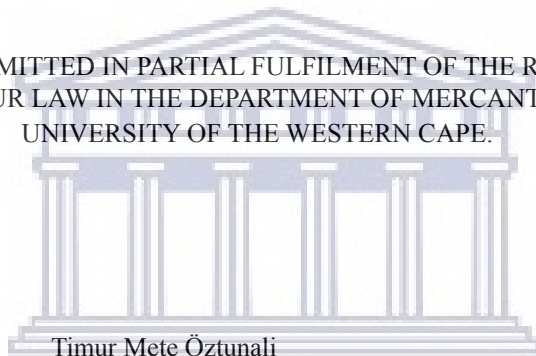


# UNIVERSITY OF THE WESTERN CAPE

## FACULTY OF LAW

### Mini Thesis

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



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## **Dedication and Acknowledgments**

This thesis is dedicated to my wife Anke, whose support and encouragement I can always count on. I would also like to thank my academic supervisor, Mrs Huysamen, my parents, Frauke and Mete, my parents in law, Birgitt and Gert, and my dogs Bruce and Lee.



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## **Abstract**

The judicial court system in South Africa is overburdened, which results in parties having to wait for long periods of time to have their matters settled or even heard. Furthermore, the cost of litigation in South Africa is immense, which prevents the biggest part of the population from access to justice in line with s 34 of the Constitution of 1996. Therefore, alternative methods of dispute resolution are worth looking into. This paper will compare the mediation system of South Africa with that of Germany. This will allow for a better insight in regard to mediation within South Africa, which can help to address the above stated problems.

## **Title**

Mediation as an alternative to litigation: A comparative study between South Africa and Germany

## **Keywords**

- ❖ **Alternative Dispute Resolution**
- ❖ **Mediation**
- ❖ **Settlement Outside of Court**
- ❖ **Conciliation**
- ❖ **CCMA**
- ❖ **Comparative Law**
- ❖ **Labour Law**
- ❖ **Commercial Law**
- ❖ **Germany**
- ❖ **South Africa**



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**Abbreviations and/or Acronyms:**

|              |  |
|--------------|--|
| ADR          | Alternative Dispute Resolution                       |
| BATNA        | Best Alternative to Negotiated Agreement             |
| CCMA         | Commission for Conciliation Mediation & Arbitration  |
| Constitution | Constitution of the Republic of South Africa 1996    |
| IMSSA        | Independent Mediation Service of South Africa        |
| IoDSA        | Institute of Directors in Southern Africa            |
| LRA          | Labour Relations Act 1965                            |
| UNICTRAL     | United Nations Commission on International Trade Law |
| USA          | United States of America                             |
| RTMKM        | Round Table Mediation und Konfliktmanagement         |



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## Chapter 1: Introduction to the study

### 1.1 Problem Statement

The Constitution of the Republic of South Africa, 1996 (Constitution) lays the legal foundation on which the modern day South Africa has been built.<sup>1</sup> In conferring rights provided for in the Constitution upon its citizens, government also has the duty to take action to ensure the realisation of such rights. This includes calling upon the judiciary to enact laws to protect and give effect to the rights provided for in the Constitution. The specific constitutional right that underpins this research is section 34. Section 34 grants everyone the right to have their 'dispute 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.'<sup>2</sup> As will be highlighted below, the South African court system in general is dysfunctional and over-burdened. As such, there is a need to turn to alternative mechanisms to resolve disputes, such as mediation.

In the Access to Justice Conference of 2011<sup>3</sup>, Chief Justice Ngcobo emphasised the importance of the constitutional right of access to justice. He held that neglecting to realise this right would result in 'vigilantism, chaos and lawlessness'.<sup>4</sup> The Chief Justice also commented on the characteristics an ideal judicial system should possess. These were fairness, equal opportunity, minimal cost, swiftness, as well as a need-oriented approach which leads to effective solutions.<sup>5</sup> It is against the backdrop of these ideal values and characteristics that the Chief Justice discussed the issues faced by, or shortcomings in, the South African judicial system.<sup>6</sup>

The reference to judicial system includes the various courts within the different areas of law, including both civil and criminal. These issues include inadequate personnel both in numbers and in training, litigation generally being a lengthy process, the cost involved in litigation, and lastly, the failure of the justice system to be responsive, understandable and fair towards all parties involved.<sup>7</sup> The research therefore proceeds from the hypothesis that the South African judicial system as it

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<sup>1</sup> The Constitution of RSA 1996

<sup>2</sup> The Constitution of RSA 1996

<sup>3</sup> <https://constitutionallyspeaking.co.za/wp-content/uploads/2011/07/Speech-of-the-Chief-Justice-2011.pdf>

<sup>4</sup> Ngcobo S CJ *Enhancing Access to Justice: The Search for Better Justice* 2011 8

<sup>5</sup> Ngcobo S CJ *Enhancing Access to Justice: The Search for Better Justice* 2011 9-10

<sup>6</sup> Ngcobo S CJ *Enhancing Access to Justice: The Search for Better Justice* 2011

<sup>7</sup> Ngcobo S CJ *Enhancing Access to Justice: The Search for Better Justice* 2011 11



currently operates does not administer justice in the way envisioned in the Constitution as previously highlighted.

Alternative dispute resolution (ADR) has gained increased popularity since the 1980s in South Africa.<sup>8</sup> ADR refers to mechanisms that are different to regular litigation, and operate on different standards and principles.<sup>9</sup> One of the main goals of ADR methods is to increase the efficiency in resolving disputes, when compared to traditional court proceedings in the form of litigation. ADR aims to resolve disputes as quickly as possible, while relying on procedures that are less formal than those encountered in litigation. Assistance is rendered by a neutral third party in an attempt to move the parties towards resolving the dispute themselves without the need to litigate.<sup>10</sup> There are several ADR methods, most commonly, negotiation, arbitration, con-arb and mediation. The focus of this research will however be on mediation specifically as a form of ADR. The process of mediation is based on confidentiality and enlists the assistance of a neutral third party that acts as a mediator who assists the parties to reach a mutually acceptable outcome.<sup>11</sup>

The research will serve to establish whether an increased use of mediation as a form of ADR in South Africa might alleviate some of the shortcomings experienced within the South African judicial system. Mediation will be discussed within the South African context to ascertain where and how mediation is most commonly used, most notably within the areas of labour-, commercial-, and family law. An assessment of the use of mediation in these fields will indicate how mediation already compliments the formal judicial system, how it potentially alleviates some of the issues encountered within the judicial system, and how mediation can be further developed and more commonly used in South Africa.

In order to properly address the aforesaid aims, the research will consider the German model of mediation within the identified fields of labour-, commercial-, and family law, while further also looking at mediation as applied in the context of sports and schools – two areas within which mediation has been fairly successfully applied in Germany . The comparison between South Africa and Germany will highlight the two countries' different approaches to mediation, and what South Africa could perhaps learn from the German approach to mediation and *vice versa*. This would

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<sup>8</sup> Nupen C, *ADR in South Africa: A Great Tool for a Rapidly Changing Society* (1998) 4 Disp. Resol. Mag. 11

<sup>9</sup> Boule L, et al *Mediation: Principles, Process, Practice* (1997) 29

<sup>10</sup> Brand J, et al *Labour Dispute Resolution* (1997) 19

<sup>11</sup> Brand J et al *Commercial Mediation: A User's Guide* (2016) 2 ed 19

assist in gaining a better understanding of the benefits of mediation and how it could be used to compliment the judicial system.

## 1.2 Significance of the problem

A proper functioning justice system contributes towards a more civilised and coherent state.<sup>12</sup> In an attempt to achieve such a fairer and more coherent state, it has been suggested that an increased use of ADR, as an alternative to the conventional way of seeking legal address through court litigation, is paramount. As highlighted previously, in South Africa specifically, there are a number of issues with the judicial system.

The World Justice Project<sup>13</sup> collects data in the form of surveys in order to find out how the general public views and feels about the rule in their country. The results of the study are categorised into several aspects of the rule of law and are given a rating from 0.0 to 1, with 1 being the highest and most positive result. In 2018/2019 civil justice in South Africa in terms of its 'accessibility' was rated at 0.49 and the category 'unreasonable delay' received a rating of 0.51.<sup>14</sup> These ratings are quite low, therefore allowing for the deduction that the general public does not view the rule of law adequate in the aforementioned categories. Even though subject to limitations, the results in themselves give some indication as to the problems faced by the South African judiciary.

While legal services should be accessible to all persons, in reality such services and access to justice are limited to those who are able to afford it. This creates the problem that those who are in penury are unable to take part in legal proceedings to the same degree as those who have money. This is particular true in civil proceedings.<sup>15</sup> In addition to the issue of cost that can hinder access to justice, formal proceedings often take long to come to fruition, which in itself can lead to higher costs.

Another shortcoming of a judicial system within which litigation is the main form of dispute resolution is that the nature of court proceedings limits the involvement of the parties since processes have been formalised to such a degree that parties barely have a say in the way the matter will proceed.<sup>16</sup> Further to the above, a court decision always brings about a *winner* and a

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<sup>12</sup> Ministry of Justice England & Wales *Solving Disputes in the County Courts: Creating a simpler, quicker and more proportionate system* 2012

<sup>13</sup> Project is accessible on: <http://data.worldjusticeproject.org/#/groups/ZAF>

<sup>14</sup> <http://data.worldjusticeproject.org/#/groups/ZAF>

<sup>15</sup> Holness D, Recent Developments in the Provision of Pro Bono Legal Services by Attorneys in South Africa (2013) PER 2013 Volume 16 no 1

<sup>16</sup> Brand J, et al *Labour Dispute Resolution* (1997) 19

loser. A judge makes a decision based on the facts presented before him and with reference to the applicable law, without the parties having a say as to the outcome.<sup>17</sup> This can also have the effect of creating a disconnect between the courts and the parties before it. Where parties do not perceive the courts as working in their best interest, a situation can occur where 'justice' is administered by the people themselves. A state of disorder due to disregard for the law could ensue.

The consequences of a legal system not functioning at its best are far-reaching. Individuals will be hindered from effectively enforcing their rights, which suggests non-achievement of the constitutional right of access to justice.<sup>18</sup>

### **1.3 Research question**

What can South Africa learn from the German approach to mediation so as to alleviate some of the shortcomings associated with the South African judicial system?

### **1.4 Aims of research**

Globally the use of mediation is on the rise and an increasing number of countries are incorporating it into their judicial systems as an alternative form of resolving disputes. As evident from the comments made by Chief Justice Ngcobo, the constitutional right to access to justice has, some 25 years after the start of democracy, still not fully been realised. The research will focus on mediation specifically as a form of ADR, and consider the nature thereof. In order for the research to provide a more comprehensive account, other ADR methods will be explained as well as the legal theory underlying them. The research will also discuss the current use of mediation in the South African judicial system, particularly in the fields of labour-, commercial-, and family law. Finally, the use of mediation in Germany will be considered to see what South Africa can perhaps learn from the approach adopted in Germany with the view of further developing the mediation system in South Africa.

### **1.5 Literature review**

Chief Justice Ngcobo previously stated that the South African justice system is in urgent need of transformation and change.<sup>19</sup> This provides the foundation for this research, as it signifies the opportunity there is for proper alternative forms to traditional court based litigation.

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<sup>17</sup> Brand J, et al *Labour Dispute Resolution* (1997) 19

<sup>18</sup> Ministry of Justice England & Wales *Solving Disputes in the County Courts: Creating a simpler, quicker and more proportionate system* 2012

<sup>19</sup> Ngcobo S CJ *Enhancing Access to Justice: The Search for Better Justice* 2011  
<http://etd.uwc.ac.za/>

Camerer supports the view that the South African judicial system has a number of shortcomings.<sup>20</sup> According to Camerer '[a]ll are plagued by the ills that dog other aspects of the administration of Justice... and as a result efficiency has deteriorated over the past 20 years'.<sup>21</sup> Some of these shortcomings have already been listed earlier. Most notable of these shortcomings are the delays in finalising court cases and the cost involved in litigation. In *Pep Stores (Pty) Ltd v Laka NO & others*<sup>22</sup> it was remarked by the Labour Court that, on average, matters usually take around two years to be finalised before labour courts.<sup>23</sup>

Another problem pointed out by Levine is the manner in which courts approach matters.<sup>24</sup> According to him courts address conflict, but do not encourage the development of a mutually acceptable resolution. This inevitably means that only one person will 'win', which adds a degree of rivalry and competition. This in turn does not only interfere with creating a productive system, but it also leads to various costs. Direct costs in the form of legal fees are incurred.<sup>25</sup> Productivity costs are incurred for the time parties spend to deal with the matter.<sup>26</sup> Continuity costs are also often incurred, which describe a loss of relationships and community ties.<sup>27</sup> Finally, there are emotional costs, which result from the competitive nature of litigation and frequent frustrations that go with it. An ADR approach to dispute resolution however deals with issues on a case by case basis, while strengthening community ties.<sup>28</sup>

Mark Anstey compares different models of conflict resolution, including mediation, and points out how a win-win situation is a possible outcome under these.<sup>29</sup> One of the processes he discusses is *joint problem solving*, which can be used as a basis in understanding how mediation works.

Features within this *joint problem solving* approach include information exchange and clear and

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<sup>20</sup> Camerer S *Reflections on the Delivery of Justice in South Africa over the last 20 years* 2014 The Journal of the Helen Suzman Foundation

<sup>21</sup> Camerer S *Reflections on the Delivery of Justice in South Africa over the last 20 years* 2014 The Journal of the Helen Suzman Foundation

<sup>22</sup> *Pep Stores (Pty) Ltd v Laka NO & others* LC (J011/97)

<sup>23</sup> Ngcukaitobi T, *Sidestepping the Commission for Conciliation, Mediation & Arbitration: Unfair Dismissal Disputes in the High Court* (2004) 25 ILJ 1 1

<sup>24</sup> Levine S *The Many Costs of Conflict* <https://www.mediate.com/articles/levine1.cfm>

<sup>25</sup> Levine S *The Many Costs of Conflict* <https://www.mediate.com/articles/levine1.cfm>

<sup>26</sup> Levine S *The Many Costs of Conflict* <https://www.mediate.com/articles/levine1.cfm>

<sup>27</sup> Levine S *The Many Costs of Conflict* <https://www.mediate.com/articles/levine1.cfm>

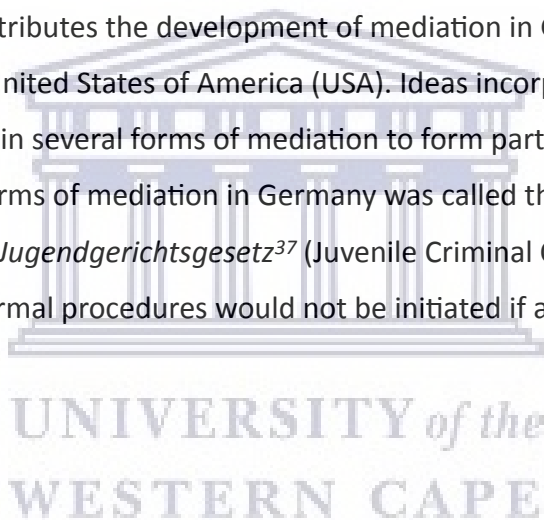
<sup>28</sup> Levine S *The Many Costs of Conflict* <https://www.mediate.com/articles/levine1.cfm>

<sup>29</sup> Anstey M, *Managing Change, Negotiation Conflict* (2006) 3 ed 124-126

accurate communication, which are also crucial features in a proper process of mediation.<sup>30</sup> Boule agrees that mediation has an important role to play in any legal system.<sup>31</sup> Amanda Boniface in turn examines mediation in South Africa within a family law context. To this extent she analyses the *Children's Act 38 of 2005* and the provision of mediation therein. In the matter of *Townsend-Turner and another v Morrow*<sup>32</sup> the court found that the family of a girl has to go through mediation rather than to present any family disputes to the courts.<sup>33</sup>

O'Leary considers family mediation from a more practical standpoint. He emphasises that deadlocks are normal during mediation and highlights ways to deal with such situations.<sup>34</sup> Reminding clients what the process is about and that solutions must be explored, and the fact that the alternative might be worse both in regards to process and outcome, remains important. O'Leary highlights that the mediator's role is not simply being a passive bystander, but to actively seek a solution.<sup>35</sup>

Hoffmann to a large extent attributes the development of mediation in Germany to the development thereof in the United States of America (USA). Ideas incorporated from the USA system of mediation resulted in several forms of mediation to form part of the German legal system. One of the earliest forms of mediation in Germany was called the *Victim-Offender Mediation*.<sup>36</sup> A section of the *Jugendgerichtsgesetz*<sup>37</sup> (Juvenile Criminal Code) was dedicated to this, which prescribed that formal procedures would not be initiated if a young offender attempted to reconcile with the victim.<sup>38</sup>



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<sup>30</sup> Anstey M, *Managing Change, Negotiation Conflict* (2006) 3 ed 173-179

<sup>31</sup> Boule L, et al *Mediation: Principles Process Practice* (1997) 31

<sup>32</sup> *Townsend-Turner and Another v Morrow* (524/2003, 6055/2003) [2003] ZAWCHC 53 (8 October 2003)

<sup>33</sup> *Townsend-Turner and Another v Morrow* (524/2003, 6055/2003) [2003] ZAWCHC 53 (8 October 2003) 13

<sup>34</sup> O'Leary J, *Mediation in Family and Divorce Disputes* (2014) 30/31

<sup>35</sup> O'Leary J, *Mediation in Family and Divorce Disputes* (2014) 30/31

<sup>36</sup> Hoffmann A, *Mediation in Germany and the United States*, (2007) 9 Eur. J.L. Reform 505 218

<sup>37</sup> *Jugendgerichtsgesetz 1953*

<sup>38</sup> Hoffmann A, *Mediation in Germany and the United States*, (2007) 9 Eur. J.L. Reform 505 218  
<http://etd.uwc.ac.za/>

De Vries discusses mediation in Germany within the jurisdiction of the European Union.<sup>39</sup> The European Union provided directions to all member countries that mediation should be incorporated into national civil laws.<sup>40</sup> In Germany it was decided that the different states could pass laws concerning mediation, but that such laws had to be in line with the framework provided by the *German Bill on Mediation* which was adopted in 2012.<sup>41</sup> Fields within which mediation has been implemented in Germany include family law, commercial law and environmental law.

Nadja Alexander discusses how the German legal system interprets the position of the judge. The role of the judges is that of the 'keepers of the keys to justice'.<sup>42</sup> Therefore, judges alone may administer justice on legal matters. Consequently, judges in the German mediation system are part of the process to achieve justice. This means that a judge has the duty encourage the parties to settle before proceeding with a trial. It is also a reflection of how mediation was first perceived by the legal community. However, the positive experiences with the above approach, together with directives issued by the European Union, created more interest in mediation that took place outside of the court room. This has contributed to an increase in training of mediators and presentation of educational courses on mediation, particularly in the private sphere.<sup>43</sup>

## 1.6 Proposed chapter outline

Chapter 1 will serve as introduction to the research. The chapter will set the scene for the discussion to follow in the other chapters. The chapter will consider the aims of the research, as well as the research question to be addressed.

Chapter 2 will serve as a general introduction of ADR as an alternative to traditional court based litigation, and discuss the various forms of ADR most commonly utilised, particularly in South Africa.

Chapter 3 will focus on mediation specifically as a form of ADR. This will include discussing the current use of mediation in South Africa specifically, particularly in the field of labour, commercial and family law.

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<sup>39</sup> de Vries T, *The Legal Regulation of Mediation in Germany*, 2012 Acta Universitatis Lucian Blaga 209 (2012) 2014

<sup>40</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008

<sup>41</sup> de Vries T, *The Legal Regulation of Mediation in Germany*, 2012 Acta Universitatis Lucian Blaga 209 (2012) 2014

<sup>42</sup> Alexander N, *Global Trends in Mediation* (2002) 13 World Arb. & Mediation Rep. 272 47

<sup>43</sup> Alexander N, *Global Trends in Mediation* (2002) 13 World Arb. & Mediation Rep. 272 47

Chapter 4 will address the implementation and use of mediation in Germany. Similar to the South African position discussed in chapter 3, chapter 4 will look at the laws in place and the way in which mediation functions in Germany.

Chapter 5 is a comparison between the German and South African approaches to mediation and how the systems might complement one another. Chapter 5 will also serve as the conclusion to the study.

### **1.7 Research methodology**

The research will be conducted by considering primary sources such as legislation and case law in regard to ADR and more specifically mediation. In addition to the above, the research will be done by reviewing secondary sources, such as academic books and journal articles. Foreign policies and laws will also be considered, specifically in relation to Germany as part of the comparative research. As a whole the research will be conducted in a conceptual manner, analysing the history of mediation, then turning to the present situation in regard to mediation in South Africa.



## Chapter 2: An introduction to alternative dispute resolution

### 2.1 Introduction

Alternative dispute resolution (ADR) encompasses a variety of processes and different approaches to resolve disputes.<sup>44</sup> This chapter will reflect what dispute resolution means and will outline the most important dispute resolution processes, with the exception of mediation, which will be discussed separately in chapters 3 and 4. For the purpose of this chapter, the most important dispute resolution processes are arbitration and negotiation. Besides mediation, they are most commonly used and are distinct enough to enable one to see mediation in the broader context. Less commonly used ADR processes not discussed in this chapter are, amongst others, con-arb, fact-finding and collaborative law.<sup>45</sup>

Litigation is the formal process that takes place before a court of law, and is therefore not part of ADR processes.

As mentioned in chapter 1, litigation in South Africa is perceived as problematic in many aspects. Apart from being time-consuming,<sup>46</sup> litigation often places a financial burden on the parties, with litigation generally accessible to only wealthier parties. Another problem with litigation is that, although judges are experts in law, they are not necessarily experts in very technical issues relating to the economy, medicine or accounting, for example.<sup>47</sup> The adversarial nature of litigation might also put a hold on any conciliatory efforts that could have taken place between the parties to settle the matter on an amicable basis. For those reasons, it is worth exploring ADR mechanisms that serve to enhance the delivery of justice.

### 2.2 Disputes and the resolution thereof

Disputes occur between two or more parties, who can be commercial entities or individuals. While some form of disagreement is normal, not all disagreement equates to a dispute. There is an

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<sup>44</sup> Applebey G *What is Alternative Dispute Resolution* (1991) 15 Holdsworth L. Rev. 20

<sup>45</sup> further reading <https://www.labourguide.co.za/workshop/1075-ccma-practice-and-procedure-manual-7-th-edition-259-pages/file> & Marumoagae MC *Does collaborative divorce have a place in South African divorce law?* (2016) De Jure 41-57 & Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 7

<sup>46</sup> <https://www.lawteacher.net/free-law-essays/contract-law/the-disadvantages-of-litigation-contract-law-essay.php>

<sup>47</sup> <https://www.lawteacher.net/free-law-essays/contract-law/the-disadvantages-of-litigation-contract-law-essay.php>



evolution from conflict to a dispute, which involves various steps.<sup>48</sup>

Conflict arises when there is a divide between the needs and interests of persons.<sup>49</sup> This can be as simple as two personalities having different perceptions. This stands in relation to 'power'. Relationships have certain dynamics, where power between the parties is at play. It is dependent on circumstances and has a changing nature.<sup>50</sup> Often 'power' will cause conflict.

The transformation from conflict to a dispute takes place through three stages.<sup>51</sup> First is the 'naming' stage, which is usually associated with a trigger event ('perceived injurious experience'<sup>52</sup>). The trigger event prompts a party to name the condition or situation that gives rise to a grievance. The second step involves 'blaming' where a specific party is blamed for the grievance. This involves that the party that is blamed should be held to rectify the situation. The last step is that of 'claiming'. This involves the person who feels ill-treated to make a claim with the view to remedy the dispute. On completion of these three steps, there is now a formalised *dispute*, which requires a solution.<sup>53</sup> It should therefore be understood that not every claim or grievance will result in a dispute.

Once a dispute is declared, there are two sides to the dispute: that of the claimant and that of the respondent.<sup>54</sup> Often, the respondent has little interest in reaching a resolution because of the cost and money involved. The claimant has a variety of methods to get the respondent active in the dispute. One such method is for the claimant to use a lawyer to proceed with the dispute. Contested disputes can however continue for lengthy periods.<sup>55</sup>

A dispute can end in one of two ways outside the court system. Either the respondent reaches an agreement with the claimant, or the claimant decides not to pursue the matter.

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<sup>48</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 2

<sup>49</sup> Ware SJ, *Principles of Alternative Dispute Resolution* (2007) 2 ed 12

<sup>50</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 3

<sup>51</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 2

<sup>52</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 3

<sup>53</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 3

<sup>54</sup> Ware SJ, *Principles of Alternative Dispute Resolution* (2007) 2 ed 3

<sup>55</sup> Ware SJ, *Principles of Alternative Dispute Resolution* (2007) 2 ed 2

## 2.3 Negotiation

There are several approaches to negotiation, which have different benefits and guidelines.<sup>56</sup> Even the definition of negotiation itself is not uniform. Generally, however, it can be said that negotiation consists of two or more parties who have a conflict or dispute of interest, and who want to reach an agreement through adjusting their individual positions.<sup>57</sup> Negotiation can be used on its own or in combination with other ADR methods.<sup>58</sup>

### 2.3.1 Approaches to negotiation

One of the approaches to negotiation is called competitive bargaining or negotiation. Competitive negotiation often works in association with dividing assets that are limited, for example, a sum of money.<sup>59</sup> The parties usually take a specific position in the beginning, and then adjust their positions, employing power tactics in order to reach an agreement. This type of negotiation has a win–lose character, and the atmosphere has been criticised for being too adversarial. Although competitive bargaining has been described as ‘too competitive’<sup>60</sup> and the results are often one-sided, it can produce a solution.<sup>61</sup> Furthermore, where parties take positions that are well reasoned and justified – while only using tactics in order to get to an agreement rather than using tactics to attack the opposition – this approach could produce satisfactory results. However, in reality, this often is not the case, and people hold on to their positions at the expense of conducive negotiation.<sup>62</sup> This then leads to the usage of tactics, such as imposing ultimatums, threatening to terminate the negotiation, demanding justifications, avoidance of issues, extreme demands, incorrect summaries and emotional outbursts, all of which create a more competitive bargaining atmosphere and add to it.<sup>63</sup>

Below the Game Theory and the Prisoner’s dilemma will be considered briefly. They give an insight into negotiation strategy and the factors that play a role in negotiations.

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<sup>56</sup> Fiadjoe A *Alternative Dispute Resolution: A Developing World Perspective* (2004) Chapter 1

<sup>57</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed Chapter 3

<sup>58</sup> Siedel G *Negotiation for Success: Essential Strategies and Skills* (2014) Chapter 2

<sup>59</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed Chapter 4

<sup>60</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed Chapter 4

<sup>61</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed Chapter 4

<sup>62</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed Chapter 4

<sup>63</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed Chapter 4

### 2.3.2 Game theory and the prisoner's dilemma

*Game theory*, which was developed by John von Neumann, examines calculated behaviour in people.<sup>64</sup> It uses mathematics and logic in order to explain and predict how people expect other people to behave. Furthermore, it tries to establish in what way people should act in order to arrive at the best outcome possible. Experiments used in developing *game theory* aimed at calculated behaviour in people also included the process of negotiation. Experiments focused on coming up with the best possible outcome for two competing parties, while having regard for costs and benefits.<sup>65</sup> *Game theory* relies on the assumption of interdependence between parties. There are two different types of interdependence, namely sequential interdependence and simultaneous interdependence.<sup>66</sup> Sequential interdependence is comparable to chess: the player makes a move anticipating what the other party might do based on that move. The player tries to think steps ahead and go through a variety of scenarios to determine his or her best decision, based on the information he or she has available. This type of interdependence is similar to competitive bargaining, where the parties try to predict the other party's moves in order to be able to reason back and make tactical concessions.<sup>67</sup>

Different to sequential interdependence, simultaneous interdependence assumes that both parties are acting simultaneously.<sup>68</sup> Here, one party is unaware of what the other party is doing; consequently, they act in ignorance. The best outcome occurs when each party does what serves him or her best. This means that one party should look for a strategy that does not rely on the other party, and which will create a situation where the participants 'win' by themselves, rather than lose. However, that does not necessarily translate into the best possible result as the 'prisoner's dilemma'<sup>69</sup> shows.

Two men stole a car and were arrested. The sentence for the crime was two years in prison. However, the police believed that both people were also involved in another crime, a bank robbery. They wanted to interrogate the prisoners to find out whether they had robbed a bank

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<sup>64</sup> Von Neumann J et al *Theory of Games and Economic Behaviour* (1953) 3 ed Chapter 3

<sup>65</sup> Dixit A et al. *Game Theory* <http://www.econlib.org/library/Enc1/GameTheory.html>

<sup>66</sup> Dixit A et al. *Game Theory* <http://www.econlib.org/library/Enc1/GameTheory.html>

<sup>67</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 40

<sup>68</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 41

<sup>69</sup> Prisoner's Dilemma was created by Merrill Flood and Melvin Dresher, more can be read in Rapoport A et al *Prisoner's Dilemma: A study in Conflict and Cooperation* (1970) 1 ed <http://etd.uwc.ac.za/>

together. In the scenario, if both admitted their guilt, they would serve three years in prison. If only one of the accused confesses to the robbery, he would receive a reduced sentence of one year, while the other accused would serve 10 years.<sup>70</sup> However, if both accused deny the robbery, they will not be convicted of robbery and will end up only serving two years for the theft conviction. Given the aforesaid, the best outcome for the prisoners would be where both deny the bank robbery. Yet, since neither of them knew what the other would confess to, and both faced the risk of a 10-year prison sentence, both confessed to the robbery. This example serves to illustrate that, even when parties make the best decision based on the information available to them, the outcome might not be the best possible outcome. The prisoners, by not being aware of the other person's decision, simply did what was best for them and served a year longer than they might have.<sup>71</sup>

From the above it is clear that shared information can be an important asset. *Game theory* further teaches parties to negotiation that variables should be reduced, as this will increase the position to bargain. Furthermore, trust and credibility enhance a party's ability to bargain as promises will be more believable. Reliability can be strengthened by ongoing relationships, while short-term responsibilities often do the opposite. It should be noted that good feelings and deeds are often reciprocated. *Game theory* can therefore be used as an instrument to analyse negotiation strategies.<sup>72</sup>

### **2.3.3 Less competitive approaches to negotiation**

Criticism of competitive bargaining resulted in the adoption of negotiation techniques attempted at creating a bargaining atmosphere based on cooperation and mutual benefit.<sup>73</sup> Principled bargaining has also been referred to as 'bargaining on the merits' and has been described by Fischer and Ury.<sup>74</sup> According to these authors, position-based negotiation is not effective, and operates at the expense of the relationships between parties. The changing of positions induces 'ego' into negotiations, which has the effect that parties will defend their position to avoid

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<sup>70</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 41

<sup>71</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 41

<sup>72</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 42

<sup>73</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed Chapter 4-5

<sup>74</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed Chapter 5

humiliation. This then leads to a standstill in negotiations.<sup>75</sup> Fischer and Ury's model proposes that:

- the people should be separated from the problem;
- the focus is on the interest and not on the position;
- multiple options are generated; and
- an objective standard is consulted for the solution.<sup>76</sup>

Fischer and Ury further emphasises six different elements that help to facilitate the process of negotiation, namely, communication, understanding, rationality, reliability, persuasion and acceptance.<sup>77</sup>

Principled bargaining follows the strategy to be unconditionally constructive, which is supposed to increase the effectiveness even in the light of disagreements. The other strategic choice is to separate the people from the problems. Personalities and people's backgrounds are often different, which already provides a basis for disagreement. Where different people try to resolve issues, their personalities and differences can get in the way and make it more difficult to determine the actual issues.<sup>78</sup> The people in the dispute must therefore be clearly removed from the issues at hand. The parties must be treated in terms of the six elements mentioned earlier. This is aimed at helping the working relationship between the parties, and making negotiation easier.<sup>79</sup> The problems must be discussed with a focus on the interests of the parties.<sup>80</sup> Fischer and Ury highlights that flexibility is important.<sup>81</sup> The parties should be open and creative in finding viable solutions to the problem and to the benefit of both parties. A tool that can be used is BATNA, which stands for *Best Alternative To a Negotiated Agreement*.<sup>82</sup> BATNA can provide the parties with a standard against which to measure the agreement, so that any one party does not accept anything that is unfavourable to them.<sup>83</sup>

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<sup>75</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed Chapter 4-5

<sup>76</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed pg 195

<sup>77</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed Chapter 4-5

<sup>78</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed Chapter 4-5

<sup>79</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed Chapter 4-5

<sup>80</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed Chapter 5

<sup>81</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed 206

<sup>82</sup> more on BATNA can be read in Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed 208-209

<sup>83</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed Chapter 4-5

Target-specific bargaining is another approach to negotiation.<sup>84</sup> It recognises that negotiation involves people competing but at the same time, while at the same time also emphasising the importance of information and problem solving. It is aimed at avoiding tactical games such as bluffing, and is focused on finding a solution to the problem.<sup>85</sup> A facilitator is involved in the process and helps the parties during the joint problem review and explanation stages to formulate the problems.<sup>86</sup> The problems are then grouped and labelled and expert knowledge can be consulted, so that in the end the data is presentable. Before the actual negotiation starts, the parties will agree on the process, which includes due dates, committees and the role of the facilitator.<sup>87</sup> The negotiation itself is characterised by each of the previously determined issues being dealt with on its own.<sup>88</sup>

### **2.3.4 Factors influencing the success of negotiation**

A number of factors have been identified that have a positive influence on the success of negotiation.<sup>89</sup> Having something in common is usually beneficial for parties. Whether this is a common- or shared/joint goal does not matter - what is important is the fact that the parties are working towards a shared benefit of some sort.<sup>90</sup>

The attitudes of the parties can also contribute to a successful process. Important factors in regard to the aforementioned attitude include: believing that the other party could compete but chooses to cooperate; viewing differences as helpful and productive; recognising the legitimacy of positions; viewing everyone as equal; and believing in a solution and common goals.<sup>91</sup> Trust and firmness are also important factors.<sup>92</sup> These factors allow for an open and conducive negotiation, as one party will be able to express his or her needs and the other party has the opportunity to understand the position properly. This is also relevant to the sharing of information. The more information that is accessible to both parties, the more both parties will be able to emphasise with

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<sup>84</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed 214-216

<sup>85</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed 214-216

<sup>86</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed 214-216

<sup>87</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed 214-216

<sup>88</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed Chapter 4-5

<sup>89</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed 175-178

<sup>90</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed 175

<sup>91</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed Chapter 4

<sup>92</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed 176

each other's position. This also allows the parties to come up with more creative means to resolve the dispute. Communication should be clear and accurate, so that misunderstanding does not occur and ideas and positions can be understood fully.<sup>93</sup>

### **2.3.5 When negotiation is not advisable**

While negotiation has many benefits as highlighted above, negotiation may not always be advisable under all circumstances. One such circumstance would be when there is a notable risk.<sup>94</sup> This is the case when one party would be in danger of losing a substantial amount of his or her assets or livelihood, another resolution procedure should rather be consulted. Furthermore, when a party has no interest in the outcome, he or she should not get involved. Time pressures can also result in skewed results.<sup>95</sup> A person under time pressure will try to get the matter resolved in a timely manner at the expense of a favourable and well-thought-out result.<sup>96</sup> This should therefore be avoided. Moreover, where a party clearly acts in bad faith, negotiation should as the success of any ADR is largely reliant on honesty and trust.<sup>97</sup>

In addition, where postponing an intervention such as negotiation might result in better means of resolving the dispute or furthering the parties' position to negotiate, such advantages should not be ignored.<sup>98</sup> One example would be where one, or all parties, are not yet adequately prepared. Not being properly prepared for negotiations will immediately put a party at a disadvantage.<sup>99</sup> A well prepared party is in a better position to negotiate and make informed decisions and agreements.

### **2.3.6 Negotiation and ethics**

As is evident, negotiations are intricate processes that rely to a large degree on the parties acting

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<sup>93</sup> Anstey M *Managing Change, Negotiation Conflict* (2006) 3 ed Chapter 4

<sup>94</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 12

<sup>95</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 12

<sup>96</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 12

<sup>97</sup> Lewicki R *The nature of negotiation* [https://www.sagepub.com/sites/default/files/upm-binaries/42926\\_1.pdf](https://www.sagepub.com/sites/default/files/upm-binaries/42926_1.pdf)

<sup>98</sup> Goldberg S et al *Dispute Resolution: Negotiation, Mediation and Other Processes* (2012) Chapter 2

<sup>99</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 13

with a degree of goodwill and empathy and the desire to agree on a solution.<sup>100</sup> However, the will to arrive at a solution must not result in a party acting unethically. Ethics are important, as they require a certain standard of the parties' actions. Different types of ethics will be discussed below in as far as negotiations are concerned. This includes ethics as relevant to both the legal and personal sides of negotiations.

Ethics require the parties to act within the boundaries of the law.<sup>101</sup> The law (particularly in South Africa), however does not say much about negotiations. There may be situations therefore where parties do not act with good faith, yet they are operating within the boundaries of existing laws. An example of operating outside the boundaries of the law will be where a party commits fraud.

Fraud is understood as an act of knowingly making a misrepresentation of a material fact or facts.<sup>102</sup> Given this definition of fraud, it has to be analysed what the terms 'knowingly', 'misrepresentation' and 'material fact' mean. 'Knowingly' is sometimes difficult to determine, as people often add, 'I think', which negates accountability.<sup>103</sup> 'Misrepresentation' normally includes non-disclosure of facts or disclosing facts that are not present.<sup>104</sup> A lawyer in a court of law has to disclose all relevant facts, not only the facts that support his or her argument. In negotiation however, a party is not held to the same standard as a lawyer and, unless there is a special relationship, a party does not have to disclose all facts. Whether something can be regarded as a 'material fact' depends on the circumstances. It usually is related to the intrinsic qualities of a product or thing; hence, misrepresenting a car's age is material, while boasting about its speed might not be considered material.

Which approach a party takes to ethics is a personal decision and dependent on what school of thought a party prescribes to. 'The poker school'<sup>105</sup> approaches negotiations as a game. Winning is the incentive, though there are certain rules which must be adhered to. A certain amount of misleading and trying to do better than the other 'player' is allowed, while hiding cards or taking

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<sup>100</sup> Mnookin RH et al *Beyond Winning* (2000) 2 ed 4

<sup>101</sup> Mnookin RH et al *Beyond Winning* (2000) 2 ed

<sup>102</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 42

<sup>103</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 42/43

<sup>104</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 42/43

<sup>105</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 43



back their proposed bets is against the rules.<sup>106</sup>

The 'idealist approach'<sup>107</sup> views negotiation as an extension of the social life. The same rules that underlie social life must therefore be used when negotiating. This means that if a person believes that his or her religious code expects of him or her to be relentlessly honest, the same code is carried over to negotiation.

The 'pragmatic approach'<sup>108</sup> lies somewhere in the middle, as it views deception as part of negotiation, yet not to the degree that misleading statements are acceptable as this might have a negative influence on the relationship between the parties later on.<sup>109</sup> As example, in a situation where one soccer club wants to buy a player from another, the club that follows this approach might state that they are not prepared to sell a certain player, in order to entice the other party to make an offer higher than they usually would. Despite this, lying about material aspects, such as the health of a player, is not accepted.

In reality, it is sometimes difficult to determine which school of thought a party to a negotiation follows. One would need great skill in reading people, and should be able to interpret clues in the correct manner.

### **2.3.7 Negotiation in the shadow of the law with a lawyer as negotiator**

Negotiation is regarded as a way to arrive at a resolution of a dispute that happens outside the court system.<sup>110</sup> Even though a resolution by way of negotiation occurs outside of the court system, it should be noted that the court system has influence on negotiations. Hence, a relationship exists between litigation and negotiation.<sup>111</sup>

There are several views on the relationship, but one recurring view is that negotiation has to be seen in context.<sup>112</sup> A comparison between the process of negotiation and litigation can be used as

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<sup>106</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 42/43

<sup>107</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 43

<sup>108</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 43

<sup>109</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 42/43

<sup>110</sup> Faris J *The Lawyer as a Litigator/Negotiator* (2006) 482

<sup>111</sup> Faris J *The Lawyer as a Litigator/Negotiator* (2006) 482

<sup>112</sup> Hurder AJ *The Lawyer's Dilemma: To Be or Not to Be a Problem-Solving Negotiator* (2007) 14 Clinical L. Rev. 253

an incentive to urge the parties to settle during negotiation. Litigation usually consumes more time, is expensive, and the parties forfeit their right to arrive at a solution themselves. Therefore, a negotiated agreement might appeal to the parties.<sup>113</sup>

Negotiations are influenced by the fact that litigation will follow should the parties be unable to come to an agreement. The *threat* of litigation lingers over the parties and thereby exerts influence. Furthermore, the notion of the 'shadow of the law' is important.<sup>114</sup> This describes the influence of the courts on negotiation. During negotiation lawyers are often representing the parties. This creates a dynamic that contemplates the possibility of a litigated outcome. Precedent enables lawyers to assess a situation and expect a certain outcome should the matter go on to be litigated. This can put a negotiating party in either a favourable or an unfavourable position, and therefore dictates how negotiations are conducted and if they are going to be successful.<sup>115</sup> This is called *relative power* and compares the result of a disagreement to the result of an agreement.<sup>116</sup> However, the downside to this is that the party that can expect a more favourable outcome during litigation has a greater degree of power and leverage. In order to gain this advantage or disadvantage, the law has to be clear as well as the outcome. Where the law is quiet on an issue or where lawyers are unable to rely on precedent, this power play disappears.<sup>117</sup>

Where one party relies on a quick and cost-effective way to settle the manner, and another party does not have to rely on it, it could also create a power imbalance since one party has to compromise more than the other in order to reach a quick resolution. That is why, even when the law is quiet or unclear and lawyers are unable to predict a certain outcome, power imbalances can still arise.<sup>118</sup>

Negotiations between two parties that are conducted through their respective lawyers present various issues that are worth considering.<sup>119</sup> Lawyers, as part of the communications, make negotiations more intricate. The parties communicate not directly but instruct their lawyers, and the lawyers then approach one another and act as agents for their respective parties. The conflict

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<sup>113</sup> Faris J *The Lawyer as a Litigator/Negotiator* (2006) 486

<sup>114</sup> Faris J *The Lawyer as a Litigator/Negotiator* (2006) 482

<sup>115</sup> Faris J *The Lawyer as a Litigator/Negotiator* (2006) 484-486

<sup>116</sup> Faris J *The Lawyer as a Litigator/Negotiator* (2006) 486

<sup>117</sup> Faris J *The Lawyer as a Litigator/Negotiator* (2006) 487

<sup>118</sup> Faris J *The Lawyer as a Litigator/Negotiator* (2006) 487

<sup>119</sup> Faris J *The Lawyer as a Litigator/Negotiator* (2006) 487-489

created by this is called a 'boundary role conflict'.<sup>120</sup> In his or her function as negotiator, the lawyer has to show insight into the matter and his or her willingness to compromise, which includes courtesy and the willingness to come to an agreement. The client, however, expects the lawyer to see to it that his or her expectations are met and that the solution serves him or her. From this it is evident that, from the client's perspective, a resolute and firm lawyer is preferred. The role of the lawyer is complicated by the fact that it is not always clear at which point firmness becomes unwillingness to cooperate or when willingness to cooperate becomes yielding in to the pressure.<sup>121</sup> The lawyer is put in a position that makes it difficult to fulfil what is expected of him or her in both roles.<sup>122</sup>

Communication lies at the heart of negotiations, however, many lawyers tend to discourage their clients from directly speaking with the other party.<sup>123</sup> Such lawyers accept the facts as presented by their clients and make these facts conform to a problem in law. From that point onwards the negotiations are reliant on, and centred around, the lawyer as most clients will not be able to take part in or understand the legal discussions between the lawyers.<sup>124</sup> This also somewhat excludes the possibility of true reconciliation between the parties, which could occur in a discussion between the parties themselves.

Further problems might arise from the motives a lawyer might have in his or her professional capacity in the negotiations.<sup>125</sup> By looking at the facts, a lawyer might discover that his or her client would most probably lose the case if it goes on to be litigated. This might blemish his or her reputation of not losing cases, and as such the lawyer might therefore settle during negotiations, even if it is unfavourable to his or her client. Another decisive factor can be that working through a large number of cases quickly can be financially rewarding. As a consequence, the quality of the negotiated agreement might be compromised.<sup>126</sup>

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<sup>120</sup> Faris J *The Lawyer as a Litigator/Negotiator* (2006) 489

<sup>121</sup> Faris J *The Lawyer as a Litigator/Negotiator* (2006) 490

<sup>122</sup> Faris J *The Lawyer as a Litigator/Negotiator* (2006) 490

<sup>123</sup> Faris J *The Lawyer as a Litigator/Negotiator* (2006) 490

<sup>124</sup> Faris J *The Lawyer as a Litigator/Negotiator* (2006) 490

<sup>125</sup> Hurder AJ *The Lawyer's Dilemma: To Be or Not to Be a Problem-Solving Negotiator* (2007) 14 *Clinical L. Rev.* 253

<sup>126</sup> Faris J *The Lawyer as a Litigator/Negotiator* (2006) 491

## 2.4 Arbitration<sup>127</sup>

Unlike other ADR processes, arbitration is often a 'default process', similar to litigation.<sup>128</sup> This means that the parties do not decide the matter themselves. Similarly to litigation, there is a third, neutral, party who will decide the dispute and whose decision will be legally enforceable. In addition to that, a closer look at arbitration and litigation reveals that they have many similarities.<sup>129</sup> In fact, arbitration's likeness to litigation is one of the process's main characteristics. Voet however listed various reasons why people would choose arbitration over litigation.<sup>130</sup> This involves the fear of astronomical expenses, the pandemonium that goes with it, as well as uncertainty and delays. The reasons might still be similar even though arbitration has changed since the times in which Voet operated.<sup>131</sup>

### 2.4.1 An introduction to arbitration

Arbitration can be defined as –

'[A] process whereby the parties to the dispute enter into a formal agreement that an independent and impartial third party, the arbitrator, chosen directly or indirectly by the parties, will hear both sides of the dispute and make an award which the parties undertake through the agreement to accept as final and binding.'<sup>132</sup>

There are several sources of arbitration in SA. Common law, which stems from the Roman Dutch Law, used to be the authority when it came to arbitration.<sup>133</sup> However, as early as 1889, different Acts started overriding common law. Where legislation is silent common law however still applies.<sup>134</sup> With the advent of the Constitution, the question was raised whether arbitration falls within the provisions of the Bill of Rights, and more specifically section 33, which provides for just administrative actions. The courts held that arbitration does not fall within this category, as

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<sup>127</sup> Arbitration in general is discussed below, and as such not all parts of the discussion might be completely relevant with reference to arbitration conducted under the auspice of the Labour Relations Act 66 of 1995.

<sup>128</sup> Ware SJ *Principles of Alternative Dispute Resolution* (2007) 2ed 10

<sup>129</sup> Ware SJ *Principles of Alternative Dispute Resolution* (2007) 2ed 10

<sup>130</sup> Gane P *The Selective Voet being the Commentary on the Pandects* (1829)

<sup>131</sup> Ramsden P *The Law of Arbitration* (2018) 2 ed 7-8

<sup>132</sup> Ramsden P *The Law of Arbitration* (2018) 2 ed 6

<sup>133</sup> Ramsden P *The Law of Arbitration* (2018) 2 ed 15

<sup>134</sup> Ramsden P *The Law of Arbitration* (2018) 2 ed 15

arbitration is not an administrative action but a judicial one.<sup>135</sup> Nonetheless, fairness remains a precondition for decisions made by way of arbitration.<sup>136</sup>

The only dedicated legislation in South Africa governing arbitration is *the Arbitration Act* of 1965<sup>137</sup> and the *International Arbitration Act*<sup>138</sup> enacted in 2017. The Arbitration Act is only relevant where parties reach an agreement to refer disputes to arbitration. The International Arbitration Act includes arbitration models based on the United Nations Commission on International Trade Law (UNCITRAL). The Act incorporates the UNCITRAL Model Law into the South African legislation. The application of this model relates mostly to international commercial arbitration. The object of this piece of legislation is to unify and to advance a fair and coherent manner of resolving disputes on an international level.<sup>139</sup>

In South Africa specifically, arbitration is often used in disputes that relate to contracts, labour, and insurance law.<sup>140</sup> Arbitration is sometimes described as private adjudication.<sup>141</sup> The term *adjudication* refers to the process of a third party deciding a matter (the dispute is therefore not settled by way of mutual agreement between the parties).<sup>142</sup> While arbitration and litigation at first glance share many similarities, there are still many differences between the processes.

One of the main differences between arbitration and litigation is the fact that an arbitration agreement is at the centre of arbitration. Litigation does not have a similar agreement in order to take place. This means that parties have to come to an agreement about the circumstances in which, and manner within which, arbitration is going to take place. In litigation, a person can start court proceedings unilaterally.<sup>143</sup> Arbitration is a private process,<sup>144</sup> while litigation is a public

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<sup>135</sup> As confirmed in the matters of *Total Support Management (Pty) Ltd and Another Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) and *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A)

<sup>136</sup> *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC)

<sup>137</sup> *The Arbitration Act* 1965

<sup>138</sup> *The International Arbitration Act* 15 of 2017

<sup>139</sup> Ramsden P *The Law of Arbitration* (2018) 2 ed 23

<sup>140</sup> Sharpe CW *Judicial Review of Arbitration Awards under the New South Africa Labour Relations Act of 1995* (2001) 33 Case W. Res. J. Int'l L. 277

<sup>141</sup> Ware SJ, *Principles of Alternative Dispute Resolution* (2007) 2 ed 7

<sup>142</sup> Ware SJ, *Principles of Alternative Dispute Resolution* (2007) 2 ed 6

<sup>143</sup> Ramsden P *The Law of Arbitration* (2018) 2 ed 8

<sup>144</sup> Paulsson J *The Idea of Arbitration* (2013) 30

process. This means that the general public as well as the media has access to court proceedings as a general rule. With arbitration the parties are able to choose the arbitrator, while with court proceedings the parties have no choice as to who will preside over the matter. Court proceedings also have a predetermined venue based on jurisdiction. In arbitration the parties will select a venue and place, with jurisdiction not playing a role. Court proceedings are also governed by the rules of court, which means that there are specified legal processes that must be adhered to. No similar prescribed processes exist in the case of arbitration.

In litigation, the adjudicator is a judge or magistrate of the relevant court before which the dispute is being argued. In arbitration, however, the process is private, which means that it takes place away from government courts.<sup>145</sup> The advantage it holds is that the parties will be able to decide on the process and whether it will be an informal or formal process. This means that where the parties choose an informal process, they will be able to make simple submissions and highlight and extend the role of the arbitrator.<sup>146</sup> Under such circumstances, arbitration is not as formal as court procedures, while still being more formal than other ADR methods, such as negotiation or mediation.

Arbitration is however not without expenses. High-profile arbitrators are generally expensive as they are retired judges or people who have obtained an outstanding reputation in the legal world. Other costs that need to be considered are those associated with legal counsel and the venue where the arbitration is agreed to take place.<sup>147</sup> All of this should be considered when choosing to do arbitration. Even though the process is not in an official court, the repercussions as per arbitration award can be serious and the costs, as demonstrated, can be substantial.

#### **2.4.2 Forms of arbitration**

There are several forms of arbitration. Well-known forms of arbitration include consensual-, statutory-, court-directed- ad hoc-, and institutional arbitration. 'Consensual arbitration' refers to two parties submitting their dispute to arbitration without being forced by legislation or clauses in contracts.<sup>148</sup> 'Statutory arbitration', on the other hand, refers to arbitration where the parties are obligated to go to arbitration by law, as example, in terms of the *Labour Relations Act*<sup>149</sup> (LRA) in

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<sup>145</sup> Ware SJ, *Principles of Alternative Dispute Resolution* (2007) 2 ed 18

<sup>146</sup> Wiese T *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016) 127

<sup>147</sup> Ramsden P *The Law of Arbitration* (2018) 2 ed 6

<sup>148</sup> Ramsden P *The Law of Arbitration* (2018) 2 ed 8-9

<sup>149</sup> *Labour Relations Act* 66 of 1995

certain employment disputes in South Africa. It also happens that a court initially hears a matter and then decides that the matter must be deferred to arbitration. This often occurs in family law matters.<sup>150</sup> This type of arbitration is called 'court-directed arbitration'.<sup>151</sup> 'Ad hoc arbitration' refers to clauses or agreements that oblige the parties to go to arbitration rather than to go to court.<sup>152</sup> 'Institutional arbitration' is similar to ad hoc arbitration, however, the agreement to arbitrate specifies that the arbitration must be conducted through an agreed arbitration institution.<sup>153</sup> While such arbitration institutions are generally more expensive, due to the reputation and credibility of such institutions, the awards of such institutions are well respected.<sup>154</sup>

Apart from the aforesaid forms of arbitration, there are also several less-known forms of arbitration. One such less-known form of arbitration is 'documents-only arbitration'.<sup>155</sup> This form of arbitration is considered where the parties agree that an arbitration based on oral evidence might inconvenience them or is not required, and that documentary evidence, such as affidavits, will suffice. 'Fast-track arbitration' refers to an arbitration where the parties agree on a specific deadline so that the matter comes to conclusion within the parties' realm of what they regard as reasonable.<sup>156</sup> 'Ex parte arbitration' caters for a scenario where only one party attends the arbitration.<sup>157</sup> This is the claimant who regardless of the defendant's attendance has to give evidence for his or her case, while the defendant can submit a defence through a statement.

From the above it is apparent that there is a variety of arbitration processes and, unless statutory arbitration makes a specific process compulsory, it is for the parties to select the form that best suits their needs.

## **2.5 Conclusion**

The chapter served as introduction to ADR overall and proceeded to provide further insight into the processes of negotiation and arbitration as two of the most commonly used forms of ADR. ADR methods are capable of being suited to the parties' needs and of working towards a process that

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<sup>150</sup> Ramsden P *The Law of Arbitration* (2018) 2 ed 9

<sup>151</sup> Ramsden P *The Law of Arbitration* (2018) 2 ed 9

<sup>152</sup> Ramsden P *The Law of Arbitration* (2018) 2 ed 9

<sup>153</sup> Ramsden P *The Law of Arbitration* (2018) 2 ed 9-10

<sup>154</sup> Ramsden P *The Law of Arbitration* (2018) 2 ed 6

<sup>155</sup> Ramsden P *The Law of Arbitration* (2018) 2 ed 11

<sup>156</sup> Ramsden P *The Law of Arbitration* (2018) 2 ed 11

<sup>157</sup> Ramsden P *The Law of Arbitration* (2018) 2 ed 11

caters for the needs of the parties. Flexibility as well as adaptability can play an important role in resolving a dispute in a way that satisfies the circumstances of the dispute. This allows the parties to resolve the dispute in a manner that suits their needs.<sup>158</sup> This does not mean that success is guaranteed. However, it allows for a needs-specific response to the dispute and ultimately the resolution of it.

The following chapter will focus on the process of mediation specifically in the South African context.



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<sup>158</sup> Stipanowich T *Arbitration: The New Litigation* (2010) U. Ill. L. Rev. 1 8  
<http://etd.uwc.ac.za/>



## Chapter 3: Mediation in South Africa

### 3.1 Introduction

Having broadly introduced ADR, notably negotiation and arbitration, processes in chapter 2, this chapter will focus on the ADR process of mediation specifically. The general principles underlying mediation will be explained as well as different concepts relating to mediation. Mediation as utilised in South Africa will be considered, specifically with reference to the fields of labour, company, and family law.

### 3.2 Background to mediation in South Africa

Mediation as an informal and voluntary means of resolving disputes reaches back as far as the beginning of chronology.<sup>159</sup> The term *mediation* is derived from the Latin words *mediatio*, *medius* and *medius fratris et sororis*, which can respectively be translated to mean 'mediation', 'intermediate' (as adjective), and 'being the intermediate between brother and sister' (as noun).<sup>160</sup> From the origin of the word the aim of mediation can be derived as finding a middle ground between parties, as well as denoting the assistance offered by a neutral third party who helps the parties in attempts to reach middle ground in a conflict.<sup>161</sup>

South Africa has a long history of traditional communities implementing corrective procedures to resolve disputes. Of particular importance is the Xhosa and Zulu concept of *ubuntu*. *Ubuntu* conveys that a person is a person through other people'.<sup>162</sup> This highlights the importance of community and values, such as tolerance, empathy, respect, communication and compromise.<sup>163</sup> Disputes in such traditional communities are resolved by application of values inherent to *ubuntu*. Likewise, the Pedi endorses that parties must first attempt to resolve a dispute themselves before involving community chiefs and families.<sup>164</sup> Should this fail, there is a hierarchy of traditional courts that must be turned to, where the chief will try to uphold the harmony of the community by encouraging the parties to resolve the dispute.<sup>165</sup>

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<sup>159</sup> Trenczek T et al *Mediation und Konfliktmanagement Handbuch* (2017) 2 ed 42

<sup>160</sup> Trenczek T et al *Mediation und Konfliktmanagement Handbuch* (2017) 2 ed 42

<sup>161</sup> Trenczek T et al *Mediation und Konfliktmanagement Handbuch* (2017) 2 ed 42

<sup>162</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 1

<sup>163</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 1

<sup>164</sup> Boniface AE *African-Style Mediation and Western-Style Divorce and Family Mediation: Reflections for the South African Context* (2012) 15 Potchefstroom Elec. L.J. 377

<sup>165</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 2

Mediation attained increased attention in South Africa during the 1980s with the formation of the Independent Mediation Service of South Africa (IMSSA) in 1984. IMSSA was formed as an alternative to an inefficient court system.<sup>166</sup> During the time of political transition leading up to the era of democracy in 1994, the National Peace Accord determined that African traditions with regard to dispute resolution should be implemented.<sup>167</sup> The National Peace Accord was created to assist South Africa with the transition into a democratic state by providing for structures aimed at preserving peace.<sup>168</sup>

From the above it becomes clear that mediation has since as far back as the 1980s already received support from the legal community and other stakeholders. Its relevance is ever-increasing, with mediation well provided for in divorce proceedings, family, environmental, and labour law in South Africa.<sup>169</sup>

### 3.3 Understanding mediation

Before turning to the position in South Africa specifically, the discussion below will first provide a brief introduction to, and general overview of, mediation as a form of ADR.

#### 3.3.1 Introduction to mediation

Mediation could be formulated as expressing that a conflict is the property of the parties and that they are generally able to resolve the dispute amongst themselves.<sup>170</sup> This strengthens the autonomy and dignity of parties as encapsulated in the Constitution.<sup>171</sup> The parties involved in mediation control the process and the conclusion to their conflict. Therefore, it can be said that mediation supports the notions of both autonomy and dignity, as it empowers parties to resolve a conflict effectively.<sup>172</sup>

Encapsulating a precise definition of mediation has however been difficult.<sup>173</sup> Mediation as a

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<sup>166</sup> Nupen C *ADR in South Africa: A Great Tool for a Rapidly Changing Society*, (1998) 4 Disp. Resol. Mag. 11

<sup>167</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 3

<sup>168</sup> <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv03275/05lv03294/06lv03321.htm>

<sup>169</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 3

<sup>170</sup> Trenzcek T et al *Mediation und Konfliktmanagement Handbuch* (2017) 2 ed 44

<sup>171</sup> *The Constitution of the Republic of South Africa* (1996)

<sup>172</sup> Trenzcek T et al *Mediation und Konfliktmanagement Handbuch* (2017) 2 ed 44

<sup>173</sup> Rabe C et al *Mediation: Grundlagen, Methoden, rechtlicher Rahmen* (2014) Chapter 1.2.8  
<http://etd.uwc.ac.za/>

process in itself can vary vastly, largely due to the different purposes of mediation and the circumstances in which people wish to implement it.<sup>174</sup> While one definition of mediation might be suited to a specific instance, it could at the same time be deemed irrelevant or faulty in a different situation. Consequently, the flexibility of mediation processes makes it difficult to define the term in exact words. Mediators themselves also have different understandings of mediation and the motives and context of mediation differ. Various theoretical approaches to mediation exist, but none has been accepted to the degree that it provides for a clear definition.<sup>175</sup> In South Africa, definitions of mediation are essentially working definitions - the result of experience and the contextual use of mediation, rather than being founded on a single, universally accepted, definition.<sup>176</sup>

There are two approaches of significant relevance, which dictate how mediation should be defined,<sup>177</sup> that is, the *conceptualist approach* and the *descriptive approach*. The conceptualist approach focuses on the ideals of a process, so as to characterise the process by its ideal values, principles and objectives.<sup>178</sup> Definitions based on this approach have however been criticised or invalidated for not being an accurate reflection of the process. For instance, while a definition of mediation, which specifies the 'improvement of relationships'<sup>179</sup>, might apply to some instances of mediation, this is not the case with all mediations, particularly where protecting relationships is not the goal of the parties who control the process.<sup>180</sup> This research supports the view that the conceptualist approach, in focusing on ideals, hinders an accurate definition of mediation since, deviation from ideals is often considered the norm rather than the exception.

An approach that looks at the practice of a process, rather than ideals, is the descriptive approach.<sup>181</sup> The descriptive approach focuses on the reality, mostly disregarding norms and rules, as it recognises that a flexible process, such as mediation, will inevitably lead to inaccuracy or

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<sup>174</sup> Baruch Bush RA et al *The Promise of Mediation* (2005)

<sup>175</sup> Boulle L et al *Mediation: Principles Process Practice* (1997) 3

<sup>176</sup> Boulle L et al *Mediation: Principles Process Practice* (1997) 3

<sup>177</sup> Boulle L et al *Mediation: Principles Process Practice* (1997) 5

<sup>178</sup> Boulle L et al *Mediation: Principles Process Practice* (1997) 5

<sup>179</sup> Boulle L et al *Mediation: Principles Process Practice* (1997) 5

<sup>180</sup> Boulle L et al *Mediation: Principles Process Practice* (1997) 5

<sup>181</sup> Boulle L et al *Mediation: Principles Process Practice* (1997) 5

values that go unnoticed.<sup>182</sup> The descriptive approach is however also not without shortcomings. One such shortcoming is that definitions stemming from the descriptive approach are often very short and not overly helpful or descriptive.<sup>183</sup>

Although mediation is already utilised in the South African ADR landscape in the absence of an accepted, clear, definition, there are compelling reasons for attempting to find an official definition. Should government decide to provide funding for mediation it will be important to know when parties (the *who* question) will qualify for what type of mediation intervention (the *what* question). A single accepted definition will also offer increased security and certainty to people using mediation. A definition should also not only set out what mediation is and what it does, but also what it should not do, so that people or interest groups can be prevented from using mediation for own benefit at the expense of someone else.<sup>184</sup>

Notwithstanding the fact that no official definition of mediation exists, there are some core, secondary, and variable features that have been identified as underlying most mediation processes. *Core features* provide that mediation is a 'decision-making process, in which parties are assisted by a third-party, the mediator, who attempts to improve the process of decision making, and to assist the parties reach an outcome to which each of them can assent'.<sup>185</sup> It should however be noted that mediation remains a dispute resolution process and that not all disputes will ultimately be resolved. As the parties involved in mediation are actively working towards a decision, Boule aptly argues that mediation is thus more accurately to be referred to as a *decision-making* process.<sup>186</sup>

*Secondary features* relate to the values and motives that underlie mediation.<sup>187</sup> These are more idealistic than core features and will not necessarily be present in every instance of mediation. However, the nature of mediation and the theoretical basis for it recognise that these features as desirable. Mediation ideally brings clarity in order for the dispute resolution process to be streamlined and to make it possible to decide on those issues that are most important.<sup>188</sup>

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<sup>182</sup> Boule L et al *Mediation: Principles Process Practice* (1997) 5

<sup>183</sup> Boule L et al *Mediation: Principles Process Practice* (1997) 5

<sup>184</sup> Boule L et al *Mediation: Principles Process Practice* (1997) 6–7

<sup>185</sup> Boule L et al *Mediation: Principles Process Practice* (1997) 7–8

<sup>186</sup> Boule L et al *Mediation: Principles Process Practice* (1997) 8

<sup>187</sup> Boule L et al *Mediation: Principles Process Practice* (1997) 8–9

<sup>188</sup> Boule L et al *Mediation: Principles Process Practice* (1997) 8–9

Mediation should also enhance the communication between parties and identity needs and interests.<sup>189</sup> The process should take the party concerns and apprehensions regarding the issues into account and work on the premise of improving the relationship, rather than hampering it. Mediation should also support and assist the parties to take a stand and make a decision themselves. In order to achieve this, a secondary feature means that the process ideally equips the parties with techniques to do so and to turn their focus to finding an acceptable solution.<sup>190</sup>

*Variable features* are features that largely relate to the parties themselves and, different from core and secondary features, cannot be regarded as an intrinsic part of mediation.<sup>191</sup> Variable features include reliance on the law in making a decision, the choice of the mediator, and the standing of the mediated outcome.<sup>192</sup>

### 3.3.2 Key (core) features of mediation

Even though mediation is organised to some extent, it largely remains a fairly flexible and informal process as the parties are able to decide on issues, such as who will be allowed to attend, which issues will be discussed, and where the process will take place.<sup>193</sup> Certain features are however so significant to any mediation process that they may be classified as key, or core, features of mediation. While such features are not rigid, they are ideally to be regarded as guidelines to be followed as far as possible.<sup>194</sup> These features may be changed and adjusted by the participating parties so that the mediation best suits their needs. This adjustability serves the purpose of making mediations more accessible for the parties and less intimidating.<sup>195</sup>

The first of such core features of mediation is that the participation of all parties is essential.<sup>196</sup> Parties can express themselves to one another and to the mediator, while retaining the right to bargain and negotiate. In addition, parties own the right to make a decision.<sup>197</sup> This means that the

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<sup>189</sup> Boulle L et al *Mediation: Principles Process Practice* (1997) 8-9

<sup>190</sup> Boulle L et al *Mediation: Principles Process Practice* (1997) 8-10

<sup>191</sup> Boulle L et al *Mediation: Principles Process Practice* (1997) 9-10

<sup>192</sup> Boulle L et al *Mediation: Principles Process Practice* (1997) 9

<sup>193</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 24

<sup>194</sup> Ade J et al *Mediation und Recht* (2017) 19

<sup>195</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 24

<sup>196</sup> Hösl G *Mediation die erfolgreiche Konfliktlösung: Grundlagen und praktische Anwendung* (2006) 3 ed location 592

<sup>197</sup> Beer EJ *The Mediator's Handbook* (2012) 4 ed

decision remains in the hands of the parties. This conforms to the idea that parties must take responsibility for their choices as well as their dignity and autonomy. Participation is said to create outcomes that are better received by the parties, because they have a sense of being responsible for the outcome. In reality, however, participation of the parties is not always as expected.<sup>198</sup> This can be the result of various variable factors, such as ignorance or advice from lawyers. Generally, it is desirable for the lawyers to encourage active participation.<sup>199</sup>

Secondly, in mediation any settlement should be based on voluntary agreement.<sup>200</sup> In reaching such an agreement, legal rules and norms can be consulted; however, if the parties decide not to consider the rules of law, that remains within their discretion.<sup>201</sup> During mediation parties are also able to consider and examine each other's points of view, so decisions in mediation have the potential to be finely tuned to the parties' interests.<sup>202</sup>

Thirdly, mediation is person-centered.<sup>203</sup> This is different from litigation which is centred around an act for which someone can be blamed and be held accountable for. Mediation does not have the tools to ascertain what has happened; therefore, the parties are not encouraged to convince the mediator of certain facts. Mediation rather concerns itself with the people and their current situation as regards to their current needs and interests. Hence, the settlement should reflect an improvement of the interests and needs of the parties.<sup>204</sup>

Fourthly, and in addition to the above, mediation is also relational.<sup>205</sup> This means that there is a human dimension to it. Ideally, mediation is aimed at improving the relationship between the parties. Methods utilised during mediation should include taking into consideration the emotions of the parties and acknowledging them; creating awareness of each party's needs; implementing constructive negotiation; and humanising the management of conflict.<sup>206</sup> Such a relational

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<sup>198</sup> Boulle L et al *Mediation: Principles Process Practice* (1997) 35

<sup>199</sup> Boulle L et al *Mediation: Principles Process Practice* (1997) 35

<sup>200</sup> Nolan K *Mediation* (2013) 39 Litig. 59

<sup>201</sup> Rabe C et al *Mediation: Grundlagen, Methoden, rechtlicher Rahmen* (2014) Chapter 2.4

<sup>202</sup> Rabe C et al *Mediation: Grundlagen, Methoden, rechtlicher Rahmen* (2014) Chapter 2.4

<sup>203</sup> Rabe C et al *Mediation: Grundlagen, Methoden, rechtlicher Rahmen* (2014) Chapter 2.6

<sup>204</sup> Baruch Bush RA et al *The Promise of Mediation* (2005) Chapter 1

<sup>205</sup> Boulle L et al *Mediation: Principles Process Practice* (1997) 34–39

<sup>206</sup> Boulle L et al *A Mediation: Principles Process Practice* (1997) 37

approach also indicates that mediation has a future focus.<sup>207</sup> This allows for some creative freedom with regard to the settlement, e.g. testing an option for a while and then only deciding later whether this option is feasible. The parties then have the choice to verify the agreement, make amendments or create a completely new agreement.<sup>208</sup>

Fifthly, and finally, mediation is private and confidential.<sup>209</sup> Unlike an open court system, discussions during mediation are not entered into public record, and mediation proceedings are not open for the public to attend, unless the parties agree otherwise. Mediation is also done on a 'without prejudice' basis, which means that the parties may not use information obtained during mediation in a court of law.<sup>210</sup> However, confidentiality is not a defining feature of mediation as the legislature may set limits to when it is appropriate.<sup>211</sup>

### 3.3.3 Approaches to mediation

There are generally three approaches to mediation that are most commonly used, namely, transformative, facilitative, and evaluative mediation.<sup>212</sup> Even though there are slight differences between the three, it does not mean that a mediation cannot utilise more than one approach. This is also in line with the feature of mediation being a flexible process.

*Transformative mediation* is aimed at helping parties transforming their relationship.<sup>213</sup> The focus in such a process is on the parties and their needs, as opposed to the actual dispute. The aim is for the parties to engage with one another and to express themselves with the assistance of a mediator. In South Africa, transformative mediation is most commonly used in settings that involve family members, communities, work relationships and workplace mediation.<sup>214</sup>

*Facilitative mediation* is focused on finding a process that best suits the respective parties and their circumstances in order to achieve a settlement.<sup>215</sup> The mediator will choose the place and process; however, he or she does not actively involve him- or herself in the process. The mediator

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<sup>207</sup> Rabe C et al *Mediation: Grundlagen, Methoden, rechtlicher Rahmen* (2014) Chapter 2.4

<sup>208</sup> Boule L et al *Mediation: Principles Process Practice* (1997) 34–39

<sup>209</sup> Marnewick C *Mediation Practice in the Magistrates' Courts* (2015) 14–16

<sup>210</sup> Marnewick C *Mediation Practice in the Magistrates' Courts* (2015) 14–16

<sup>211</sup> Boule L et al *Mediation: Principles Process Practice* (1997) 39

<sup>212</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 21-24

<sup>213</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 21-24

<sup>214</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 21-24

<sup>215</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 21-24

merely sets the ground rules, but limits his or her role to that of a facilitator.<sup>216</sup>

*Evaluative mediation* sees the mediator taking an active role in the process.<sup>217</sup> The mediator is usually an expert in the field of law within which the mediation is conducted. Such expertise places the mediator in a position to comment and guide on the issues. Being an expert, the mediator will provide recommendations and guidance, as well as an indication regarding the positions of the parties. His or her expertise enables the mediator to evaluate arguments and point out weaknesses and strengths. All of this assists the parties in reaching an agreement. This type of mediation is often found in the building and construction professions.<sup>218</sup>

### 3.4 Mediation in South Africa

In South Africa, mediation can be either statutory or voluntary. *Statutory mediation* refers to mediation that is required by law and regulated by statute. *Voluntary mediation* in turn, as the name suggests, happens on the parties' own accord.<sup>219</sup> The parties are not compelled by law to mediate, and the process itself is completely within the hands of the parties.

#### 3.4.1 Voluntary mediation

Voluntary mediation is dependent on the parties and their respective choices. The process itself, the appointed mediator and the surrounding circumstances can be freely selected by the parties.<sup>220</sup> This however also means that since no party is compelled to mediate, they can abandon the mediation process at any stage.

The decision to mediate is an important one, and the parties should be aware of not only the benefits of mediation, but also of the different attitudes and approaches towards solving disputes. It should be understood that mediation is a strategic process of working together, as opposed to the win–lose outcome of litigation.

After it has been decided that mediation is going to take place, the first step in the voluntary mediation process is the preparation phase.<sup>221</sup> This phase usually involves steps to set the tone of

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<sup>216</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 21-24

<sup>217</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 21-24

<sup>218</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 21-24

<sup>219</sup> Zylstra A *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled* (2001) 917 J. Am. Acad. Matrimonial Law. 69

<sup>220</sup> Wiese T *Alternative Dispute Resolution in South Africa* (2016) 67

<sup>221</sup> Beer EJ *The Mediator's Handbook* (2012) 4 ed



the mediation and decisions regarding the form it is going to take.<sup>222</sup> Ideally, this step should increase the chances of reaching an agreement.<sup>223</sup> Included in this stage is that the parties have to appoint a mediator. In voluntary mediation the parties are free to choose a mediator; however, it is recommended that they take into consideration the experience and qualification of the mediator. In addition to appointing a mediator, the parties can conclude a mediation agreement in writing. While such mediation agreement is not a requirement, it might prove beneficial as it lays out the ground rules relating to the mediation, and the parties can refer to it at a later stage. Mediation agreements can set out time frames, make provisions regarding the degree of confidentiality, regulate the powers of the mediator, set out the date(s) and time(s) for the mediation process, the venue where the process will take place, as well as the duties of the parties.<sup>224</sup> The agreement might also make reference to information exchange, which means that it regulates that certain documents must be shared by the respective parties as means of encouraging open discussion. Where parties are unwilling to disclose information, an option would be to disclose information to the mediator directly. Preparation could also involve preliminary meetings, which are largely focused on the mediation agreement and information exchange. If the parties cannot agree on a mediation agreement or choose not to make use of it, then organisational matters should be agreed upon with the help of the mediator.<sup>225</sup>

Because of the benefits that mediation presents, it might be tempting to suggest that mediation should be used for every sort of dispute. Such a view has however been held to be too facile.<sup>226</sup> Where voluntary mediation is suggested by only one of the parties, it would be prudent for legal counsel to advise the other party whether to agree to mediation based on the client's best interest.<sup>227</sup> Although there might be a clash of interest between the lawyer and the client in terms of legal fees (early settlement during litigation is generally associated with lower legal fees in comparison to prolonged litigation), a lawyer has a professional duty to act in the best interest of the client.<sup>228</sup> It is therefore advisable for the parties to analyse circumstances and to decide

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<sup>222</sup> Beer EJ *The Mediator's Handbook* (2012) 4 ed

<sup>223</sup> Wiese T *Alternative Dispute Resolution in South Africa* (2016) 68

<sup>224</sup> Wiese T *Alternative Dispute Resolution in South Africa* (2016) 68

<sup>225</sup> Wiese T *Alternative Dispute Resolution in South Africa* (2016) 70

<sup>226</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 24

<sup>227</sup> see: *Van den Berg v Le Roux* ([2003] ALL SA 599 (NC)) or *Brownlee v Brownlee*: 2008/25274

<sup>228</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 56

whether the dispute is suitable and ripe for mediation.<sup>229</sup>

Whether a dispute is *suitable* for mediation is dependent on the surrounding circumstances. Most disputes have the potential to be resolved by agreement between the parties, although certain disputes remain better suited for mediation than others. When a dispute concerns a relationship, the continuation of which is important, parties ideally want to stay in control of the outcome.<sup>230</sup> In addition, when both parties have a good reason for the dispute, meaning that no party is inherently wrong and the dispute is largely due to miscommunication, while there is no power difference, then the matter is likely to be suitable for mediation. Other factors that could influence on the suitability of the matter for mediation are matters where a quick resolution is favoured, , where complex issues are involved, and where case law has set a precedent which parties would like to avoid.<sup>231</sup>

*Ripeness* refers to the best time for a dispute to be resolved by mediation.<sup>232</sup> In voluntary mediation parties are able to decide themselves when to mediate. Mediation can generally commence either before or after formal court proceedings have been instituted.<sup>233</sup> It is however favourable to commence the process before the commencement of legal proceedings as that would result in lower costs. On the other hand, it can be argued that mediation benefits from some sort of previous adversarial conflict. This allows for parties to rid themselves of hard feelings that have accumulated over time. Such an approach might however be counterproductive where it reinforces the hard feelings between the parties and increases emotions. In addition, at this stage, parties might be more aware of the consequences related to litigation as opposed to mediation, which could prompt them to be more agreeable.<sup>234</sup> A risk associated with proposing mediation too early could be that the other party might see it as a sign of weakness and that the proposing party expects to lose in court. This can then have a negative influence on mediation, as the other party might have high expectations for an agreed settlement.<sup>235</sup> Therefore, in order to determine whether the time is ripe, one needs to take various factors into consideration.

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<sup>229</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 56

<sup>230</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 57

<sup>231</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 57

<sup>232</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 59

<sup>233</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 59

<sup>234</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 60

<sup>235</sup> Brand J et al *Commercial Mediation A User's Guide* (2016) 2 ed 60/61

### 3.4.2 Statutory mediation

There are currently around 50 Acts of Parliament that refer to mediation in South Africa.<sup>236</sup> *Mandatory (or statutory) mediation* requires parties to go through mediation first before they can approach a court. Should no agreement come from this, then there is nothing preventing the parties from going to have their dispute resolved in court.<sup>237</sup>

What will be discussed below is statutory mediation as provided for in South African labour law, family law and company law, three areas of law in which mediation is most commonly encountered in South Africa.

#### 3.4.2.1 The Labour Relations Act 66 of 1995 (LRA) and the Commission for Conciliation Mediation and Arbitration (CCMA)

Mediation is regarded as a form of conciliation under the LRA. In particular, section 135(3) prescribes mediation as one of three ways in which a conciliator may decide to deal with a matter that has been referred for conciliation.<sup>238</sup> As such, mediation as a form of conciliation conducted under the auspices of section 135(3) is discussed below.<sup>239</sup> Statutory mediation has the advantage of compelling parties to engage in mediation, with the result that parties might be more committed to finding a solution.

The CCMA was created through the LRA as a result of the shortcomings experienced with the former industrial courts.<sup>240</sup> While the former industrial courts were originally intended to be easily accessible and to resolve disputes at a fast pace and at low cost, those objectives were not met.<sup>241</sup> The legislature attempted to address such issues by providing for the creation of the CCMA under the auspices of the LRA. Consequently, the CCMA is a creature of statute and may only operate under prescribed conditions.<sup>242</sup>

Statutory conciliation is regulated by the CCMA only where so provided for in the LRA. Issues that

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<sup>236</sup> Wiese T *Alternative Dispute Resolution in South Africa* (2016) 88

<sup>237</sup> Brand J *Commercial Mediation A User's Guide* (2016) 2ed 47

<sup>238</sup> *Labour Relations Act* 66 of 1995 section 135(3)

<sup>239</sup> Wiese T *Alternative Dispute Resolution in South Africa* (2016) 107

<sup>240</sup> *South Africa* 22 Ann. Hum. Rts. Rep. Submitted to Cong. by U.S. Dep't St. 316 (1997) 326

<sup>241</sup> Bosch C, 'Abantu Badidekele – *When must an applicant prove that he is an employee?*', (2010) 31 ILJ 809 810

<sup>242</sup> Bosch C, 'Abantu Badidekele – *When must an applicant prove that he is an employee?*', (2010) 31 ILJ 809 809

fall under the jurisdiction of the CCMA for purposes of conciliation are, amongst others, the disclosure of information; issues relating to the interpretation of application of a collective agreement if agreed and the procedure fails; enforcement of a council's collective agreement; dismissal in the context of a closed shop agreement; unfair dismissal; and unfair labour practices in relation to probation.<sup>243</sup>

For a matter to be conciliated before the CCMA, the dispute must be one in the realm of labour law as provided for in the LRA. As the CCMA is a creature of statute, the jurisdiction of the CCMA flows from the fact that a matter is one involving an employment relationship. This bears the notion that a conciliator must first establish whether the matter to be conciliated falls within the jurisdiction of the CCMA. This has to be done early on in the process.<sup>244</sup>

The aim of conciliation is for the parties to settle their dispute by reaching a mutually acceptable agreement through the assistance of the conciliator. The conciliator however does not have any power to force the parties to settle a matter. At the end of a conciliation process in which no settlement was reached, a certificate of outcome will be awarded, which shows the exact issue that was discussed and that the attempt to settle was meaningful.<sup>245</sup>

Different to private mediation, the parties do not agree on a mediator and date, as the CCMA provides for those issues. An advantage however is that the costs are usually covered by the CCMA. Despite the fact that the goal is simplicity and effectiveness, the fact that the conciliator has to make a finding on the employment relationship, could however become problematic.<sup>246</sup> It may render the process more formal than normally associated with mediation.

#### **3.4.2.2 Companies Act 71 of 2008**

Statutory mediation is also provided for in the *Companies Act*.<sup>247</sup> That the *Companies Act* provides for mediation and can be linked to a finding in the 'Guidelines for Corporate Law Reform',<sup>248</sup> which recognises that the foregoing rules regulating corporate rights were intricate.<sup>249</sup> In order to remedy

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<sup>243</sup> *Labour Relations Act* 66 of 1995 section 133(1), 9, 21, 24, 69, 86

<sup>244</sup> Bosch C, 'Abantu Badidekele – When must an applicant prove that he is an employee?', (2010) 31 ILJ 809 813

<sup>245</sup> Bosch C *The Conciliation and Arbitration Handbook* (2004) 70 – 80 Chapter 7

<sup>246</sup> Bosch C, 'Abantu Badidekele – When must an applicant prove that he is an employee?', (2010) 31 ILJ 809 813

<sup>247</sup> *Companies Act* 71 of 2008

<sup>248</sup> <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/bills/040715companydraftpolicy.pdf>

<sup>249</sup> Wiese T *Alternative Dispute Resolution in South Africa* (2016) 95

the status quo, it was suggested that a less formalistic approach should be taken, in order to allow parties a more readily available manner to find recourse. In addition, the Institute of Directors in Southern Africa (IoDSA) included paragraph 81 in the 'Code on Corporate Governance'<sup>250</sup>. It states that it is essential for directors and executives that disputes be resolved in a manner that is effective, expeditious and efficient.<sup>251</sup> The needs, interests and rights of employees must be taken into consideration, and a dispute resolution system should not work in a manner that exhausts the finances of the company. Paragraph 84 of the Code provides insight on how this can be implemented, and explains that referral to a court or to arbitration may not be the best manner concerning the above-mentioned factors. The paragraph highlights the importance of mediation, and that it has the ability to enhance the relationship.<sup>252</sup> *The Companies Act*,<sup>253</sup> which came into effect in 2008, took this into consideration and allows for disputes to be resolved through ADR.<sup>254</sup> The Act also specifies in section 15(6) that the Memorandum of Incorporation (MOI) is binding on the parties. Therefore, the MOI could be used as the basis for using mediation in commercial disputes. As long as the MOI prescribes that mediation must be used before any other means of dissolving the dispute, this will be enforceable.<sup>255</sup>

Furthermore, section 156 of the *Companies Act* provides that corporate disputes can be resolved through dispute resolution as an alternative to going to the Companies Commission or the court.<sup>256</sup> According to the Act, a party to a dispute could approach the Companies Tribunal, an accredited entity or any other person.<sup>257</sup> The parties are then required to mediate; however, there is no provision in the Act which requires the parties to take part in the mediation in good faith.<sup>258</sup> When the mediator does not see any merit in the mediation or comes to the conclusion that one of the parties is not taking part in good faith, a certificate has to be issued by him or her stating

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<sup>250</sup> [www.iodsa.co.za](http://www.iodsa.co.za)

<sup>251</sup> Brand et al *Commercial Mediation A User's Guide* (2016) 2ed 7

<sup>252</sup> Brand et al *Commercial Mediation A User's Guide* (2016) 2ed 7

<sup>253</sup> *Companies Act* 71 of 2008

<sup>254</sup> Wiese T *The use of alternative dispute resolution methods in corporate disputes: The provisions of the Companies Act 2008* (2014) SAMLJ

<sup>255</sup> Wiese T *Alternative Dispute Resolution in South Africa* (2016) 98

<sup>256</sup> Wiese T *Alternative Dispute Resolution in South Africa* (2016) 95

<sup>257</sup> Wiese T *Alternative Dispute Resolution in South Africa* (2016) 95

<sup>258</sup> *Companies Act* 71 of 2008 section 166(1)

that the mediation did not resolve the dispute.<sup>259</sup>

The wording in the *Companies Act* speaks of mediation as an alternative to court proceedings. This suggests that, where the mediation was unsuccessful, the parties are barred from approaching the Tribunal or the courts.<sup>260</sup> However, this is unlikely to have been the intention of the lawmaker, as it would mean that non-cooperation would result in a situation where the matter remains unresolved, which could even be the result of bad faith or non-engagement in the mediation process.<sup>261</sup> A more likely interpretation would be one that is similar to the approach of the LRA. Parties could mediate prior to going to the courts, but where the mediation is not successful, the parties can go to the courts.<sup>262</sup> Despite that, the *Companies Amendment Bill* of 2018 states that where the mediation process has been unsuccessful, one of the parties could refer the matter to arbitration, where it will be resolved by way of a final and binding finding of the arbitrator.<sup>263</sup>

### 3.4.2.3 Family mediation

Mediation in family law has become increasingly relevant in South Africa since the 1990s.<sup>264</sup> There have been a number of decisions by the courts which are worth taking note of. In *Townsend-Turner v Morrow*,<sup>265</sup> the court was approached to grant an order for the right of access. The application was made by the grandmother and her husband regarding their grandchild. The child's mother – who was the grandmother's daughter – died of cancer, which resulted in the child growing up with the father. The presiding officer ruled that the application should be dismissed and ordered the parties to attend mediation. He justified this decision by mentioning that mediation would assist the parties in dealing with future conflicts and to handle it in a manner that does not jeopardise the best interest of the child.<sup>266</sup>

The *Townsend-Turner* matter was decided prior to the commencement of the *Children's Act*.<sup>267</sup> The

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<sup>259</sup> *Companies Act* 71 of 2008 section 166(2)

<sup>260</sup> Wiese T *Alternative Dispute Resolution in South Africa* (2016) 95-96

<sup>261</sup> Wiese T *Alternative Dispute Resolution in South Africa* (2016) 95

<sup>262</sup> Wiese T *Alternative Dispute Resolution in South Africa* (2016) 98

<sup>263</sup> *Companies Amendment Bill 2018*

<sup>264</sup> MacNab DS Mowatt JG *Family Mediation – South Africa's Awakening Interest* (1987) 20 De Jure 41

<sup>265</sup> *Townsend-Turner and Another v Morrow* (524/2003, 6055/2003) (2003) ZAWCHC 53

<sup>266</sup> *Townsend-Turner and Another v Morrow* (524/2003, 6055/2003) (2003) ZAWCHC 53

<sup>267</sup> *Children's Act* 38 of 2005

*Children's Act* (section 7(1)) now provides that a Children's Court can refer a matter to mediation where the circumstances allow for it. The matter can also be directed to mediation where the issue in question is whether an unmarried biological father has fulfilled the requirements in terms of s 21(1) of the Act.<sup>268</sup> In terms of the Act, the mediator has to be a suitably qualified person, a social service professional, or a family advocate.<sup>269</sup> The Act further stipulates that co-holders of parental responsibilities and rights first have to try to agree on a parenting plan before proceeding to court. In attempting to agree on a parenting plan, the parties have to go to mediation.<sup>270</sup> This does not mean that they have to complete the mediation successfully; however, the Act emphasises that an attempt has to be made.<sup>271</sup> A court also has the power to do a pre-hearing, where they attempt to mediate between the parties.

After the commencement of the *Children's Act*, there have been numerous decisions by the courts that refer to mediation. In *Brownlee v Brownlee*,<sup>272</sup> the Johannesburg High Court imposed the costs of litigation on the parties' lawyers, as they had failed to advise the parties to mediate. In *MB v NB*,<sup>273</sup> the presiding officer commented that the money spent by the disputing parties on attorney fees could have been put to better use, indicating that it could have contributed towards the education of the children in question. The presiding officer stated:

'I asked her whether the resolution of the case through mediation had been mooted by her legal advisers. She said it had not, but she went on to explain that she thought mediation would have served no purpose. Though this was her response to a question put by me, it is ultimately a matter on which, not being an expert, she can entertain no informed belief.'<sup>274</sup>

The presiding officer ruled that he believed that the legal counsel failed to make the clients aware

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<sup>268</sup> The requirements for the father to acquire full parental responsibilities and rights in respect of the child are that: I) that the unmarried father lived with the mother at the time of the child's birth or that he II) consents to being identified as such III) contributes or has attempted in good faith to contribute to child's upbringing for reasonable period III) contributes or has attempted in faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period

<sup>269</sup> Boniface A *Family Mediation in South Africa: Developments and Recommendations* (2015) 78 THRHR 397

<sup>270</sup> *Children's Act* 38 of 2005 S32(2)

<sup>271</sup> Boniface A *Family Mediation in South Africa: Developments and Recommendations* (2015) 78 THRHR 397

<sup>272</sup> *Brownlee v Brownlee* (2008) 25274

<sup>273</sup> *MB v NB* (2008/25274) (2009) ZAGPJHC 76; 2010 (3) SA 220 (GSJ)

<sup>274</sup> *MB v NB* (2008/25274) (2009) ZAGPJHC 76; 2010 (3) SA 220 (GSJ) para 50

of the benefits that mediation would have granted them and that the clients' best interests had not been served. He then went on to limit the fees of the lawyers as a consequence for their failure to inform the clients properly.

The aforesaid cases represent the change that needs to take place in the legal world in South Africa in as far as ADR, and in particular mediation, is concerned. Many resources and time are needlessly spent on litigation, when mediation could be consulted first. It also shows how mediation receives endorsement from the courts. This could gradually lead to changes. As stated by Brassey in commenting on the *MB v NB* judgement: "mediation was the better alternative and it should have been tried."<sup>275</sup> Referring to it as the *better alternative* demonstrates that family law is especially suitable for mediation.

The aforesaid view was also supported in *S v J*.<sup>276</sup> The presiding officer noted that litigation should not have been the first choice in the matter and that litigation is not automatically the best way of resolving family disputes. According to him, litigation resulted in the matter being prolonged, while also creating burdensome costs that could have been avoided. He referred to section 6(4) of the *Children's Act* to enforce the view that legal practitioners should opt for the dispute resolution mechanism that avoids confrontation and supports conciliation.<sup>277</sup> These cases touch on the issue that attorneys sometimes are not advising their clients to pursue mediation.

Boniface recommends that, in order to bring about changes, it would be beneficial to set up family relationship centres, as those opposed to court-annexed mediation would take away the urgency to go through courts and lawyers to resolve a dispute.<sup>278</sup> It could also contribute to a legal environment that does not necessarily view the courts as the first point of call. A good starting point would be to set up these centres at places such as legal aid clinics and universities, as those places are accessible and already well known to the public. Such mediation centres could also serve as training facilities for mediators, while encouraging pro bono work from psychologists, lawyers and social workers.<sup>279</sup> The benefits would include dispute resolution to lower-income

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<sup>275</sup> *MB v NB* (2008/25274) (2009) ZAGPJHC 76; 2010 (3) SA 220 (GSJ) para 59

<sup>276</sup> *S v J* (695/10) (2010) ZASCA 139

<sup>277</sup> *S v J* (695/10) (2010) ZASCA 139 para 54

<sup>278</sup> Boniface A, *Family Mediation in South Africa: Developments and Recommendations* (2015) 78 THRHR 397 406

<sup>279</sup> Boniface A, *Family Mediation in South Africa: Developments and Recommendations* (2015) 78 THRHR 397 406



groups, while also providing an alternative to private mediation for higher-income groups.<sup>280</sup>

### 3.5 Conclusion

This chapter discussed some of the key characteristics of mediation as well as the different approaches to mediation. The chapter attempted to demonstrate how the theoretical basis for mediation is approached in South Africa. There are many advantages to mediation, such as, that the solution reached is often more in line with the needs and wants of the parties. The process is flexible, and consequently a mediation process could be held in a way and at a time that suit the conflict and the parties. Furthermore, mediation is confidential and has a human dimension, which the court system does not have. This enables mediation to approach conflict in a manner that has the potential to reconcile the parties and make them agreeable.

Mediation is applied with differing degrees of success in various fields in South Africa, notably in family-, company-, and labour law. From the few cases discussed, it however seems as if legal professionals and the general public alike remain largely unaware of the benefits of mediation, and in fact the availability of mediation as an alternative to litigation. Simply on that account, mediation centres as suggested by Boniface<sup>281</sup> in the realm of family law would present an opportunity to educate and inform the public, so that they are more aware of the option of mediation.

The next chapter will focus on mediation in Germany. Similar to this chapter, chapter four will discuss the laws and rules relating to mediation in Germany, as well as the fields in which it has been implemented.

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<sup>280</sup> Boniface A, *Family Mediation in South Africa: Developments and Recommendations* (2015) 78 THRHR 397 406

<sup>281</sup> Boniface A, *Family Mediation in South Africa: Developments and Recommendations* (2015) 78 THRHR 397 406

## Chapter 4: Mediation in Germany

This chapter will discuss the process of mediation and its application in selected fields of law in Germany.

### 4.1 Brief overview of development of mediation in Germany

Mediation in Germany has been practiced as far back as the 14th century.<sup>282</sup> The earliest mediation projects that were implemented in Germany occurred during the 1980s. They were mostly utilised in divorce proceedings as well as in attempts to achieve a *Täter-Opfer-Ausgleich*, which refers to creating a settlement between the perpetrator and the victim.<sup>283</sup> This stems from the idea of restorative justice.<sup>284</sup> Also, the *Jugendgerichtsgesetz*<sup>285</sup> (Juvenile Criminal Code) of 1953 incorporated into the law a provision that would allow the prosecution to stop formal procedures where the perpetrator was open to reconciliation with the victim.<sup>286</sup>

In 1992 the first mediation associations, i.e., the *Bundesverband Mediation* and the *Bundes-Arbeitsgemeinschaft für Familien-Mediation*, were established.<sup>287</sup> Four years later in 1996 another mediation association, the *Bundesverband Mediation in Wirtschaft und Arbeitswelt*, was established, mostly focusing on commercial and labour mediation. The aforesaid associations worked closely together in order to create a certain standard of quality for mediations and mediators alike.<sup>288</sup> However, numerous smaller mediation associations were subsequently founded, each with its own approach and voice towards mediation. Recently there has however been an upsurge in the effort by the original three mediation associations towards the establishment of a unified standard of, and approach to, mediation.<sup>289</sup>

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<sup>282</sup> Hoffmann A *Mediation in Germany and the United States* (2007) 9 Eur. J.L. Reform 505

<sup>283</sup> Tenczek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 69

<sup>284</sup> Tenczek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 69

<sup>285</sup> *Jugendgerichtsgesetz* 1953

<sup>286</sup> Hoffmann A *Mediation in Germany and the United States* (2007) 9 Eur. J.L. Reform 505

<sup>287</sup> Tenczek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 69

<sup>288</sup> Tenczek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 69

<sup>289</sup> Tenczek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 69

Amendments were effected to the *Strafprozessordnung* (Code of Criminal Procedure)<sup>290</sup>, *Strafgesetzbuch* (Criminal Code)<sup>291</sup> and the *Jugendgerichtsgesetz* (Juvenile Justice Act)<sup>292</sup> in the 1990s, which provided for dispute resolution outside of the courts in the fields of criminal and civil law. In 1999 the *Einführungsgesetz zur Zivilprozessordnung*<sup>293</sup> (Introductory Act to the Civil Procedure Code) was also amended with federal state being afforded the discretion to establish obligatory dispute resolution. Paragraph 15 of the *Einführungsgesetz zur Zivilprozessordnung* gives the federal state the power to refer disputing parties to negotiation outside of the courtroom. The Act is however only applicable to disputes that deal with a monetary amount up to 750 euros.<sup>294</sup>

In 2001 an amendment to the *Zivilprozessordnung*<sup>295</sup> (Code of Civil Procedure) came into effect which allowed the courts the right to suspend an active case so as to afford the parties the opportunity to settle their disputes outside of the courtroom by way of ADR. An evaluation was done to determine the effectiveness of these new provisions,<sup>296</sup> which evaluation found that the provisions had very little impact in practice and did not bring about the intended and desired changes. It was found that the provisions were rarely used and did not meaningfully increase the possibility of a settlement outside of court proceedings.<sup>297</sup>

Between 2002 and 2012 some federal states practiced mediation in the courts (*gerichtsinterne Mediation*).<sup>298</sup> Although mediations by the courts indicated high rates of matters that had been dealt with in this way, mediation in the courts remains controversial. It has been argued that this type of mediation is unable to discuss and analyse the conflict fully due to factors such as time pressure and the expectancy of the court to work through a certain number of disputes in a prescribed time. This had a negative effect on the ability to analyse and assess the underlying problems on which the dispute is based.<sup>299</sup> For the aforementioned reasons it has been argued

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<sup>290</sup> <https://www.gesetze-im-internet.de/stpo/StPO.pdf>

<sup>291</sup> <https://www.gesetze-im-internet.de/stgb/>

<sup>292</sup> <https://www.gesetze-im-internet.de/jgg/BJNR007510953.html>

<sup>293</sup> *Einführungsgesetz zur Zivilprozessordnung* 1877

<sup>294</sup> Tenczek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 70

<sup>295</sup> *Zivilprozessordnung* 1877

<sup>296</sup> Tenczek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 70

<sup>297</sup> Tenczek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 70

<sup>298</sup> Tenczek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 69-71

<sup>299</sup> Tenczek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 69-71

that mediations by courts are not comprehensive in that they fail to comprehensively discuss the causes and issues of the dispute.<sup>300</sup>

In 2009 the *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*<sup>301</sup> (Act on the procedure in family matters and on matters of voluntary jurisdiction) came into effect which promoted the use of ADR, especially in respect of matters involving families and children.<sup>302</sup> The courts have the duty to advise the parties on the possibilities of ADR in such matters. Furthermore, the courts have the power to order the families to attend events educating them about mediation. The Act however does not create an obligation on the parties to attend mediation itself.<sup>303</sup>

In 2012, the *Mediationsgesetz*<sup>304</sup> (Mediation Act) was passed which specifically regulates mediation in general, regardless of the field of law within which mediation is taking place.<sup>305</sup>

## 4.2 Selected issues on mediation in Germany

The discussion below will deal with some issues that are of relevance when discussing mediation in Germany.

### 4.2.1 Who may work as a mediator in Germany?

In Germany the term *Berufsrecht*<sup>306</sup> (professional law) refers to the laws that prescribe who is allowed to practice in a certain field and the rules that a practitioner has to uphold. This has the effect that just as not everyone can simply decide to be a doctor or a lawyer, not everyone can simply decide to be a mediator.<sup>307</sup> A person has to be sufficiently qualified in order to practice in these fields.<sup>308</sup>

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<sup>300</sup> Trenczek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 69-71

<sup>301</sup> *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* 2009

<sup>302</sup> Trenczek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 71

<sup>303</sup> Trenczek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 71

<sup>304</sup> *Mediationsgesetz* 2012

<sup>305</sup> Trenczek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 72

<sup>306</sup> <https://www.gesetze-im-internet.de/brao/>

<sup>307</sup> Berning D *Mediation und Konfliktmanagement* (2017) 2 ed 452

<sup>308</sup> Berning D *Mediation und Konfliktmanagement* (2017) 2 ed 452

The question arises whether mediation should be considered legal advice for purposes of the *Berufsrecht*. In terms of the *Berufsrecht* people who are not lawyers are not allowed to render a legal service.<sup>309</sup> This means that if mediation is considered a legal service, then only lawyers would be allowed to render such service. Clarity was brought on this matter by way of the *Legal Services Act* of 2008,<sup>310</sup> which stipulates that mediation and other types of ADR do not constitute a legal service. A mediator's duties are to facilitate and support the parties, rather than rendering a legal service.<sup>311</sup>

While clarity in respect of the above was welcomed, the downside was that, technically, any person was consequently allowed to call him- or herself a mediator in Germany.<sup>312</sup> In 2012 the legislature introduced the term *certified mediator (zertifizierter mediator)* into German law by way of the *Mediationsgesetz* of 2012 (Mediation Act).<sup>313</sup> This was largely in an attempt to create a universal applicable standard to mediators. Not every mediator is allowed to call him- or herself a *certified mediator*. In order to become certified one has to comply with the relevant criteria as set out in *Zertifizierte-Mediatoren-Ausbildungsverordnung* (Certified Mediator Training Ordinance).<sup>314</sup> This includes an educational course that requires the participant's attendance for at least 120 hours.<sup>315</sup> This course should not only be theoretical but also contain practical elements, such as role plays. Additionally, a person has to do one mediation within a year of completing the course and this mediation has to fall within the definition of a mediation in terms of the *Mediationsgesetz* of 2012 (Mediation Act).<sup>316</sup> Once so certified, a person must spend 40 hours on furthering his or her level of expertise and education over a 4-year period in order to retain certification.<sup>317</sup>

Lawyers who want to act as mediators further also have to comply with the professional conduct of lawyers, which is codified in the *Berufsordnung der Rechtsanwälte*<sup>318</sup> (Professional Code of

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<sup>309</sup> Hoffmann A *Mediation in Germany and the United States* (2007) 9 Eur. J.L. Reform 505

<sup>310</sup> *Rechtsdienstleistungsgesetz* 2008

<sup>311</sup> *Rechtsdienstleistungsgesetz* 2008

<sup>312</sup> <https://www.in-mediation.eu/wer-darf-sich-mediator-nennen/>

<sup>313</sup> See discussion of this Act under 4.3.1 below.

<sup>314</sup> <http://188.210.44.216/zmediatausbv/BJNR199400016.html>

<sup>315</sup> <https://www.mediatorenausbildung.org/zertifizierter-mediator/>

<sup>316</sup> See discussion of this Act under 4.3.1 below.

<sup>317</sup> <https://www.mediatorenausbildung.org/zertifizierter-mediator/>

<sup>318</sup> *Berufsordnung der Rechtsanwälte* 2017

Lawyers). The Act prescribes that a lawyer who wishes to act as a mediator also has to receive suitable training, which equips him or her with enough knowledge to be in command of the principles of mediation.<sup>319</sup>

#### 4.2.2 Role of the mediator

It has already been established that the mediator's role is that of intermediary, who structures the procedure and guides the parties.<sup>320</sup> This involves creating the surrounding circumstances that facilitate successful mediation to take place, and using tools such as seating arrangements and encouraging constructive communication.<sup>321</sup> A mediator's role is ultimately to establish an atmosphere and process to enable parties to engage in communication, so that the parties can come to an agreement over an issue which they were previously unable to reach agreement on.<sup>322</sup> The mediator should ideally be a trained and knowledgeable person who keeps an eye not only on immediate needs of the parties involved, but also on future requirements.<sup>323</sup>

The understanding of what a good mediator is can differ vastly. What is clear is that it falls outside of the powers of a mediator to decide on a matter.<sup>324</sup> A good mediator has the ability to guide the parties towards a common denominator, so that both sides to the dispute can appreciate the position and interests of the other side.<sup>325</sup> Some people might go to mediation without any real expectations; others understand the mediator's role as one of a go-between; yet other expect the mediator to listen to both sides and then make a recommendation, while some might view a mediator as a neutral person who should not give his or her view but simply facilitate.<sup>326</sup> None of these views are wrong per se. It comes down to the choices the mediator makes and what he or she thinks will benefit the mediation most. The process that a mediator chooses at the beginning of the mediation does not even necessarily need to be kept the same since it is a dynamic process.<sup>327</sup>

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<sup>319</sup> *Berufsordnung der Rechtsanwälte* 2017

<sup>320</sup> Proksch S *Mediation: Die Kunst der Professionellen Konfliktlösung* (2018) chapter 3

<sup>321</sup> Ade J et al *Mediation und Recht* (2017) 53

<sup>322</sup> Kreuser K et al *Mediationskompetenz: Mediation als Profession Etablieren* (2012) 69

<sup>323</sup> Purver EM *The Mediator's Responsibilities* (1958) 9 Lab. L.J. 800

<sup>324</sup> Duve C et al *Mediation in der Wirtschaft* (2011) 87-88

<sup>325</sup> Duve C et al *Mediation in der Wirtschaft* (2011) 87-88

<sup>326</sup> Duve C et al *Mediation in der Wirtschaft* (2011) 88

<sup>327</sup> Duve C et al *Mediation in der Wirtschaft* (2011) 88

Riskin proposed a grid that attempts to identify different mediation styles and within which circumstances a specific style would be best suited.<sup>328</sup> The Riskin grid contains four styles of mediation: *evaluative narrow*, *facilitative narrow*, *evaluative broad*, and *facilitative broad*. Based on these, the grid can be used to place a mediation to see whether the problem definition is narrow or broad and whether the mediator's role should be evaluative or facilitative. It should however be understood that the identified styles are idealistic versions of mediation styles.

*Evaluative narrow* is similar to the way in which judges and lawyers operate.<sup>329</sup> The mediator focuses on the interpretation of laws and factual questions. He or she will listen to the parties and then explain his or her take on the matter. He or she can be seen as a sort of referee who is often an expert on the matters presented. The mediator will also explain the weaknesses and strengths of the positions that the parties take.<sup>330</sup> This contributes towards a solution as the mediator provides a neutral, but informed, insight.

*Evaluative broad* refers to a situation where the parties require the bigger picture of the dispute to be taken into consideration and want the mediator to make a suggestion for a resolution based on all circumstances and factors.<sup>331</sup> This approach evaluates the interests of the parties fully and then proceeds to attempt finding a solution that indicates an appreciation of the inquiry. In order for the mediator to make a well-informed suggestion with regard to a settlement, he or she has to be well informed and involved.<sup>332</sup>

*Facilitative narrow* means that the mediator decides not to make a suggestion with regard to the settlement.<sup>333</sup> As the name suggests, the mediator has to facilitate between the parties. He or she acts as a facilitator between the parties and in order to do justice to that role the mediator will ask questions that assist in the discourse.<sup>334</sup> Creating an environment that is conducive to mediation is therefore part of the mediator's duty.

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<sup>328</sup> Riskin L *Decisionmaking in Mediation: The New Old Grid and the New New Grid System* (2003) Notre Dame Law Review Volume 79 Issue 1

<sup>329</sup> Riskin L *Decisionmaking in Mediation: The New Old Grid and the New New Grid System* (2003) Notre Dame Law Review Volume 79 Issue 1

<sup>330</sup> Riskin L *Decisionmaking in Mediation: The New Old Grid and the New New Grid System* (2003) Notre Dame Law Review Volume 79 Issue 1

<sup>331</sup> Riskin L *Decisionmaking in Mediation: The New Old Grid and the New New Grid System* (2003) Notre Dame Law Review Volume 79 Issue 1

<sup>332</sup> Duve C et al *Mediation in der Wirtschaft* (2011) 89-90

<sup>333</sup> Duve C et al *Mediation in der Wirtschaft* (2011) 89-83

<sup>334</sup> Duve C et al *Mediation in der Wirtschaft* (2011) 89-93

*Facilitative broad* goes further than the *facilitative narrow* ideal and requires the mediator to analyse the dispute with the parties fully.<sup>335</sup> The mediator has to assist the parties by asking questions that lead them to examine their positions and interests. Furthermore, the mediator facilitates between the parties by prescribing a process that is goal-oriented and presents opportunities to come to an agreement.

In practice the differentiation between the various types of mediation styles is not always clear. It is actually a sign of a good mediator to see what the situation and progress requires and to employ more than one of these styles during various stages. An evaluation with a recommendation can be the starting point for further discussion, in which the mediator engages as a facilitator.<sup>336</sup>

Aside from understanding the different approaches to, or styles of, mediation, there are certain characteristics a mediator should display. A mediator has to show empathy for and acceptance of the parties.<sup>337</sup> Those values will indicate to the parties that they are being taken seriously.<sup>338</sup> This contributes towards building trust and confidence with the parties which is regarded as an imperative to successful mediation. Tools that the mediator could use to build more trust are showing concern, providing assertions, and explaining the process.<sup>339</sup> Success of mediation is also largely dependent on trust between the parties and the mediator. Nonetheless, during proceedings it can occur that the mediator is perceived as biased by one of the parties.<sup>340</sup> It is then necessary for the mediator to rectify the situation and try to explain his or her role, as well as to account for his or her impartiality.<sup>341</sup> The mediator should not take sides, but should treat both parties equal. This can also be reflective of open-mindedness concerning facts and the interests and needs of the parties involved.<sup>342</sup>

Good awareness is another characteristic of being a good mediator.<sup>343</sup> Parties may find themselves in a position where the superior intellect or ability of one party to present his or her side of the

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<sup>335</sup> Duve C et al *Mediation in der Wirtschaft* (2011) 89-93

<sup>336</sup> Duve C et al *Mediation in der Wirtschaft* (2011) 91

<sup>337</sup> Ade J et al *Mediation und Recht* (2017) 54

<sup>338</sup> Ade J et al *Mediation und Recht* (2017) 54

<sup>339</sup> Ade J et al *Mediation und Recht* (2017) 53-54

<sup>340</sup> Trenzcek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 184

<sup>341</sup> Boulle L et al *Mediation: Principles Process Practice* (1997) 114

<sup>342</sup> Trenzcek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 184

<sup>343</sup> Boulle L et al *Mediation: Principles Process Practice* (1997) 126



conflict will put that party in a better position, not due to factually being in a better position, but only due to personal skills and techniques.<sup>344</sup> Awareness of these differences in personalities allows the mediator to empower the party that cannot express him- or herself properly. Although the mediator in such a situation has to address the power imbalance, he or she has to be careful not to breach impartiality.<sup>345</sup> Paying attention to equal speaking time, enforcing the same mediation guidelines, having separate meetings and exchanging information can be used to protect and strengthen the weaker party.<sup>346</sup>

The mediator regulates the process, opens the mediation sessions, and stipulates guidelines and rules with which the parties must comply.<sup>347</sup> Hence, the role of the mediator is also that of a coordinator. He or she also has to be able to analyse the positions, needs and conflict that are being dealt with. Beyond that, a mediator needs to be able to listen actively, reframe, understand, reflect and find the right timing to transition from one phase to the next. It is often required and helpful if the mediator has a certain knowledge and education in various fields, such as law, mediation, conflict and active communication. In some circumstances, such as commercial mediation, it is helpful and required of the mediator to have vast experience and knowledge in a field, such as contracts in the building industry.<sup>348</sup>

Mediators clearly require a variety of skills, and the skills and techniques appropriate in one mediation might not necessarily be appropriate in another. Nonetheless, it seems apparent that the mediator's role is informed by the concept of fairness.

### **4.3 Mediation in selected fields in Germany**

The discussion below will focus on mediation in selected fields in Germany. This will contribute to a later comparison between mediation in Germany and South Africa.

#### **4.3.1 Mediation Act of 2012**

In 2012 the *Mediationsgesetz* was enacted in Germany. The Act governs mediation in Germany as a whole; therefore, it is applicable to all fields of law (even those fields where mediation is legislatively required). The way in which the Act works is that it sets a specific standard which has

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<sup>344</sup> Boule L et al *Mediation: Principles Process Practice* (1997) 126

<sup>345</sup> Boule L et al *Mediation: Principles Process Practice* (1997) 126

<sup>346</sup> Boule L et al *Mediation: Principles Process Practice* (1997) 126

<sup>347</sup> Tenczek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 184

<sup>348</sup> Tenczek T et al *Mediation und Konfliktmanagement* (2017) 2 ed 184

to be met. It does not necessarily prescribe when mediation has to be used, but rather regulates the surrounding circumstances and duties, such as the duties of the mediator.<sup>349</sup>

According to section 1 of the *Mediationsgesetz* mediation is a structured process, which assists parties with communication and negotiation. This does not however mean that mediation is a flexible process, since a flexible process can still have certain structural characteristics.<sup>350</sup> However, section 1 places the duty on the mediator to inform the parties about the content, the process and the goals of mediation.<sup>351</sup> The mediator also has the duty to exert his or her influence on the mediation agreement, so that rules with regard to the parties' conduct and communication are included.<sup>352</sup> In addition, a mediator contract is required which is expected to encapsulate the expectations of the parties and the mediator, as well as confirming the mediator's professional fee and confidentiality.<sup>353</sup> Confidentiality is included as it allows the parties to share information that they otherwise would be reluctant to share. Therefore, it is important that the Act specify that it is a confidential process.<sup>354</sup>

In Germany the right to self-determination is an important element of mediation and, as such, the Act specifies that mediation is a voluntary process.<sup>355</sup> There is an argument to be made that this eliminates the possibility for courts to direct parties to mediation.<sup>356</sup> The Act also prescribes that laws that previously made mediation compulsory remain intact, provided that these laws do not prevent the parties from having access to courts.<sup>357</sup> The first section also includes provisions concerning the autonomy of the parties. It stipulates that any agreement reached at the end of mediation must be finalised by the parties themselves - the mediator is not allowed to induce or coerce the parties to come to an agreement in any respect. Furthermore, the Act provides that the mediator can be chosen by the parties.<sup>358</sup> Again, the right of self-determination finds expression by

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<sup>349</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 484

<sup>350</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 485-486

<sup>351</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 485

<sup>352</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 485-486

<sup>353</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 485

<sup>354</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 485-486

<sup>355</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 486

<sup>356</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 485-486

<sup>357</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 486

<sup>358</sup> *Mediationsgesetz* 2012 s 1

letting the parties make that decision. This does not exclude the ability of mediation centres to provide a mediator, as the parties are allowed to accept a suggested mediator.<sup>359</sup>

As the mediator is central to the success of the mediation, the Act is quite prescriptive as to who may mediate and the characteristics and functions of a mediator.<sup>360</sup> Although the Act provides that the parties may choose a mediator, it still provides some ground rules of who would be regarded a suitable mediator. According to section 5 of the Act the mediator has to ensure that he or she is sufficiently qualified and maintains this standard by furthering his or her education.<sup>361</sup> The mediator needs to possess theoretical knowledge as well as the practical experience in order to aid the parties in a skilful manner. The Act further regulates when a mediator may be regarded as certified. A certified mediator is someone who has completed training that complies with the directives of the Federal Ministry for Justice and Consumer Protection.<sup>362</sup> Further to the aforesaid, the Act also lists characteristics a mediator is required to possess.<sup>363</sup> Importantly, a mediator needs to be independent. The Act also requires that the mediators be impartial, and expressly mentions that the mediator does not have any power to decide the matter.<sup>364</sup>

As the mediator is responsible for the process, it is the responsibility of the mediator to inform the parties about the procedure and principles of the mediation process.<sup>365</sup> The information that the mediator provides puts the parties in a position where they can make an informed decision about whether or not they actually wish to mediate. The mediator also has to assure him- or herself about the voluntariness of the parties' participation in the process. Where the mediation was prescribed by any law, the mediator has the duty to let the parties know that they do not have to come to an agreement and that their access to courts is not curtailed by any participation in the mediation process.<sup>366</sup> The second section of the Act also touches on the communication between the parties, and prescribes that the mediator's duties include facilitating communication between the parties.

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<sup>359</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 486

<sup>360</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 486-490

<sup>361</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 486

<sup>362</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 486

<sup>363</sup> *Mediationsgesetz* 2012 s 2, 4, 5

<sup>364</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 486

<sup>365</sup> *Mediationsgesetz* 2012 s2(1)

<sup>366</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 487-490

The Act also provides that both parties must be integrated in the mediation in a fair and suitable manner.<sup>367</sup> Section 2 further provides that the mediator has an active duty to serve the parties, rather than just being neutral.<sup>368</sup> This can be done by way of separate meetings between the mediator and the parties. The Act even gives the parties the discretion to allow for third parties to become part of the mediation.<sup>369</sup>

Section 3 obliges mediators to explain their professional background as well as education and experience in mediation, should the parties request it. This is done to keep the standard of mediators high and to give the parties a degree of control over who mediates the matter. Section 3 also requires mediators to mention anything to the parties that could bring their independence and impartiality into dispute.<sup>370</sup>

Due to the nature of mediation as a voluntary process, the parties can end the mediation at any time. Section 2 also gives the mediator the power to end the mediation. When the parties have come to an agreement, the mediator has to ensure that the parties understand the content of the agreement. The mediator also has to inform the parties that they can have the agreement inspected by advisers. Then the mediator can record the agreement.<sup>371</sup>

#### **4.3.2 Family law mediation**

Family mediation has been regarded as the type of mediation that is most commonly used in Germany.<sup>372</sup> Furthermore, family mediation is one of the earliest fields that mediation has found application.<sup>373</sup>

Family mediation in Germany can be organised into different types of family conflicts. What resembles most with the South African perception of family mediation is mediation in the field of divorce and family conflicts. Other conflicts that Germany recognises as part of family law include generational conflicts, elder mediation, successions, international family conflicts and conflicts concerning co-habitation.<sup>374</sup>

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<sup>367</sup> *Mediationsgesetz* s2(3)

<sup>368</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 489

<sup>369</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 487-490

<sup>370</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 492

<sup>371</sup> *Mediationsgesetz* 2012

<sup>372</sup> Hoffmann A *Mediation in Germany and the United States* (2007) 9 Eur. J.L. Reform 520

<sup>373</sup> Carl E et al *Mediation und Konfliktmanagement* (2017) 2 ed 509

<sup>374</sup> Rafi A et al *Mediation und Konfliktmanagement* (2017) 2 ed 518

German literature on family mediation identifies three main reasons why mediation is suitable for divorce: a desire to resolve the matter in a harmonious and civil manner;<sup>375</sup> to ensure the outcome is suited to the individual needs and capabilities of the parties<sup>376</sup>; and for the parties to retain more control over the process and the outcome.<sup>377</sup>

Mediation entails that the parties can come to their own agreement.<sup>378</sup> However, in a field that is well regulated by law, such as family law, it is often helpful for parties to be aware of what the courts would possibly have decided in their dispute. Experts can often clearly indicate what the courts would have decided if the matter proceeded to court.<sup>379</sup> That could be used as encouragement to settle the matter outside of the court. The mediator has to be conscious of the parties' perception of fairness. The goal should be for him or her to guide the parties towards an agreement that deviates from the law in all aspects where the parties' perception of fairness dictates a different arrangement.<sup>380</sup>

Divorce agreements as a result of mediation are generally final, especially with regard to how property is to be divided. The agreements are binding and are concluded with a *memorandum of understanding*, which includes not only the agreed terms but also aspects such as the autonomy of the parties, how the mediation was conducted, and the voluntariness of the process.<sup>381</sup> Although the results of divorce mediation might be similar to the court's decision, the advantage is that mediation takes its time. The parties discuss facts and solutions together, as well as wishes and ideas. This can ideally produce a better relationship between the divorcees. Not only will the children benefit from this but also family members and friends.<sup>382</sup>

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<sup>375</sup> Ripke L et al *Mediation und Konfliktmanagement* (2017) 2 ed 520-522

<sup>376</sup> Ripke L et al *Mediation und Konfliktmanagement* (2017) 2 ed 520-522

<sup>377</sup> Ripke L et al *Mediation und Konfliktmanagement* (2017) 2 ed 520-522

<sup>378</sup> Walk S *Familienmediation: Eine Methode des familiären Konfliktmanagement im Blickpunkt* (2015) chapter 1

<sup>379</sup> Ripke L et al *Mediation und Konfliktmanagement* (2017) 2 ed 522

<sup>380</sup> Ripke L et al *Mediation und Konfliktmanagement* (2017) 2 ed 522

<sup>381</sup> Ripke L et al *Mediation und Konfliktmanagement* (2017) 2 ed 525-526

<sup>382</sup> Ripke L et al *Mediation und Konfliktmanagement* (2017) 2 ed 525

### 4.3.3 Mediation in sports (football)

Another area of law in which mediation is often utilised is sport disputes.<sup>383</sup> In Germany, matters that have been mediated in football often had to do with racism, the prevention of violence, the prevention of discrimination and conflict management.<sup>384</sup>

With over 80 000 football matches taking place every weekend, football is the dominant sport in Germany. There is a large number of matches, and while most of the time no conflict arises, there are instances where conflict escalates. As most of the games are not played in professional leagues but rather small local leagues, the opponents often know one another. Sometimes this results in teams being called derogatory names, which are mostly related to their ethnic background (especially Turkish and Middle Eastern minorities living in Germany)<sup>385</sup>.

The way in which these mediations occur is that the parties involved in an incident, or even the whole team, is invited to the sports court.<sup>386</sup> At the court, the parties have the opportunity to attend mediation in exchange for a lesser punishment. The mediation is conducted by two experienced mediators. The goal of the mediation is to ensure that in future such conflicts will not occur again. Regarding the process, there are usually three meetings: the first two at the respective clubs and then a joint one at a neutral location. The first two meetings serve the purpose of blowing off steam and for the mediator to familiarise the attendees with the process and gain some insight.<sup>387</sup>

A typical agreement obtained through mediation between two teams could prescribe that both teams arrive early for their next match against one another, so that they can greet one another before the game in order to establish respect.<sup>388</sup> One of the mediators will attend the match as an overseer. The agreement can also determine that, where verbal abuse takes place, the coaches have the duty to take the players in question off the field, even if the referee missed such

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<sup>383</sup>Ribler A et al *Mediation und Konfliktmanagement* (2017) 2 ed 610

<sup>384</sup> Ribler A et al *Mediation und Konfliktmanagement* (2017) 2 ed 610

<sup>385</sup> In games, such terms are also often used in order to provoke a player into committing a foul that will result in being sent off the pitch. The provoking player is not punished, as it is difficult for the referee to detect the provocation. These provocations and escalations of violence on the football pitch can be related to the world of politics. It has been observed that games often have a symbolic meaning that transcends the sport and deals with the conflicts of society. Ribler A et al *Mediation und Konfliktmanagement* (2017) 2 ed 612.

<sup>386</sup> Ribler A et al *Mediation und Konfliktmanagement* (2017) 2 ed 613-614

<sup>387</sup> Ribler A et al *Mediation und Konfliktmanagement* (2017) 2 ed 614

<sup>388</sup> Ribler A et al *Mediation und Konfliktmanagement* (2017) 2 ed 614

behaviour. The spirit of 'fair play' will be upheld by apologising after every foul committed. Should any disturbance arise, the players of a team have the duty to calm their teammates. The referee has to be an experienced referee and his decisions should be met with acceptance.<sup>389</sup>

#### 4.3.4 Mediation in German schools

Schools in Germany have adopted mediation as part of their pedagogical approach.<sup>390</sup> In the 1990s, the discussion surrounding violence amongst school children gained momentum, so mediation was chosen as a suitable process to prevent it.<sup>391</sup> Even though no laws specifically prescribe for mediation in schools, schools in Germany have introduced what is generally known as *peer mediation*.<sup>392</sup> Peer mediation is a system where some learners are taught about mediation and conflicts.<sup>393</sup> Usually, teachers or social workers educate and train the learners. Often this training and peer mediation are inspired by only a few enthusiastic teachers. These teachers then incorporate it into the school as an after-school activity. Equipped with this knowledge, these learners then assist other learners to resolve their conflicts.

The benefit of this type of mediation in the school setting is that the parties in conflict as well as the mediator belong to the same group - they are all learners. There is therefore initially a feeling of belonging to the same group. In addition, there is a considerable degree of trust amongst learners, which can help individuals open up and might make effective communication easier.<sup>394</sup> The objective of the first peer mediation projects was to combat violence amongst school children. Peer mediation was therefore also intended to teach learners that they themselves could aid their fellow learners to solve their disputes.<sup>395</sup>

Mediation in schools normally follows a system that consists of five distinct phases.<sup>396</sup> The first phase is the introduction phase. The mediator explains the ground rules to the parties and sets out the goals for the mediation. The second phase is concerned with the conflict from the perspective

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<sup>389</sup> Ribler A et al *Mediation und Konfliktmanagement* (2017) 2 ed 614

<sup>390</sup> Will H et al *Mediation und Konfliktmanagement* (2017) 2 ed 596

<sup>391</sup> Will H et al *Mediation und Konfliktmanagement* (2017) 2 ed 596

<sup>392</sup> Will H et al *Mediation und Konfliktmanagement* (2017) 2 ed 597

<sup>393</sup> Will H et al *Mediation und Konfliktmanagement* (2017) 2 ed 596

<sup>394</sup> Will H et al *Mediation und Konfliktmanagement* (2017) 2 ed 597

<sup>395</sup> Will H et al *Mediation und Konfliktmanagement* (2017) 2 ed 597

<sup>396</sup> Schubarth W *Gewaltprävention nach Erfurt und Pisa: zur Wirksamkeit von Präventionsprogrammen am Beispiel der Schulmediation. Sozialwissenschaften und Berufspraxis* (2003) 26(2), 203. <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-38032>

of the parties. Each participant gets the opportunity to present the conflict from his or her point of view. Following this phase, the parties are encouraged to explain how the actions affected them. This phase highlights the feelings of the parties. The fourth phase is about finding solutions. The fifth phase is the conclusion of the mediation, and usually contains a written agreement, which states the solution or non-solution with which the parties came up.<sup>397</sup>

The benefits of school mediation are that conflict is constructively solved, teaching the learners that not every conflict needs to be resolved in 'winner or loser' manner. This is also favourable as it introduces mediation to the learners early, who then later in life might remember the benefits mediation has brought them, and they might choose it as an alternative to court proceedings. This creates and furthers a culture of communication and interaction. Furthermore, it emphasises values such as equality, participation and non-violent conflict resolution. It empowers children early to be able to empathise with others and gain a different perspective on conflict.<sup>398</sup> They can understand conflict better and experience first-hand how specific factors can contribute. School mediation also has a psychological benefit as it provides an opportunity to intervene and rectify a situation without having to punish or ignore – both of which force a person to lose face.

However, school mediation is not always an appropriate process. The success is dependent on the support that peer mediation has by those in authority.<sup>399</sup> If the principal and teachers therefore do not support it, the necessary influence will be missing. Furthermore, if the learners are not properly trained, they might be overwhelmed with the situation, which is detrimental not only to themselves but also to the parties to the conflict. Hence, the quality of the training has to be consistently high, while integrating peer mediation as a means to resolve conflict in and around the school. This ideally involves parents, teachers and learners alike.<sup>400</sup>

Studies have been conducted in order to assess why peer mediation has been a success at some schools but a failure at others. A study that was published in 2006<sup>401</sup> did quantitative research at about 1 455 schools throughout Germany. The results concerning violence prevention and constructive conflict solving were positive. Learners involved showed improved communication

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<sup>397</sup> Schubarth W *Gewaltprävention nach Erfurt und Pisa: zur Wirksamkeit von Präventionsprogrammen am Beispiel der Schulmediation. Sozialwissenschaften und Berufspraxis* (2003) 26(2), 199-212. <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-38032>

<sup>398</sup> Will H et al *Mediation und Konfliktmanagement* (2017) 2 ed 598-599

<sup>399</sup> Will H et al *Mediation und Konfliktmanagement* (2017) 2 ed 598

<sup>400</sup> Will H et al *Mediation und Konfliktmanagement* (2017) 2 ed 598

<sup>401</sup> Behn S et al *Mediation an Schulen: Eine bundesweiter Evaluation* (2006)  
<http://etd.uwc.ac.za/>



and social skills.<sup>402</sup> The research further found that school and mediation are two separate systems that both operate on different underlying principles.<sup>403</sup> While mediation relies on voluntariness, autonomy of the parties and an equal footing for all parties, schools are characterised by principles, such the hierarchical order of teacher and learner, the system of order and command, a strictly organised schedule, and the evaluation of individuals.<sup>404</sup> This demonstrates the stark contrast between the two systems. This could also explain why difficulties may arise when trying to introduce mediation into the school environment.

For the effective implementation of a mediation system at school, certain factors are needed to facilitate a successful introduction. The first factor is to embrace other complementary projects in relation to violence prevention and to incorporate mediation into the school programme.<sup>405</sup> By doing so, learners are being taught how to prevent violence and grow in social situations – all of that will be encouraged by mediation.<sup>406</sup> This relates to changing the dynamics of the school environment as a whole. The rationale is that mediation will be more effective if it is embraced fully. Schools that devised further strategies to support mediation had a much higher success rate than schools who did not devise further strategies. Such strategies include progressively training more teachers who can serve as supervisors. The promotion of peer mediation at schools is another important point.<sup>407</sup> Teachers should encourage mediation and inform learners that such a project exists. It was also found to be helpful to assign peer mediators to specific classes.<sup>408</sup> For these classes, they will act as a mentors. Schools that conducted workshops with a focus on social competencies observed that mediation was more readily accepted and ultimately successful. This indicates that it is not only important to educate the learner mediators, but also the other learners. Again, this can be related to changing the dynamics of the school system. In addition, it has been observed that the involvement of school social workers has been a contributing factor for successful implementation.<sup>409</sup> Their advisory function is essential, especially in the beginning

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<sup>402</sup> Behn S et al *Mediation an Schulen: Eine bundesweiter Evaluation* (2006)

<sup>403</sup> Behn S et al *Mediation an Schulen: Eine bundesweiter Evaluation* (2006)

<sup>404</sup> Behn S et al *Mediation an Schulen: Eine bundesweiter Evaluation* (2006)

<sup>405</sup> Behn S et al *Mediation an Schulen: Eine bundesweiter Evaluation* (2006)

<sup>406</sup> Behn S et al *Mediation an Schulen: Eine bundesweiter Evaluation* (2006)

<sup>407</sup> Behn S et al *Mediation an Schulen: Eine bundesweiter Evaluation* (2006)

<sup>408</sup> Behn S et al *Mediation an Schulen: Eine bundesweiter Evaluation* (2006)

<sup>409</sup> Behn S et al *Mediation an Schulen: Eine bundesweiter Evaluation* (2006)

stages of introducing mediation, as they have a deeper knowledge and therefore can assist teachers and learner mediators alike.

It has also been submitted that the decision at the school to establish mediation to deal with conflicts had an effect on the success.<sup>410</sup> Where the principal alone decided to launch a mediation project, the implications were sometimes negative, while a decision made by learners, parents and teachers together after information had been presented to them generally had higher success rates. This has its source in the element of acceptance. Teachers, learners and parents all contribute towards the success. Where a decision is therefore announced without consulting with them, there is the likelihood that they will not be as accepting as they might have been otherwise. Lastly, the success of mediation projects at schools is linked to establishing a conflict management system from the start.<sup>411</sup> This system is ideally the result of careful consideration, and answers questions about how a conflict makes it to mediation, what the process of mediation is, and which conflicts could possibly be mediated by learner mediators. Another aspect is whether conflicts between learners and teachers can be mediated.<sup>412</sup> This shows that, before launching a mediation project, it is advisable to have proper consideration of the relevant factors and difficulties that might arise and to think of ways to deal with them. Preparation and planning are essential for the success of this system at schools.

#### **4.3.5 Commercial mediation**

The implications of legal proceedings on businesses can be far-reaching. As example, in 2001 Lufthansa (the German national airway) announced that strikes for a better salary had cost the airline more than 190 million euro during that financial year.<sup>413</sup> It has been found that employees spend 12 per cent of their time at work on conflicts. Companies with more than 500 employees can record even higher numbers.<sup>414</sup>

In light of examples such as the above, it would be desirable for companies to have procedures in place that enable more effective and efficient conflict management, so that damages and consequences can be avoided. Different types of conflicts can arise in a company. Generally, one

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<sup>410</sup> Behn S et al *Mediation an Schulen: Eine bundesweiter Evaluation* (2006)

<sup>411</sup> Behn S et al *Mediation an Schulen: Eine bundesweiter Evaluation* (2006)

<sup>412</sup> Behn S et al *Mediation an Schulen: Eine bundesweiter Evaluation* (2006) location 2950

<sup>413</sup> Duve C et al *Mediation in der Wirtschaft* (2011) 12-13

<sup>414</sup> *Frankfurter Allgemeine Zeitung* (8/7/2002) 17

can differentiate between internal and external conflicts.<sup>415</sup> Furthermore, most conflicts can be categorised as material conflict, conflict of value, strategic conflict, distributional conflict, relationship conflict or inner conflict.<sup>416</sup> The categorisation has the benefit that certain approaches to mediation are more suited for certain conflicts. By categorising it as such it becomes apparent early on which approach should be used.<sup>417</sup>

Generally speaking, it has been observed through the research that commercial mediation adheres largely to accepted mediation theory. Mediation consists of three phases: the preparation, the mediation and the implementation phases.<sup>418</sup> The preparation comprises making contact, the analysis of the conflict and agreeing to mediate. For conflicts happening within the company, contact is mostly made through a phone call or a high-ranking employee. The mediation is regulated and paid for by an entity that legitimises mediation within the company, but who is not directly involved in the company.<sup>419</sup> The mediator is contracted to this entity, and the contract details the professional fees, the definition of mediation, the goals, rules, functions and the role of the law and confidentiality.<sup>420</sup> The mediator also enters into a contract with the parties to the mediation. This contract excludes professional fees to satisfy the requirement of independence.<sup>421</sup> The contact stage between companies usually starts with one of the parties suggesting mediation to the other party. Contracts between the companies can also contain clauses that refer a matter to mediation first before going to court.<sup>422</sup>

The mediation phase starts with reading the mediation contract and setting behavioural rules for the duration of the mediation.<sup>423</sup> The topics are decided on and interests, motives and needs are

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<sup>415</sup> Duve C et al *Mediation in der Wirtschaft* (2011) 14-17

<sup>416</sup> Duve C et al *Mediation in der Wirtschaft* (2011) 16

<sup>417</sup> Duve C et al *Mediation in der Wirtschaft* (2011) 16

<sup>418</sup> Koschany-Rohbeck M *Praxishandbuch Wirtschaftsmediation: Grundlagen und Methoden zur Lösung innerbetrieblicher und zwischenbetrieblicher Konflikte* (2018) 2 ed chapter 5

<sup>419</sup> Koschany-Rohbeck M *Praxishandbuch Wirtschaftsmediation: Grundlagen und Methoden zur Lösung innerbetrieblicher und zwischenbetrieblicher Konflikte* (2018) 2 ed chapter 5

<sup>420</sup> Koschany-Rohbeck M *Praxishandbuch Wirtschaftsmediation: Grundlagen und Methoden zur Lösung innerbetrieblicher und zwischenbetrieblicher Konflikte* (2018) 2 ed chapter 5

<sup>421</sup> Koschany-Rohbeck M *Praxishandbuch Wirtschaftsmediation: Grundlagen und Methoden zur Lösung innerbetrieblicher und zwischenbetrieblicher Konflikte* (2018) 2 ed chapter 5

<sup>422</sup> Koschany-Rohbeck M *Praxishandbuch Wirtschaftsmediation: Grundlagen und Methoden zur Lösung innerbetrieblicher und zwischenbetrieblicher Konflikte* (2018) 2 ed chapter 5

<sup>423</sup> Koschany-Rohbeck M *Praxishandbuch Wirtschaftsmediation: Grundlagen und Methoden zur Lösung innerbetrieblicher und zwischenbetrieblicher Konflikte* (2018) 2 ed chapter 5

explored. Following that, a solution has to be generated and one of the solutions has to be chosen. The last step would be to take down the solution in writing. The implementation phase is concerned with making sure that the agreement is respected by the parties and the mediator has to reflect on the mediation.<sup>424</sup> This involves the drafting and signing of a mediation agreement. The agreement can contain a mediation-clause, which prescribes that should the parties encounter any difficulties with the implementation of the agreement they are obliged to approach the mediator to resolve the difficulties. This is preferable as the mediator is already familiar with the parties and circumstances.<sup>425</sup> Another aspect of the implementation phase is the evaluation of the mediation by the mediator. The mediator will compile a file documenting the feedback received from the parties but also the techniques that were used in the mediation as well as a description of the case. Compiling this data is beneficial as it allows the mediator and others to gain greater insight into the mediator's work.<sup>426</sup>

It is desirable for companies to establish a conflict management system.<sup>427</sup> The decision about how a conflict is dealt with should ideally be based on its merits and check lists, which refers to a process for a certain type of problem. The processes should not be arbitrary and need to have certain qualities, such as transparency, certain standards and uniformity.<sup>428</sup> This can be achieved by incorporating mediation rules into the company's guidelines or using external rules. Companies should make use of qualified personnel to regulate mediations. A human resources department could be comprised of such personnel. Otherwise, companies could also use external mediators or personal from their legal department.<sup>429</sup>

In Germany steps have been taken to improve and promote conflict management systems. In 2008 the *Round Table Mediation und Konfliktmanagement* (RTMKM) was founded. It is a coalition of about 80 companies that are active in a variety of fields. This includes influential companies such as *Die Deutsche Bahn*, which is a German railway company that is state-owned and was the biggest

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<sup>424</sup> Koschany-Rohbeck M *Praxishandbuch Wirtschaftsmediation: Grundlagen und Methoden zur Lösung innerbetrieblicher und zwischenbetrieblicher Konflikte* (2018) 2 ed chapter 5

<sup>425</sup> Koschany-Rohbeck M *Praxishandbuch Wirtschaftsmediation: Grundlagen und Methoden zur Lösung innerbetrieblicher und zwischenbetrieblicher Konflikte* (2018) 2 ed chapter 5

<sup>426</sup> Koschany-Rohbeck M *Praxishandbuch Wirtschaftsmediation: Grundlagen und Methoden zur Lösung innerbetrieblicher und zwischenbetrieblicher Konflikte* (2018) 2 ed chapter 5

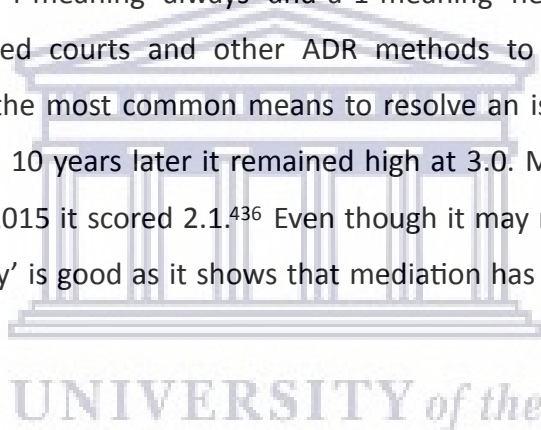
<sup>427</sup> Nöldeke M *Konfliktmanagement: Wie Wissenschaft und Praxis sich bereichern* (2011) Spektrum der Mediation Ausgabe 44

<sup>428</sup> Gläßler U et al *Mediation und Konfliktmanagement* (2017) 2 ed 555-558

<sup>429</sup> Gläßler U et al *Mediation und Konfliktmanagement* (2017) 2 ed 555-558

railway company in the world in terms of revenue.<sup>430</sup> This coalition of companies was intended to increase innovation by providing a large pool of experiences that can be shared. The ultimate goal was to optimise and improve conflict management systems by creating an exchange between the praxis and theory.<sup>431</sup> RTMKM members take part in studies and academic functions. Between 2014 and 2015 they were involved in 40 functions and at least 25 published articles. The RTMKM can be regarded as a success because it was responsible for a variety of improved conflict management systems.<sup>432</sup> The member companies tested new conflict management structures which bridged the gap between theory and praxis.<sup>433</sup> The insights together with the data collected enabled the adaption and modification of conflict management models so that they could be successfully used.<sup>434</sup>

A study conducted by the European University Viadrina Frankfurt focused on the changes that happened between 2005 and 2015 at German companies with regard to conflict management.<sup>435</sup> On a scale from 1 to 4, with 4 meaning 'always' and a 1 meaning 'never', the companies had to indicate how often they used courts and other ADR methods to resolve conflicts. In 2005 negotiation appeared to be the most common means to resolve an issue. Negotiation was used very often, scoring 3.3, while 10 years later it remained high at 3.0. Mediation was almost never used in 2005 (1.2), while in 2015 it scored 2.1.<sup>436</sup> Even though it may not seem very significant, a change from 'never' to 'rarely' is good as it shows that mediation has become more relevant and



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<sup>430</sup> <https://www.railway-technology.com/features/featureengines-of-trade-the-ten-biggest-rail-companies-by-revenue-4943955>

<sup>431</sup> [https://www.ikm.europa-uni.de/de/Studie\\_V.pdf](https://www.ikm.europa-uni.de/de/Studie_V.pdf)

<sup>432</sup> [https://www.ikm.europa-uni.de/de/Studie\\_V.pdf](https://www.ikm.europa-uni.de/de/Studie_V.pdf)

<sup>433</sup> According to German legal theory, a conflict management system should document conflicts. The focus of the documentation should be on the techniques that were used and the effect it had. This helps to improve mediation and also serves as a quality check. Another important component is communication. A conflict management system in companies can only be utilised if the system is known and accepted. In order to achieve that, the system has to be accessible, transparent and readily understood. Establishing a functioning conflict management system does not only require to have all of the above-mentioned in place. It also requires an entity that has a coordinating function, which connects the single elements, guarantees that they work together and oversees the system as a whole. Furthermore, the coordination must be based on rules and should be structurally incorporated into the company.

<sup>434</sup> [https://www.ikm.europa-uni.de/de/Studie\\_V.pdf](https://www.ikm.europa-uni.de/de/Studie_V.pdf)

<sup>435</sup> *Konfliktmanagement in der deutschen Wirtschaft - Entwicklung eines Jahrzehnts* accessible on: [https://www.ikm.europa-uni.de/de/Studie\\_V.pdf](https://www.ikm.europa-uni.de/de/Studie_V.pdf)

<sup>436</sup> [https://www.ikm.europa-uni.de/de/Studie\\_V.pdf](https://www.ikm.europa-uni.de/de/Studie_V.pdf)

still has the potential to become even more relevant with increased exposure.<sup>437</sup> The same goes for 'arbitration', which went from 1.3 to 2.3. At the same time, 'court proceedings' dropped from 2.3 to 1.9.

In my opinion, the study showed that there is merit in mediation and that companies recognise this. At the same time, the study revealed that companies may not know how to incorporate mediation. In conclusion, this means that, while mediation models and the theory are already quite developed, more emphasis should be placed on helping companies and the public to utilise this knowledge.

#### 4.4 Reception of mediation in Germany

After having discussed the theoretical basis and the various areas within which mediation can be utilised, the discussion is now going to focus on how well mediation has been received in Germany.

Paragraph 1 of the *Mediation Act* obliged the German federal government to report to the federal parliament by 26 July 2017 on the impact that the *Mediation Act* had on the development of mediation in Germany.<sup>438</sup> For the report, more than a thousand mediators were questioned, who provided answers and insights. Of the questioned mediators, 67% stated that they had less than five (many in fact had none) mediations in 2016. Only 7% of the mediators had more than 20 mediations per year.<sup>439</sup>

These low numbers make sense in the context of mediators mostly doing mediation as a secondary occupation (42%), while only 17% of the interviewed mediators viewed mediation as their main

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<sup>437</sup> [https://www.ikm.europa-uni.de/de/Studie\\_V.pdf](https://www.ikm.europa-uni.de/de/Studie_V.pdf) The study also looked at how companies perceive the different possibilities to resolve conflicts. Even though people rarely utilised mediation in 2005, it was perceived as the second most beneficial possibility to resolve disputes. It was perceived as the second most beneficial dispute resolution method again in 2015. In my opinion, this is significant, as it presents the notion that even though people have not really had much exposure to mediation, they still recognise its potential benefits. The study goes on to describe what a 'corporate pledge' is. A corporate pledge is the promise of a company to try to resolve a conflict first by way of an alternative dispute resolution. The corporate pledge was invented by the International Institute for Conflict Prevention & Resolution in New York, and since its inception, more than 4 000 companies have joined.

<sup>438</sup> The German Federal Government *Bericht der Bundesregierung über die Auswirkungen des Mediationsgesetzes auf die Entwicklung der Mediation in Deutschland und über die Situation der Aus- und Fortbildung der Mediatoren* (2017) 2

<sup>439</sup> The German Federal Government *Bericht der Bundesregierung über die Auswirkungen des Mediationsgesetzes auf die Entwicklung der Mediation in Deutschland und über die Situation der Aus- und Fortbildung der Mediatoren* (2017) 5

occupation.<sup>440</sup> The mediators further identified several factors that, according to them, impede the development of mediation. They most commonly mentioned public awareness, but also the existence of alternative mediation providers, such as telephone mediation and arbitration boards.<sup>441</sup> The professional groups that act as mediators are for the most part consultants or coaches (42%) and lawyers (20%). In Germany mediators practice in businesses or enterprises (23%) or other organisations (20%) such as schools, churches and hospitals. Other fields where mediators are active are family and partnership mediation (22%), followed by business mediation (12%) and neighbourhood mediation (10%).<sup>442</sup>

The Roland Legal Report from 2018 found that 73% of the people who took part in the representative survey had heard about mediation before. This is in comparison to the only 57% of people who had heard about mediation by 2010.<sup>443</sup> This shows that the public is becoming increasingly aware of mediation as an alternative to courts.

Nonetheless, the low numbers of mediations might also be influenced by the trust that the German public places in the courts and laws. According to the Roland Legal Report, 68% of the people asked stated that they had a 'great deal of trust' or at least 'quite a bit of trust' in the laws, while 64% had 'a great deal of trust' or 'quite a bit of trust' in the courts.<sup>444</sup>

#### 4.5 Conclusion

This chapter provided information about mediation and the mediator's role in Germany. Mediation in Germany has become especially relevant in recent years, resulting in the enactment of the *Mediation Act* in 2012. This Act provides certain requirements that need to be met during mediation. For instance, a mediator needs to be suitably qualified or he or she needs to give his or her professional background upon request. In addition to that, this chapter discussed the most common fields of law in which mediation in Germany is implemented. In family law, mediation has been described as suitable, as it focuses on harmonious and civil dialogue with a solution that can

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<sup>440</sup> The German Federal Government *Bericht der Bundesregierung über die Auswirkungen des Mediationsgesetzes auf die Entwicklung der Mediation in Deutschland und über die Situation der Aus- und Fortbildung der Mediatoren* (2017) 5

<sup>441</sup> The German Federal Government *Bericht der Bundesregierung über die Auswirkungen des Mediationsgesetzes auf die Entwicklung der Mediation in Deutschland und über die Situation der Aus- und Fortbildung der Mediatoren* (2017) 6

<sup>442</sup> The German Federal Government *Bericht der Bundesregierung über die Auswirkungen des Mediationsgesetzes auf die Entwicklung der Mediation in Deutschland und über die Situation der Aus- und Fortbildung der Mediatoren* (2017) 6

<sup>443</sup> Institut für Demoskopie Allensbach *Roland Rechtsreport 2018* (2018) 22

<sup>444</sup> Institut für Demoskopie Allensbach *Roland Rechtsreport 2018* (2018) 11

be in accordance with the needs of the parties. In conclusion it can be stated that mediation has become a key feature of the German legal landscape.



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## Chapter 5: Conclusion

### 5.1 Introduction

This concluding chapter will provide a brief summarised overview of the differences and similarities between mediation in Germany and South Africa in the fields of family-, commercial- and labour mediation. In doing this, the researcher will attempt to consider what South Africa can learn from the approach to mediation in Germany in the respective fields, and perhaps, what Germany could learn from the South African approach. Sports mediation will not form part of the comparison, simply for the reason that it does not have a comparable counterpart in South Africa. School mediation is also not included, as it has been discussed at length in the previous chapter, and similarly does not have a comparable counterpart in South Africa. Mediation in Germany in these two fields will however be referred to in as far as determining some best practices on mediation in the South African context.

### 5.2 Comparing mediation in Germany and South Africa

To date, South Africa and Germany have both used mediation to varying degrees.<sup>445</sup> In South Africa, mediation was first encountered as part of tribal culture and expressed through *ubuntu*, while mediation in Germany can be traced back as far as the 14th century.<sup>446</sup> What both countries have in common though is that alternative ways of resolving disputes, such as through mediation, traditionally played a secondary role, with adjudication before courts being the primary way through which to address disputes. The use of mediation has however been on the rise in both Germany and South Africa. The comparison between mediation in Germany and South Africa might provide insight into how mediation can be utilised to a larger extent to resolve disputes in both countries.

#### 5.2.1 Family mediation

In South Africa and Germany alike, a field in which mediation gained early popularity was that of family law.<sup>447</sup> In South Africa, mediation in family law received early attention, such as where judges directed parties to undergo mediation before returning to court.<sup>448</sup> Since 2005 the *Children's Act* has also promoted mediation in family matters in South Africa by providing courts

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<sup>445</sup> See Chapter 3

<sup>446</sup> Hoffmann A *Mediation in Germany and the United States* (2007) 9 Eur. J.L. Reform 505

<sup>447</sup> Wiese T *The use of alternative dispute resolution methods in corporate disputes: The provisions of the Companies Act 2008* (2014) SAMLJ

<sup>448</sup> *Townsend-Turner and Another v Morrow* (524/2003, 6055/2003) [2003] ZAWCHC 53  
<http://etd.uwc.ac.za/>

with the power to refer a conflict to mediation.<sup>449</sup> Legal experts and judges alike have remarked that mediation in family matters is often the best alternative to court proceedings.<sup>450</sup> Despite the aforesaid, mediation is still not utilised sufficiently, with the public still viewing courts as the starting point for resolving issues.<sup>451</sup>

Family mediation in Germany occurs in more areas, and more frequently, in comparison to South Africa. Outside of divorce proceedings, family matters that have been mediated in Germany include successions, elder mediation, generational conflicts and international family conflicts.<sup>452</sup> German family law is well regulated and follows clear rules; therefore, in many circumstances, it is predictable what the courts will decide.<sup>453</sup> Knowledge of what the courts will decide can then be used as a starting point or guide for mediation over the issue. According to section 1 of the *Mediation Act*, mediation is understood as a voluntary process in Germany.<sup>454</sup> Even though mediation is voluntary, section 156 of the *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*<sup>455</sup> (Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction) gives the courts the power to order parents to take part in an information session about mediation.<sup>456</sup> Taking part in mediation remains voluntary in accordance with the Act, but the parties can be forced by the Act to consider it (by way of information sessions).

Mediation in Germany also works on the premise of informing both parties of the emotional situation and economic and social differences between the parties, in order to create a feeling of fairness.<sup>457</sup> It is the view of the researcher that this is important as it opens the door for empathetic decision-making. Extensive use of mediation in German family law arguably also

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<sup>449</sup> *Children's Act 38 of 2005*

<sup>450</sup> *MB v NB* (2008/25274) (2009) ZAGPJHC 76; 2010 (3) SA 220 (GSJ) and *Brownlee v Brownlee* (2008) 25274

<sup>451</sup> Brand J et al. *Commercial Mediation A User's Guide* (2016) 2 ed 2

<sup>452</sup> Rafi A *Mediation und Konfliktmanagement* (2017) 2 ed 518

<sup>453</sup> Ripke L et al. *Mediation und Konfliktmanagement* (2017) 2 ed 522

<sup>454</sup> *Mediationgesetz 2012*

<sup>455</sup> *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit 2008*

<sup>456</sup> *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit 2008*

<sup>457</sup> Ripke L et al. *Mediation und Konfliktmanagement* (2017) 2 ed 525

indicates to the general public that mediation is a viable alternative to court proceedings under the right circumstances and if done properly.

However, promoting mediation involves more than simply directing parties to mediation. There are more benefits attached to a mediation process when people go to mediation on their own accord as they are likely to be more willing to engage fully.

Similar to Germany where mediation is also voluntary, the provisions of the *Children's Act* in South Africa merely create an opportunity for the courts to send the conflicting parties to mediation, which the parties may choose not to invoke.

### 5.2.2 Commercial mediation

In terms of commercial mediation, South Africa has the *Companies Act 71* of 2008 in place which permits resolution of certain disputes through mediation.<sup>458</sup> It also stipulates that a memorandum of incorporation is binding, which is relevant because it means that where companies have agreed previously to settle conflict through mediation first, such mediation is compulsory.<sup>459</sup> The *Code on Corporate Governance*<sup>460</sup> also highlights the importance of resolving disputes through ADR and encourages the inclusion of mediation clauses in contracts.

In Germany, on the other hand, the appeal for commercial mediation seems to stem from the practical standpoint that resources and money are often wasted on conflict in the workplace and the implications thereof.<sup>461</sup> A study conducted in 2015 by the European University, Viadrina Frankfurt, has shown that even though mediation is recognised by German companies and recognised for holding many benefits, it is not used as much as it could.<sup>462</sup> However, the study did reveal that an increasing number of conflicts within German companies are resolved through mediation compared to ten years ago.<sup>463</sup>

The researcher is of the view that similar studies, representative of both bigger and smaller companies, could provide better insight into the effectiveness of mediation in terms of the *Companies Act* and the status of mediation in South African companies in general. Much can be

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<sup>458</sup> *Companies Act 71* of 2008

<sup>459</sup> Brand et al *Commercial Mediation: A User's Guide* (2016) 2 ed 7

<sup>460</sup> *King Report on Corporate Governance South Africa 2009* accessible at <https://www.iodsa.co.za/page/kingIII>

<sup>461</sup> Duve C et al. *Mediation in der Wirtschaft* (2011) 12–13

<sup>462</sup> [https://www.ikm.europa-uni.de/de/Studie\\_V.pdf](https://www.ikm.europa-uni.de/de/Studie_V.pdf)

<sup>463</sup> [https://www.ikm.europa-uni.de/de/Studie\\_V.pdf](https://www.ikm.europa-uni.de/de/Studie_V.pdf)  
<http://etd.uwc.ac.za/>

learned from the German theory on commercial mediation. German mediation theory suggests that rather than only endorsing mediation, a more comprehensive conflict management system should be created. A conflict management system is able to provide suitable circumstances and conditions for mediation to function in a commercial environment.<sup>464</sup> Contrary to what happens when mediation is simply introduced on its own at a company, a conflict management system consists of numerous elements.<sup>465</sup> Such elements include a designated contact person, accepted and clear mediation rules that are incorporated into the company, qualified personnel overseeing mediation and proper documentation of conflicts. Proper documentation helps to assess which processes work for which type of conflict.<sup>466</sup>

Germany attempted to promote and improve conflict management systems by creating the RTMKM, where experiences and knowledge were shared in order to push for quicker innovation of improved conflict management systems. A larger pool of experiences enables quicker and more accurate conclusions concerning the effectiveness of mediation in the commercial context. Something similar could be implemented in South Africa as all companies that take part could actually benefit from the shared knowledge and improvements. A well-thought-out conflict management system in conjunction with the decisions by courts that have been made with regard to mediation, together with the legislation in place in South Africa, could provide the right type of environment for mediation to be more readily accepted and used.

Even though mediation in Germany is voluntary (in accordance with the *Mediation Act*), a corporate pledge enforced by the right authority could also encourage companies to make use of mediation more often.<sup>467</sup> A corporate pledge is the declaration by a company to commit to mediation before taking the matter to court. The RTMKM also actively assists companies in signing such a corporate pledge by providing advice on the content and wording of the pledge.<sup>468</sup>

The majority of companies that took part in a study regarding a corporate pledge in Germany rated it as a useful measure.<sup>469</sup> Nonetheless, more than 50% of the participants found the

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<sup>464</sup> Nöldeke M *Konfliktmanagement: Wie Wissenschaft und Praxis sich bereichern* (2011) Spektrum der Mediation Ausgabe 44

<sup>465</sup> Koschany-Rohbeck M *Praxishandbuch Wirtschaftsmediation: Grundlagen und Methoden zur Lösung innerbetrieblicher und zwischenbetrieblicher Konflikte* (2018) 2 ed Chapter 5

<sup>466</sup> Gläßler U et al. *Mediation und Konfliktmanagement* (2017) 2 ed 556

<sup>467</sup> [https://www.ikm.europa-uni.de/de/Studie\\_V.pdf](https://www.ikm.europa-uni.de/de/Studie_V.pdf)

<sup>468</sup> Gläßler U et al. *Mediation und Konfliktmanagement* (2017) 2 ed 560-561

<sup>469</sup> [https://www.ikm.europa-uni.de/de/Studie\\_V.pdf](https://www.ikm.europa-uni.de/de/Studie_V.pdf)

implementation of such a pledge 'difficult'.<sup>470</sup> Should South Africa decide to impose something of a similar nature, it would be beneficial if there could be a professional body assisting the companies that are willing to join the pledge. In the South African context, a corporate pledge might work in conjunction with the memorandum of incorporation. A memorandum of incorporation that states that companies have to mediate first would be a viable option. Therefore, the pledge could simply work by giving further emphasis to the memorandum of incorporation within a company and making such a commitment common knowledge amongst employees.

### 5.2.3 Labour mediation

In South Africa, the CCMA was created to, amongst others, address the problems of the previous slow and inefficient industrial courts system. The CCMA is a creature of statute, meaning that it can only perform the functions as stipulated in the LRA.<sup>471</sup> This adds complexity to the jurisdiction of the CCMA as it is not always clear which matters fall within the functions provided for in the Act.<sup>472</sup> It also presents the problem that people who have labour disputes are prevented from using CCMA mediations. In the course of any mediation (conciliation or arbitration) the relationship between the parties has to be determined. Where no employment relationship exists in the legal sense, the CCMA does not have jurisdiction.

In terms of the LRA, mediation (typically in the form of conciliation) is compulsory under certain circumstances. It is only where mediation does not produce a result that the matter can then be referred to arbitration.<sup>473</sup> This LRA driven system is beneficial in the sense that people have the chance to have their matter resolved by less expensive (when compared to court proceedings) mediation, conciliation or arbitration.

In Germany there is no similar Act to the LRA or an organisation similar to the CCMA. Mediation in labour law is also governed by the *Mediation Act* as discussed under 5.2.1 above. Labour law mediation often also forms part of internal conflict management systems. These conflict management systems assist both employees and employers and have gained the support of the RTMKM.<sup>474</sup>

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<sup>470</sup> [https://www.ikm.europa-uni.de/de/Studie\\_V.pdf](https://www.ikm.europa-uni.de/de/Studie_V.pdf)

<sup>471</sup> Bosch C, 'Abantu Badidekele – *When must an applicant prove that he is an employee?*', (2010) 31 ILJ 809 809

<sup>472</sup> Bosch C, 'Abantu Badidekele – *When must an applicant prove that he is an employee?*', (2010) 31 ILJ 809 813

<sup>473</sup> Bosch C, 'Abantu Badidekele – *When must an applicant prove that he is an employee?*', (2010) 31 ILJ 809 809

<sup>474</sup> [https://www.ikm.europa-uni.de/de/Studie\\_V.pdf](https://www.ikm.europa-uni.de/de/Studie_V.pdf)  
<http://etd.uwc.ac.za/>

While mediation at the CCMA as provided by the LRA is important, the fact that an employment relationship has to be established in order to access the services of the CCMA presents a source of difficulty.<sup>475</sup> It would have been more beneficial to workers and employers if an entity similar to the CCMA existed which caters for all disputes that occur in a work environment. That way more workers can gain the benefits of mediation, such as independent contractors.

In contrast, the German system relies on the incentives of a well-functioning conflict system that can improve the way a company runs. In addition, it is important to give support to labour mediation, whether the system relies on voluntary or compulsory mediation. An initiative such as the RTMKM, which has the means to improve the system and encourage research, can be effective.

### 5.3 Observations and recommendations

One of the more apparent differences between mediation in Germany and South Africa is that Germany has a *Mediation Act* that regulates mediation in general – that is, being applicable to all areas of law.<sup>476</sup> The Act extensively regulates issues such as the role and duties of the mediator, a mediator's qualifications and training, and requirements related to having sufficient theoretical and practical knowledge to act as a mediator.<sup>477</sup> The mediator is responsible for the process as a whole, including having to inform the parties about what mediation entails and the effect of decisions reached.<sup>478</sup> The *Mediation Act* also caters for the mediator having to lay down his or her credentials upon request.<sup>479</sup> In addition, the Act makes mention of the impartiality requirement, which could be impaired due to professional cooperation for example.<sup>480</sup> From the research it appears as if the *Mediation Act* codifies what is already common practice concerning mediation in Germany.

In South Africa there are various Acts dealing with mediation in different fields of law. The Acts deal with mediation in their respective fields and mostly allow for mediation to be used in a specific set of events or scenario, whether it be voluntary or mandatory. The *Children's Act* for

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<sup>475</sup> Bosch C, 'Abantu Badidekele – When must an applicant prove that he is an employee?', (2010) 31 ILJ 809 813

<sup>476</sup> Carl E et al. *Mediation und Konfliktmanagement* (2017) 2 ed 485–486

<sup>477</sup> *Mediationsgesetz* 2012 section 2

<sup>478</sup> *Mediationsgesetz* 2012 section 3

<sup>479</sup> *Mediationsgesetz* 2012 section 3(5)

<sup>480</sup> Carl E et al. *Mediation und Konfliktmanagement* (2017) 2 ed 485–486

example makes provision for referring a matter to mediation in the right circumstances.<sup>481</sup> There is no Act however that regulates mediation or sets out the rules and standards that have to be met as is the case with the *Mediation Act* in Germany.

There are quite a few lessons South Africa can take from the German *Mediation Act* should South Africa decide to enact a similar Act. First, there is a distinction between a mediator and a *certified* mediator, with the certified mediator having to comply with more stringent formal and professional requirements. Such an approach has the advantage of enabling a larger pool of people to act as mediators, while still maintaining a specialised group of certified mediators. Such a distinction is important in cases dealing with issues of a very technical, and more difficult, nature. This also provides protection to the parties who attend mediation. According to the *Mediation Act* parties may ask the mediator for his or her credentials.

Secondly, in terms of the German *Mediation Act* the mediator has the duty to serve the parties to an equal degree – a requirement that seems to stretch further than merely requiring impartiality.<sup>482</sup> This highlights the position of the mediator as the facilitator but also places an active duty on him or her to assist both parties. There are also provisions that deal with circumstances when mediators are deemed not to be impartial<sup>483</sup> and the duties of the mediator are also clearly defined.<sup>484</sup>

Thirdly, the German *Mediation Act* lays down some ground rules regarding mediation and thereby sets a specific standard that has to be met.

Fourthly, having a single Act regulating mediation in general also provides more certainty over when and how mediation is to take place and provides easier recourse to mediation. For these reasons, it is believed that a single, comprehensive, Mediation Act would ultimately be advantageous for mediation in South Africa.

That is however not to say that such an approach will not have some shortcomings or difficulty in South Africa. One such issue is the requirement of mediator certification. Different from Germany, South Africa has a large number of rural areas where mediators might not be able to obtain the prescribed training, let alone prescribed accreditation. Any Mediation Act (or similar Act) in South

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<sup>481</sup> *Children's Act* 38 of 2005 section 71(1)

<sup>482</sup> *Mediationsgesetz* 2012

<sup>483</sup> *Mediationsgesetz* 2012 section 2(5), 3(2)

<sup>484</sup> *Mediationsgesetz* 2012 section 2

Africa should therefore ideally also cater for mediation in rural areas and take into consideration the different circumstances of the parties involved.

A problem observed through the research with mediation in both Germany and in South Africa is that even though mediation is catered for in both countries, the process seems to be under-utilised in many instances. As such it is important to keep any Mediation Act as simple in wording and meaning as possible, since an overly complex Act could deter the public from making use of it and might create more questions than answers. One solution could be to teach people about mediation from a young age – in line with the model of mediation in schools utilised in some German schools.<sup>485</sup> Such an approach has many advantages: first, people are familiarised with the concept of mediation, and that conflicts can be solved in such a way, from a young age. Secondly, it equips young people with the right tools to resolve disputes in a productive manner. An introduction to mediation at a young age could change the legal landscape and thinking of people. Principles and approaches to mediation should be taught to learners by competent teachers or skilled outside mediators. The quality of the training is essential, because only then will the learners be in a position to deal with conflict rather than being overwhelmed thereby. Lawyers who are educated in mediation could mentor schools as part of their *pro bono* work in order to guarantee a certain quality of mediation as well as overseeing the programme from a professional perspective.<sup>486</sup>

#### **5.4 Conclusion**

To conclude, it can be said that mediation is a very promising alternative to court proceedings. The benefits are plentiful and could create both creative and satisfactory outcomes. The comparison between Germany and South Africa showed how innovative and versatile the use of mediation could be.<sup>487</sup> The challenge however remains as to how to reap the benefits of mediation, which goes hand in hand with the question of how to implement mediation.

What is important to those that stand to benefit from mediation is certainty around when mediation will be used and the process itself, and being able to almost immediately receive some benefit from the get-go. If mediation only reveals its benefits during later stages of the process it might not be enticing enough. Courts are well known to people; therefore, in order for mediation to play a larger part in disputes it has to more enticing in terms of the immediately felt benefits, such as accessibility and pricing.

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<sup>485</sup> Larsson L *Begegnung Fördern: Mediation in Theorie und Praxis* (2009) Chapter 1

<sup>486</sup> Behn S et al. *Mediation an Schulen: Eine bundesweite Evaluation* (2006) location 2950

<sup>487</sup> Behn S et al. *Mediation an Schulen: Eine bundesweite Evaluation* (2006)



The comparison between Germany and South Africa has shown that introducing mediation is more than simply passing legislation which promotes mediation. Legislation that forces mediation might not create the same outcome and attitude towards mediation as voluntary mediation and also seems to be at odds with the characteristics of mediation. Creating a functional mediation system that is accessible to the public is a complex task, which involves various factors. The success of mediation involves creating an environment that has confidence in mediation as a way to resolve a dispute. This is where the German model in the fields of sports and school mediation becomes important. In sports, instead of forcing parties to attend mediation, the parties have a choice to attend for a more lenient punishment. Since lengthy bans are often feared by the sports parties, they make the choice to attend mediation themselves. The goal of sports mediation is to ensure that the type of conflict under consideration does not happen again.<sup>488</sup> Introducing mediation programmes in schools could help to develop confidence and awareness; however, it should be borne in mind that confidence can only be gained if the mediation programmes in schools are well thought out and implemented. Nonetheless, mediation programmes are a good starting point both to increase the atmosphere in schools and to change the perception of mediation.

In addition, a successful system of mediation depends on creating bodies and entities, such as the CCMA in South Africa, that are trustworthy, reliable and accessible. Mediation centres outside of only the CCMA (and the bargaining councils) in South Africa could be advantageous in this regard. Such centres should ideally be located in areas where people have easy access. Staff has to be well trained, professional and ethical. In this regard the German example could be beneficial in South Africa, since the *Mediation Act* dictates rules with which a mediator has to comply and creates a verified system of mediation.

Ultimately, mediation is a viable option in a wide range of fields, provided it has been given the necessary amount of thought and resources. Mediation has the ability to replace and relieve overburdened and expensive court systems, while at the same time encouraging the public to view disputes in a different light. It is definitely worth pursuing further in South Africa and has already yielded some positive results in the field of labour law specifically.

Word Count: 29 996

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<sup>488</sup> Ribler A et al. *Mediation und Konfliktmanagement* (2017) 2 ed 610  
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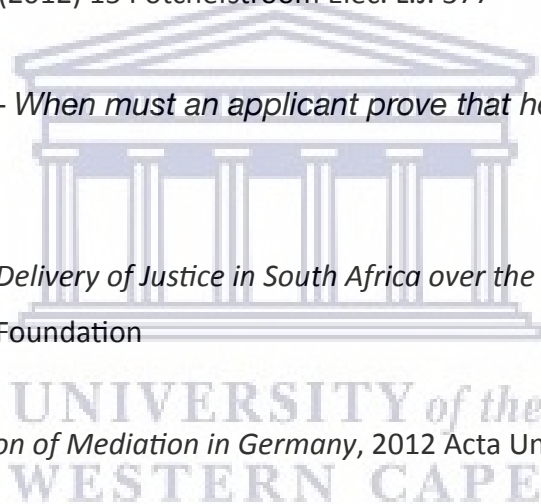
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