (2007) 2 *Tydskrifvir die Suid-Afrikaanse Reg* 240-62.

Hwang K & Wang K 'Labour Dispute Arbitration in China: Perspectives of the arbitrators' (2015) 37 *Employee Relations* 582-603.

Lacombe A & Brandão L 'Labour Dispute Resolution in Brazil' 2015 *Labour & Employment Law Newsletter* 9.

Leeds C & Wöcke A 'Methods of reducing the referral of frivolous cases to the CCMA' (2009) 33 *South African Journal of Labour Relations* 28-44.

Mason P & Simões A 'Brazil's New Mediation Law and the Impact on International Business disputes' (2015) 70 *Dispute Resolution Journal* 13-9.

Paleker M 'Court Connected ADR in Civil Litigation: The Key to Access to Justice in South Africa' (2003) 6 *ADR Bulletin* 48-50.

Qian C 'The Culture of China's Mediation in regional and international affairs' (2010) 28 *Conflict Resolution Quarterly* 53-65.

Schulze C 'International Commercial Arbitration: An Overview' (2005) 46 *Codicillus* 45-59.

Steenkamp A, Stelzner S & Badenhorst N 'The Right to Bargain Collectively' (2004) 25 *ILJ* 944.

Van Niekerk A 'Speedy Social Justice: Streamlining the Statutory Dispute Resolution Processes' (2015) 36 *ILJ* 837-48.

Van Loggerenberg D 'Civil Justice in South Africa' (2016) 3 *BRICS Law Journal* 125-47.

Wiese T 'The use of Alternative Dispute Resolution Methods in Corporate Disputes: The Provisions of the Companies Act of 2008' (2014) 26 *SA Mercantile Law Journal* 668-77.

BOOKS

Anstey M *Managing Change - Negotiating Conflict* 3 ed (2006) Cape Town: Juta.

Brand J et al *Labour Dispute Resolution* 2 ed (2009) Cape Town: Juta.

Jordaan B, Kantor P & Bosch C *Labour Arbitration: With a Commentary on the CCMA Rules* 2 ed (2011) Cape Town: Siber Ink.

Ramsden P *The Law of Arbitration - South African and International Arbitration* (2009) Cape Town: Juta.

Reynolds S *Handbook on Commercial Dispute Resolution in the Russian Federation: A Guide for Businesses on Navigating the Russian Legal System for Resolution of Business Disputes* (2000) Washington D.C.: U.S. Dept. of Commerce, International Trade Administration, Office of Eastern Europe, Russia, and Independent States.

Van Niekerk A et al *Law@Work* 3 ed (2015) Durban: LexisNexis.

CASES

BRAZIL

TST-AIRR-1574/2000-193-05-00 of 2008.

TST-RR-144300-80.2005.5.02 of 2010.

SOUTH AFRICA

Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996 1996 (4) SA 744 (CC).

Heroldt v Nedbank Ltd [2013] 11 BLLR 1074 (SCA)

Hofmeyer v Network Healthcare Holdings (Pty) Ltd [2004] 3 BLLR 232 (LC).

MB v NB 2010 (3) SA (GSJ).

Ndwalane v The Magic Company (Pty) Ltd (2006, 5 BALR 497).

Sidumo & another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 4205 CC.

Simani vs Coca Cola Furtune (2006 10 BALR 1044).

INDIA

Bangalore Water Supply and Sewerage Board v R Rajappa 1978 SCR (3) 207.

Bhaskaran v Kerala State Electricity Board (1986) IILLJ 346 KER.

Ved Prakash Gupta v Delton Cable India (P) Ltd 1984 SCR (3) 169.

CHAPTERS IN BOOKS

Le Roux R 'The purpose of labour law: Can it go green?' in Malherbe K & Sloth-Nielsen J (eds) *Labour Law into the Future: Essays in honour of D'Arcy du Toit* (2012) Cape Town: Juta.

Wolter G et al 'South Africa' in Cotton J (ed) *The Dispute Resolution Review* 8 ed (2016) London: Law Business Research Ltd.

CONVENTIONS

International Labour Organisation, Termination of Employment Convention, 1982 (No.158).

International Labour Organisation Voluntary Conciliation and Arbitration Recommendation, 1951 (No.92).



DELEGATED LEGISLATION

Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014.

GOVERNMENT PUBLICATIONS AND REPORTS

The Hoexter GG *Commission of Inquiry into the Structure and Functioning of the Courts* (1983) Government Printer: Pretoria.

LAW COMMISSION PAPERS

South African Law Commission Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997).

South African Law Commission (Project 94) *Arbitration: An International Arbitration Act for South Africa* (1998).

LEGISLATION

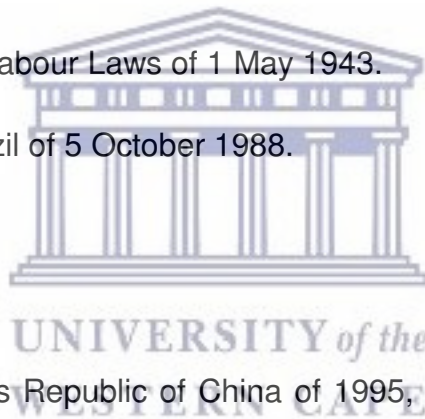
BRAZIL

Arbitration Law No. 9.307 of 1996.

Mediation Law no. 13.140/2015.

Brazilian Consolidation of Labour Laws of 1 May 1943.

Federal Constitution of Brazil of 5 October 1988.



CHINA

Labour Law of the People's Republic of China of 1995, Order of the President No. 28.

Labour Dispute Mediation and Arbitration Law of the People's Republic of China of 2008, Order of the President No. 80.

Mediation Regulations of 1989.

INDIA

Arbitration Act of 1940.

Code of Civil Procedure of 1908.

Industrial Disputes Act 1 of 1947.

Legal Services Authority Act of 1987.

RUSSIA

Draft Bill No. 323191-7.

Federal Law No. 197-FZ of 2001.

The Federal Law on Alternative Dispute Resolution Procedure Involving a Mediator No. 193-FZ.

Federal Law on Amendments to Certain Legislative Acts of the Russian Federation Following the Adoption of the Federal Law on Alternative Dispute Resolution Procedure Involving a Mediator No. 194-FZ.

SOUTH AFRICA

Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014.

Arbitration Act 42 of 1965.

Basic Conditions of Employment Act 75 of 1997.

Constitution of the Republic of South Africa, 1996.

Employment Equity Act 55 of 1998.

Labour Relations Act 66 of 1995.

Rules for the Conduct of Proceedings before the CCMA of 2003.

Skills Development Act 97 of 1998.

Unemployed Insurance Act 63 of 2001.



THESES

Kwakwala BOK *A critical evaluation of the dispute resolution function of the Commission for Conciliation, Mediation and Arbitration (CCMA)* (unpublished Master of Commerce thesis, University of Stellenbosch, 2010).

Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (unpublished LLM thesis, University of the Western Cape, 2014).

Mphahlele W *The Labour Relations Disputes Resolutions system: Is it effective?* (unpublished LLM thesis, University of Pretoria, 2016).

WEBSITES

Baker T 'Overhauling arbitration in South Africa' available at <http://www.nortonrosefulbright.com/knowledge/publications/121382/overhauling-arbitration-in-south-africa> (accessed 25 May 2018).

Brazilian Consolidation of Labour Laws of 1 May 1943 available at <http://www.equalrightstrust.org/ertdocumentbank//Decree-Law%20No.%205%2C452%20Consolidation%20of%20Labour%20Laws.pdf> (accessed 6 November 2018).

BRICS 'Information about BRICS' available at <http://www.brics.itamaraty.gov.br/about-brics/information-about-brics> (accessed 15 May 2018).

BRICS 'What is BRICS?' available at <http://www.brics2018.org.za/en/what-brics> (accessed 22 April 2018).

CCMA '2018/19 Annual Performance Plan' available at http://www.pmg-assets.s3-website-eu-west-1.amazonaws.com/1/CCMA_APP_2018_19A695.PDF (accessed 30 August 2018).

CCMA 'Rules for the Conduct of Proceedings before the CCMA' available at <http://www.ccma.org.za/Advice/Knowledge-Hub/Downloads/Rules-Legislation> (accessed 10 January 2019).

Chief Justice Ngcobo S 'Enhancing access to justice: The search for better justice' available at <http://www.constitutionallyspeaking.co.za/wp-content/uploads/2011/07.Speech-of-the-Chief-Justice-2011.pdf> (accessed 22 May 2018).

Demirkol S 'What is the Consolidation of Labour Laws' available at <http://www.braziliannr.com/2015/02/15/consolidation-labor-laws/> (accessed 6 November 2018).

Foundation for Human Rights 'Access to Justice' available at <http://www.fhr.org.za/programmes/access-justice/> (accessed 6 September 2018).

Israelstam I 'Dirty hands will be caned at CCMA' available at <https://www.labourlawadvice.co.za/dirty-hands-will-be-caned-at-ccma/> (accessed 27 November 2018).

Israelstam I 'There is a significant number of referrals based on facts that are misrepresented' available at <https://www.labourguide.co.za/information-ccma/158-bringing-trivial-case-to-ccma-could-cost-you> (accessed 27 November 2018).

Kukushkina E, Mzhavanadze G & Mogutova N 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: Russia' available at <http://www.thelawreviews.co.uk/editions/the-labour-and-employment-disputes-reviews---edition-1/1167309/russia> (accessed 27 August 2018).

Lexis PSL Arbitration 'The Brazilian Arbitration Act 2015 - what's changed?' available at [http://www.clydeco.com/uploads/Files/Updates/The_Brazilian_Arbitration_Act_2015-whats_ch_\(2\).pdf](http://www.clydeco.com/uploads/Files/Updates/The_Brazilian_Arbitration_Act_2015-whats_ch_(2).pdf) (accessed 7 November 2018).

Maia A 'Mediation Could Well be a Solution to a More Modern, Agile, and Efficient Framework for Resolving Labour Disputes' available at <http://www.mediationblog.kluwerarbitration.com/2012/07/25/mediation-could-well-be->

a-solution-to-a-more-modern-agile-and-efficient-framework-for-resolving-labour-disputes/ (accessed 27 August 2018).

Mazzillo L 'Huge Labour Law Reforms In Brazil' available at *http://www.ggiform.com/law/corporate-and-commercial/1125-huge-labour-law-reforms-in-brazil-2.html* (accessed 28 August 2018).

Raghavan A, Swarnima & Chinmaye A 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide: India' available at *https://www.thelawreview.co.uk/edition/the-labour-and-employment-disputes-review--edition-1/1167301/india* (accessed 28 August 2018).

The Federal Constitution of Brazil of 5 October 1988 available at *https://www.constituteproject.org/constitution/Brazil_2014.pdf* (accessed 6 November 2018).

The Economist 'Europe's Civil Courts: The Wheels of Justice Grind Slow' available at *http://www.economist.com/Europe/2016/02/18/the-wheels-of-justice-grind-slow* (accessed 25 August 2018).

Young J & Zhu L 'Overview of China's New Labor Dispute Mediation and Arbitration Law' available at *http://www.dwt.com/advisories/Overview_of_Chinas_New_Labor_Dispute_Mediation_and_Arbitration_Law_01_29_2008/* (accessed 28 August 2018).

