

**THE LACK OF A REGULATORY AND SUPERVISION NEXUS TO ENHANCE THE
USE OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN CORPORATE
LAW.**

by

Emihle Mkubukeli

Student number: 2019676994

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Supervisor: Dr E.C. Muller

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DECLARATION

I, Emihle Mkubukeli , declare that the mini-dissertation I herewith submit for the degree Master of Law with specialisation in law of business entities by coursework at the University of the Free State is my own independent work, that I have not previously submitted it for any degree or examination at another higher education institution, and that all the sources I have used or quoted have been acknowledged as complete references.


E. Mkubukeli

2019676994

22 November 2024

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“If I have seen further than others, it is by standing upon the shoulders of giants.”

Isaac Newton

To God, the universe, thank you for watching over me and for giving me the strength to always push forward. All glory to you.

To my ancestors, ndiyacamagusha kuni, ndibamba ngazibini, ndithi makukhanye, kwande, kube chosi, kube hele. Ndiyabulela ngayo yonke into bantu abadala. Camagu

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LIST OF ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
AASA	Association of Arbitrators (Southern Africa)
AFSA	Arbitration Foundation of South Africa
BATNA	Best alternative to a negotiated agreement
C-ADR	Corporate Alternative Dispute Resolution Directive
CCs	Close Corporations
CC	Close Corporation
CCMA	Commission for Conciliation, Mediation and Arbitration
DiSAC	Dispute Settlement Accreditation Council
JSA	Johannesburg Stock Exchange
LRA	Labour Relations Act
MOI	Memorandum of Incorporation
MSSA	Mediation Society of South Africa
NPA	National Prosecuting Authority
PATNA	Probable alternative to a negotiated agreement
SALRC	South African Law Reform Commission
WATNA	Worst alternative to a negotiated agreement.

ABSTRACT

Although court litigation remains the conventional dispute resolution method of dealing with corporate and commercial disputes, ADR mechanisms are not an unfamiliar concept in South African civil justice jurisprudence. Court litigation is often inadequate for some corporate disputes due to its relationship-damaging effects, complexity, high costs, and time consumption effects. Litigation also fails to consider the nature and psychology of these disputes. In contrast, ADR is becoming increasingly recognised because it enables businesses to resolve disputes more efficiently and cost-effectively. ADR encompasses negotiation-based mechanisms that allow business entities to navigate disputes flexibly, foster collaborative environments, and protect business relationships. Using ADR is a practical decision that is an investment in long-term business success.

The judiciary and the legislature have demonstrated support for ADR mechanisms as alternatives to litigation in corporate law through Uniform Court Rules and Statutory provisions. These include ADR provisions in the *Companies Act*, the *Arbitration Act*, the role of institutions such as the Companies and Intellectual Property Commission, the Companies Tribunal, Uniform Court Rules on Court-annexed mediation, and King III recommendations. These initiatives and policy considerations to promote ADR have coincided with the growing trend of using ADR mechanisms to resolve corporate disputes in South Africa. Simply put, through piecemeal regulation, the use of ADR has increased. In light of this revelation, the researcher argues that a more enhanced use of ADR can be achieved through establishing a nexus between regulation and supervision.

Noting that regulation entails a legislative framework, while supervision on the other hand is the enforcement of a legal framework: The researcher examines the relationship between regulation and supervision in promoting the effective use of ADR mechanisms in South African corporate law. In light of the country's changing legal landscape, this research highlights a significant gap between regulation and supervision. There is no regulatory authority whose only duty or mandate is to supervise the use of ADR and compliance with ADR standards. Some voluntary bodies accredit, mandate, and regulate their members' professional standards and conduct.

However, these bodies themselves are not statutorily regulated. The researcher explores how the lack of distinct regulatory legislation, and supervisory bodies hinders the enhanced use of ADR in resolving corporate disputes.

This research seeks to contribute to the existing body of knowledge by addressing flaws in the regulatory and supervisory framework, highlighting areas for reform to enhance the use of ADR, and providing policy recommendations to close the regulation-supervision gap.

Keywords: Alternative dispute resolution (ADR), negotiation, mediation, arbitration, conciliation, court-annexed mediation, corporate law, regulation, legislation, supervision, business entities, companies, companies' tribunal, close corporations, partnerships, business trusts

CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION

Disputes are ever-present in the corporate field. Although they can never be avoided, an appropriately informed outlook on a dispute can determine how well that dispute is approached and settled. This chapter provides a roadmap for the research study that aims to analyse the importance of a regulatory and supervision nexus in promoting Alternative Dispute Resolution (hereafter referred to as ADR) in corporate disputes. It will also provide the contextual background, aims and reasons for the study, the methodology, and the structure of the thesis.

1.2 BACKGROUND AND RATIONALE

Corporate law is a complex legal field that deals with creating, operating, managing, interacting with third parties, and closing business entities.¹ Whether you are starting a new business, managing an existing one, or involved in business transactions, it is crucial to understand and consider establishing a dispute resolution mechanism that can provide a first recourse for aggrieved parties.² In South Africa, civil litigation is the common method used in resolving civil disputes.³ This conventional method of dispute resolution has, in many ways, become unsuited for many corporate disputes due to its deficiencies. These include the damage to the relationship between the parties, the expensive and time-consuming nature of civil litigation, and its lack of acknowledgement of the theory related to the way disputes arise, or the psychological approaches to dispute resolution.⁴

Although corporate law encompasses juristic persons as well, it is important to note that these entities are managed and controlled by human beings.⁵ The theory and

¹ Davis and Geach 2021:4-15.

² Cassim *et al.* 2012:593.

³ Muller 2021:2-5.

⁴ Muller 2021:3.

⁵ Patelia & Chicktay 2016:v.

psychological approaches to dispute resolution should not be disregarded. The challenges associated with litigation also hinder access to justice for South African businesses, especially small to medium-sized entities that need it the most.⁶ The concept of access to justice outlined in *section 34* of the Constitution of the Republic of South Africa takes a broader approach and moves away from the assumption that justice can only be obtained through an independent court or tribunal adjudicating the dispute.⁷ ADR has been widely embraced for fulfilling the constitutional requirement of providing equitable access to justice and for reducing the time and expense of litigation, managing court backlogs, and generally improving the efficiency of the South African legal system.⁸

ADR refers to a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts. It is normally thought to encompass negotiation,⁹ mediation,¹⁰ arbitration,¹¹ conciliation in terms of the Labour Relations Act 66 of 1995,¹² and a variety of “hybrid” processes by which a neutral 3rd party facilitates the resolution of legal disputes without formal judicial adjudication.¹³ Although numerous statutes refer to using ADR as a dispute resolution mechanism, the lack of regulation and supervision of these mechanisms persists, leading to uncertainty. ADR is suggested and not compulsory but there is a need for a distinct regulatory legislation and supervision framework to be in place for parties who have opted voluntarily to take the route of ADR.

⁶ Maclons 2014:v.

⁷ *Constitution of the Republic of South Africa*, 1996:sec. 34.

⁸ Hoffman 1996:132.

⁹ Negotiation is a process where parties attempt to settle a dispute personally without using an independent third party.

¹⁰ Mediation is the process whereby parties to a corporate dispute attempt to reach consensus with the aid of a neutral third party.

¹¹ Arbitration is a formal dispute resolution method involving a neutral third party making binding decisions.

¹² Conciliation is a process where a commissioner meets with the parties to a dispute and explores ways to settle the dispute by agreement.

¹³ Mnookin 1998:1.

1.3 PROBLEM STATEMENT

This study aims to investigate the effect/impact a regulatory and supervision nexus may have in promoting the use of ADR mechanisms. Weise¹⁴ is of the view that businesses “desire among all things that controversies be rapidly as well as equitably decided”, and that prolonged lawsuits are the tumours and cancers of businessmen, eating into the very substance of their lives. Thus, the use of ADR mechanisms to resolve corporate disputes has grown internationally over the last few decades and it has been regulated in other international jurisdictions, such as the United Kingdom.¹⁵ However, the South African legal system still has not adopted a legislative framework primarily for regulating ADR mechanisms apart from private arbitration in the commercial sphere.¹⁶

The *Arbitration Act* 42 of 1965¹⁷ introduces regulations for using arbitration in an otherwise unregulated space of dispute resolution, being the only regulated method of ADR. However, the scope and theoretical framework it introduces are moderate and lack depth and substance. The lack of regulation of ADR mechanisms, such as mediation and negotiation, has caused and led to a subsequent lack of supervision of these mechanisms. The researcher is of the view that this leads to poor compliance with the terms of the resolutions achieved. Poor compliance leads to court involvement that was meant to be avoided, requiring it to supervise and ensure enforcement of these resolutions.

¹⁴ Wiese 2014:668.

¹⁵ The UK has implemented a Directive by way of secondary legislation (‘the UK Regulations’) to regulate the ADR; The Alternative Dispute Resolution (ADR) for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (as amended by the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015); Kirkham 2016:7.

¹⁶ Although the primary focus of this study is corporate law it is prudent to mention that labour dispute resolution is regulated by the Labour Relations Act and the ADR processes conducted under the auspices of the CCMA. Also, the ADR processes at statutorily enacted ombud offices are regulated by the enacting legislation.

¹⁷ *Arbitration Act* 42/1965.

1.3.1 Research Questions

The primary research question of this study is whether the lack of a regulatory and supervision nexus impacts the enhanced use of ADR mechanisms in corporate law. In addressing the main research question, the following sub-questions arose:

- Is there an interrelationship between the efficient regulation and supervision of ADR and its use in corporate disputes?
- Should ADR be exempted from adequate regulation and supervision due to its nature?
- Would regulating ADR mechanisms defeat its intended purpose and turn it into a form of private litigation?

The researcher will, therefore, conduct comprehensive research on these sub-questions to address the main research question.

1.4 DEMARCATION OF THE STUDY

The business/corporate entities that are the subject of this study are, companies (any form of a company), close corporations, partnerships, and business trusts. The law that governs these entities will be investigated concerning the use of ADR to resolve disputes that may occur within or between these entities. The focus of this study is on negotiation, mediation, conciliation, and arbitration which are the most common forms of ADR by which parties resolve legal disputes outside of court.¹⁸ In corporate law, several varying disputes can occur. Corporate disputes commonly refer to disagreements or conflicts that occur within a business entity. These disputes can involve parties within the corporate environment such as employees, management, shareholders, partners, and members.

These disputes can also be external disputes between an entity, its shareholders, members, or partners and third parties.¹⁹ Simply put, in a close corporation this can refer to a disagreement between members of the close corporation or between

¹⁸ Wiese 2014:668-669; Muller 2021:2-5.

¹⁹ Sarkar Amrita "Ways to navigate Corporate Disputes," <https://www.linkedin.com/pulse/ways-navigate-corporate-disputes-amrita-sarkar> (accessed 14 March 2024).

members and a third party. In a company, this can refer to a disagreement between shareholders, directors, and employees or between the company and third parties. Similarly, in partnerships, this can refer to a disagreement between partners or between partners and third parties. It is worth noting that third parties can include other entities, private persons, or even regulatory bodies.

Corporate disputes involve broad legal issues such as contractual disputes, intellectual property rights, regulatory compliance, ownership, and management misconduct. Contractual disputes arise when one party fails to uphold their end of the agreement arising from an employment contract, goods/services contract, lease contract or any other valid contract.²⁰ Intellectual property disputes arise when more than one parties claim the right to an intellectual property.²¹ An example would be more than one entity or private person claiming a right to a name, business idea, or strategic marketing concept. Ownership and/or management disputes arise from an entity's day-to-day business, mergers and acquisitions, rights to shares and dividends, and decision-making. These conflicts/disagreements all affect the entity's ordinary course of business and operations.

Understanding the scope and nature of a dispute is important to manage the risks involved and to effectively resolve the dispute. The complexity of corporate disputes requires specialised legal expertise to navigate the intricacies to achieve favourable outcomes. A dispute between an entity and an employee can transcend the realm of corporate law to labour law, giving application to labour laws and principles. Some of these disputes may even span across different jurisdictions. However, it is beyond the scope of this study to analyse possible corporate disputes or to analyse the laws governing disputes spanning across different jurisdictions or streams of law. The South African position on the use of ADR in addressing corporate disputes will be a central focus.

²⁰ These disputes can be classified as civil disputes where parties seek monetary damages, specific performance, or other remedies instead of criminal sanctions.

²¹ Trade4MSMEs "What is an intellectual property dispute?" <https://trade4msmes.org/guides/intellectual-property-disputes> (accessed 13 March 2024).

1.5 METHODOLOGY

The study will be expository, analytical, and critical. The research will be based on a critical and integrated analysis of primary sources of law as well as secondary sources of law. This means that the position of the law will be presented before being analysed and, if necessary, criticised.

This study will analyse existing regulation of the concept of ADR and the supervision of these mechanisms. On equal footing, the study will investigate the nature of ADR mechanisms and whether they warrant proper and efficient regulation and supervision. This exposition will be undertaken to illustrate how proper regulation and supervision of these methods could either aid or prevent turning them into private litigation.

1.6 STRUCTURE OF THE STUDY

Chapter 1: Introduction

This chapter introduces the context of the research, the main research question and the sub-questions thereto. The background and rationale for the research are set out and the limitations are mentioned to further elaborate on the key intent of the study.

Chapter 2: The interrelationship between efficient regulation and supervision of ADR and its use in corporate disputes.

This chapter will investigate the existence of an interrelationship between the efficient regulation of ADR and its use in corporate disputes. Although there is no distinct regulatory framework, the provisions mentioning ADR in corporate law interrelate with its use and promotion. These provisions will be analysed and criticised.

Chapter 3: The nature of Alternative Dispute Resolution mechanisms

This chapter will conduct an analysis of the nature of ADR mechanisms on two premises. First, on whether ADR mechanisms are being proposed as an adjunct to court procedures or as an alternative separate from the established judicial system. An investigation will be conducted to ascertain whether the nature of ADR warrants adequate regulation and supervision on one or both premises.

Chapter 4: The intended purpose of ADR mechanisms

The departing theme will look at the submission of how regulating ADR may create a sense of formalism and defeat its intended purpose. The rebuttal theme will be an exposition on how the lack of a regulatory framework has defeated the intended purpose of ADR by often allowing it to become a litigation look-alike.

Chapter 5: Conclusions and Recommendations

The chapter will summarise the conclusions of the mini dissertation. The recommendations as to how the lack of a regulatory and supervision nexus can be enhanced in the use of alternative dispute resolution mechanisms in corporate law will also be formulated in this chapter.

1.7 CONCLUSION

In this chapter, the researcher laid the foundations from which this study departs. The researcher alluded to the deficiencies of court litigation as the conventional method of dispute resolution. These deficiencies have led to the embrace of ADR mechanisms to ease the burden on access to justice for South African business entities, particularly small to medium-sized entities. Businesses desire disputes to be rapidly and equitably decided for the reason that prolonged lawsuits are the diseases of businessmen, eating into the substance of their lives. While the use of ADR mechanisms to resolve corporate disputes has significantly increased, the absence of regulation and supervision for these mechanisms creates uncertainty and erodes trust. The researcher proposes that the lack of a regulatory and supervision nexus impacts the enhanced use of ADR mechanisms in corporate law.

CHAPTER 2: THE INTERRELATIONSHIP BETWEEN EFFICIENT REGULATION OF ADR AND ITS USE IN CORPORATE DISPUTES.

2.1 INTRODUCTION

This chapter will share insights on regulatory provisions that suggest or recommend the use of ADR in South African corporate law. The objective is to investigate the existence of an interrelationship between the regulation and supervision of ADR and its use in corporate disputes. Although there is no distinct regulatory framework, the researcher argues that provisions suggesting ADR in corporate law interrelate with enhancing its use and promotion. ADR is regulated using a piecemeal approach in South African law.²² Apart from court rules and the express provisions under the *Companies Act* 71 of 2008 that support the use of ADR in corporate law, no legislation is solely dedicated to regulating ADR in South Africa.²³ Proper and adequate regulation and supervision refer to measures aimed at safeguarding and promoting the rights of involved entities and parties to provide the necessary mechanisms to ensure fair, accessible, and sustainable dispute resolution achieved using ADR mechanisms.

Regulation entails a legal framework. Supervision on the other hand is the enforcement of a legal framework. Put differently, ADR regulation and supervision entail different measures and mechanisms which are aimed at minimising the risks and potential risks to create accessible ADR mechanisms that entities can access and make use of seamlessly.²⁴ It is submitted that regulation and supervision are key measures and policy interventions that can enhance the use of ADR in a corporate environment. As a point of departure, the law that governs companies, close corporations, partnerships, and business/corporate trusts will be critically analysed to investigate their position concerning the use of ADR to resolve internal or external disputes when they arise.

²² There is no distinct regulatory legislation outside provisions that mention it in one form or the other.

²³ Broodryk 2015:493-494

²⁴ The risks include ADR mechanisms such mediation and conciliation being used in a manner that emulates a mini trial, formalising these forms ADR because it is not regulated. A more depth discussion about these risks is provided in Chapter 4.

2.2 LAW THAT GOVERNS BUSINESS ENTITIES' USE OF ADR

King III is a South African report on corporate governance that was released on 1 September 2009 and became effective on 1 March 2010. King III applies to all entities regardless of the manner and form of incorporation or establishment, whether in the public, private, or non-profit sectors.²⁵ This document contains recommendations that apply to all business entities and sets out several key corporate governance principles. These include advocating for the insertion of an enforceable ADR clause in contracts to efficiently resolve disputes according to the needs of parties, rather than their legal rights and obligations.²⁶ However, compliance with King III remains voluntary for most business entities and is only mandatory for business entities listed on the Johannesburg Stock Exchange (JSE).²⁷ The paragraphs below will evaluate the law governing different corporate entities in South Africa to analyse whether they make provisions for the use of ADR in addressing disputes or not.

2.2.1 Company law

South African company law is governed by the *Companies Act 71* of 2008, which regulates the formation, operation, governance, and dissolution of companies in South Africa. Case law and common law also apply to companies because many of the concepts and principles concerning directors' duties have been reviewed and adjudicated in court judgments.²⁸ Companies are separate legal entities from their shareholders and directors, which means that shareholders' liability is limited to their shares.²⁹ Directors act on behalf of the company and they must act in the best interests of the company.³⁰ Although incorporating a company provides limited liability to those persons behind the company, in certain exceptional circumstances, the court has the

²⁵ King III at 6-7.

²⁶ King III at 15.

²⁷ JSE Listings Requirements:par.7.F and 8.63(a); King III at 6.

²⁸ Davis and Geach 2019:330-335.

²⁹ Davis and Geach 2019:34.

³⁰ Davis and Geach 2019:34.

power to “pierce” or “lift” the corporate veil and to hold the directors (and others) personally liable for the debts of the company.³¹

The 2008 *Companies Act* provides for two types of companies, namely profit companies, and non-profit companies.³² A company is a profit company if it is incorporated for financial gain for its shareholders.³³ A profit company can be incorporated in the form of a public company, a state-owned enterprise, a personal liability company, or a private company.³⁴ A public company is any profit-driven company that is not a state-owned enterprise, a private company or a personal liability company.³⁵ In a public company, shares can be sold to the public and are easily transferable.³⁶ A state-owned company is a profit company under the ownership and control of the national government.³⁷

A personal liability company is a private profit company where the directors are jointly and severally liable together with the company for all contractual debts and liabilities incurred during their terms of office.³⁸ A private company is a profit company whose Memorandum of Incorporation (MOI) prohibits it from offering its shares to the public and restricts the transferability of its shares.³⁹ A non-profit company is a company

³¹ Davis and Geach 2019:37-39

³² Davis and Geach 2019:41.

³³ Davis and Geach 2019:41-42.

³⁴ Davis and Geach 2019:41.

³⁵ Davis and Geach 2019:41 A public company can either be listed on a stock exchange or remain unlisted. The recognition of a company's public status is primarily derived from its Memorandum of Incorporation (MOI), which serves as the company's governing document. The provisions outlined in the MOI will determine whether the company qualifies as a public company.

³⁶ Davis and Geach 2019:41-42.

³⁷ Davis and Geach 2019:41-42.

³⁸ Davis and Geach 2019:42; personal liability companies are mainly used by professional associations such as attorneys, entrepreneurs and stockbrokers who wish to exploit some of the advantages of corporate personality such as perpetual succession.

³⁹ Davis and Geach 2019:43-44.

incorporated for any objective other than to acquire profit.⁴⁰ It is worth noting that non-profit companies may acquire and hold securities issued by a profit company, or directly or indirectly, alone or with any other person, carry on any business, trade or undertaking consistent with or ancillary to its stated objects.⁴¹

In reference to the brief discussion above, it is clear that a company and business environment is complex and dynamic, and disputes involving regulatory compliance, ownership, management misconduct, and/or contractual disputes are bound to occur. The commonly known and most used dispute resolution method for addressing complaints regarding alleged contraventions of the *Act* or for the enforcement of a provision of a right is litigation.⁴² This includes applying for appropriate relief to the division of the High Court that had jurisdiction over the matter.⁴³ Litigation can be time-consuming, expensive, and too adversarial.⁴⁴ It often strains relationships between the parties involved, hindering business growth. Court congestion has also increased since the implementation of the 2008 *Companies Act*, leading to an increased use of ADR - for company dispute resolution.⁴⁵ Under the *Companies Act*, any person (including the company) who has a complaint relating to company law that can be referred to the court may refer the matter to the Companies Tribunal for mediation, conciliation, or arbitration.⁴⁶

⁴⁰ Davis and Geach 2019:46; These companies must have as at least one of their objectives a public benefit object or an object relating to one or more cultural or social activities or communal or group interests.

⁴¹ Davis and Geach 2019:46.

⁴² Davis 2010:421; *Companies Act* 71/2008:sec. 156.

⁴³ *Companies Act* 71/2008:sec. 156(c).

⁴⁴ Pete *et al* 2009:501.

⁴⁵ Wiese 2014.

⁴⁶ *Companies Act* 71/2008:sec. 166(1).

2.2.1.1 Adjudication and resolution of disputes by the Companies Tribunal ⁴⁷

Referring a dispute with or within a company to ADR is regulated by section 166(1) of the 2008 *Companies Act*.⁴⁸ This section previously regulated the use of ADR concerning bodies/entities that may be approached to conduct ADR, including the Companies Tribunal, an accredited entity, or any other person.⁴⁹ However, it has recently been amended to provide that only the Companies Tribunal can conduct ADR in respect of a dispute emanating from a contravention or enforcement of a provision of the *Act*.⁵⁰ There are requirements that must be met before a matter is brought before the tribunal.

Firstly, the party bringing the application must have standing.⁵¹ Persons who may bring a dispute to the Companies Tribunal are set out in section 157 of the *Companies Act*.⁵² Secondly, the Tribunal has jurisdiction in disputes arising out of the *Companies Act* or company relations and these disputes must be with or within the company.⁵³ These can involve alleged contraventions of the *Act* or the enforcement of a provision of a right under the *Act*.⁵⁴ Lastly, all parties must agree to the use of ADR and the tribunal does not possess compulsory jurisdiction in terms of section 166.⁵⁵ The use of ADR is voluntary unless it is ordered by the court.

⁴⁷ Companies Tribunal “Alternative Dispute Resolution at the Companies Tribunal” www.companiestribunal.org.za/alternative-dispute-resolution-at-the-companies-tribunal (accessed on 23 September 2024)

⁴⁸ Wiese 2014:672.

⁴⁹ *Companies Act* 71/2008:sec. 166(1).

⁵⁰ Companies Tribunal Bulletin Volume 1: April to June 2024.

⁵¹ Companies Tribunal Bulletin Volume 1: April to June 2024.

⁵² This includes a person directly contemplated in a particular provision in the Act (including CIPC), a person acting on behalf of another who is unable to act in their name, a member acting on behalf of a group of affected persons or an association acting on behalf of its members, and a person authorised to act in the public interest as authorised by the court

⁵³ Companies Tribunal Bulletin Volume 1: April to June 2024.

⁵⁴ No matter that falls within the jurisdiction of a particular body, such as the Takeover and Regulation Panel or the High Court, may proceed to ADR in front of the Companies Tribunal unless it has been referred to ADR by such a body.

⁵⁵ Davis 2010:422.

The tribunal's functions include adjudicating applications made to it concerning the *Act* and assisting in the resolution of disputes.⁵⁶ The tribunal is required to conduct proceedings addressed to it to determine the outcome of the complaint according to the rules of natural justice.⁵⁷ The tribunal appoints a qualified mediator, conciliator, or arbitrator and provides a venue for the hearing.⁵⁸ Mediation is the process whereby parties to a corporate dispute attempt to reach consensus with the aid of a neutral third party. Arbitration is a formal dispute resolution method involving a neutral third party making a binding decision. Conciliation is a process where a commissioner meets with the parties to a dispute and explores ways to settle the dispute by agreement. The services are provided to the business community at no cost to the parties to maintain business relationships. The layout and nature of the proceedings should be less formal than those of a formal court, as set out in section 180(2) of the 2008 Act.⁵⁹ These proceedings are confidential. Once the hearing begins, a panel of members will consider the case, and the majority decision will represent the Tribunal's ruling.⁶⁰ Parties are not required to have legal representation during the proceedings but may choose to have it if they wish.⁶¹

Time and procedure are intended to be flexible to better suit the needs of the parties. Although there are no express time limits, it is part of the Tribunal's objectives to

⁵⁶ *Companies Act 71/2008*:sec. 195.

⁵⁷ Davis 2010:422.

⁵⁸ Companies Tribunal "Alternative Dispute Resolution at the Companies Tribunal" www.companiestribunal.org.za/alternative-dispute-resolution-at-the-companies-tribunal; The parties are provided with qualified facilitators, business relationships are maintained, the proceedings are private, and time and procedure are flexible to suit the needs of the parties.

⁵⁹ Wiese 2014:674.

⁶⁰ Companies Tribunal "Alternative Dispute Resolution at the Companies Tribunal" www.companiestribunal.org.za/alternative-dispute-resolution-at-the-companies-tribunal (accessed on 23 September 2024).

⁶¹ Companies Tribunal "Alternative Dispute Resolution at the Companies Tribunal" www.companiestribunal.org.za/alternative-dispute-resolution-at-the-companies-tribunal (accessed on 23 September 2024).

conduct hearings expeditiously, informally, by the principles of natural justice.⁶² Section 166(2) of the 2008 *Companies Act* states that if the tribunal conducting ADR concludes that either party is not participating in good faith or that there is no reasonable probability of the parties resolving the dispute raised during the process, a certificate in the prescribed form stating that the process has failed must be issued.⁶³

The tribunal's decision or settlement agreement reached in an ADR process is not automatically enforceable.⁶⁴ To make it legally binding, the order must be submitted to the court for confirmation using the court application procedure to be discussed in Chapter 3. However, it is important to note that the court is not obligated to make the decision or settlement agreement a court order; it has the authority to amend the agreement or even refuse to issue the order altogether.⁶⁵

2.2.1.2 Complaints to the Companies and Intellectual Property Commission⁶⁶

The second route in which a dispute may reach the Companies Tribunal as allowed by section 156 of the *Act* is to file a complaint with the Companies and Intellectual Property Commission (the Commission). The Commission is enlisted as part of the persons who may bring a dispute to the Companies Tribunal under section 157 of the *Companies Act*. The functions of the Commission are set out in section 169(1) of the *Companies Act*. They include the promotion of voluntary dispute resolution through ADR methods and the investigation of complaints.⁶⁷ In promoting voluntary dispute

⁶² Companies Tribunal "Alternative Dispute Resolution at the Companies Tribunal" www.companiestribunal.org.za/alternative-dispute-resolution-at-the-companies-tribunal (accessed on 23 September 2024).

⁶³ *Companies Act* 71/2008:sec. 166(2).

⁶⁴ Companies Tribunal "Alternative Dispute Resolution at the Companies Tribunal" www.companiestribunal.org.za/alternative-dispute-resolution-at-the-companies-tribunal (accessed on 23 September 2024).

⁶⁵ Companies Tribunal "Alternative Dispute Resolution at the Companies Tribunal" www.companiestribunal.org.za/alternative-dispute-resolution-at-the-companies-tribunal (accessed on 23 September 2024).

⁶⁶ This section is based on section 169(1) of the *Companies Act* 71/2008.

⁶⁷ *Companies Act* 71/2008:sec. 187(2)(a) & (c) of the Act.

resolution, the Commission refers the complainant to the Companies Tribunal if it believes it will be an expedient way of resolving the filled complaint.⁶⁸

2.2.2 Close Corporations

Close Corporations (CCs) are governed by the *Close Corporations Act* 69 of 1984 (hereafter referred to as the *Close Corporation Act*). Similarly to Companies, case law and the common law also find application to CC.⁶⁹ The 2008 *Companies Act* which replaced the 1973 *Companies Act* also had implications for CCs. Following its commencement on the 1st of May 2011, no new CC could be registered under the *Close Corporations Act* and no companies could be converted into CCs after that date.⁷⁰ However, CCs that were in existence or incorporated on or before the 1st of May 2011 were and are still allowed to continue to exist indefinitely.⁷¹ However, the 2008 *Companies Act* makes provisions for these existing CCs to be converted into companies.⁷² Thus, it is important to analyse the law governing CCs for its position on the use of ADR mechanisms to resolve disputes with other business entities or within the CC itself.

A CC does not have shareholders but instead has members.⁷³ This entity has a separate legal person and is distinct and apart from its members.⁷⁴ The *Close Corporations Act* sets out provisions for the simple, deregulated, and flexible process of the formation of CCs as limited liability entities, mostly suitable for small businesses.⁷⁵ However, this Act contains no provision(s) setting out the use of ADR to resolve disputes that may arise. On the other hand, no provision(s) exists preventing the use of ADR. An argument can be made that the 2008 *Companies Act*'s ADR provisions may find application in CCs as well. However, that would be far reaching

⁶⁸ *Companies Act* 71/2008:sec.169(1)(b)

⁶⁹ Davis & Geach 2019:377.

⁷⁰ Davis & Geach 2019:377.

⁷¹ Davis & Geach 2019:376-378.

⁷² Davis & Geach 2019:377-378.

⁷³ Davis & Geach 2019:377.

⁷⁴ Davis & Geach 2019:377.

⁷⁵ Davis & Geach 2019:377.

because Schedule 3 of the 2008 *Companies Act* makes certain amendments to the *Close Corporations Act* but no reference is made for disputes to be resolved using Section 156 of the 2008 *Companies Act* ADR methods/mechanisms.⁷⁶

Perhaps reference can be made to the CC's founding statement. The close corporation's founding statement is the document that establishes a close corporation and sets out certain details about the corporation, including the name of the corporation, its financial year, details of members, details of the accounting officer, and the principal business of the corporation.⁷⁷ However, this is impracticable since no new CCs can be founded and registered. The most practical option would be amending the founding statements of existing CCs. Additionally, members can voluntarily draft an association agreement contract setting out the rights and duties of, and relationship between members. It is within this contract that members can consider the insertion of an enforceable ADR clause to resolve disputes similarly to what King III recommends.

As far as third parties dealing with a CC are concerned, all contracts entered by the CC remain valid, even if the transaction goes beyond the stated business of the corporation (as expressed in the founding statement).⁷⁸ This notion reinforces the binding effect the ADR clauses might have in disputes with or within the close corporation. However, the fact remains that no specific regulatory mechanism exists within the law of close corporations to promote the use of ADR mechanisms for parties who might voluntarily intend to use the said mechanism.

2.2.3 Partnerships

A partnership is a contract between two or more persons, in which each partner agrees to contribute to the partnership business, which is executed for the joint benefit of the parties and with the object of making a profit.⁷⁹ Individuals, companies, or close

⁷⁶ Davis & Geach 2019:379.

⁷⁷ Davis & Geach 2019:377.

⁷⁸ Davis & Geach 2019:377.

⁷⁹ *Pezzutto v Dreyer* 1992 (3) SA 379 (A):390D.

corporations can form partnerships. Two or more individuals, an individual with a company, or two companies can enter into a partnership. The trustees of a trust can enter into a partnership agreement, either expressly in writing, verbally, or even by the conduct of the trustees.⁸⁰ A business venture constituting a single transaction could be carried out by a partnership, provided that all essential elements of a partnership are met.⁸¹ These are namely: there must be a contract; between two or more persons; who agree to carry on a business; with the object of sharing profits, and the business must be carried on by all or any of them acting for all.⁸²

A partnership is formed by signing a specifically drafted agreement, or it can also be verbal.⁸³ Although it can be comprised of a legal entity, a partnership is never a separate legal entity.⁸⁴ In a partnership, all the partners are accountable for the actions of the partnership. The rights, duties, and property of the partnership are all attributed to the individual partners.⁸⁵ There has been a lot of debate internationally and historically about whether a partnership should be seen as a separate entity from its partners or just as a group of individuals.⁸⁶ This debate has influenced how courts and legislators have treated partnerships.⁸⁷ South African jurisprudence has adopted the aggregate theory, which considers a partnership as simply an aggregate or collection of individuals, with no separate identity or existence apart from its members.⁸⁸

The 2008 *Companies Act* does not define partnerships. The provisions of the *Companies Act* that relate to the use of and promotion of ADR mechanism also do not apply to partnerships as they are not considered incorporated entities under South African law. There still hasn't been recognition or an exception on the use of ADR for partnership disputes. However, because partnerships come into existence by way of

⁸⁰ Davis & Geach 2019:428.

⁸¹ *Bester v Van Niekerk* [1960] 2 All SA 512 (A):784–785.

⁸² *Bester v Van Niekerk* [1960] 2 All SA 512 (A):784–785.

⁸³ Davis & Geach 2019:410.

⁸⁴ Davis & Geach 2019:410.

⁸⁵ Davis & Geach 2019:410-411.

⁸⁶ Henning 2014:139-140.

⁸⁷ Henning 2014:139-140.

⁸⁸ Henning 2014:54.

contacts and are governed by the law of contracts, the insertion of an enforceable ADR clause remains the only way for disputes to be adjudicated or resolved using ADR mechanisms in the space of partnership entities, similarly to that of close corporations as discussed above.

2.2.4 Law of Trusts

A trust is often used in and has found its place in estate and financial planning. However, a trust can also be used to protect assets, and/or for business or trading purposes if the aim is to avoid implications of using a company or close corporation.⁸⁹ The *Trust Property Control Act*⁹⁰ largely regulates many administrative aspects of trusts but remains uncomprehensive compared to the 2008 *Companies Act* and *Close Corporation Act*.⁹¹ The South African law of trusts has been largely developed through decided case law and is based on the law of contract, not the law of equity.⁹² A trust is a legal relationship/arrangement that is created in a trust deed.⁹³

A corporate/business trust is a trust that carries on business or trading activities, and it works similarly to an individual trust.⁹⁴ However, a few key points differentiate between a business trust and an individual trust.⁹⁵ Business trusts are centred around the structure of the company, the company itself is the trustee of the business trust, members of the trust are the directors of the company, and the addition or removal of directors is simpler than in a case where a company is formed without or outside a trust for general business and trading purposes. Added members of the trust need to become trustees, and only a single director is needed.⁹⁶ Similarly to partnerships, trusts are not considered separate legal entities, except for the *Income Tax Act 58* of

⁸⁹ Davis & Geach 2019:435.

⁹⁰ *Trust Property Control Act 57/1988*.

⁹¹ Davis & Geach 2019:436.

⁹² Davis & Geach 2019:435-436.

⁹³ *Trust Property Control Act 57/1988:sec.1*.

⁹⁴ Davis & Geach 2019:439.

⁹⁵ Davis & Geach 2019:439.

⁹⁶ Davis & Geach 2019:439.

1962, *Value Added Tax Act* 89 of 1991, and *Companies Act* 71 of 2008 purposes.⁹⁷ A trust may be a contract if formed *inter vivos*,⁹⁸ or may be formed in terms of the last will of a deceased person.⁹⁹

The 2008 *Companies Act* defines a juristic person as including a trust for a few reasons.¹⁰⁰ Firstly, the name of a trust is reflected as a shareholder of a company and to ensure that assets are beyond the reach of a beneficiary's creditors or other claimants.¹⁰¹ However, similarly to close corporations and partnerships, the law of contract, as it pertains to the use of ADR, applies only if a relevant clause is inserted in the trust deed or a contract agreed to by the parties involved. From the observation of close corporations, partnerships, and now business trusts, the evidence of the lack of regulatory mechanisms to promote the use of ADR in disputes involving the mentioned corporations painfully persists. Company law although it lacks depth and substance, it remains the only business entity with provisions set out with the intent of promoting the use of ADR in corporate law.

The regulatory provisions analysed above for the use of ADR mechanisms by different corporate entities (if any) can be used at the discretion of the parties involved at any stage after the dispute has ensued. When the parties have decided to proceed with the court litigation, whether in the Magistrates' Court or the High Court, the amended Chapter 2 of the Rules governing the Proceedings in the Magistrates' Court and Rule 41A of the Uniform Court Rules, respectively compel both the plaintiff/applicant and the defendant/respondent to consider mediation before proceeding with litigation. These rules are not intended for only corporate disputes but rather for any type of disputes brought before Courts respectively. These rules will be discussed below.

⁹⁷ Davis & Geach 2019:435-436.

⁹⁸ Trusts *inter vivos* are trusts formed during the lifetime of the founder.

⁹⁹ Davis & Geach 2019:436-437.

¹⁰⁰ *Companies Act* 71/2008:sec1.

¹⁰¹ Davis & Geach 2019:439.

2.3 COURT-ANNEXED MEDIATION

Rules governing court-annexed mediation suggest that mediation is a voluntary process entered into by agreement between the parties to a dispute.¹⁰² Over the years, the legal system has gradually shifted from relying solely on the costly and time-consuming process of litigation to settling most disputes.¹⁰³ The amended Chapter 2 of the Rules governing the Proceedings in the Magistrates' Court and Rule 41A of the Uniform Court Rules govern the use of mediation in both the Magistrates' Court and High Court, respectively. These Rules contain similar wording, structure, forms for notices, and time periods. Chapter 2 of the Magistrates' Court Rules will be evaluated, with reference implied to both Uniform Court Rules.

Rule 72(1) of the Magistrates' Court Rules requires the plaintiff to serve a notice along with the summons or combined summons. This notice must indicate whether the plaintiff agrees to or opposes referring the dispute to mediation, along with their reasons for that position. Similarly, Rule 72(2) requires the defendant to serve a notice indicating whether they agree to or oppose the referral for mediation when delivering a notice of intention to defend. This notice must be given any time after that but no later than when the plea is delivered. In the case of the application procedure, Rule 72(1) also applies. This means that the applicant must serve a notice along with the notice of motion, indicating whether they agree to or oppose referring the dispute to mediation, along with their reasons for their position.

Rule 72(2) also requires the respondent to serve a notice that indicates their agreement or opposition to referring the dispute to mediation. This notice must include reasons and should be delivered when submitting a notice of intention to oppose, or at any time thereafter, but no later than when the answering affidavit is submitted. According to Rule 73(1), parties may refer their dispute to mediation at any stage before a judgment is rendered. If the trial or an opposed application has already begun and the parties wish to pursue mediation, they must first obtain permission from the

¹⁰² Uniform Court Rules:rule 41A(1) and Rules 70-79 of the Rules regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa GN 710 of 210.

¹⁰³ Sardwalli 2015.

court. Additionally, Rule 73(2) states that the court may inquire into and allow the parties to consider mediation at any stage before the judgment is made.

If the parties agree to refer the matter to mediation, per Rule 72 or 73, they must deliver a joint, signed document that formally records their decision to mediate. Additionally, they should enter into a mediation agreement before the mediation proceedings begin.¹⁰⁴ If multiple parties are involved in the dispute, those who agree to mediation may proceed with it, regardless of other parties' refusal to participate.¹⁰⁵ In disputes involving multiple issues, parties may choose to mediate some matters while pursuing litigation for the remaining issues.¹⁰⁶ The mediation process should be completed within 30 days from the date the parties submit their signed joint minutes. However, if the parties demonstrate good cause, the judicial officer or the court may extend the deadline for completing mediation.¹⁰⁷

After the mediation process concludes, the parties involved will notify the court clerk or registrar, as well as all other parties if there are multiple involved.¹⁰⁸ Within five days of completing the mediation, both the parties and the mediator must prepare a joint minute.¹⁰⁹ This minute should indicate whether a settlement was reached or if the mediation was unsuccessful.¹¹⁰ This minute must also specify the issues on which the parties have reached an agreement, which will not require a court hearing.¹¹¹ If any issues remain unresolved after mediation, parties may proceed to litigation regarding those disputed issues.¹¹² All communications and disclosures made during mediation are confidential and cannot be used as evidence in litigation.¹¹³

¹⁰⁴ Rules governing the procedure in Magistrates' Courts:rule 73(3)(a) and (b).

¹⁰⁵ Rules governing the procedure in Magistrates' Courts:rule 75(1).

¹⁰⁶ Rules governing the procedure in Magistrates' Courts:rule 75(4).

¹⁰⁷ Rules governing the procedure in Magistrates' Courts:rule 74(2).

¹⁰⁸ Rules governing the procedure in Magistrates' Courts:rule 77(1).

¹⁰⁹ Rules governing the procedure in Magistrates' Courts:rule 77(4).

¹¹⁰ Rules governing the procedure in Magistrates' Courts:rule 77(4)(a).

¹¹¹ Rules governing the procedure in Magistrates' Courts:rule 77(4).

¹¹² Rules governing the procedure in Magistrates' Courts:rule 75(4).

¹¹³ Rules governing the procedure in Magistrates' Courts:rule 76.

2.4 THE NPA'S CORPORATE DISPUTE RESOLUTION DIRECTIVE

Although this study is centred around civil and corporate law, the researcher briefly detours to criminal law. It is worth noting that the National Prosecuting Authority (NPA) has adopted using ADR in suitable and applicable criminal cases that involve a company. This initiative is referred to as the Corporate Alternative Dispute Resolution Directive (C-ADR) where the NPA offers companies involved in corrupt activities an alternative path to resolution with law enforcement agencies.¹¹⁴ This directive enables companies involved in potential criminal charges to seek resolution through ADR mechanisms.¹¹⁵ Comprehensive guidelines for the C-ADR outline how prosecutors will evaluate companies that wish to resolve issues without facing criminal consequences. These guidelines entail there must be voluntary disclosure and cooperation by the company involved, cost contribution and restitution must be made by the company, corporate accountability and remediation by the company, and transparency and accountability.¹¹⁶ These guiding principles are designed to ensure legal soundness and compliance with established laws while also considering the broader public interest.¹¹⁷

This directive also acknowledges resource constraints within the NPA while emphasising the consideration of unlawful activity complexity, prosecution success likelihood, and resource availability for legal proceedings. This balance ensures that C-ADR decisions serve the public interest and support effective law enforcement. ADR is crucial for resolving commercial disputes in South Africa, providing cost-effective and efficient solutions. The C-ADR shows a deeper understanding of addressing white-collar crime while recognising institutional limitations.¹¹⁸

¹¹⁴ Khashifa Ussuph "The role of alternative dispute resolution in resolving commercial disputes in South Africa: exploring the NPA's new initiative- Corporate Alternative Dispute resolution", <https://www.macrobet.co.za/insights/posts/role-of-alternative-dispute-resolution-in-resolving-commercial-disputes-in-south-africa> (accessed on 29 September 2024).

¹¹⁵ Khashifa Ussuph.

¹¹⁶ Khashifa Ussuph.

¹¹⁷ Khashifa Ussuph.

¹¹⁸ Khashifa Ussuph.

2.5 OBSERVATIONS AND CONCLUSIONS

This chapter shared insights on regulatory mechanisms that promote and enhance the use of ADR in South African corporate law. Although access to courts is a constitutional right every South African citizen is entitled to, the concept of access to justice goes beyond the availability of the court process. At the core of the adoption and inception of ADR, was to improve access to justice in South Africa for socially and economically disadvantaged groups. This has far extended beyond realising the constitutional right of access to justice. South Africa has started recognising the importance of ADR in safeguarding business relationships and easing the burden on the court system. The trend towards the increasing use of ADR mechanisms to resolve corporate disputes is interrelated with the initiatives that have been made in the country's legal framework to support the use of ADR. This is evident in South Africa where the support for mediation over adjudication has increased in the last few decades due to over 50 statutes providing for the use of mediation.¹¹⁹ There is an existing relationship between regulation and supervision of ADR and its use in South African corporate law. It seems when ADR is suggested in regulatory provisions, this enhances its use. In all the business entities mentioned above, ADR is mostly used in company law.

The nexus between regulation and supervision of ADR is essential for enhancing its use in South African corporate law. Regulation entails a legal framework, while supervision on the other hand is the enforcement of a legal framework. Enforcement of a legal framework involves ensuring compliance with established rules, laws, and standards. Effective enforcement is important in maintaining public trust, providing training and accreditation for ADR practitioners, and promoting fairness in a legal framework. While notable initiatives have been made to promote the use of ADR in corporate law, there is still a lack of proper regulation. The absence of proper regulation of ADR is also responsible for its subsequent lack of supervision.

Apart from court rules and the express provisions under the *Companies Act*, no legislation is solely dedicated to regulating ADR in South Africa.¹²⁰ In addition to this,

¹¹⁹ Wies 2014:668; Brand *et al* 2012:2; Roycroft 2013:197.

¹²⁰ Broodryk 2015:493-494

there is no regulatory authority whose only duty or mandate is to supervise the use of ADR and compliance with ADR standards. Some voluntary bodies accredit, mandate, and regulate their members' professional standards and conduct. The Mediation Society of South Africa (MSSA), Association of Arbitrators (Southern Africa), Tokiso Dispute Settlement, Dispute Settlement Accreditation Council (DiSAC), and the Arbitration Foundation of South Africa (AFSA) are examples of voluntary bodies that actively promote mediation and arbitration by establishing panels of mediators and arbitrators.¹²¹ However, these bodies themselves are not statutorily regulated.¹²²

Chapter 3 will evaluate the nature of ADR mechanisms and expose their place and use in corporate law and civil practice.

¹²¹ Negal *et al* 2019:735.

¹²² There are no regulated statutory enforcement consequences that exist for members who fail to adhere to the mentioned standard and conduct.

CHAPTER 3: THE NATURE OF ALTERNATIVE DISPUTE RESOLUTION

3.1 INTRODUCTION

This chapter will analyse the nature of ADR mechanisms on two premises. First, on whether ADR mechanisms are proposed as an adjunct to court procedures or as an alternative separate from the established judicial system. As discussed in Chapter 1 paragraph 1.4, corporate disputes include the legal disputes that arise from corporate entities' operations and activities. These disputes can occur both within a corporate entity, such as between shareholders, employees, members, or partners, and externally, such as with third parties, other corporate entities, or regulatory bodies. The variation of these disputes alone warrants alternative mechanisms to address them. A shareholders' dispute may require a different approach compared to a dispute between an entity and a third party.

To fully understand the nature of ADR, it is important to ascertain what is meant by "alternative." For an alternative to exist, there needs to be a conventional method to which the alternative will exist to alternate. Court litigation is the conventional dispute resolution method to which ADR exists as an alternative. The researcher will first evaluate the conventional litigation process to determine how the need for alternatives to address corporate disputes comes about. The chapter will conclude with a discussion on whether the nature of ADR and its current piecemeal regulation qualifies it for adequate supervision in its use in corporate law.

ADR has been presumably viewed as a substitute for the conventional dispute resolution mechanism, litigation.¹²³ However, that is not the case as the argument for "alternative" is not based on the need to find a substitute for court litigation.¹²⁴ Rather, it is based on the need to gain a better understanding of the functioning of these alternative mechanisms and their place in resolving disputes generally.¹²⁵ Using ADR as an adjunct to the judicial system does not replace litigation, instead, it is used to

¹²³ Edwards 1986:671.

¹²⁴ Frank A Sander

¹²⁵ Edwards 1986:671.

make traditional court systems work more efficiently and effectively.¹²⁶ This occurs in a court-annexed manner, such as with court-annexed mediation as discussed in the previous chapter.

Similarly, using ADR separate from the established judicial system also does not aim to replace litigation, instead, it is aimed at avoiding the lengthy and costly process of court litigation and to assist in reducing caseloads therein. There is a need for regulation of ADR mechanisms to enhance its use and effectiveness. Whether or not ADR qualifies for regulation and supervision, will be determined in the course of this Chapter's discussion. As a point of reference, the paragraph below will examine the nature of court litigation.

3.2 NATURE OF COURT LITIGATION

Court litigation is a vehicle of the justice system to enforce rights and duties by way of adjudication.¹²⁷ The systems of dispute resolution can be distinguished as the adversarial or inquisitorial systems of dispute resolution.¹²⁸ In the adversarial system, there is an impartial and neutral adjudicator who decides on the matter based on the evidence gathered and presented by the parties who are adversaries, hence the name "adversarial" system.¹²⁹ The procedural action is controlled by the parties and the adjudicator remains essentially passive.¹³⁰ In inquisitorial trial systems, the adjudicator takes an active role in investigating and gathering evidence to discover the material truth and can conduct their investigations without the parties' consent.¹³¹ The adjudicator then rules on the matter on the "totality of evidence" provided by the parties and that gathered by themselves.

¹²⁶ Edwards 1986:673.

¹²⁷ Hurter 2007:241.

¹²⁸ Pete *et al* 2009:501.

¹²⁹ Pete *et al* 2009:501; Muller 2021:52.

¹³⁰ Roodt 2004:138–139.

¹³¹ Muller 2021:52; Jolowicz 2003:293.

In South Africa, the civil justice system is based on an adversarial system.¹³² In this system, parties involved seek a binding winner/loser outcome based upon facts and evidence they present per strict rules of procedure and evidence.¹³³ Due to the variation of corporate disputes, not every dispute is suitable for a winner/loser outcome. Preservation of relationships is often more important than the dispute itself or the outcome, especially in disputes involving ongoing business relationships. However, court litigation doesn't prioritise preserving relationships or finding a mutually acceptable outcome or solution.¹³⁴ The law is strictly applied, and rules must be adhered to. It is also important to note that confidentiality is not prioritised. Court proceedings are held publicly unless an application is granted on good grounds for proceedings to be held privately.¹³⁵

The researcher will briefly discuss the litigation process. Covering all aspects and procedures related to litigation is beyond the scope of this study. The researcher will divide the main litigation process into three stages. Stage one will encompass procedures before litigation, stage two will involve litigation procedures, and stage three will involve procedures after litigation.

3.2.1 Before litigation

The first stage deals with what happens before litigation starts and the court becomes involved in the process.¹³⁶ This stage can be divided into preliminary questions and pre-litigation issues, respectively.¹³⁷ This stage is where the initial consultation and assessment take place.¹³⁸ Parties meet with their attorneys to assess the details of the dispute and develop a strategic approach.¹³⁹ The use of open communication and early neutral evaluation is emphasised. When parties have opted to make use of court

¹³² Pete *et al* 2009:501.

¹³³ Pete *et al* 2009:501.

¹³⁴ Pete *et al* 2009:501-502.

¹³⁵ Pete *et al* 2009:501.

¹³⁶ Peté *et al* 2016:51.

¹³⁷ Peté *et al* 2016:51-52

¹³⁸ Peté *et al* 2016:51-52.

¹³⁹ Peté *et al* 2016:65-71.

litigation, this stage creates an opportunity for parties to consider using ADR to resolve the dispute.¹⁴⁰ Questions and issues considered are mentioned below.

3.2.1.1 Preliminary questions

Preliminary questions such as the determination of the correct court with jurisdiction over the matter, whether the parties have standing to sue or to be sued, or whether the plaintiff has a sustainable cause of action are considered. A valid cause of action is found in substantive law. In a corporate dispute over a contractual matter, the initiating party must prove there was a valid contract and a breach of that contract.¹⁴¹ A cause of action can also be statutory. This can result from a provision of a statute placing a duty, prohibiting an action or giving rise to a right, such as the *Companies Act* or *Close Corporation Act*.

Parties must have legal standing to sue or to be sued. The standing of the parties depends on whether or not they have a direct and substantial interest in the matter, as well as the requisite capacity to litigate.¹⁴² This can emanate from but is not limited to an agreement, contract, or a provision of a statute, founding statement or MOI. Entities that enjoy separate legal personalities such as companies and close corporations have legal standing. Entities that do not enjoy separate legal personalities such as partnerships and business trusts do not possess legal standing. However, High Court rule 14 and Magistrates' Courts rule 54 provide procedural relief by allowing a partnership to sue or be sued in its name, without conferring legal personality on this entity.¹⁴³ Trustees of a trust must either sue or be sued but the provisions of High Court rule 14 and Magistrates' Courts rule 54, may well apply to trusts.¹⁴⁴

¹⁴⁰ Theophilopoulos *et al* 2012:51.

¹⁴¹ Peté *et al* 2016:65-71.

¹⁴² Peté *et al* 2016:72.

¹⁴³ Peté *et al* 2016:85.

¹⁴⁴ *First National Bank of SA Ltd v Strachan Family Trust* [2000] 3 All SA 379 (T):par.384; *Cupido v Kings Lodge Hotel* [1999] (4) SA 257 (E):par.263E.

Courts can only adjudicate matters if they have jurisdiction over those matters; thus, litigants cannot choose the court where their case will be heard.¹⁴⁵ Depending on the quantum of the amount claimed disputes with claims valued at less than R20 000,00 are issued in the Small Claims Courts.¹⁴⁶ Claims that are below R400 000,00 but are above R200 000,00 are brought before the Regional Magistrates' Courts and claims below R200 000,00 are issued in the District Magistrates' Courts.¹⁴⁷ Claims more than R400 000,00 are brought to the High Courts.¹⁴⁸ The High Court can also hear disputes for any amount, even those below R400 000,00 but there are cost implications involved.¹⁴⁹

Additionally, the nature of a claim is significant in determining the appropriate court for litigation proceedings.¹⁵⁰ In cases of contract breach where the affected party seeks specific performance without pursuing an alternative claim for damages, the matter will be heard exclusively in the High Court, not in the Magistrates' Court.¹⁵¹ ADR mechanisms are generally more informal and less intimidating than court litigation. There are predefined rules, statutes or case precedents that govern the procedures of ADR mechanisms. Furthermore, there are no court rooms designed for ADR processes.

i. Court rules and statutes

¹⁴⁵ Theophilopoulos *et al* 2012:51.

¹⁴⁶ Peté *et al* 2016:93; In Small Claims Court only natural persons may sue, not corporate entities. However, private persons may sue corporate entities.

¹⁴⁷ Peté *et al* 2016:93.

¹⁴⁸ Peté *et al* 2016:93.

¹⁴⁹ A matter that falls under the jurisdiction of a Magistrates' Court can also be heard in the corresponding division of the High Court located in the same area. In this case, the High Court division will have concurrent jurisdiction with the Magistrates' Court. However, it is typically cheaper and quicker to resolve matters in the Magistrates' Court when it has the appropriate jurisdiction.

¹⁵⁰ Theophilopoulos *et al* 2012:30.

¹⁵¹ *Magistrates' Court Act* 32/1944:sec. 46(2)(c).

The law governing procedures of the litigation process is found in statutes and case law that have built up around the interpretation of these statutes.¹⁵² The Superior Courts Act 10 of 2013 governs the Constitutional Court, the Supreme Court of Appeal, and the High Courts. The Magistrates' Courts Act 32 of 1944 pertains to Magistrate Courts, both regional and district, while the Small Claims Courts Act 61 of 1984 applies to small claims courts. Each court has its own set of rules, which should be consulted alongside the relevant statute.¹⁵³ Uniform Court Rules are applicable to the High Courts, while the Rules of the Constitutional Court pertain to the Constitutional Court. The Rules of the Supreme Court of Appeal apply to that court, and the Rules Regulating the Proceedings in the Magistrates' Courts govern the Magistrates' Courts. Finally, the rules that regulate matters in the Small Claims Courts apply specifically to those courts.

3.2.1.2 Pre-litigation issues

In this part, issues such as demand, time limits and the decision regarding the correct procedure are considered. This part serves to introduce the second stage which deals with the litigation process.¹⁵⁴ Litigation takes place in two ways, either by court action or by application.¹⁵⁵ In legal action proceedings, facts and evidence are presented verbally in court during the trial. In application proceedings, facts and evidence are presented in affidavits, which will be read by a judge before hearing arguments in court regarding the issues raised by the parties in their affidavits.¹⁵⁶ A key difference between these two proceedings is that application proceedings are usually heard in court shortly after they begin, while action proceedings may be heard several months or years later. Application proceedings are typically resolved more quickly than action proceedings, making them a faster and more cost-effective way to resolve disputes in appropriate instances.¹⁵⁷

¹⁵² Peté *et al* 2016:47.

¹⁵³ Peté *et al* 2016:47

¹⁵⁴ Peté *et al* 2016:51

¹⁵⁵ Peté *et al* 2016:51.

¹⁵⁶ In certain limited circumstances, when one fact, or only a few disputed facts, cannot be decided on the affidavits, these issues may be referred for oral evidence by the Court.

¹⁵⁷ Magistrates' Court Rules 2010 Rule 55.

3.2.2 Litigation

3.2.2.1 Court Application

The court application procedure is used when there are no factual disputes between the parties involved. It typically addresses issues related to the interpretation or application of the terms and conditions of an agreement, the legal principles governing the business entity and its transactions, or any other relevant laws applicable in the corporate sector. A court application may also be pursued after an ADR process to legally enforce the agreement reached during that procedure.¹⁵⁸ In application proceedings, the party instituting an application is referred to as an Applicant and the party the application is made against is the Respondent.¹⁵⁹

A court application begins with a notice of motion and a founding affidavit.¹⁶⁰ A court application is primarily based on written documents.¹⁶¹ Chapter 2 of the Magistrates' Court Rules and Rule 41A of the Uniform Rules of Court require the applicant to file a prescribed notice indicating whether they agree to or oppose the referral of the dispute for mediation.¹⁶² This is referred to as Court-Annexed Mediation and was briefly discussed in Chapter 2. If this court-annexed mediation is not used or fails to settle the matter, the involved parties continue to file their respective affidavits that set out their cases and evidence. After both the applicant and the respondent have completed their filings, a hearing is scheduled before a presiding officer.¹⁶³ The presiding officer can issue orders concerning the evidence presented in the affidavits or through oral arguments, allowing both parties or their legal representatives to present and argue their respective positions.¹⁶⁴ If a factual dispute arises, Rule 6(5)(g) of the Uniform

¹⁵⁸ *Arbitration Act 42/1965*:sec. 35.

¹⁵⁹ *Peté et al 2016*:152-154.

¹⁶⁰ *Peté et al 2016*:151.

¹⁶¹ *Peté et al 2016*:180.

¹⁶² As discussed in Chapter 2 of this study above.

¹⁶³ *Peté et al 2016*:157.

¹⁶⁴ *Peté et al 2016*:151-152.

Rules of Court states that a court application can be converted into an action to address the dispute.¹⁶⁵

3.2.2.2 Court Action

Court action is used in matters where the parties have a factual and material dispute arising from their fundamental differences regarding facts. In corporate law, these differences can be a result of breached contracts or laws governing the different business entities. In the court action, the party instituting the action is referred to as the Plaintiff and the party whom the action is instituted against is the Defendant.¹⁶⁶ Court action is divided into four phases, namely the pretrial, trial preparation, trial phase, and judgment, interest and costs phase.¹⁶⁷

i. Pre-trial

The pretrial phase consists of pleadings. Court action commences with a summons annexed with particulars of the claim setting out the claim of the plaintiff and served on the defendant.¹⁶⁸ Similar to application proceedings, Chapter 2 of the Magistrates' Court Rules and Rule 41A of the Uniform Rules of Court compels the plaintiff to file a prescribed notice indicating whether they agree or oppose the referral of the dispute for mediation. If this court-annexed mediation is not used or fails to settle the matter, the parties will proceed with litigation.

ii. Trial preparation

The trial preparation phase takes place after the close of pleadings. The steps that follow in this phase include the discovery of documents that each party possesses, a request for further particulars for trial, witness statements, expert reports, a meeting of experts if necessary, and a pre-trial conference.¹⁶⁹ This procedure serves a purpose

¹⁶⁵ Rule 55(1)(k) of the Magistrates' Courts Rules contains similar provisions governing the conversion of a court application to action proceedings where the matter cannot be decided on affidavits.

¹⁶⁶ *Peté et al* 2016:179.

¹⁶⁷ *Peté et al* 2016:179.

¹⁶⁸ *Peté et al* 2016:214.

¹⁶⁹ *Theophilopoulos et al* 2012:101.

similar to that of ADR, which is to reduce issues in dispute and costs before the trial commences.¹⁷⁰ The primary goal is to keep undisputed matters off the court roll and to expedite hearings of disputed cases. However, this does not always happen, and it often delays the finalisation of cases further.¹⁷¹

iii. Trial

The trial process in the High Courts is governed by Rule 39 of the Uniform Court Rules, while in the Magistrates' Courts, it is governed by Rule 29 of the Magistrates' Court Rules. The duration of the trial depends on the complexity of the case and the number of witnesses providing evidence.¹⁷² During the trial, both parties must substantiate the claims made in their pleadings with evidence.¹⁷³ Evidence that is not included in the pleadings is generally inadmissible unless it can be introduced without being prejudicial to the other party.¹⁷⁴ The party upon whom, per the pleadings, the burden of proof rests, must adduce evidence first, and thereafter the other party will have their turn.¹⁷⁵ Usually, the burden of proof rests on the plaintiff who will proceed with the opening address.¹⁷⁶

After the opening address, the plaintiff will lead the witnesses who give evidence in support of his case individually.¹⁷⁷ The witnesses are examined in chief by the plaintiff's

¹⁷⁰ Muller 2021:53; De Vos and Broodryk 2018:18–35.

¹⁷¹ Muller 2021:53

¹⁷² Peté *et al* 2016:313.

¹⁷³ Peté *et al* 2016:313-314.

¹⁷⁴ *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173;par. 198; Peté *et al* 2016:315.

¹⁷⁵ Peté *et al* 2016:314.

¹⁷⁶ Typically, the person bringing a legal claim must provide evidence first to prove their case and that is normally the plaintiff. This is because the burden of proof is on them to establish their case on a balance of probabilities. However, there is also a secondary evidentiary burden of proof that must be considered. This is when a party must combat the opposing party's prima facie case. To determine where the burden of proof lies, a review of the statements made in the pleadings is conducted. In some cases, the defendant may admit to the claim but offer a defence. In this situation, the plaintiff will no longer be required to prove their case, and the burden of proof will shift to the defendant to prove their defence; *Pillay v Krishna and Another* 1946 AD 946;par. 952–953.

¹⁷⁷ Peté *et al* 2016:315.

legal representative where they set out their version of events with the aid of open questions.¹⁷⁸ The opposing party will have the opportunity to cross-examine the witnesses to put the defendant's version, probe inconsistencies, and show any weakness in the evidence that the witness has presented.¹⁷⁹ During cross-examination, leading questions are permitted. Thereafter, the plaintiff will have the opportunity to re-examine the witnesses to clear up discrepancies that have arisen during cross-examination.¹⁸⁰ After all the evidence for the plaintiff has been led, the plaintiff's case is closed.

The opposing party can apply to the court, without leading evidence, for absolution from the instance if the plaintiff has failed to discharge the overall onus by the end of his case.¹⁸¹ If absolution is granted, the case ends. The plaintiff can start a new case if they choose to. If the defendant's application for absolution from the instance is refused or if he did not make such an application, the opposing party will open the defendant's case, and the same pattern is followed for each witness called.¹⁸² The opposing party thereafter closes his case. The court has the discretion to examine every witness and ask questions to clarify obscure points.¹⁸³

iv. Judgement and enforcement

After all the submissions, the judicial officer delivers a judgment on the dispute either in favour of the plaintiff or the defendant. Similarly, if neither the plaintiff nor the defendant has proved his case on a balance of probabilities at the end of the case, the court will grant absolution from the instance. In a case where a plaintiff wins, and the defendant does not pay, the plaintiff can take steps to execute the money judgment. When enforcing a judgment in the High Court, a writ of execution is

¹⁷⁸ Peté *et al* 2016:315.

¹⁷⁹ Peté *et al* 2016:315.

¹⁸⁰ Peté *et al* 2016:315.

¹⁸¹ Peté *et al* 2016:316.

¹⁸² Peté *et al* 2016:315-316.

¹⁸³ Peté *et al* 2016:316.

issued.¹⁸⁴ If the judgment emanates from the Magistrates' Courts, a warrant of execution to enforce the provisions of that judgment is issued.¹⁸⁵

The effect of the writ or the warrant is to instruct the sheriff of the court to attach the property of the judgment debtor.¹⁸⁶ If a judgment debtor (defendant) owes money to a judgment creditor (plaintiff), the creditor may apply for a third-party debt order to redirect funds owed to the debtor by a third party to the creditor.¹⁸⁷ This can be done by issuing a garnishee order in both the High Courts and Magistrates' Courts, or emoluments attachment orders in the Magistrates' Courts.¹⁸⁸ Other debt collection procedures include administration orders in terms of section 74 of the Magistrates' Courts Act¹⁸⁹ and section 65 procedure, which is set out in the Magistrates' Courts Act.¹⁹⁰ Unlike in court proceedings, in ADR mechanisms, the parties to the dispute may adapt the procedure to be followed as well as the remedies that may be awarded through consensus. Using court litigation as a reference, ADR was designed to simplify the complexities of litigation and resolve disputes efficiently, cost-effectively, and amicably, without resorting to litigation.

3.2.3 After litigation

There are set of rules and provisions that allow further litigation in the form of an appeal where an unsuccessful party appeals the judgment or the decision. Appeals focus on the merits of the judgment itself, either on the law, on the facts, or both the law and

¹⁸⁴ Uniform Court Rules:rule. 45-46; *Superior Courts Act* 10/2013:sec. 42 & 45

¹⁸⁵ Magistrates' Courts Rules:rule. 36-43.

¹⁸⁶ *Peté et al* 2016:416.

¹⁸⁷ Such debts may include salary or wages as are now and will in the future be owed to the judgment debtor by his employer, as well as any other kind of debt owed to the judgment debtor.

¹⁸⁸ There is no distinction in the High Court but there is in the Magistrates' Courts between so called emoluments attachment orders (which relate to the attachment of the salary or wages of the judgment debtor) and garnishee orders (which relate to the attachment of other kinds of debts owed to the judgment debtor); *Peté et al* 2016:430.

¹⁸⁹ *Magistrates' Courts Act* 32/1944

¹⁹⁰ The section 65 procedure may also be used for judgments taken in the High Court, provided that the provisions of section 65M are complied with; *Peté et al* 2016:437.

the facts.¹⁹¹ A judgment made by a Magistrates' Court, sitting as a court of first instance, is appealed to the High Court without leave to appeal.¹⁹² The appeal is heard by two judges of either a main or local seat of the High Court.¹⁹³ If the party is still not satisfied with the decision, it is appealed to the Supreme Court of Appeal by obtaining special leave to appeal from the Supreme Court of Appeal.¹⁹⁴

A judgment made by a division of the High Court, sitting as a court of first instance, is appealed by making an application for leave to appeal to the judge who gave the judgment.¹⁹⁵ This appeal is heard by a full court of the division of the High Court. If the appeal is turned down by the full court, special leave to appeal to the Supreme Court of Appeal from the Supreme Court of Appeal is required.¹⁹⁶ Appeals can also be taken to the Constitutional Court in certain circumstances,¹⁹⁷ provided that leave to appeal is obtained by way of an application to the Constitutional Court.¹⁹⁸

On the other hand, reviews focus on the procedure whereby the judgment of the court, tribunal, board, or arbitrator is reached. In court litigation, review is the process whereby the proceedings of lower courts, are brought before the High Courts in respect of irregularities occurring during such proceedings.¹⁹⁹ An application procedure is used to bring a matter under review.²⁰⁰ Section 22 of the Superior Courts Act sets out the various grounds upon which the proceedings of any Magistrates' Court may be reviewed.²⁰¹

¹⁹¹ Peté *et al* 2016:376.

¹⁹² Magistrates' Courts Act 32/1944:sec. 83.

¹⁹³ *Superior Courts Act* 10/2013:sec14(3).

¹⁹⁴ *Superior Courts Act* 10/2013:sec. 13(1)(a)-(b). 384.

¹⁹⁵ Peté *et al* 2016:392.

¹⁹⁶ *Superior Courts Act* 10/2013:sec. 17(2)(b) & 16(1)(a)(ii).

¹⁹⁷ By way of direct access cases, declarations of invalidity in constitutional cases, or the leapfrog to the Constitutional Court.

¹⁹⁸ Rules of the Constitutional Court:rule.19.

¹⁹⁹ Peté *et al* 2016:403.

²⁰⁰ Peté *et al* 2016:405.

²⁰¹ If any irregularities take place during a High Court proceeding, there is no option for review by a higher court. A remedy in this situation would be to include these issues in an appeal;

3.3 THE NATURE OF ADR MECHANISMS

In the paragraphs above the researcher analysed how the adversarial litigation process resolves corporate disputes. The analysis was conducted to point to the nature and the underlying purpose of ADR mechanisms.²⁰² Court litigation is complex and for that reason, disputants must strictly adhere to the rules and follow the right procedures to have their disputes resolved. This entails that failure to follow the right procedures per the prescribed rules and provisions, can influence the probabilities of the matter to favour one side regardless of the merits or the nature of the dispute. Other issues include time, costs, resources, and limited knowledge. However, ADR mechanisms are not meant to replace litigation or undermine it, instead, they are meant to play off its weaknesses and strengths to create an alternative form of dispute resolution without replicating. Supporters of modern ADR such as Frank Sander,²⁰³ Roger Fisher, and William Ury²⁰⁴ see it as an effective way to resolve disputes compared to litigation.²⁰⁵ They also believe it leads to better solutions and quality of justice. It is also argued that the more control disputing parties have over the settlement process, the more likely they are to support and implement the outcome.²⁰⁶ An important feature of all ADR mechanisms is that they are voluntary, despite the judiciary's incorporation of court-annexed mediation.²⁰⁷ ADR is suited to addressing the needs of the parties involved, and the ADR outcome is usually a win-win solution.²⁰⁸

Unlike the adversarial nature of court litigation, ADR mechanisms are non-adversarial, with some inquisitorial elements.²⁰⁹ The non-adversarial nature is evident due to

Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A):par. 601D–F; Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others 2003 (2) SA 385 (SCA).

²⁰² Simokat 2008:3-4

²⁰³ Sander 1979

²⁰⁴ Fisher & Ury 1982.

²⁰⁵ Sander 1979; Fisher & Ury 1982.

²⁰⁶ Simokat 2008:6.

²⁰⁷ Grogan: 2014: 456.

²⁰⁸ Susskind *et al* 2000:34-45.

²⁰⁹ Grogan: 2014: 456.

ADR's cooperative approach by encouraging parties to work together to resolve disputes, the mutual interest-based focus, and the flexible procedures that are tailored to suit parties' needs, rather than following strict rules. Its inquisitorial elements include investigative approaches, such as arbitration, which involves investigating facts, and neutral inquiry which may entail neutrals asking questions to clarify issues, gather information, and may involve fact-finding to inform decision-making.

3.3.1 Negotiation

Negotiation is the oldest and most generic form of consensus-seeking dispute resolution mechanism.²¹⁰ It forms the basis of the corporate field and is employed daily therein. Most of the ADR mechanisms that will be discussed below are to a large extent the facilitation of a negotiated settlement between disputing parties.²¹¹ Negotiation is a process where parties attempt to personally settle without using an independent third party.²¹² It is an expedient, unstructured, and voluntary process available to parties that often initiate business working relationships or preserve those relationships.²¹³ The success of the negotiations rests entirely with the parties involved in the dispute. In negotiation, unlike mediation, arbitration, or conciliation, the process relies solely on the parties involved to ensure its success, as there is no third-party facilitating or conducting the discussion. Many factors influence the success of negotiations. These can be the parties' lack of objectivity during negotiations, emotional involvement, power imbalance, or as a result of a lack of knowledge.²¹⁴ The causes of disputes and how parties react to them influence their attitude toward resolving the dispute. By implication, it influences their approach to negotiation.

²¹⁰ Muller 2021:104.

²¹¹ Muller 2021:104.

²¹² Ramsden 2010: 2.

²¹³ Bosch *et al* 2004: 8-9.

²¹⁴ Cotton 2016:594.

3.3.1.1 Positional Negotiation

An approach to negotiation can either be positional-based or interest-based.²¹⁵ Because negotiation forms the basis of all the ADR mechanisms, a neutral third party should be aware of the types of approaches a party may employ when involved in conciliation, arbitration, or mediation.²¹⁶ In positional negotiation, parties often stick to their positions and bargain to reach a compromise.²¹⁷ A win for one party often means a loss for the other. This type of approach is often a result of a lack of trust between the involved parties. This approach is more likely to result in inefficient agreements and can jeopardise any prospective relationships.²¹⁸ In the corporate world, when the objective is economic advancement, a result of this nature is undesired. The idea that positional negotiation requires little preparation, is fairly predictable and is easy to conduct can be as advantageous, especially in once-off agreements. In corporate matters involving long-standing relationships and a potential impact on the corporate entity, positional negotiation reduces the likelihood of reaching a settlement or an agreement.²¹⁹ The nature of this approach is superficial and does not prioritise an understanding of the needs of the parties.²²⁰ Although it is easy to prepare for and to conduct, its superficialness can see it dragging for too long due to power plays, expectations for the other party to break first and compromise, and very little respect for the continuation of the relationship.²²¹

3.3.1.2 Interest-based Negotiation

The second approach, which is interest-based negotiation was developed as an alternative to positional negotiation by Roger Fisher and William Ury.²²² This approach focuses on the needs of the parties instead of their positions, to find a mutually

²¹⁵ Patelia & Chicktay 2016:13.

²¹⁶ Muller 2021:105.

²¹⁷ Patelia & Chicktay 2016:13.

²¹⁸ Muller 2021:106; Fisher *et al.* 1981:4–10.

²¹⁹ Muller 2021:105-106; Fisher *et al.* 1981:6.

²²⁰ Patelia & Chicktay 2016:13.

²²¹ Patelia & Chicktay 2016:13.

²²² Patelia & Chicktay 2016:14; Roger Fisher and William Ury, in their famous book *Getting to Yes* (published in 1991) suggested a model of what they called interest-based bargaining as an alternative to the common positional bargaining approach.

agreeable settlement that is reasonably close to the objectively identified needs of the parties.²²³ Fisher and Ury suggested the enhancement of five specific areas when using interest-based negotiation. The first area is moving from positions to interests.²²⁴ Positions refer to what the parties are asking for, while interests focus on the reasons why each party wants what they want.²²⁵ Factors such as the needs, desires and fears behind the parties' positions are also considered collectively when moving from positions to interests.²²⁶ Implementation often tends to be more complex than theory as it involves real human beings with different logics and reasonings, however, the principle behind positions and interests remains the same. The second area proposed is the focus on building a healthy working relationship and listening effectively. It is important to remember to separate the parties from the issue or dispute in question. Paying enough attention to the parties and the issue at hand is crucial because emotions may lead to frustration and failure to reach a consensus or agreement.²²⁷

The third area involves analysing the best alternative to a negotiated agreement.²²⁸ In this analysis, the realistic options that are available if the parties fail to resolve the issue at hand negotiations are considered.²²⁹ The fourth area proposed focuses on inventing options.²³⁰ When the interests of the parties involved have been identified, everyone involved must work together to create solutions that would satisfy both parties' interests.²³¹ Being attentive to the parties' differences in perception is useful because people may value things differently, making room for the invention of creative options.²³² The fifth and final area proposed is using objective criteria to choose options. An objective criterion could include market value, an entity's history,

²²³ Brand *et al.* 2016:16.

²²⁴ Patelia & Chicktay 2016:14.

²²⁵ Patelia & Chicktay 2016:14.

²²⁶ Patelia & Chicktay 2016:14.

²²⁷ Patelia & Chicktay 2016:16.

²²⁸ Patelia & Chicktay 2016:16.

²²⁹ Patelia & Chicktay 2016:16.

²³⁰ Patelia & Chicktay 2016:16-17.

²³¹ Patelia & Chicktay 2016:16-17.

²³² Patelia & Chicktay 2016:16-17

professional standards, precedents, or anything related to a certain corporate entity.²³³ Justifying a decision based on an objective criterion that caters for the interests of all those involved may put those parties at ease.²³⁴

3.3.2 Mediation

In both statutory and voluntary mediation, parties to a corporate dispute attempt to reach consensus with the aid of a neutral third party.²³⁵ The mediator does not have the power to make a final award where the parties are not able to settle the dispute through an agreement.²³⁶ Mediation is appropriately used if the disputing parties are committed to achieving an amicable and negotiated settlement or if the parties wish to continue their business or commercial relationship after the resolution of the dispute.²³⁷ Unlike the court-annexed mediation employed in the pre-trial phase of litigation, parties initiate this mediation voluntarily through private agreements to mediate in the form of clauses within contracts or can reach an agreement after the dispute. Resolution of disputes in mediation is achieved through negotiation and agreement between the parties.²³⁸ Mediations do not result in binding resolutions unless the parties formalise the agreement into a binding contract.²³⁹ Furthermore, the mediation agreement can be given additional strength by having it made an order of court, if the parties agree to this.

3.3.2.1 Principles of Mediation

The general principles of a valid contract apply. An offer by one of the disputing parties to refer the dispute to mediation has no binding effect before it is accepted by the opposing party.²⁴⁰ Where the parties have included a clause to refer the matter for mediation in a signed agreement or have reached an agreement after the dispute

²³³ Patelia & Chicktay 2016:16-18.

²³⁴ Patelia & Chicktay 2016:16-17-18.

²³⁵ Patelia & Chicktay 2016:25.

²³⁶ Nagel *et al.* 2019: 736

²³⁷ Nagel *et al.* 2019:736.

²³⁸ Feehily 2009:292.

²³⁹ Feehily 2009:292.

²⁴⁰ Nagel *et al.* 2019:736.

arose, that agreement has a binding effect on both parties. Parties can also agree to mediate during the pre-litigation phase mentioned in paragraph 2.2.1 above or at any time before trial where they had opted for court litigation. In company law disputes referred to the Companies Tribunal, the tribunal appoints a qualified mediator and provides a venue for the hearing.²⁴¹ The mediation process used by the companies is similar to that conducted by the mediator not appointed by the tribunal.²⁴² The mediation process is confidential and without prejudice to the parties' rights.²⁴³ The process is also relatively speedy and cost-effective.²⁴⁴ There are no clear-cut legal principles guiding the parties to a resolution of the dispute when using private mediation. This lack of standardisation is a disadvantage, given the nature of the corporate law and cultures within that are hardly ever based on equal bargaining positions.²⁴⁵

3.3.2.2 A Typical Mediation Format

The mediator assigned to or agreed to contacts the involved parties individually.²⁴⁶ These contact sessions are designed for the mediator to give an overview of the mediation process.²⁴⁷ If the contract or agreement between the parties includes a mediation clause, both parties confirm their knowledge of it. If such a clause is not present, the mediator will ask both parties to sign an agreement to mediate as a showcase of willingness and voluntariness.²⁴⁸ The involved parties have control over substantive matters such as defining the issues at hand, identifying their needs and

²⁴¹ Companies Tribunal "Alternative Dispute Resolution at the Companies Tribunal" www.companiestribunal.org.za/alternative-dispute-resolution-at-the-companies-tribunal (accessed on 23 September 2024).

²⁴² Wiese 2014:672.

²⁴³ Companies Tribunal "Alternative Dispute Resolution at the Companies Tribunal" www.companiestribunal.org.za/alternative-dispute-resolution-at-the-companies-tribunal (accessed on 23 September 2024).

²⁴⁴ Feehily 2009:292.

²⁴⁵ Nagel *et al.* 2019:736

²⁴⁶ Patelia & Chicktay 2016:26.

²⁴⁷ Brand *et al.* 2016:36

²⁴⁸ Brand *et al.* 2016:37-38.

interests, and determining potential outcomes that may be reached.²⁴⁹ The parties can make use of their power resources, such as BATNA,²⁵⁰ WATNA,²⁵¹ or PATNA,²⁵² by adopting a broad and innovative outlook with the assistance of the mediator.

The mediator must always maintain impartiality and refrain from advising the parties regarding the legal merits of their cases.²⁵³ However, if an evaluative mediation takes place, the mediator can advise parties. The mediator must also test the reality of these power resources and establish the importance of reaching an agreement.²⁵⁴ Although the role of a mediator is not to restore the relationship between parties, the mediation process helps parties gain a better understanding of the underlying issues between them, regardless of whether they reach an agreement or an impasse.²⁵⁵ Mediation agreements if reached are enforced through using litigation, particularly the court application procedure discussed in paragraph 3.2.2.1 above to legally enforce the agreement reached therein. Another way of enforcing mediation agreements is through the normal remedies in terms of the law of contract.²⁵⁶ These can include, but are not limited to, claiming damages, specific performance or cancellation of the contract. In comparison to the discussed court litigation, mediation is dependent on a measure of co-operation between the parties. However, perseverance with mediation can amount to a waste of time and costs if a dispute has escalated beyond the point of consensus-finding.

3.3.3 Arbitration

Arbitration is one of the oldest adversarial methods of settling disputes. It is an expedient way of finalising disputes without the need to wait for any trial dates. Arbitration is referenced in both Roman and Roman-Dutch law, making it a component

²⁴⁹ Patelia & Chicktay 2016:26.

²⁵⁰ Best alternative to a negotiated agreement.

²⁵¹ Worst alternative to a negotiated agreement.

²⁵² Probable alternative to a negotiated agreement.

²⁵³ Patelia & Chicktay 2016:27.

²⁵⁴ Patelia & Chicktay 2016:27

²⁵⁵ Brand *et al.* 2016:13; Patelia & Chicktay 2016:27.

²⁵⁶ Nagel *et al.* 2019:736

of South African common law.²⁵⁷ The role of arbitration in the South African legal system was formally recognised and confirmed in 2009 by the Constitutional Court in *Lufuno Mphaphuli & Associates (Pty) Ltd vs Nigel Athol Andrews and Bopanang Construction CC*.²⁵⁸ In arbitration, private arbitrators or arbitral tribunals are appointed to give final decisions on commercial disputes.²⁵⁹ Although adversarial and somewhat formal, arbitration provides a timely, private, and confidential approach to resolving disputes with binding decisions.²⁶⁰

3.3.3.1 Arbitration agreement

If there is a written arbitration agreement, the arbitration procedure is subject to the provisions of the *Arbitration Act*.²⁶¹ If the agreement to refer any dispute to arbitration is in the form of an oral agreement, this contract is governed by the principles of common law.²⁶² The appointment and powers of the arbitrator are usually outlined in this agreement, including the issues that must be determined. If the agreement is silent on the latter, section 14 of the *Arbitration Act* dictates the terms.²⁶³ Arbitration allows experts to be appointed as arbitrators. This raises the prospects of a better-suited resolution. However, depending on the agreement, the appointed arbitrator may not necessarily be an expert in a particular field but can potentially call an expert as a witness for an agreed fee to deal with the technical aspects of the matter.²⁶⁴

²⁵⁷ Nagel et al. 2019:737.

²⁵⁸ *Lufuno Mphaphuli & Associates (Pty) Ltd vs Nigel Athol Andrews and Bopanang (CCT 97/07)* [2009] ZACC 6; 2009 (4) SA 529 (CC).

²⁵⁹ Patelia & Chicktay 2016:59.

²⁶⁰ Albright 2005:18, arbitration proceedings are typically not open to the public, and the awards given are often kept confidential; Patelia & Chicktay 2016:60, parties are entitled to legal representation unless otherwise agreed.

²⁶¹ *Arbitration Act* 42/1965.

²⁶² Nagel et al. 2019:737

²⁶³ Patelia & Chicktay 2016:59.

²⁶⁴ Law Society of South Africa "Litigation vs Arbitration," <https://www.lssa.org/wpcontent/uploads/2022/10/Arbitration-v-Litigation-Brochure.pdf> (accessed on 10 July 2023).

The agreement to arbitrate should state who would be liable for costs for the arbitrator, venue, and interpreters, but if not, section 35 of the *Arbitration Act* enables the arbitrator to make a cost order.²⁶⁵ In disputes referred to the Companies Tribunal for arbitration, the Tribunal appoints a qualified arbitrator and provides a venue for the hearing at no costs to the parties.²⁶⁶ The arbitration agreement, like any other contract, must comply with the requirements for a valid contract.²⁶⁷ South African courts view the arbitration agreement as a self-contained contract collateral or ancillary to the main agreement.²⁶⁸ This entails that the arbitration agreement remains legally binding even if the main agreement was cancelled.²⁶⁹ However, if the main agreement is *void ab initio*, or if the parties agree to terminate the main agreement, the arbitration agreement does not survive the main agreement.²⁷⁰

Alternatively, an arbitration agreement may be entered into after a dispute has arisen between the parties where they both desire to seek a resolution of their dispute by arbitration.²⁷¹ This can happen during the pre-litigation phase discussed in paragraph 3.2.1. It was mentioned that the pre-litigation phase creates an opportunity for parties to consider using ADR to resolve the dispute.

3.3.3.2 *The Arbitration Procedure*

The arbitration procedure gives parties more control of the process than a court hearing. Parties agree to conduct the arbitration with a limited time for the presentation of oral evidence, or even with no oral evidence at all.²⁷² The *Arbitration Act* contains provisions relating to the arbitration procedure. Section 16 allows any party to request the summoning of a witness to give evidence or produce books or documents in the

²⁶⁵ Patelia & Chicktay 2016:60.

²⁶⁶ Nagel *et al.* 2019:739.

²⁶⁷ Nagel *et al.* 2019:739.

²⁶⁸ Nagel *et al.* 2019:739.

²⁶⁹ *South African Transport Services v Wilson NO* 1990 (3) SA 333 (W) 340E.

²⁷⁰ *Atteridgeville Town Council v Livanos t/a Livanos Brothers Electrical* 1992 (1) SA 296 (A)

²⁷¹ Brand *et al.* 2016:10.

²⁷² Patelia & Chicktay 2016:56.

same way as in civil litigation.²⁷³ Although following court procedures is allowed in the arbitration process, this negates the benefits of using arbitration and delays the process.²⁷⁴ Conducting arbitrations without the strict application of rules of evidence reduces the likelihood that parties will resort to the use of power or coercion to resolve disputes.²⁷⁵

3.3.3.3 Arbitration Award and Enforcement

After considering all the evidence, the arbitration award is delivered.²⁷⁶ This award should conform to formal requirements as required by the *Arbitration Act*, as well as certain substantive requirements to be valid. Section 23(a) of the *Arbitration Act* requires the arbitrator to make the award within four months of the commencement of the arbitration proceedings. Section 24(1) requires the award to be in writing and signed by all the arbitrators to the proceedings. Section 25(1) requires the award to be delivered to the parties or their respective representatives.²⁷⁷ Further substantive requirements prescribe that any arbitration award should be final, certain, legally possible, and fall within the ambit of the arbitration agreement.²⁷⁸

In terms of section 31(1) of the *Arbitration Act*, a person must apply to the High Court for the award to be made an order of the court. This is typically done using the court application procedure. Arbitration awards that have been made into court orders are enforced in the same way as any other judgment or order with the same effect.²⁷⁹ This includes execution by state mechanisms.²⁸⁰ An arbitration award is not subject to

²⁷³ Section 14(b) states that unless the arbitration agreement provides otherwise, a party to the dispute, or a witness, may be ordered to give evidence under oath or to produce documents for discovery.

²⁷⁴ Patelia & Chicktay 2016:62.

²⁷⁵ Brand *et al.* 2016:13.

²⁷⁶ Nagel *et al.* 2019:742.

²⁷⁷ Nagel *et al.* 2019:742; Arbitration Act:sec. 23-25

²⁷⁸ Nagel *et al.* 2019:742; Patelia & Chicktay 2016:65

²⁷⁹ *Arbitration Act* 42/1965:sec. 31.

²⁸⁰ Detailed discussion is provided in paragraph 2.4.1.

appeal.²⁸¹ The courts will not readily interfere with the finality of an award, but a dissatisfied party may take it for review.²⁸²

Arbitration offers confidentiality to parties who wish to have a dispute adjudicated without resorting to the convoluted process of court litigation. Although arbitration is fundamentally different from litigation, most of the disadvantages associated with litigation also apply to arbitration; it may be slow and expensive.²⁸³ In corporate law, arbitration has become the preferred ADR mechanism when compared to other mechanisms, especially in disputes arising in terms of written contracts.²⁸⁴ The researcher believes that this is caused by the notion that arbitration is a much faster process compared to court litigation, often resolving disputes within months instead of the years typically associated with court cases. Additionally, arbitration offers enhanced confidentiality, which is crucial in many corporate disputes that involve sensitive business information. Protecting this information is essential, as it can impact a company's reputation. Arbitration provides a private forum for dispute resolution, keeping sensitive details away from the public and unauthorized parties, in contrast to the open nature of court proceedings. These features give arbitration an edge compared to court litigation and mediation because it can be easily enforced, unlike mediation agreements.

3.3.4 Conciliation

Conciliation is an alternative dispute resolution mechanism, where a conciliator or panellist meets with disputing parties seeking a dispute resolution by mutual agreement.²⁸⁵ Conciliation shares similarities with both mediation and arbitration. Conciliation is informal like mediation while the conciliator is much more active similar to an arbitrator. Conciliation can be viewed as a crossover between the two but unique in its own way. Conciliation is a voluntary process, and the involved parties are free to

²⁸¹ *Arbitration Act 42/1965*:sec. 28.

²⁸² *Arbitration Act*:sec. 33; Detailed discussion is also provided in 2.4.2.

²⁸³ Brand *et al.* 2012:13; Boule & Rycroft 1997:66; Wiese 2016:127-128.

²⁸⁴ Ramsden 2010:173.

²⁸⁵ Pretorius 1993:4.

agree and attempt to resolve their dispute through the use of this mechanism.²⁸⁶ The flexibility of this process allows parties to define the time, structure, and content of the conciliation proceedings.²⁸⁷ The decision to settle is in the hands of the parties involved in the dispute, the conciliator only 'facilitates' the process. The conciliator can express an opinion or make suggestions on the merits of the dispute and recommend a solution which the parties are free to accept or reject.²⁸⁸

The conciliation process is fast, uncomplicated, inexpensive, and does not allow legal representation.²⁸⁹ In labour disputes, conciliation is a well-established mechanism. This mechanism is established in terms of the Labour Relations Act of 1995 through the Commission for Conciliation, Mediation and Arbitration ("CCMA"). The nexus between the regulation and supervision of the use of ADR in labour law draws a visual representation of the rationale of this study but in corporate law. The concluding paragraph will provide a discussion on whether the nature of ADR mechanisms warrants adequate supervision for its use in corporate law.

3.4 OBSERVATIONS AND CONCLUSIONS

This chapter analysed the nature of ADR mechanisms with the intent of determining whether they qualify for adequate supervision when used in corporate law. With the aid of the above evaluation, the researcher concludes that the nature of ADR does not discharge it from adequate regulation and supervision. Adequate regulation and supervision are important to ensure that ADR mechanisms are conducted fairly and efficiently. Supervision involves monitoring ADR institutions and practitioners, ensuring compliance with regulations and standards, and providing training and accreditation for ADR practitioners to maintain public confidence in ADR mechanisms.

²⁸⁶ Bosch *et al* 2004:8-9.

²⁸⁷ Bosch *et al* 2004:8-9.

²⁸⁸ Peté *et al* 2016:536.

²⁸⁹ Pretorius 1993:10-12.

The manner in which disputes are resolved is important for maintaining business relationships, more especially in a highly dynamic environment like corporate law. Court litigation procedures often prove to be too adversarial, time-consuming, and costly. This can negatively impact the business relationships between the parties involved. ADR's effectiveness and benefits are dependent on parties' willingness to engage with each other in good faith and the commitment parties show to the process. Power imbalances, cultural differences, and the complexity of some disputes can also pose challenges to ADR outcomes.²⁹⁰ Raising awareness concerning ADR advantages by inciting early intervention, offering adequate training for ADR practitioners can address these challenges and promote its broader adoption in South African corporate law.²⁹¹

Chapter 4 will examine the submission of how regulating ADR may create a sense of formalism and defeat its intended purpose.

²⁹⁰ Khashifa Ussuph "The role of alternative dispute resolution in resolving commercial disputes in South Africa: exploring the NPA's new initiative- Corporate Alternative Dispute resolution", <https://www.macroberty.co.za/insights/posts/role-of-alternative-dispute-resolution-in-resolving-commercial-disputes-in-south-africa> (accessed on 29 September 2024).

²⁹¹ Khashifa Ussuph "The role of alternative dispute resolution in resolving commercial disputes in South Africa: exploring the NPA's new initiative- Corporate Alternative Dispute resolution", <https://www.macroberty.co.za/insights/posts/role-of-alternative-dispute-resolution-in-resolving-commercial-disputes-in-south-africa> (accessed on 29 September 2024).

CHAPTER 4: THE INTENDED PURPOSE OF ALTERNATIVE DISPUTE RESOLUTION

4.1 INTRODUCTION

This Chapter will investigate whether regulating ADR will defeat its intended purpose. As discussed in the previous chapters, ADR lacks regulation. This ordeal extends into the corporate sector, where there are only a few regulatory provisions and recommendations from current legislation and corporate governance reports that encourage using ADR to resolve corporate disputes.²⁹² These provisions and recommendations that mention or suggest using ADR in corporate law will be investigated to determine whether a complete regulation would formalise ADR. It can be argued that regulating ADR defeats its intended purpose by formalising its mechanisms. In corporate law, the argument can be raised around the attitudes and corporate cultures which often work against an equitable, agreeable outcome.²⁹³ Winning is often the only thing that matters; no party will forgo a chance to win a courtroom triumph despite the realities. Secondly, ADR is perceived as not particularly different from litigation. Corporations that have committed to using ADR mechanisms often allow the procedure to become an embodiment of litigation due to the lack of regulation to govern its use.²⁹⁴ Whenever this occurs, the cost associated with ADR increases significantly, approaching the cost of the litigation that it is supposed to replace.²⁹⁵

The researcher argues based on the concerns mentioned above to show how regulation of ADR or lack thereof impacts its use in corporate law disputes. The crux of this Chapter is an exposition on how the lack of a regulatory framework for the use of ADR has defeated the intended purpose of ADR as opposed to this resulting from regulation. ADR was intended to provide creative, specialised, flexible, and

²⁹² *Companies Act 71/2008* & King III discussed in Chapter 2.

²⁹³ Todd *et al* 2004:3.

²⁹⁴ Todd *et al* 2004:3; South African Company Law for the 21st Century Guidelines for Corporate Law Reform ('Guidelines') GN 1183 in GG 26493 of 23 June 2004:50.

²⁹⁵ Todd *et al* 2004:4.

participatory solutions.²⁹⁶ Modern proponents of ADR asserted that the traditional court systems are not effectively addressing the needs and interests of all parties involved in disputes.²⁹⁷ ADR was proposed as a non-dyadic and non-adversarial alternative to serve the parties' interests better. However, looking at how ADR has been used in corporate disputes if it has been used, it is evident that it is not different from litigation. This is mainly because parties involved can revert automatically to the habits of litigation due to the lack of regulation of these mechanisms. Putting a regulatory framework in place would lead to a more effective use of ADR within corporate law, minimising its disadvantages and maximising its advantages. The paragraph below will briefly discuss the intended purpose of ADR.

4.2 THE PRIMARY OBJECTIVES OF ADR

ADR's primary objectives are evaluated to ascertain its intended purpose.²⁹⁸ Firstly, ADR was intended to be a cost-cutting measure.²⁹⁹ Attempting to resolve disputes using ADR mechanisms reduces legal fees and all costs that are typically associated with court litigation. Negotiation and mediation may be more cost-effective than arbitration, but arbitration is usually cheaper than litigation.³⁰⁰ Cost-cutting is intricately connected to risk management. By effectively managing these aspects, businesses can allocate their resources wisely, reducing the financial burden associated with lengthy court cases. This approach can also have a positive socio-economic impact, as increased revenue and profits may result in expansion and more job creation.

Secondly, ADR offers the benefits of a cooperative and participatory dispute settlement.³⁰¹ ADR encourages the culture of open communication that normally sees parties involved in a dispute work together with a neutral third party to resolve issues and where they may agree to a mutually acceptable resolution of the dispute.³⁰² This

²⁹⁶ Menkel-Meadow 1997:417.

²⁹⁷ Sander 1979; Fisher & Ury 1982.

²⁹⁸ Peté *et al* 2016:535.

²⁹⁹ South African Law Reform Commission Discussion Paper168 2025:xxviii.

³⁰⁰ Peté *et al* 2016:535.

³⁰¹ South African Law Reform Commission Discussion Paper168 2025:xxviii.

³⁰² Peté *et al* 2016:535.

objective is crucial in the field of corporate law because it helps in maintaining business relationships and its flexibility offers tailored mechanisms. Thus, the preservation of business relationships, reputation, and continuity is more likely. Thirdly, ADR was intended to help facilitate access to justice outside the conventional process of Court litigation.³⁰³ These mechanisms, if used effectively can offer affordable solutions to parties and expedite the resolution of disputes.³⁰⁴

Lastly, ADR was intended to relieve court congestion.³⁰⁵ Court litigation is lengthy and complex, which makes it sensible for its alternative to offer a completely different approach. Disputes resolved through ADR ease the Court backlogs, leading to a reduction in the number of matters on the court rolls altogether.³⁰⁶ Altogether ADR offers a different nature and approach compared to the conventional adversarial legal culture encroached in court litigation.

4.3 THE UNFAIRNESS AND FORMALISATION OF ADR ARGUMENTS

The push against the regulation of ADR is based on the unfairness associated with it and in the fear of formalising it to emulate private litigation, thus defeating its intended purpose. The relationship between fairness and formality is contingent and varies in different societies and eras.³⁰⁷ The formal nature of litigation is embedded in the predefined procedures and rules thereto, the physical arrangements of the courtroom, the robed presiding officers sitting on highchairs, the national flag on prominent display, and the blindfolded lady of justice fixed on the walls.³⁰⁸ Arguably this exact formal setting serves as a reminder to litigants that they are expected to act in accord with the law of the republic.³⁰⁹ Unlike court litigation, alternative dispute resolution

³⁰³ Peté *et al* 2016:535-536

³⁰⁴ Peté *et al* 2016:535-536

³⁰⁵ South African Law Reform Commission Discussion Paper168 2025:xxviii.

³⁰⁶ Peté *et al* 2016:535-536.

³⁰⁷ Delgado 2017:635.

³⁰⁸ Delgado 2017:621

³⁰⁹ Delgado 2017:621

offers or ought to offer few cues in terms of a setting.³¹⁰ ADR offers a comfortable setting and an informal atmosphere.³¹¹

Disempowered disputing parties may seek better treatment from informal sources rather than expecting help from official channels enforcing indifferent laws.³¹² However, the connection between prejudice and informality remains a critical factor not to be ignored. When the parties begin on unequal footing, it provides an ideal situation for more empowered corporations to act in their own best interests, with little consideration for the opposing party.³¹³ This fuels the argument that the main aim of ADR mechanisms is not to promote justice but to coerce parties and have them believe they have agreed on a mutually acceptable resolution.³¹⁴ It is also argued that large entities view ADR as a means of settling less important disputes, or as a method that can be easily abandoned if it doesn't result in the desired outcome.³¹⁵

However, the researcher disagrees with the above arguments. An astute neutral third party is attentive to power imbalances and aims to ensure a level playing field. Although the lack of regulation and supervision persists, the Dispute Settlement Accreditation Council (DiSAC) offers uniform accreditation and qualification standards for mediators in the case of commercial mediation.³¹⁶ Furthermore, the researcher proposes learning and better understanding the functioning of these alternative mechanisms to use them effectively. The view that regulating the use of ADR in corporate law would formalise it is only one narrow way of looking at it. The researcher argues a regulatory framework would prevent formalisation by setting a consistent standard and system of how ADR mechanisms should be used. This would need to be strategic given the already formal and power-imbalanced corporate field. The

³¹⁰ Patelia & Chicktay 2016:5-17.

³¹¹ Patelia & Chicktay 2016:13-17.

³¹² Delgado 2017:635.

³¹³ Nelson D. Schwartz & Alan Rappeport, Call to Create Jobs, or Else, Tests Trump's Sway, N.Y. TIMES (Jan. 23, 2017)

³¹⁴ Hurter 2020 TSAR 301.

³¹⁵ Todd *et al* 2004:3.

³¹⁶ Kotze 2021:2

existing regulatory mechanisms for the use of ADR in corporate law outlined in Chapter 2 will be briefly mentioned to address the concerns raised against them.

4.3.1 Court-Annexed Mediation Concerns

In Chapter 3, it was mentioned that mediation can either be voluntary, statutorily, or court annexed. The rationale for adopting court-annexed mediation in Rule 41A and Chapter 2 of the Magistrates' Court is to promote the use of mediation between parties who are in the first stage of court litigation.³¹⁷ However, there is no obligation on any party to either attempt to settle or to participate in ADR processes.³¹⁸ Mediation relies on the notion of good faith and parties must be willing to resolve their dispute amicably.³¹⁹ Mediation is intended to be informal and simple, an alternative to formal and complex court litigation. It might not be well suited to assume a role adjacent to court litigation as its notion of good faith might be jeopardised. In some cases, certain parties may perceive mediation as coercive when they enter the process solely to avoid the risk of facing an adverse cost order for refusing mediation, or because they feel they have no other option if they want to pursue litigation.³²⁰

Although rules governing court-annexed mediation purport to encompass voluntary mediation, it can also be seen as quasi-mandatory. This is due to the reason that these rules empower a presiding officer to award adverse cost orders against a party who refuses to agree to refer a matter to mediation.³²¹ A presiding officer may also refuse to award costs in favour of the successful litigant.³²² For this reason, court-annexed mediation can be viewed as indirect coercion into mediation, not coercion in

³¹⁷ Daya 2018:12-13.

³¹⁸ Wiese 2018:670.

³¹⁹ Opperman 2023:18-21.

³²⁰ Vettori (2015) African Human Rights Law Journal 355-358.

³²¹ High Court Rules:rule 41A(9)(b).

³²² High Court Rules:rule 41A(9)(b); When considering making a cost order, the presiding officer has recourse to the mediation notices, tenders and offers made between the parties.

mediation,³²³ because parties can be seen as only compelled to seriously consider the use of mediation.³²⁴ Coercion in mediation is unlikely. The qualification and standards for mediator accreditation under Rule 86 of the Magistrates Court Rules require adherence to its conduct guidelines and submission of a certificate of good standing from an approved professional body or mediation training provider designated by the minister.³²⁵

The researcher submits that the coercion and quasi-mandatory argument is based on one view. An argument can also be made from the view that the adverse cost order is not an obligation but remains the discretion of the court on a case-by-case basis. Court-annexed mediation does not formalise or force the use of mediation. The issue remains with the frameworks that regulate court-annexed mediation. The rules do not provide any guideline as to what would constitute a sound reason for refusing to agree to refer a matter to mediation. If such guidelines were included, it is conceivable that parties would have a standard to use when making their reasons for refusing mediation clear, without the fear of a cost order being made against them.³²⁶ The standard would only serve as a guideline, and not necessarily create a closed list.

4.3.2 The Companies Tribunal

The unclear wording of section 166(1) of the 2008 *Companies Act* could create a perception that a dispute referred to the tribunal for ADR would be unable to be referred to the Commission for investigation, or to a court for adjudication if the former fails.³²⁷ This is due to the wording of section 156 specifically providing that a dispute can be referred to ADR as an alternative to applying for relief to a court or filing a

³²³ Opperman 2023:20-21 notes the difference between coercion into mediation and coercion in mediation. When parties are compelled to refer their matter to mediation, this refers to coercion into mediation. If during mediation, they are coerced into settling, this refers to coercion in mediation.

³²⁴ Compelling parties to attempt mediation may lead to situations where parties reach a settlement that they in fact do not really desire because they have limited resources to pursue further litigation.

³²⁵ Muller 2021:164; GK 854/2014 paras 5, 7, 8 and 9.

³²⁶ Broodryk 2019a:631.

³²⁷ Wiese 2014:673.

complaint with the Commission.³²⁸ The only ADR mechanism that does not fall under this confusion is arbitration. The disputes that are referred to arbitration are not allowed to be adjudicated in more than one forum.³²⁹ This lack of clarity might result in parties becoming reluctant to attempt to resolve a dispute by way of mediation or conciliation because non-agreement to a settlement would typically entail no further remedy being available.³³⁰ This fallout would be contrary to the intended promotion of ADR by the legislature to allow for a speedy and inexpensive resolution of disputes through less formal mechanisms.³³¹ However, if there was an existing nexus between regulatory and supervision mechanisms, similar to how the CCMA handles matters concerning labour disputes, section 166 would better promote the referred use of ADR for company law disputes.

When adjudicating on matters addressed to it in terms of the *Companies Act*, the Companies Tribunal is required to conduct proceedings according to the rules of natural justice.³³² The layout and nature of these proceedings should be less formal than court litigation as set out in section 180(2) of the 2008 *Companies Act*.³³³ However, despite the provisions allowing for informal procedures, regulations to the Act make detailed provisions regarding the conduct of tribunal proceedings on such matters as pre-hearing conferences, settlement conferences, set down of matters, matters struck off, default orders, record of hearings, and costs and taxation.³³⁴ This can be seen as the formalisation of ADR mechanisms. The proceedings before the tribunal become overly formal and emulate trial proceedings in court litigation because parties may also be represented by lawyers who might revert to court procedures or tactics that are familiar to them.³³⁵ However, this cannot be viewed as complete formalisation because the member(s) presiding over each matter remains with the

³²⁸ *Companies Act* 71/2008:sec. 156; Wiese2014:673.

³²⁹ Wiese 2014:673.

³³⁰ Wiese 2014:673.

³³¹ Wiese 2014; Department of Trade and Industry (2004) South African Company Law for the 21st Century: Guidelines for Corporate Reform at 50.

³³² Davis 2010:422.

³³³ Wiese 2014:674.

³³⁴ *Companies Regulations*, 2011:reg.149-162; Wiese 2014:674.

³³⁵ Wiese 2014:674-675.

discretion or duty to ensure adjudication and dispute resolution that is conducted speedily, informally and cost-effectively.³³⁶

4.3.3 The *Arbitration Act*

Arbitration includes many of the features of a trial court including prehearing motion practice, prolonged discovery, extensive hearings to avoid claims of procedural injustice, and the erosion of the finality of arbitration awards.³³⁷ The intended purpose was for arbitration to provide greater finality and efficiency at less cost than litigation. Corporate arbitration is often turned into the most formal, costly, and time-consuming form of ADR mechanism.³³⁸ Similar to litigation, arbitration is a formalised adversarial process designed to adjudicate rights with legal practitioners driving the process.³³⁹ For these reasons, the contending parties often waste a lot of time, money, and energy by reverting almost automatically to the habits of litigation.³⁴⁰ As a result, arbitration becomes more expensive than it should be and ADR's cost-cutting ability becomes an exaggeration.³⁴¹ However, arbitration is not to be blamed but the involved parties and personnel. Arbitration permits the parties to stipulate, or agree on, certain facts and virtually eliminate briefs, discovery, and the endless reliance on expert testimony and counter-testimony to cut down on time and the overreliance on legal practitioners.³⁴²

³³⁶ Wiese 2014:674.

³³⁷ Pappas 2015:162.

³³⁸ International Chamber of Commerce “Effective Management of Arbitration: A Guide for In-House Counsel and Other Party Representatives” <https://iccwbo.org/wp-content/uploads/sites/3/2017/05/866-3-ENG-Effective-Management-of-Arbitration.pdf> (accessed 17 August 2024).

³³⁹ Pappas 2015:162

³⁴⁰ “Lawyers make repetitious presentations of facts and legal arguments as if they were appearing before a judge rather than an arbitrator. They pursue discovery, file motions, and rely excessively on expert witnesses-exactly the way they would in a lawsuit. Outside the courtroom, lawyers grind out publicity favouring their cause. Moreover, arbitrators themselves contribute to the problem by handing down damage awards that are beyond reason and contractual limits. Sometimes, they even award punitive damages. Adding to ADR's reputation as nothing more than litigation-in-disguise;” Todd 2004:3-4

³⁴¹ Todd 2004:3-4

³⁴² Todd 2004:3.

Arbitration looks and works like arbitration when the parties are prepared to pursue common goals such as streamlining the proceedings,³⁴³ limiting the necessity for briefs,³⁴⁴ participating in preheating exchanges,³⁴⁵ agreeing to limit damages, and using experts selectively.³⁴⁶

Arbitration by its nature is more formal than any of the forms of ADR mentioned herein. It is also more complex and time-consuming, but it remains behind court litigation in terms of the time and costs parties may bear. However, it is worth noting that in some cases it can be more expensive and complex than litigation. The scope and framework the *Arbitration Act* introduces are moderate and lack the depth and substance to warrant the argument that regulating ADR would defeat its intended purpose and turn it into private litigation. Instead, it is a more in-depth and substantial regulatory framework that would prevent the formalisation of ADR mechanisms. The involvement of legal practitioners and flexibility of ADR requires regulation to prevent its elasticity stretching in the confines of formal court litigation. The fairness issue concerning the link between prejudice and informality is not to be overlooked. Regulation, if employed in a manner that retains the informality of the ADR mechanism, would weaken that link.

4.4 OBSERVATIONS AND CONCLUSIONS

This Chapter set out to investigate whether or not regulating ADR would defeat its intended purpose. The existing regulatory provisions and recommendations from current legislation and corporate governance reports that encourage the use of ADR for resolving corporate disputes were evaluated. Based on the concerns and arguments that were evaluated in this chapter, the researcher concludes that the

³⁴³ The parties agree to stipulate undisputed facts and matters of law and to encourage the arbitrator to rule on disputed issues of law in summary form before hearing evidence.

³⁴⁴ In some cases, no briefs are needed at all.

³⁴⁵ The parties trade exhibits and witness lists and discuss which items are important to the case and which peripheral. These exchanges should not resemble the discovery process typical of litigation should instead focus on documents to be used in the hearing.

³⁴⁶ Because in adversarial proceedings, each side typically tries to out-expert the other, in arbitration, a limit on the use of experts saves time and money.

regulation of ADR does not defeat its intended purpose. Instead, it is the lack of a regulatory framework for the use of ADR that may defeat its intended purpose. ADR was intended to provide creative, specialised, and timely resolutions. ADR was intended to be flexible and remain free from formality and complex legal rules that sanitise and depersonalise disputes.³⁴⁷ Something flexible is not meant to be consistent, but rather limitless. However, it is this flexibility that leaves it prone to being abused and used in an unintended manner, such as formalising it.

A standard or rule is needed to ensure ADR is conducted in ways that do not dilute its informal nature and fairness. The standard or rule in question is regulatory legislation for the use of ADR in corporate law which supervision can exist to enforce. This is mainly because parties involved can revert automatically to the habits of litigation due to the lack of regulation of these mechanisms. In court-annexed mediation, the Qualification and standards for mediator accreditation in Rule 86 of the Magistrates Court Rules provide standards of conduct. This rule also requires the submission of a certificate of good standing from an approved professional body or mediation training provider designated by the minister. Non-compliance with standards may result in removal from the panel of court-annexed mediators.³⁴⁸ Currently, there is no list of panellists for mediators working under the court rules, despite the provisions outlined in Rule 86 of the Magistrates' Court Rules.³⁴⁹

ADR regulation and supervision would entail different measures and mechanisms which are aimed at minimising the risks and potential risks to create accessible ADR mechanisms that entities can access and make use of seamlessly.³⁵⁰ It is submitted that regulation and supervision are some of the measures and policy interventions that can enhance ADR and its use in a corporate environment. The duty to ensure dispute resolution is conducted speedily, informally, and cost-effectively remains with all the parties involved. Thus, the proposed supervision would be for ADR practitioners, the

³⁴⁷ Peté *et al* 2016:533.

³⁴⁸ Muller 2021:164.

³⁴⁹ Muller 2021:164.

³⁵⁰ The risks include ADR mechanisms such mediation and conciliation being used in a manner that emulates a mini trial, formalising these forms ADR because it is not regulated. A more depth discussion about these risks is provided in Chapter 4.

neural third parties involved to ensure they are held accountable to transparent practice standards. This would ensure protection for ADR users alongside relevant professional bodies, as ADR practitioners would be required to adhere to the conduct rules of voluntary organisations that would be statutorily regulated.

In Chapter 5, the researcher will conclude and make recommendations.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 CONCLUSIONS

Disputes disrupt operations, strain relationships, and consume valuable resources across all sectors. Court litigation is the primary method for resolving disputes. However, ADR has grown in popularity to become an essential part of the modern corporate landscape internationally.³⁵¹ ADR allows businesses to resolve conflicts more efficiently and cost-effectively. It encompasses strategies that enable corporations to navigate disputes flexibly, foster collaborative environments, and protect business relationships. ADR is no longer the “new kid” on the block. However, it is treated like the “step-kid”. The trend towards the increasing use of ADR mechanisms is slowly becoming evident in South Africa.³⁵² Although this remains arguable, the recent draft mediation bill serves as a step in the right direction. Court litigation is the primary method for resolving disputes, but it has significant limitations that make it less effective. The shift towards ADR in corporate law will show a departure from traditional approaches and a fundamental evolution in how businesses handle conflicts. Court proceedings often take months or even years, from filing to trial and potential appeals thereafter.³⁵³ This hinders a business's ability to adapt to changing circumstances. In turn, many disputes are left unresolved for a long period if ever.

Unresolved disputes have negative effects across multiple areas. Normal business operations are disrupted, causing delays and inefficiencies. Relationships among stakeholders such as employees, partners, clients, and shareholders are strained, negatively impacting trust and collaboration. Furthermore, legal costs associated with court litigation can drain financial resources, posing a considerable threat to a company's financial health. Thus, using ADR to resolve corporate disputes is not only a practical decision but also an investment in long-term success. It creates a culture where conflicts are resolved speedily, relationships are maintained, and corporate

³⁵¹ Stepanowich 2004:879.

³⁵² Wiese 2014:668.

³⁵³ Wiese 2014:667-670.

governance adapts to the constantly changing landscape of the modern business world.

Chapter 2 shared insights on regulatory provisions that suggest or recommend the use of ADR in South African corporate law. The researcher submitted how the nexus between regulation and supervision of ADR is essential for enhancing its use in South African corporate law. Although this nexus is lacking in South African law, it is submitted establishing it would enhance the use of ADR in several ways. Firstly, it can increase the legitimacy of ADR mechanisms. Regulation provides a legislative framework, while supervision ensures that ADR mechanisms are legitimate and trustworthy through accountability and monitoring. Secondly, regulation and supervision provide a sense of consistency by reducing uncertainty. The quality of ADR mechanisms would be increased because supervision would ensure that ADR practitioners meet standards. Another aspect that can be improved is public trust, encouraging the use of ADR. This can be seen in how the support for mediation over adjudication has increased in the last few decades due to over 50 statutes providing for the use of mediation.³⁵⁴ It is important to note that these statutes only briefly mention mediation. Mediation is not made mandatory, and there is insufficient detail provided regarding the mediation process to be followed. This gap shows how the nexus between regulation and supervision of ADR can be used to improve public trust. Lastly, the biggest drawback associated with ADR is enforceability. Regulation and supervision could improve this disadvantage, ensuring that ADR outcomes are enforceable.

Chapter 3 examined the complexities of mediation, arbitration, and negotiation in conjunction with court litigation to provide a comprehensive understanding of the multifaceted landscape of ADR. The decision on the mechanism to follow must be a deliberate and thoughtful agreement. Exploring available options for resolving corporate and commercial disputes effectively and speedily should be considered in nearly every case. This can be done by determining the effectiveness of a dispute resolution method in each dispute. Negotiation allows the involved parties to engage in direct dialogue with each other to achieve mutually agreeable solutions. It is through

³⁵⁴ Wiese 2014:668.

incorporating negotiation techniques that other ADR mechanisms are formed to a certain extent.

Mediation is a key component of ADR that facilitates open communication and conflict resolution with the help of a neutral third party. The fundamental characteristics of negotiation allow for various approaches to be employed during the mediation process.³⁵⁵ These negotiation approaches are namely positional and interest-based negotiation. These approaches are important for developing a personal mediation style. A mediator must understand the types of approaches parties may take during the negotiation in the mediation process.³⁵⁶ Arbitration is another key method that provides a more streamlined and confidential process compared to traditional litigation. Conciliation provides a process that is seemingly a cross-over between mediation and arbitration, yet different in its way. The objective of Chapter 3 was to analyse the nature of ADR mechanisms with the intent of determining whether they qualify for adequate supervision when used in corporate law. The researcher concluded that the nature of ADR does not discharge it from adequate supervision. This envisioned supervision would concern matters relating to the proceedings of ADR mechanisms, systemising it to oversee the qualifications, appointment, conduct, and scope of all parties to be involved therein.

Chapter 4 addressed the concerns raised against the regulation of ADR, namely the fear of formalising the entire process and thus emulating private litigation. This Chapter investigated whether regulating ADR would defeat its intended purpose. The nature of the existing regulatory provisions and recommendations from current legislation and corporate governance reports that encourage the use of ADR for resolving corporate disputes were critically evaluated. The researcher concluded that the regulation of ADR does not and would not defeat its intended purpose. Instead, it is the lack of a regulatory framework for the use of ADR that defeats its intended purpose.

³⁵⁵ Muller 2021:105

³⁵⁶ Muller 2021:105

5.2 RECOMMENDATIONS

5.2.1 Regulatory Legislation

Legislation that regulates ADR is recommended. The most alluded to recommendation which the study was formed around is the urging of the judiciary and legislators to enhance the use of ADR as a means to resolve corporate disputes through enacting legislation. This form of regulation through a legislative framework and a supervisory authority would lead to the institutionalised use of ADR in the civil justice system.³⁵⁷ Regulation and supervision that aims at binding ADR practitioners through rules of conduct would protect parties who opt for ADR. Currently, voluntary bodies that accredit, mandate, and regulate their members' professional standards and conduct remain statutorily unregulated themselves. The Mediation Society of South Africa (MSSA), Association of Arbitrators (Southern Africa), Tokiso Dispute Settlement, Dispute Settlement Accreditation Council (DiSAC), and the Arbitration Foundation of South Africa (AFSA) are examples of voluntary bodies that actively promote mediation and arbitration by establishing panels of mediators and arbitrators.³⁵⁸ The recommended legislation would require thorough research. It is beyond the scope of this study to make comprehensive suggestions in this regard. However, the researcher can suggest that the recommended legislation would among other things need to describe the main objectives and features of ADR mechanisms and provide provisions for the establishment of a regulatory body and its functions, because the current voluntary bodies lack statutory regulation.

It is also worth noting that the South African Law Reform Commission (SALRC) has long established a project aimed at developing a draft Mediation Bill for South Africa. This Bill is said to address the issue of accreditation of mediators amongst other things.³⁵⁹ This Bill aims to facilitate the resolution of disputes through mediation. It outlines the principles that govern mediation and establishes arrangements for using mediation as an alternative to initiating or continuing civil proceedings.³⁶⁰ The Bill also

³⁵⁷ Muller 2021:163.

³⁵⁸ Negal et al 2019:735.

³⁵⁹ Kotze 2021:2.

³⁶⁰ South African Law Reform Commission Discussion Paper168 2025:xxviii.

provides for the creation of codes of practice that mediators may adhere to and seeks to regulate the mediation profession.³⁶¹ Additionally, it proposes the recognition of a body as the Mediation Council of South Africa under the Act and addresses the enforcement of international commercial mediation settlement agreements, along with related matters.³⁶² This project and the court-annexed mediation rules show the amount of development the mediation practice in South Africa has undergone. It is for this reason the researcher argues for the regulation and institutionalisation of the entire ADR system. Given the amount of enhancement and promotion mediation has seen as a result of being suggested in several statutes, the same can be expected when a mediation statute is finally enacted. Lessons can be taken from this initiative to regulate other ADR mechanisms.

5.2.2 Conversion of Close Corporations

Business entities such as close corporations remain behind due to the *Close Corporation Act* not being among the over 50 statutes providing for the use of mediation or ADR mechanisms altogether. However, this is not due to the reluctance to adopt ADR but due to the 2008 *Companies Act* changing the business landscape and disallowing close corporations to be formed after its commencement. The *Companies Act* permits existing CCs (those incorporated before 2011) to continue trading as CCs for an indefinite period. It is for this reason; that no ADR provisions have been added to the Close Corporation Act. This creates a gap because the 2008 *Companies Act* contains no express provisions that section 156 applies to close corporations as well. It recommended that at some point, the *Companies Act* should be amended to compel all CCs to convert to one of the company forms provided for in the *Companies Act*. A private company ((Pty) Ltd) is currently the most suitable form of business registration for small, medium, and large businesses. This ownership option is more beneficial and flexible. With the introduction of less burdensome compliance requirements under the new *Companies Act*, close corporations no longer hold significant advantages over private companies.

³⁶¹ South African Law Reform Commission Discussion Paper168 2025:xxviii.

³⁶² South African Law Reform Commission Discussion Paper168 2025:xxviii.

5.2.3 Mandating Compulsory Mediation

Enhancing commitment to ADR is a crucial step towards harmonising confrontational and negotiation approaches in resolving disputes. A fundamental approach is to establish a systematic process that requires ADR to be the first step in any legal action. Mandating compulsory ADR for certain company disputes such as employment and contractual disputes would be the start of this approach. However, this would require statutory interventions that are most likely to be opposed given the commitment to adversarial traditions.³⁶³ Nonetheless, it is proposed that the *Companies Act* should mandate compulsory mediation before a dispute escalates to court litigation.³⁶⁴ Compulsory mediation is not a foreign concept in the South African legal system. This would align with the compulsory mediation of certain disputes in the framework of the *Labour Relations Act* 66 of 1995 and recommendations in King III.³⁶⁵ Insights in the labour sector show that compulsory mediation often results in quick, cost-effective, and informal resolutions for most disputes.³⁶⁶ Compulsory mediation would significantly enhance the informal resolution of corporate disputes, aligning with the legislative goals of the *Companies Act*.

Another route that can be taken to address the gaps in the *Companies Act* regarding the unclear wording for the use of ADR, would be adding clear ADR procedures to all its agreements.³⁶⁷ The company's MOI can also be used to outline ADR mechanisms, specifically mediation for resolving disputes with shareholders and directors. The use of ADR for settling corporate disputes has become a key component of South Africa's corporate governance framework, through the provisions of the *Companies Act* and the recommendations of King III.³⁶⁸ Mandating compulsory mediation in the company's MOI would not be a wrong progression. The researcher believes this approach would not only benefit the companies themselves but would also serve the interests of their

³⁶³ Muller 2021:163.

³⁶⁴ Wiese 2014:676.

³⁶⁵ Wiese 2014:676.

³⁶⁶ Benjamin 2013:2452.

³⁶⁷ Wiese 2014:677.

³⁶⁸ Wiese 2014:677.

stakeholders, ensuring that everyone has access to fair and efficient methods for resolving conflicts.

5.2.4 Expediting Arbitration

Arbitration can often be more expensive than necessary, which supports the argument that the cost-saving benefits of ADR are overstated. One contributing factor to this issue is the absence of regulatory standards and oversight to ensure compliance with those standards. To address this problem, the researcher proposes developing guidelines.³⁶⁹ Arbitration functions effectively when the parties involved are committed to pursuing certain goals. Much like mediation, arbitration resembles and operates as arbitration when both parties are prepared to engage for similar objectives: resolving the dispute, saving time and cutting unnecessary costs.³⁷⁰

Although the study argues for the regulated supervision of ADR practitioners, disputing parties also have a role to play in ensuring that arbitration is carried out in a way that seeks to achieve their objectives. Parties can ensure that proceedings are streamlined by agreeing on facts that are disputed and undisputed and matters of law. Parties can further encourage the arbitrator to issue rulings on disputed legal matters in summary form before hearing evidence. The arbitrator would need to identify which issues are likely to lead to disputes and avoid requesting the parties to submit pre-hearing briefs on irrelevant issues to prevent wasting time and resources.³⁷¹

Secondly, the parties involved in arbitration need to minimise the reliance on briefs. There are instances where the complexities of the case do not warrant the submission of briefs at all, as the issues may be sufficiently clear or straightforward. In such cases, the process can be streamlined by reducing unnecessary documentation. Arbitrators should take the initiative to communicate their preferences regarding the issues that

³⁶⁹ Some of these guidelines were taken from the guidelines AT&T Global Information Solutions (an American Company) set up guidelines to deal with the issue of seeing arbitration costs becoming more expensive than necessary.

³⁷⁰ Carver 2004:5

³⁷¹ Carver 2004:5

require further elaboration. By doing so, they can specify which areas necessitate detailed written arguments from the parties, thereby ensuring that the focus is maintained on the most relevant and contentious points of the case.³⁷²

Thirdly, parties should engage in prehearing exchanges, which are vital for reaching a resolution. During these exchanges, they can share exhibits and witness lists to identify key items for the case, avoiding the typical discovery process of litigation. This focus has been shown to lead to shorter witness lists and allows less critical witnesses to provide testimony through affidavits or by telephone.³⁷³

Moreover, parties should agree to limit damages in contracts by including damage limitations in the ADR clause.³⁷⁴ When there is minimal dispute over amounts, extensive damage proof is often unnecessary.³⁷⁵ Parties should stipulate the extent of damages, allowing the arbitrator to determine their reasonableness before evidence is presented. Lastly, parties should selectively use experts. In arbitration, agreeing on a single neutral expert can save time and money, as it encourages negotiation rather than conflicting partisan reports that may entrench positions.³⁷⁶

5.2.5 Developing the Legal Profession

In the legal profession, a significant challenge to promoting a shift towards ADR is altering the adversarial mindset of legal practitioners.³⁷⁷ All legal practitioners are required to act in the best interests of clients. When ADR mechanisms are available and more viable and appropriate, legal practitioners ought to recommend clients explore these options instead of resorting to litigation.³⁷⁸ The researcher recommends that legal practitioners should have a thorough understanding of the benefits of ADR

³⁷² The AT&T Global Information Solutions has even gone so far as to ask arbitrators to set page limits on briefs.

³⁷³ Carver 2004:5

³⁷⁴ Carver 2004:6

³⁷⁵ Carver 2004:6

³⁷⁶ Carver 2004:6

³⁷⁷ Muller 2021:162.

³⁷⁸ Muller 2021:163.

to provide appropriate advice to their clients. In the legal profession, one of the most significant challenges in promoting a shift towards negotiation as a preferred approach over confrontation is the need to change the traditional adversarial mindset that many legal practitioners possess. This adversarial approach is only about winning a case over seeking suitable solutions, hindering the recommendation of collaborative alternatives.

The mandate for legal practitioners to act in the best interests of their clients extends beyond merely advocating for their clients in court; it involves the responsibility to explore and present all viable options for resolving disputes. When there are far better alternatives to litigation, such as mediation, that can effectively address the issues at hand, legal practitioners have an ethical duty to inform and encourage their clients to consider these alternatives. To fulfil this responsibility, lawyers must possess a comprehensive understanding of these alternatives' advantages and the situations in which they can be most beneficial. This knowledge would enable them to make informed recommendations that could lead to more amicable and cost-effective resolutions for their clients. By encouraging a mindset that embraces collaboration and negotiation over confrontation, legal practitioners can facilitate a shift in the broader legal culture towards more constructive forms of dispute resolution.

Enhancing legal practitioners' awareness and appreciation of ADR through promoting it in legal education will not only serve their client's best interests but also contribute to a more effective and humane legal system. This can even extend to the institutionalisation and professionalisation of ADR, widening the spectrum for law graduates resulting in socio-economic benefits.

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