Commercial mediation: commercial conflict panacea or an affront to due process and the justice ideal?

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Abstract

The article analyses the potential negative impact of the commercial mediation process, gleaned from experience in foreign jurisdictions, to assess the lessons that can be learned in order that such negative effects can be avoided as the process develops as a viable alternative to judicial adjudication and arbitration in South Africa. The limits of mediation and the need for court adjudication, both for those cases that require it and for providing the shadow of the law within which commercial mediation functions are assessed. The impact of the process on court backlogs, reducing trial rates, the potential costs to lawyers, clients and justice and the potential baleful impact of power imbalances in commercial mediation are analysed and discussed. The article proceeds to assess the approach of the South African legislature to defining mediation in various statutes and reveals that much of the criticism of the process is based on the fact that many varied processes are collectively described as mediation. The article concludes with a focus on the need to appropriately describe the process, as the issues discussed do not invalidate the rationale for encouraging the use of commercial mediation; they play an instrumental role in defining its appropriate limits.

INTRODUCTION

The French philosopher Voltaire once remarked that: 'I was ruined but twice, once when I won a lawsuit and once when I lost one.'[1] Indeed, it has been suggested that discontent with the law's approach to resolving disputes

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[1] Greenhill 'State of the judiciary message' quoted in Dougherty 'Family mediation, what does it mean for lawyers?' (2001) 51 *Texas Bar Journal* at 31.

seems endemic to human society.[2] Roman citizens glorified Cicero when he defended popular figures, but turned against him when he took on unpopular causes.[3] In Shakespeare's *King Henry VI*, Dick the butcher offers to rebel Jack Cade the unforgettable suggestion: 'The first thing we do, let's kill all the lawyers.'[4] Charles Dickens devoted an entire novel to the tale of the seemingly endless lawsuit, *Jarndyce and Jarndyce*, which moves through the court so slowly that by the time the case is concluded there is nothing left of the inheritance that the parties were disputing about.[5]

While the resolution of community-based disputes has traditionally been seen as part of *ubuntu*, many believe that this concept is developing in the corporate realm in the form of commercial mediation.[6] As commercial mediation makes its advance into the realm of dispute resolution in South Africa, encouraged by a growing body of supportive lawyers[7] and the advent of a public policy push through the courts,[8] it is an appropriate juncture to analyse the potential negative impact of the process, gleaned from experience in foreign jurisdictions, to assess the lessons that can be learned in

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2 Hensler 'Our courts, ourselves: how the Alternative Dispute Resolution Movement is re-shaping our legal system' (2003) 108 *Penn State Law Review* at 168.

3 Wilkin *A legal biography of Cicero* (1947).

4 Shakespeare *King Henry VI Part 2* Act 4 scene 2.

5 Dickens *Bleak house*. See also Hensler n 2 above at 168.

6 Bougardt & King 'The only place "litigation" should precede "mediation" is in the dictionary' 1 February 2007 *Without Prejudice* 18. Mediation is well established in other fields in South Africa such as labour law, for example, s 157(4)(a) of the Labour Relations Act 1995 provides that the Labour Court (a court of equal standing to the High Court established under the Act) may refuse to determine any dispute, other than an appeal or a review before the court, if it is not satisfied that an attempt has been made to resolve the dispute through mediation.

7 Todd & Brand 'Commercial mediation: a new era for the resolution of commercial disputes is South Africa' African Initiative for Mediation (2007) *Quarterly Newsletter* available at: www.cedr.com/articles/?item=A-new-era-for-South-Africa (last accessed 3 April 2015).

8 The new Magistrates Courts Rules provide the procedure for the voluntary submission of civil disputes to mediation in selected courts, available at: file:///C:/Users/R730A~1.FEE/AppData/Local/Temp/new%20rules%20on%20mediation.htm (last accessed 3 April 2015). While court referred mediation schemes are not the focus of this article (and it would in any event be premature to engage in an assessment of the success of the scheme), for a useful discussion and comprehensive critique of the new rules, see Allen 'A discussion of the new mediation provisions in the South African Magistrates Courts Rules' available at: http://www.conflictdynamics.co.za/SiteFiles/205/Discussion%20of%20SA%20CAMR%202014.pdf (last accessed on 9 April 2015).

order that such negative effects can be avoided as the process develops as a viable alternative to judicial adjudication and arbitration in South Africa.[9]

THE LIMITS OF MEDIATION

Despite the traditional scepticism that many feel towards the courts as dispute resolvers, it would be foolish to contend, and it is not being suggested, that mediation is a panacea for all commercial ills. Some suggest that settlements reached by alternative dispute resolution ('ADR') methods such as mediation lack the 'legitimacy' of authoritative judicial decisions, while many large commercial institutional litigants may also want a binding court precedent in order to guide future disputes.[10]

There is clearly a fine balance between encouraging mediation through financial incentives, such as Italy's company law reform that introduced tax incentives for mediated settlements,[11]and decreasing access to the courts through financial disincentives to go to court.[12] While the former promotes the use of mediation, the latter may effectively block access to justice before the courts.[13]

There is little doubt that the handing down and publication of judicial decisions constitutes a valuable 'public good', in providing important

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9 While mediation is employed to resolve conflict in various fields including family, employment and community disputes, the focus of this article is on commercial mediation; the use of mediation to resolve disputes between business parties. See Feehily 'Costs sanctions; the critical instrument in the development of commercial mediation in South Africa' 26 (2) *SALJ* 2009, 291–315, Feehily & Brand 'Commercial mediation in South Africa' IBA Legal Practice Division (2008) *Mediation Committee Newsletter* September 44, and Todd & Brand 'Commercial Mediation: a new era for the resolution of commercial disputes in South Africa' African Initiative for Mediation (2007) *Quarterly Newsletter* December 2007, available at: www.cedr.com/articles/?item=A-new-era-for-South-Africa (last accessed 3 April 2015). See also Carroll & Mackie *International mediation – the art of business diplomacy* (2ed 2006) 3–17.

10 See Trollip *Alternative dispute resolution in a contemporary South African context* (1991) 17. For an interesting discussion and analysis of the potential and limits of mediation in resolving international conflicts, see Jett 'Mediation – Its Potential and Its Limits: Developing an Effective Discourse on the Research and Practice of Peacemaking' *Penn State Journal of Law & International Affairs* (2013) Vol 2 Issue 1 103–117, available at: http://elibrary.law.psu.edu/jlia/vol2/iss1/12/ (last accessed 4 April 2015).

11 See De Palo & Carmeli 'Mediation in Continental Europe: a meandering path toward efficient regulation' in Newmark & Monaghan (eds) *Mediators on meditation: leading mediator perspectives on the practice of commercial mediation* at (1991) 218.

12 See Australian Law Reform Commission 'Review of the adversarial system of litigation' *Issue Paper 20* 115.

13 Alexander (ed) *Global trends in mediation* (2003) at 25.

information about what can and cannot lawfully be done, and it has been suggested by numerous commentators that the referral of commercial matters to mediation could stifle the development of law and precedent in this area.[14] There is also the possibility of weaker parties being pressured into accepting less than their full entitlement, while the fact that a dispute has been resolved does not guarantee that the public interest has been appropriately served.[15]

Some point to the danger that mediation will simply reflect existing power imbalances by merely legitimising existing, and possibly undesirable, power structures, or that in some large corporate organisations, there will be a tendency to follow the path of least resistance and minimal risk, so that leaving issues to be resolved by a court may appear preferable to risking criticism from superiors who may regard particular settlements as imprudent.[16] Others have pointed to the fact that there are many issues that do not lend themselves to mediation, and that engaging in the process in such circumstances can set back the conflict. Issues such as beliefs, personalities, emotions, and skills sets cannot be mediated, and such issues often lie at the heart of business conflict.[17]

While client satisfaction is often promoted as a criterion for measuring the success of mediations, client satisfaction is a very subjective concept, and can, it is suggested, correspond to a number of elements such as a need for speed and cost savings, or a need for self-determination.[18] Therefore, as discussed below, these commentators believe that the success stories relayed about mediation may not reflect the full picture.

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14 See, for example Trollip n 10 above at 18.

15 *Ibid*.

16 *Ibid*. For an interesting analysis of the use of power in divorce mediation in the USA, particularly the impact that the disparity in earning power between spouses has on such a mediation, see Brinig 'Does mediation systematically disadvantage women? (1995) 2 *William & Mary Journal of Women and the Law* 1–34.

17 This is particularly true in the case of family business disputes. It is suggested that to have any success with mediation in such environments, mediation should commence only after the non-negotiable issues of emotions, relationships and identity have been given due diligence and the parties are ready to focus on the negotiable issues. See Trippe 'Mediation's limits in conflicts arising in family business' 2014 *Family Business* 16–17, available at: http://www.continuityfbc.com/wp-content/uploads/2014/09/FBM-reprint-summer-2014-Mediations-Limits-in-Conflict.pdf (last accessed 4 April 2015).

18 Luban 'The quality of justice' (1989) 66 *Denver University Law Review* 381 at 405. See also Adetoro 'Examining mediation as the opportunity cost of litigation: can it be sustained in the long term?' (2005) 42/5 *Journal of Peace Research* 563–583.

While disputes are inevitable, the way in which they are handled can have an enormous impact on the profitability and viability of business, and competitive approaches to dispute management and resolution can be costly. With the establishment of mediation in Australia some years ago, it was suggested that 'mediation is much cheaper than litigation' and 'it has been said that the mediation of a commercial dispute by the Australian Commercial Disputes Centre costs 5 per cent of the costs of litigating or arbitrating the same matter'.[19] There is little doubt that mediation presented a viable option for business. As far back as 1989, it was estimated that only 5,7 per cent of all commercial disputes in Australia ended up within the court system.[20]

However, the court and tribunal system plays an important role regarding the broader and larger dispute-resolution system, and is said to cast a shadow over the dispute-resolution system, as many disputes are resolved or discontinued on the basis of the likely court outcomes, and more importantly in many cases, the cost of litigation. As many commercial disputes can involve contrasting and often irreconcilable views on issues that can never be eliminated by techniques that encourage emotional purges and an understanding of needs and interests, conventional legal adjudication processes have traditionally served, and will need to continue to serve, as a means of publicly resolving such irreconcilable differences.[21] The formal system will continue to play an important preventative and precedent-setting role. In addition, the court system is increasingly involved in determining how mediation processes are to operate, and defining and clarifying the guidelines, processes and structures used in mediation.[22]

COURT BACKLOG, VANISHING TRIALS AND THE COSTS TO LAWYERS, CLIENTS AND JUSTICE

It is interesting to look at the impact that ADR processes such as mediation have had on the backlog of court cases, and the more recent phenomenon of vanishing trials, in other jurisdictions. In light of the private nature of commercial mediation due to the confidentiality provisions in the agreement

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19 *Report of the Chief Justice's Policy and Planning Sub-committee on Court Annexed Mediation* (November 1991) at 9.

20 See Fulton *Commercial alternative dispute resolution* as quoted by Sourdin 'Mediation in Australia: the decline of litigation?' in Alexander n 13 above at 59.

21 Trollip n 10 above at 18.

22 Sourdin n 20 above at 59.

to mediate,[23] it is understandable that there are no studies to show the impact that settlement through this process has had on the rate of court adjudication. We consequently turn to the studies that are available. Three comments should be made in respect of the empirical evidence discussed below. First, many of the studies cover ADR processes in general and consequently their scope is much broader than commercial mediation. Second, the mediation elements generally relate to court-annexed or court-mandated mediation. Consequently they are reviewed and discussed in order to identify and analyse potential criticisms of mediation as an ADR process. They are not necessarily indicative of the impact that voluntary commercial mediation will have in this jurisdiction, where the process is employed either by agreement between disputing parties or encouraged (but not mandated) by the courts. The third comment is that the analysis of the research discussed below can act as a cautionary guide in the event that the introduction of mandatory mediation either, within the court process or in alternative forms, is considered by the legislature in future.

The court backlog

The dramatic increase in cases in many jurisdictions caused such a backlog that it seemed to reach critical proportions. This issue has obvious relevance for South Africa and has proved to be a challenge for some time. A decade ago, the Department of Justice estimated over 130,000 backlogged cases.[24] This issue appears to be a continuing challenge for South African courts.[25]An article in 2002 described the position in the USA as follows:

> Even without the considerable impact of additional pre-trial proceedings, it would now be completely impracticable to try the one out of six-and-a-half criminal cases or the nearly one out of 10 civil cases that were tried in 1970.

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[23] Standard form agreements to mediate generally include a provision that the mediation will be conducted on a without prejudice basis, see Boulle & Nesic *Mediation: principles, process, practice* (2001) at 491. While most agreements to mediate contain an express statement that the negotiations are to be regarded as privileged, even in the absence of such an express provision it is likely that the negotiations will be covered provided the common-law requirements are satisfied, see *Schokoladenfabriken Lindt v Nestlé* [1978] RPC 287.

[24] Bougardt & King n 6 above at 18. For a more recent overview of the court backlog situation at various court levels, see Department of Justice and Constitutional Development *Annual Report* 2013–2014 available at: http://www.justice.gov.za/reportfiles/anr2013-14.pdf (last accessed 21 May 2015).

[25] Du Preez 'Justice delayed is justice denied' 24 May 2012 *FW de Klerk Foundation* available at: http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=301203&sn=Detail&pid=71654 (last accessed 2 April 2015).

> In 2000, that would have meant 41,000 total trial dispositions, as against the 10,000 that occurred. The cost of the necessarily gargantuan complement of more judges, logistical support, and courtrooms would be an intriguing figure to quantify and contemplate in the distant mist of a political/economic mirage.[26]

Given the backdrop of such a dramatic increase in cases being filed, the decline in the number of trials during this period has apparently been a self-fulfilling necessity:

> What are trials, and what are the future, long term implications of the almost dinosaur-like dwindling in their number? Litigation represents a breakdown in communication, which consists in the civil area of the inability of the parties to work out a problem themselves and, in the criminal area, of ineffectively inculcating society's rules and the consequences for violating them. Trials are the method we have ultimately used to deal with those breakdowns. However, the goal of our system is not to try cases. Rather, it is to achieve a fair, just, economical, and expeditious result by trial or otherwise, where communication has previously failed.[27]

Vanishing trials

Civil caseloads have been declining significantly for some years in courts in many jurisdictions,[28] while there has simultaneously been a dramatic decrease in the fraction of civil cases reaching trial.[29]

As part of the ABA's Litigation Section's Civil Justice Initiative, Professor Marc Galanter compiled the report, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts'.[30] The report documents the apparent paradox that the proportion of cases going to trial dropped sharply during the previous 40 years, despite substantial increases in other indicative legal factors such as the number of lawyers, the number of cases filed and the amount of published legal authority. The most remarkable fact seems to be that the civil trial rate in the federal courts dropped steadily from 11,5 per cent in 1962 to 1,8 per cent in 2002, and

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26 Ludwig 'The changing role of the trial judge' (2002) 85 *Judicature* 216 at 253.

27 Ludwig n 26 above at 217.

28 See Hensler n 2 above at 166–167.

29 Higginbotham 'So why do we call them trial courts?' (2002) 55 *SMU Law Review* 1405. See also Hensler n 2 above at 167.

30 Galanter 'The vanishing trial: an examination of trials and related matters in federal and state courts' (2004) available at: www.abanet.org/litigation/ (last accessed 3 April 2015).

while the number of federal cases filed increased, the absolute number of trials decreased.[31]

Some argue that rhetoric of 'vanishing trials' panders to the fears of 'litigation romanticists'[32] who regret the end of a time when it was easier to get to trial, and when a judge's role was to try cases rather than to manage them. As noted above, others contend that by settling cases through forms of ADR such as commercial mediation, the development of public norms and vindication of public values are impeded.[33]

Commenting on the report, one commentator remarked that in a time of fiscal constraints, it is tempting to some politicians to use startling data about 'vanishing trials' to criticise courts for being unproductive and over-funded which in turn, could prompt some judges to use ADR as a scapegoat and cut court-connected ADR programmes, in an effort to increase trial rates and in turn regain legitimacy.[34]

However, Galanter's report suggests that ADR is not the cause of reducing trial rates, and he doubts that ADR resulted in the 'disappearance' of many trials. A number of possible causes for the decline are identified, but the specific factors most responsible are not identified.[35] The possibilities include: (a) increased complexity and expense of litigation and trial; (b) changes in the definition and nature of cases as units of measurement; (c) an increasing tendency of defendants to settle for fear of large adverse judgments; (d) an enhanced role for judges as case managers and proponents of settlement; (e) an expanded discretion of the judiciary; (f) lack of faith in trials by the public, judges and lawyers; and (g) increased use of ADR.

Some commentators have concluded that all of the changes in the litigation environment in recent decades that reduced the trial rate are likely also to have increased the use of ADR. In light of the increases in aspects of the legal system such as judicial caseloads and the complexity of litigation, it is

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31 For a more detailed discussion of the report, see Lande '"The Vanishing Trial" Report: an alternative view of the data' 2004 *Dispute Resolution Magazine* 19.

32 Menkel-Meadow 'Ethics and the settlements of mass torts: when the rules meet the road' (1995) 80 *Cornell Law Review* 1159 at 1172.

33 Lande n 31 above at 20.

34 *Ibid*.

35 *Ibid*.

understandable and indeed sensible for the courts to devote more resources to pre-trial case management and ADR.[36]

One commentator with over three and a half decades of judicial experience has suggested that the decline in trials is an economic and cultural phenomenon. Aside from the economic cost, litigants, he reveals, shrink from the uncertainties, the time investment, the lack of finality, the aggravation and stress, as well as the impaired opportunity for more productive activity. Trials, in his view, to an increasing extent, have become a societal luxury. Consequently, the judge's role has taken on new and large dimensions that are essential to society's welfare. This process is assisted in the US by specialised training that judges can avail of in order to learn to facilitate early settlements and how best to be authoritative neutrals or, as case managers, to recommend the most effective referral for a non-trial resolution.[37]

The Centre for Analysis of Alternative Dispute Resolution Systems ('CAADRS') based in Chicago summarised the results of 62 studies that assessed the effectiveness of more than 100 court mediation programmes.[38] The studies revealed a wide range of programmes varying widely in both effectiveness and structure, some of which examined the impact on the trial rate, and while revealing mixed findings, in most studies mediation was found to have no impact on the trial rate. Overall, the studies revealed many other ways in which mediation can alter the dispute resolution experience, such as improved settlement rates, greater participant satisfaction with the process or its results, perceptions of enhanced fairness, cost savings, faster resolution, improved or sustained relationships among parties and higher rates of compliance.

A report published by the Judicial Council of California provides one of the most revealing examinations of court-connected mediation ever conducted.[39] A state statute-mandated Early Mediation Pilot Programmes in five superior

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36 *Id* at 20–21.

37 Ludwig n 26 above.

38 Shack 'Efficiency: mediation can bring gains, but under what conditions?' 2003 *Dispute Resolution Magazine* 11 which provides general descriptions of surveys that are summarised more specifically on the CAADRS website at: www.caadrs.org (last accessed 3 April 2015). See also Stipanowich 'ADR and "the vanishing trial"' 2004 *Dispute Resolution Magazine* 7.

39 Judicial Council of California, Administrative Office of the Courts, Office of General Counsel, Evaluation of the Early Mediation Pilot Projects (27 February 2004). See also Stipanowich n 38 above at 7.

courts, involving three mandatory, in Fresno and Los Angeles and San Diego and two voluntary, in Contra Costa and Sonoma, and required the Judicial Council to study these programmes. The study assessed the impact of the mediation programmes on settlement/trial rate, disposition time, litigant/attorney satisfaction, litigants' costs, and courts' workload. In measuring the overall effectiveness of the programmes, the study used data provided by the courts' computerised case management system in addition to surveys of the parties, attorneys and judges, and during the pilot period of 2000 and 2001, almost 8 000 cases were mediated.

In particular the California study revealed the following:

- In the San Diego and Los Angeles programmes, the trial rate was twenty-four to thirty per cent lower among cases in the mediation programme group than those in the control group.
- All of the pilot programmes resulted in reduced disposition time for cases and enhanced attorney perceptions of the services provided by the court or the litigation process.
- Four of the five pilot programmes reported reduced numbers of motions or other pre-trial court applications.

Attorney estimates indicate that the programmes may have saved over $49 million in litigant costs and more than a ¼ million attorney hours.

California's landmark study strongly supports the notion that court-connected mediation programmes are capable of producing important benefits for courts, litigants and lawyers, and reinforces the fact that much depends on the specific characteristics of a programme and the context within which it is established.[40]

Cornell University conducted a study of ADR use among Fortune 1 000 corporations, and concluded, based on responses from more than 600 companies, that 'ADR processes are well established in corporate America, widespread in all industries and for nearly all types of disputes' and that 'ADR practice is not haphazard or incidental but rather seems to be integral to a systematic, long-term change in the way corporations resolve disputes.'[41] From the companies that responded, eighty-seven per cent

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[40] Stipanowich n 38 above at 8.

[41] See generally, Lipsky & Seeber *The appropriate resolution of corporate disputes: a report on the growing use of ADR by US Corporations* (1998). The survey was directed at general counsel or heads of litigation at the Fortune 1 000 companies. In it, ADR was

reported some use of mediation in the previous three years, and eighty per cent reported using arbitration during the same period. While other ADR processes were used, mediation was the preferred ADR option, based on perceptions that it offers potential cost and time savings, enables parties to retain control over the issues to be resolved, and is generally more satisfying both in terms of process and outcomes. More recently, in an international study involving over 400 respondents from over thirty-one countries, fifty-nine per cent of companies reported that they had engaged in the process to resolve disputes.[42]

Costs to lawyers, clients and justice

Commentators have also pointed to the negative impact that the increased use of ADR processes have had on young lawyers in view of the decline in available trials, as they not only gain less experience, but can enjoy the practice less. Clients, it seems, suffer too, as they can now pay more to receive the same quality of legal service they received a decade ago, and may pay more in settlements when represented by litigators who fear the prospect of a trial. As a consequence, the absence of trials means that there is a lack of experience against which to measure settlement options and litigation risks. The system of justice is ultimately affected, as the reduction in trials results in a reduction in the quality of advocacy and the ability of lawyers to try cases protecting legal rights.[43]

The absence of trials, it is believed, also deprives mediators of the experience required to assist parties in assessing their litigation costs, risks and benefits. It is also believed that the courts have a responsibility to ensure that

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defined as 'the use of any form of mediation or arbitration as a substitute for the public judicial or administrative process available to resolve a dispute.' See also Stipanowich n 38 above at 8.

42 Fullbright and Jaworski 'Third Annual Litigation Trends Survey 2006' as quoted in Bougardt & King n 6 above at 18. Despite the increased use of mediation, it seems that many parties elect to go to trial, rather than settle, often to their detriment. In a US survey of 2,054 cases that went to trial between 2002 and 2005, sixty-one per cent of plaintiffs ended up with less from a judgment, than they would have received had they accepted a settlement offer, while a survey of trial outcomes over a 40 year period up to 2004, shows that over time, such decisions to go to trial resulting in adverse financial consequences have become more frequent. The study is available at: www.blackwellpublishing.com/journal.asp?ref=1740-1453&site=1 For an overview of the study see: www.nytimes.com/2008/08/08/business/08law.html?_r=1&adxnnl=1&oref=slogin&adxnnlx=1218658341-vhhlMyrtNxvOWqTUDHrPUA (last accessed 3 April 2015).

43 Atlas & Atlas 'Potential ADR backlash: where have all the trials gone? To mediation or arbitration' 2004 *Dispute Resolution Magazine* at 16.

trials are available to parties who elect to take the risk and want a judicial decision. In the USA some parties and lawyers complain that the courts have become increasingly concerned with case management and that parties seeking a trial are often viewed unfavourably by the judge. If parties elect trial, the courts should be willing to provide the forum and resources, and only then, it is believed, can the parties and the system operate fairly.[44]

There are those who espouse a contrary view, regarding the practice of mediation and litigation/adjudication as symbiotic. A US circuit court judge, for example, believes that acting as a mediator in the federal court's ADR programme improved her performance as a lawyer. Even extremely competent lawyers, in her view, often mesmerise themselves with the merits of their cases or project unsubstantiated optimism in an effort to please clients. When the advocacy process is viewed from the perspective of a mediator while still practising as a lawyer, it serves, in her view, as an antidote to such self-delusion in a lawyer's own practice. Observing the work of many other advocates from a detached perspective is also beneficial as opportunities arise to see behaviour that is counter-productive or that encourages more constructive and less defensive responses. This, in turn, acquaints a lawyer with a variety of ways to respond to difficult behaviour by clients or opposing counsel and to meet parties' substantive needs. It also gives the mediator a chance to feel how a person sitting in the neutral's chair reacts to a range of 'lawyering' behaviour.[45]

With the advent of judicial settlement and court-mandated mediation, many scholars argued that the neutrality of the judiciary could be compromised by their attempts to promote settlement,[46] and that the settlement movement would disadvantage less powerful litigants and, as previously mentioned, erode public values inherent in formal adjudication.[47] Rather than providing more options for disputants, the critics saw the advent of such alternatives as fundamentally transforming the civil justice system.[48]

Others offered empirical evidence that parties whose cases were tried or arbitrated felt that they had been treated more fairly than parties whose cases

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44 Atlas & Atlas n 43 above at 17.

45 Berzon 'Beyond altruism, how I learned to be a better lawyer by being a pro bono neutral' 2004 *Dispute Resolution Magazine* at 27.

46 Resnik 'Managerial judges' (1982) 96 *Harvard Law Review* 374.

47 Fiss 'Against settlement' (1984) 93 *Yale Law Journal* 1073.

48 See Hensler n 2 above at 176.

had been resolved through settlement processes.[49] The notion that people who believe they have a legal claim prefer to resolve their disputes through mediation rather than adversarial litigation and adjudication was rejected; such a belief, it was argued, was based on questionable assumptions and debatable extrapolations from other social conflict contexts.[50] Researchers, it seems, have not paid sufficient attention to the terminology they use to describe the procedures, for example, what the researchers termed 'mediation' resembled non-binding arbitration, where a third party heard the evidence, did not discuss it with the disputants, and rendered an advisory non-binding opinion.[51]

In the studies undertaken, it seems that the perceptions of parties of the fairness of dispute resolution procedures depended on procedural characteristics, rather than on whether they won or lost their case or were satisfied with its outcome.[52] Hence, people saw the outcomes of dispute resolution procedures as legitimate and complied with them when the outcomes were unfavourable, provided they believed that the process used was fair.[53] It seems that we have yet to see the kind of detailed analysis of individual assessments of the procedural features of mediation that has been performed for court arbitration, and the conclusion that litigants' perceptions of the fairness of mediation procedures are more positive than their perceptions of court or arbitration has yet to be comprehensively tested.[54]

While it seems that only a few studies have been carried out in the USA that reflect empirical observations of what has happened during court mediation, available information reveals that parties were largely uninvolved and seldom participated in the process, while mediators rarely encouraged

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49 Lind *et al The perception of justice: tort litigants' views of trial, court-annexed arbitration and judicial settlement conferences* (1989); Lind *et al* 'In the eyes of the beholder: tort litigants' evaluations of their experiences in the civil justice system' (1989) 24 *Law & Society Review* 953.

50 See Hensler 'Suppose it's not true: challenging mediation ideology' (2002) 1 *Journal of Dispute Resolution* at 85.

51 *Id* at 87.

52 For a more detailed review of this research, see Tyler & Lind 'Procedural justice' in Sanders & Hamilton (eds) *Handbook of justice research in law* (2000) 65.

53 See, for example, Tyler 'The psychology of disputant concerns in mediation' (1987) 3 *Negotiation Journal* 367 at 396.

54 Hensler n 2 above at 188. For a discussion and analysis on the limitations of empirical evidence gleaned on the effectiveness of mediation in dealing with domestic violence disputes, see Londrum 'The ongoing debate about mediation in the context of domestic violence: a call for empirical studies of mediation effectiveness' (2011) 12 *Cordozo Journal of Conflict Resolution* 425–469.

integrative negotiation. In the courts studied, mediation resembled traditional judicial settlement conferences, with a privately selected and privately paid mediator taking the place of a publicly funded and publicly selected judge.[55] In addition, anecdotal reports indicate that evaluative mediation is the form of mediation that has taken firmest hold in some courts.[56] As in earlier judicial settlement and arbitration programmes, court mediation programmes appear to result in very little time or cost savings,[57] while very little is known about the outcomes of mediation programmes or whether they shift the distribution of power between the 'haves' and 'have nots'.[58]

Broadly speaking there are two comments that can be made about such commentaries. First, the above criticisms do not focus on mediation as an alternative per se, but relate to the expansion of mediation into court-mandated settlement processes[59] and the way in which this is responsible for reshaping how judges view the role of the courts.[60] The attack tends to focus on the fact that courts are empowered to order parties to use a private ADR process, run by private providers, in circumstances that impede public scrutiny, as a condition for seeking access to the courtroom.[61] While the expansion of mediation into court mandated programmes is not within the scope of this article, it seems that the criticism in part focuses on the fact that mediation as a term is misused in describing these processes. The second comment is that the criticisms centre on forms of ADR other than commercial mediation. Some of the literature, for example, speaks of 'second class justice' intended for second class citizens, ie individuals with

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55 See Hensler 'In search of "good mediation" rhetoric, practice and empiricism' in Sanders & Hamilton n 52 above; see also Macfarlane 'Culture change? A tale of two cities and mandatory court-connected mediation' 2002 *Journal of Dispute Resolution* 241; Welsh 'Disputants' decision control in court-connected mediation: a hollow promise without procedural justice' 2002 *Journal of Dispute Resolution* 179.

56 Hensler n 2 above at 193. Evaluative mediation assumes that the parties want and need the mediator to provide direction as to the appropriate grounds for settlement. See Feehily 'The role of the commercial mediator in the mediation process; a critical analysis of the legal and regulatory issues' (2015) *SALJ* 374, 376–381.

57 See Kakalik *et al An evaluation of mediation and early neutral evaluation under the Civil Justice Reform Act* (1996). For a review of empirical research on court mediation of civil money disputes, see Hensler n 55 above.

58 Galanter 'Why the "haves" come out ahead: speculations on the limits of legal change' (1974) 9 *Law & Society Rev* 95. See also Hensler n 2 above at 188.

59 See for example Boulle & Nesic n 23 above at 414–417 dealing with some of the available survey evidence. It is not however within the remit of this article to deal with such forms comprehensively.

60 See Hensler n 50 at 82.

61 See Hensler n 2 at 195.

claims of low value.[62] Consequently, they are unlikely to be directly relevant to a voluntary process such as commercial mediation.

Critics also argue that in order to encourage people to consider alternatives to litigation, mediators are telling claimants that legal norms are contrary to their interests, that vindicating their legal rights is contrary to social harmony, that juries are erratic, that judges cannot be relied upon to apply the law properly, and that it is better to seek inner peace than social change.[63] To drive these messages home, it is believed that courts and legislatures mandate mediation and preclude dissemination of information about what happens during a mediation. In addition, both legislatures and courts seem to display a complacent approach to vetting the qualifications[64] of those who act as mediators and to the costs imposed on litigants by mandatory mediation requirements, based on the belief that any alternative to adversarial conflict must be beneficial.[65] While it is conceded that mediation has much to recommend it, the visible presence of institutionalised and legitimised conflict, channelled productively, teaches parties that it is not always better to compromise and that great gains can be achieved by peaceful contest.[66]

Even the harshest critics of mediation concede that parties should be free, in most circumstances, to negotiate privately and to keep any agreements reached by mediation confidential. There is no doubt that trials should not be regarded as a 'failure' of the legal system, and sufficient resources should be allocated by legislative bodies to enable courts to operate efficiently so as to hear cases within a reasonable time after they have been filed, and judges should manage pre-trial and trial processes efficiently so that the costs of the process do not make trials effectively inaccessible.[67]

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62 Wood 'Court annexed arbitration: the wrong cure' 1990 *University of Chicago Legal Forum* 432 at 435; Jennings 'Note: court-annexed arbitration and settlement pressure: a push towards efficient dispute resolution or second class justice?' (1991) 6 *Ohio State Journal On Dispute Resolution* 313.

63 Hensler n 2 above at 195.

64 Such issues can be addressed by effective training and accreditation of mediators and adherence to appropriate standards. For a discussion on the importance of training, accreditation and standards for the developing commercial mediation community in South Africa, see Feehily n 56 above at 383–397.

65 Hensler n 2 above at 195.

66 *Id* at 197.

67 Hensler n 50 above at 96.

POWER IMBALANCE

Perhaps, the most damning criticism of commercial mediation is that it does not provide the procedural safeguards of a court and consequently offers second-class justice, particularly where there is an imbalance in bargaining power between the parties.[68] The logical response to this criticism is that commercial mediation is voluntary, if either party does not like the way the mediation is progressing, it can choose to exit the process. In light of the sums involved, the vast majority of commercial mediations will have lawyers present. On the rare occasions when lawyers are absent, if either party is unsure about the proposed settlement agreement, it can make it conditional upon its lawyer's approval.[69]

However, there may be circumstances in which parties feel pressure or a degree of duress, even where they have ostensibly engaged voluntarily in the process.[70] A variety of mediator techniques and strategies have evolved in order to deal with inequalities of power, most notably in the USA. Bush, through his concept of 'active impartiality,' believes that mediators should direct their invitations, support, encouragement and challenges to each party in turn, and each party should see clearly that the other is receiving similar treatment.[71] If necessary, mediators should explicitly assure the parties that they intend to behave identically towards each side, and fulfil this assurance. Bush believes that mediators who positively encourage the parties, and adhere to the requirement of 'active impartiality,' can act as translator for each side to the other and also serve as devil's advocate to each party respectively, effectively reality-testing the exchanges being made, without losing the trust and confidence of either side which is essential in fulfilling the mediator's role.[72]

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68 Cappelletti 'Alternative dispute resolution processes within the framework of the World Wide Access to Justice Movement' (1995) 56 *Modern Law Review* 287 at 288.

69 Lovenheim *Mediate, don't litigate* (2004) 30.

70 Feehily 'The legal status and enforceability of mediated settlement agreements' (2013) 12/1 *HLJ* 1 for a discussion of cases where aggrieved parties alleged oppressive behaviour during mediation.

71 Bush 'Efficiency and protection, or empowerment and recognition? The mediator's role and ethical standards in mediation' (1989) 41 *University of Florida Law Review* 253 at 281–282.

72 *Id* at 281–282. See also Merrills *International dispute settlement* (3ed 1998) at 27. This has proved to be a structural limitation in workplace mediations, where HR staff trained in mediation are not seen as impartial. See Graham '3 limitations to workplace mediation' available at: http://cmpresolutions.co.uk/3-limitations-to-workplace-mediation/ (last accessed 4 April 2015).

In addition to not being associated with either side, mediator impartiality means that due to a lack of personal investment, a mediator has greater distance from and perspective on the parties' discussions. In order to fulfil both the empowerment and recognition functions, a mediator can and should be an actively impartial 'narrator' who ensures that no relevant exchange between the parties is unheard or ignored.[73]

One of the most challenging activities in a commercial mediation, is the conversion of the dispute from an 'either/or' situation, a binary choice, to a focused, joint problem-solving exercise involving the voluntary participation of parties in a collective as opposed to an individual effort, and this willingness to participate is within the sole control of every commercial party.[74] The willingness of a party so to engage is seen as more important to the success of a mediation than any amount of screening for mediator aptitudes or orientation, or matching of disputes and disputants to the process, or the relative 'power-over' of the parties. A willingness to engage in 'power-with' is critical for commercial parties in a mediation, which entails the conversion of a situation from one that pulls parties away from each other, to one that draws them together, at least for the purposes of resolving the dispute.[75]

Unless a commercial party accepts the values and attitudes that interest-based mediation requires, the process is unlikely to produce the desired result, as it requires some element of vulnerability and 'letting-go' for the possibilities for settlement to be explored.[76] For commercial parties who can suspend reliance on power as a form of unilateral influence and control and

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[73] Bush n 71 above at 281–282. Some commentators suggest that arm's length commercial parties are almost always presumed to be of equal bargaining power, regardless of their differences, and any vulnerability is presumed to be preventable through more prudent exercise of their bargaining, see Chornenki 'Mediating commercial disputes: exchanging "power over" for "power with"' in Macfarlane (ed) *Rethinking disputes: the mediation alternative* (1997) 163–168.

[74] See Chornenki n 73 above at 163–168. See also Walde 'Efficient management of transnational disputes: mutual gain by mediation or joint loss in litigation' (2006)22 (2) *Arbitration International* 205–232.

[75] Chornenki n 73 above at 163–168. See generally Pruitt & Lewis 'The psychology of integrative bargaining, in negotiations: a social psychological perspective' in Druckman (ed) *Negotiations: social-psychological perspectives* (1977).

[76] Chornenki n 73 above at 163–168. The need for both parties to engage in this way was one of the primary reasons cited for the failure of mediation between Apple and Samsung in a dispute over patents. See Loney 'Failure in Apple/Samsung talks shows limits of mediation' *Managing Intellectual Property* 25 February 2014 available at: http://www.managingip.com/Author/19776/Michael-Loney.html (last accessed 4 April 2015).

participate in a collective problem-solving effort, the mediation process has much to offer. It is a measured understanding of mediation's demands rather than its benefits that will assist parties in having more realistic expectations.[77]

As power imbalances, or at least potential power imbalances, arise in every mediation, one of the most challenging tasks for a mediator is how to deal with them.[78] Mediators often deal with such situations by attempting to enhance the perception of equal power, by encouraging each party to list its bases of power and then identifying the costs and benefits to each from exercising that power.[79] Another method involves shifting the focus from power relationships to interests, by focusing on the process of how the parties' needs can be satisfied.[80] The openness of the mediation process can also be seen as enabling the mediator to remind the parties that they have agreed to certain process values, such as respect for the other party and a commitment not to intimidate.[81]

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77 See Chornenki n 73 above at 163–168. See also Walde *Pro-active mediation of international business and investment disputes involving long-term contracts: from zero-sum litigation to efficient dispute management* (2003) vol 4, available at: www.ogel.org (last accessed 3 April 2015).

78 Murray, Rau & Sherman *Process of dispute resolution: the role of lawyers* (2ed 1996) 342–3; see also note 'Protecting confidentiality in mediation' (1984) 98 *Harvard Law Review* 441 452–453.

79 Bellows & Moulton *Assessment: framing the choices, in the lawyering process* (1978) 998–1017.

80 Moore *The mediation process* (1987) 280.

81 Davis & Salem 'Dealing with power imbalances in the mediation of interpersonal disputes' (1984) 6 *Mediation Quarterly* 17 at 21. As far back as 1981, the then draftsman of the American Bar Association's Model Rules of Professional Conduct, Yale Law Professor Geoffrey C Hazard Jr remarked that 'legal regulation of trustworthiness cannot go much further than to proscribe fraud', see Hazard, Jr 'The lawyer's obligation to be trustworthy when dealing with opposing parties' (1981) 33 *South Carolina Law Review* 181, 196. See also Cooley 'Defining the ethical limits of acceptable deception in mediation' available at: http://www.mediate.com/articles/cooley1.cfm (last accessed 10 April 2015). See also Angyal 'The ethical limits of advocacy in mediation' available at: http://www.civiljustice.info/cgi/viewcontent.cgi?article=1004&context=profstan (last accessed 10 April 2015). While there is no independent requirement of good faith in South African contract law, this does not mean that bad faith will be condoned. See Hutchison 'Agreements to agree: Can there ever be an enforceable duty to negotiate in good faith?'(2011) 128/2 *SALJ* 273 at 281. See also *Barkhuizen v Napier* 2007 5 SA 323 (CC) pars 69–70. In South Africa, damages for bad faith negotiation have not yet been established. The Supreme Court of Appeal has ruled that a contractual clause requiring that parties negotiate in good faith is enforceable, provided that it is accompanied by a deadlock breaking provision, such as an arbitration clause, see *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 2 SA 202 (SCA), par 17. See Hutchison *supra* at 295. See also Rycroft 'The duty to bargain in good faith' (1988) 9 *Indus LJ Juta* 202 at 204.

The most difficult problem facing a mediator in the context of power relationships is where there is a wide discrepancy between the strength of means of influence. As a result of a mediator's commitment to neutrality and impartiality, he or she is ethically barred from direct advocacy for the weaker party, but is also ethically obliged to assist the parties in reaching a mutually acceptable agreement.[82] It has been suggested that the mediator should initiate moves to assist the weaker party by mobilising the power he or she possesses. The mediator should not, however, act directly as an organiser to mobilise or develop new power for the weaker disputant unless the mediator has received the other party's approval. The mediator must avoid acting, and avoid the perception of acting, as a secret advocate, as this would put his or her impartiality and effectiveness as a process intervener at risk.[83]

Empowering moves could include assisting a weaker party in obtaining, organising, and analysing data, and identifying and mobilising his or her means of influence, assisting and educating the party in planning an effective negotiation strategy, aiding the party to develop financial resources so that he or she can continue to participate in negotiations, referring a party to a lawyer or other professional advisor,[84] and encouraging the party to make realistic concessions.[85] Such interventions will assist in countering the potential baleful effects of actual or perceived power imbalance in commercial mediation.

THE SOUTH AFRICAN APPROACH TO DEVELOPING MEDIATION

While it is interesting to speculate on the reasons why mediation emerges in a particular place, the major cause for its emergence in the USA and, subsequently, elsewhere was always believed to be a dissatisfaction with the litigation process, with its costs, delays, aggressive tone, and the inherent

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82 Effective training and accreditation can assist mediators in understanding such distinctions and assist in educating mediators about how best to deal with such ethical issues when they arise in practice. For a discussion on training and accreditation for commercial mediators, see Feehily n 56 above at 383–387.

83 Moore n 80 above at 281–282.

84 Allen 'Judging civil justice – a critique of the 2008 Hamlyn Lectures given by Professor Dame Hazel Genn QC: Part II' available at: http://www.cedr.com/articles/?item=Judging-civil-justice-a-critique-of-the-2008-Hamlyn-Lectures-given-by-Professor-Dame-Hazel-Genn-QC-Part-II (last accessed 3 April 2015).

85 Moore 80 above at 281–282.

uncertainties in the process that made commercial decision making so difficult.[86]

Proponents of mediation have argued that it involves not only a move *away* from the more negative aspects of litigation, but also a move *towards* a more constructive approach, so that the motivation did not emanate only from the failings of the old, but also a perception of the value of the new, with both 'carrot' and 'stick' applying.[87] In this spirit, it is useful to take stock of developments in South Africa and the processes that have been described as mediation.

The Law Commission investigation

The South African Law Commission began an investigation into arbitration in 1995. As a first step it published a draft International Arbitration Act for information and comment in December 1996. It also engaged in a revision of the Arbitration Act 42 of 1965 by asking interested parties, by means of a Working Paper, to submit comments on the 1965 Act.[88]

On 8 July 1996 the Minister for Justice requested the Law Commission to expand its investigation into arbitration to include all elements of ADR, in order to develop a framework within which ADR could be discussed in an organised fashion. The urgency of the project was emphasised by the Minister, as formalised methods of ADR could relieve the overburdened court system. The Commission considered and approved the inclusion of such an investigation in its programme and a project committee for this purpose was appointed by the Minister for Justice with effect from 16 September 1996, with work commencing on 26 October 1996.[89]

Community involvement was seen as critical to the investigation, and the Commission consequently decided to compile an issue paper to initiate, facilitate and encourage focused consideration and response by all interested parties. It was believed that, in light of the response and consequent work of the Project Committee, a discussion paper, and should it be deemed necessary going forward, draft legislation, would be prepared and published

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86 See Marsh 'The development of mediation in Central and Eastern Europe' in Newmark & Monaghan (eds) n 11 above at 385.

87 Marsh n 86 above at 385.

88 South African Law Commission Issue Paper 8 Project 94 *Alternative Dispute Resolution* (1997) 1.

89 *Ibid*.

for general information and comment.[90] This was followed in July 1998 by the 'Report on an International Arbitration Act for South Africa' and in May 2001 by the 'Report on Domestic Arbitration'. Both reports included draft legislation with commentaries dealing with their respective areas.

The industry's response

Seventeen respondents submitted comments regarding ADR and the civil law, eight of which exclusively related to this aspect of the investigation.[91] Respondents generally stressed the important role they believed ADR played in civil practice.[92] The crucial questions to be answered from the Commission's perspective were whether the state has a role to play in the regulation of ADR activities, and whether there is a need for statutory intervention in this field.[93] Some respondents specifically requested to be excluded from any possible legislation that might be enacted as they believed that ADR already played an important role in the resolution of disputes in their industry and that it should not be tinkered with.[94]

The consensual nature of the ADR processes was repeatedly emphasised as was the belief that the state's role regarding such processes should be one of support rather than control.[95] Such support could take the form of showing approval of ADR institutions, allocating funds, and in suitable circumstances providing legislative support.[96] The purpose of the legislation should not be formally to institutionalise ADR in civil practice, but instead to support the reference of disputes to ADR organisations such as the Arbitration Foundation of Southern Africa.[97] The legislation, it was suggested, should be enabling rather than prescriptive.[98]

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90 *Id* at 1–2.

91 For a list of the relevant names see Annexure B to South African Law Commission Committee Paper 556 Project 94 *Alternative dispute resolution: evaluation of comments received on Issue Paper 8, Planning of investigation* 18 October 1997.

92 See submissions from SAICE, MIB Technical Services, SAACE, Prof Faris, Mr Goodman, the Society of Advocates in Natal, OD Hart, director, Venn Nemeth and Hart and SACOB in South African Law Commission n 91 above at 2–3.

93 *Id* at 2.

94 See the comments of SAICE and SAACE *id* at 2.

95 South African Law Commission n 91 at 2.

96 See Society of Advocates of Natal, SAICE, AHI and the Association of Law Societies of RSA amongst others in South African Law Commission n 91 at 2–3.

97 See Society of Advocates of Natal in South African Law Commission n 91 above at 2–3.

98 See AHI in South African Law Commission n 91 above at 2–3.

One academic contributor[99] believed that regardless of whether ADR is institutionalised or not, its eventual regulation by the state is inevitable. As the ADR movement gains impetus, it becomes necessary, in his view, to regulate by legislation contentious matters such as mediator privilege, or to determine issues such as standards of training and ethics for practitioners in order to protect those who use ADR services.[100]

Mediation in the courts

The South African litigation system is governed by formalistic procedures and since the 1980s,[101] has endured constant criticism for making access to justice too slow and too expensive.[102] Commentators have remarked that the government's response has traditionally been to argue that the courts should be restructured.[103] However, many[104] argue that while restructuring the courts is one option, a preferable solution would be the incorporation of mediation into the litigation system as this would lead to a substantial saving in court time and administration, and spare the judicial expertise for more serious cases.[105]

While it is not within the scope of this article to engage in a detailed analysis of court-annexed forms of mediation, it is useful to look at the approach taken by the legislature in this area as indicative of its commitment to, and understanding of, the mediation process. There have been numerous endeavours to introduce mediation into the litigation system. The first came in the form of the Short Process Court and Mediation in Certain Civil Cases Act 103 of 1991, and the second in the form of High Court Rule 37. Both of these initiatives have been criticised for not recognising the true nature of mediation.[106]

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99 See Faris (Unisa) in South African Law Commission n 91 above at 3.

100 For a discussion of these issues, see Feehily n 56 above at 374–412.

101 Hoexter Commission *Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court* (1983). See also Paleker 'The changing face of mediation in South Africa' in Alexander (ed) *Global trends in mediation* (2003).

102 South African Law Commission n 8) above at 5.

103 Paleker n 101 above at 304.

104 Faris 'Exploring the alternatives' in 'Alternative Dispute Resolution' (1994) 27/2 *De Jure* 331 at 339; Mowatt 'Some thoughts on mediation' (1988) 105 *SALJ* 727. See also Paleker n 101 above at 304.

105 Faris n 104 above at 339; Mowatt n 104 above. See also Paleker n 101 above at 304.

106 For a more detailed discussion of these provisions, see Paleker n 101 above at 301–311.

Mediation in the magistrates' courts

As lower courts, the magistrates' courts are the courts of first access for the public. Their powers are elucidated in the Magistrates' Courts Act[107] read with the Magistrates' Courts Rules,[108] under which they can hear contractual, delictual and property disputes,[109] as well as different types of application where the Act or rules so provide.[110] The Short Process Court and Mediation in Certain Civil Cases Act 103 of 1991 (the 'SPCA') came into effect on the 17 July 1992 and attempted to introduce mediation into the ordinary magistrates' courts[111] and a new form of court that the Act created called the Short Process Court.

Definition and referral

While mediation is not expressly defined in the SPCA, section 3(1) provides that 'at any time prior to or after the issuing of a summons for the institution of a civil action (be it in the ordinary Magistrates' Court, or the Short Process Court), the parties or their legal representatives may refer the dispute to mediation'. The referral requires the consent of both parties and is consequently voluntary.[112]

The parties have a right to refer a matter to mediation before a summons is issued, but where proceedings have commenced by the issue of summons, the parties' right to mediation is affected as the court 'must be satisfied that mediation proceedings will not delay the trial unreasonably and will not prejudice the parties'.[113] It has been pointed out that this provision is practically meaningless, as in the normal course of litigation the parties can reach a settlement at any time prior to a judgment on any of the disputed issues without the approval of the presiding judge, and the court is simply requested to make the settlement an order of the court. The only real

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107 Magistrates' Courts Act 32 of 1944 as amended.

108 Government Notice R1108 *RG* 980 of 21 June 1968 as amended. For a contemporary commentary on the Magistrates' Courts Act and Rules, see Erasmus & Van Loggerenberg *Jones and Buckle: the civil practice of the magistrates' courts in South Africa* (9ed 1996).

109 Magistrates' Courts Act 32 of 1944, as amended, s 29 read with s 46.

110 Paterson *Eckard's Principles of civil procedure in the magistrates' courts* (1996) at 41–43.

111 This excludes the specialist divisions of the magistrates' court such as the Small Claims Court, governed by the Small Claims Court Act 61 of 1984, the Maintenance Court, which is governed by the Maintenance Act 98 of 1998 and the Children's Court which is governed by the Children's Act 33 of 1960, see Paleker n 101 above at 305.

112 Paleker n 101 above at 306.

113 Section 3.

practical effect that the limitation in section 3(1) has, is to deny the parties an absolute right to refer a matter to mediation.[114]

The mediator

As a mediator is assigned to the parties under the SPCA, they are not allowed to choose their own, and this has been understandably criticised as the parties should be free to choose their own mediator,[115] and this is particularly important in situations where, for example, parties may wish to choose a mediator with special qualifications.[116]

The Minister for Justice is responsible for appointing mediators to the magisterial districts from a list of attorneys and advocates furnished by the General Council of the Bar and the Association of Law Societies[117], and as has been pointed out, this pool for selecting mediators should be broadened to include specialists in other disciplines such as engineers and doctors.[118]

There is little doubt that lawyers who act as mediators need to be 're-educated to bring about a change in mindset when mediating'.[119] Unfortunately the SPCA does not deal with the training of mediators or with lawyers advising parties in mediations, despite the need for lawyers acting as mediators or advisors in the process to be adequately trained.[120]

Mediation venue

When the parties agree to mediation, the clerk of the court arranges a date and time for the parties to appear before a mediator for an 'interview and investigation',[121]and the proceedings take place in 'chambers'.[122] The reference to chambers implies that the interview and investigation are to take place in the court building, which is unlikely to be the most suitable surroundings for mediation, and the parties should, in any event be free to choose their own mediation venue.[123]

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114 Paleker n 101 above at 306.
115 Cohen 'Mediation: terminology is important' (1993) 3 *De Rebus* 221 at 222.
116 See Paleker n 101 above at 306.
117 Section 2(1).
118 Paleker n 101 above at 306.
119 Cohen n 115 above at 222. See also Paleker n 101 above at 306–307.
120 Paleker n 101 above at 307. See also Feehily n 56 above 374 at 383–387 on the importance of training and accreditation of mediators.
121 Section 3(1)(b)(ii).
122 *Ibid*.
123 Paleker n 101 above at 307.

The mediation process

The SPCA provides that 'the mediator entrusted with mediation proceedings may make such enquiries and institute such investigation as he may deem necessary,'[124] and it has been sensibly remarked that it would be difficult to guarantee that a mediator would not take an adjudicative role when exercising these powers.[125] This issue is also apparent when considering the oath of office a mediator is expected to take before engaging in the process. The oath states that he or she 'will administer justice over all persons alike without fear, favour or prejudice and, as the circumstances of a particular case may require, in accordance with the law and customs of the Republic of South Africa applying to the case concerned'.[126] The reference to 'administer justice' clearly confuses mediation with adjudication.[127]

The purpose of the mediation proceedings is stated in section 3, as being to achieve 'settlement out of court'. Where settlement is reached, the mediator issues a written order, which is subsequently recorded.[128] Once an order has been recorded it becomes binding on the parties.[129] Where settlement cannot be reached on all issues, settlement may be reached on specific issues.

The SPCA empowers the Minister for Justice to create rules to regulate the 'practice and procedure in respect of an interview with and investigation by a mediator'.[130] In 1992, the Rules for Short Process Courts and Mediation Proceedings were promulgated[131] and lay down what has been described as 'tedious administrative directives'[132] that fail to deal with the content of the mediation process or issues such as the ethical or formal duties of the mediator, or to how the parties are to conduct themselves.[133]

It is clear that in its attempt to provide for mediation in the magistrates' courts, the legislature has failed to recognise the true nature of mediation,[134] as the SPCA does not assist to facilitate mediation and 'the mechanisms are

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124 Section 3(d).
125 Paleker n 101 above at 307.
126 Section 2(2).
127 See Paleker n 101 above at 307.
128 Section 3(2)(b).
129 Section 3(3).
130 Section 13(1)(a).
131 Government Notice R2196 *GG* 14188 of 31 July 1992.
132 See Rules 4, 5, 6, 7.
133 Paleker n 101 above at 308.
134 Cohen n 115 above at 222; Mowatt 'The high price of cheap adjudication'(1992) 109 *SALJ* 77 at 85. See also Paleker n 101 above at 308.

more concerned with process than with finding a solution'.[135] Commentators have also remarked that the process mentioned in the SPCA should be described as a 'pre-adjudicative procedure'[136] rather than mediation, and that 'Whatever else [the SPCA] may be, it is simply not mediation.'[137]

High Court Rule 37 ('Rule 37')

The High Court[138] in South Africa has extensive jurisdiction, with the practice and procedure of the court being regulated by statute,[139] it also enjoys inherent jurisdiction under the common law[140] and the Constitution.[141]

Similar to the magistrates' courts, litigation in the High Court has been criticised as being very slow and expensive.[142] The restructuring of the court by introducing a number of specialist courts[143] operating at High Court level has partially alleviated the problem of inefficiency, but has failed to deal with the costs issue[144] resulting in calls[145] for mediation in the High Court. The only facility currently available to accommodate mediation is ingrained in High Court Rule 37, which obliges parties to hold a pre-trial conference[146]

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135 Paterson n 110 above at 13–14. See also Paleker n 101 above at 308.

136 Cohen n 115 at 222. See also Paleker n 101 above at 308.

137 Cohen n 115 above at 222. See also Paleker n 101 above at 308.

138 Chapter 8 of the Constitution of the Republic of South Africa renamed the Supreme Court as the High Court, which did not change the powers, functions, or status of the Court.

139 The practice and procedure of the High Court is governed by the Supreme Court Act 59 of 1959, as amended, read with the Uniform Rules of Court (Regulation *Gazette* 437 *GG* 999 of 12 January 1965), as amended. For a full version of the Act and the Rules, see Harms *Civil procedure in the Supreme Court vol 1*. See also Paleker n 101 above at 309.

140 Harms n 139 above at par A6. See also Paleker n 101 above at 309.

141 Section 173 of the Constitution of the Republic of South Africa.

142 Hoexter Commission *Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court: Third and Final Report* (1997). See also Paleker n 101 above at 309.

143 For example, the Labour Court. See Paleker n 101 at 309.

144 Road Accident Fund Submission on Arbitration to the Satchwell Commission of Enquiry *An Evaluation of the Road Accident Fund Arbitration Pilot Project* (November 1998). See also Paleker n 101 above at 309.

145 Road Accident Fund Submission on Arbitration to the Satchwell Commission of Enquiry n 144 above. See also Paleker n 101 above at 309.

146 High Court Rule 37(2).

with the apparent objectives of curtailing the length of trials,[147] narrowing the issues in dispute,[148] curbing costs,[149] and facilitating agreements.[150]

As the rule obliges parties to hold a pre-trial conference, it cannot be waived by agreement and is consequently not voluntary.[151] The parties must agree to a date, time and place for the conference, and if agreement cannot be reached, the Registrar of the High Court will direct them.[152] Strict time periods dictate issues such as when the conference must be held,[153] when the minutes of the conference must be filed,[154] when the parties must exchange lists detailing the admissions they are required to make, enquiries that the parties will direct, and other issues relating to the preparation for trial.[155] It has been suggested that the strict time periods imposed on parties place unnecessary pressure to comply with the rule's requirements rather than to achieve a settlement.[156]

After setting out the preliminary procedural steps with the relevant time periods for holding the conference, the rule proceeds to explain the kind of information that the minutes must contain,[157] but fails to set out any governance of the conduct of the parties during the meeting. It has been pointed out that sub-rule 8 is the most obvious illustration that the rule does not really facilitate mediation, as under it, a judge, who may ultimately try the matter, can call the parties to a pre–trial conference and preside over it if he or she believes it is advisable. As the process is closer to informal adjudication than mediation, it falls far short of what is required 'to break the shackles of formalism which is very much needed if mediation is to thrive.'[158]

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147 *Bosman v AA Mutual Insurance Association Limited* 1977 2 SA 407 (C) at 408F. See also Paleker n 101 above at 310.

148 *Fitla-Matix (Pty) Ltd v Freudenberg and Others* 1998 1 SA 606 (SCA) at 614C. See also Paleker n 101 above at 310.

149 *Lekota v Editor, 'Tribute' Magazine and Another* 1995 2 SA 706 (W) at 707H. See also Paleker n 101 above at 310.

150 *Lekota v Editor, 'Tribute' Magazine and Another* 1995 2 SA 706 (W) at 707H. See also Paleker n 101 above at 310.

151 Harms n 139 above at par M 29. See also Paleker n 101 above at 310.

152 High Court Rule 37(3)(b).

153 High Court Rule 37(3)(a).

154 High Court Rule 37(7).

155 High Court Rule 37(4).

156 *Lekota v Editor, 'Tribute' Magazine and Another* 1995 2 SA 706 (W). At 708F, Flemming DJP held that 'the strict time periods (in rule 37) should be timeously held …'. See also Paleker n 101 above at 310.

157 See High Court Rule 37(6). See also Paleker n 101 above at 310–311.

158 Paleker n 101 above at 311.

It is unfortunate that the South African legislature failed in its attempt to introduce mediation into the court system under the reforms discussed. The analysis of High Court Rule 37 and the SPCA illustrates the lack of understanding of the mediation process at government level when these reforms were drafted. This was a lost opportunity, particularly in view of the success of court–annexed forms of mediation in other jurisdictions when appropriate and effective reforms are adopted.[159]

Commercial laws

Under section 166 of the Companies Act, 2008, a person can seek to resolve his or her dispute through mediation as an alternative to going to court.[160] Recent statutory provisions dealing with mediation in niche areas such as tax and consumer law, show the advance of the process into these areas. Rule 7 promulgated[161] under section 107 (A) of the Income Tax Act 1962 (as amended),[162] provides that any taxpayer who is entitled to object to an assessment and is dissatisfied with the decision of the Commissioner under the Act, may in their notice of appeal request that the matter be resolved by an ADR process. Similarly, the Commissioner can request an ADR procedure if he or she thinks it would be appropriate in the circumstances. Provided there is agreement, an ADR procedure such as mediation may be used, subject to the requirements set out in the schedule to the rules.

Section 134 of the National Credit Act[163] provides as an alternative to filing a complaint with the National Credit Regulator involving an alleged contravention of the Act, a person may refer the matter to mediation, provided the credit provider is not a financial institution (in which case it would go to the relevant Ombudsman) and does not object. Similarly, under section 70 of the Consumer Protection Act, 2008, a customer may refer a dispute with a supplier to be mediated rather than settled in the courts.

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159 See for example Boulle & Nesic n 23 above, chapter 11, and in particular 414–417 dealing with some of the available survey evidence. It is not however within the remit of this article to deal with such forms comprehensively.

160 The King III Report on Corporate Governance also requires company directors to consider ADR (including mediation) before resorting to litigation, based on the fiduciary duty of a director and the management of risk. See Myburgh 'Speech delivered at the launch of Tokiso Commercial' Johannesburg 18 March 2008. See also part 8.6 of the King Report on Governance for South Africa 2009 (King III Report), available at: http://african.ipapercms.dk/IOD/KINGIII/kingiiireport/ (last accessed 2 April 2015).

161 Promulgated on 1 April 2003.

162 58 of 1962.

163 Section 34 of 2005.

Unfortunately, none of these pieces of legislation describes or defines what it means by mediation, or indeed other alternative forms of alternative dispute resolution (such as conciliation and arbitration) against which the mediation process could be distinguished.

THE DEFINITIONAL NECESSITY

Much of the criticism of mediation stems from the fact that many different processes are described as mediation. There has been an emerging trend in countries such as the USA, Canada and Australia over the past three decades to use mediation to resolve numerous types of conflict.[164] With increasing numbers of mediation practitioners, there is still no consensus on numerous professional and practice issues, such as a uniformly accepted role for the mediator or even a definition of mediation, while mediator styles and approaches have proliferated as both the process and the practitioner have evolved and adapted to the marketplace. Many academics and legal policy experts believe that the 'promise of mediation' has not been fulfilled, while others believe that they have found their life's calling to become a mediator. Such varying views flow in part from the legal context and the varied types of disputes being mediated.[165]

Boulle and Rycroft point out that mediation is not easy to define or to describe.[166] They give reasons such as the flexibility and open interpretation of terms such as 'voluntary' and 'neutrality' which are often used in the definition of mediation, but remain unclear. They add that the term is used in different senses by different users, often for different purposes and in different contexts, by mediators with varying backgrounds, skills sets and diversity in practice.[167]

They contend that definitional problems arise because of comparisons between private mediation and institutionalised (court annexed/compulsory) mediation. In their view descriptions have arisen from a perception that private mediations have ample resources, few time limits, and are usually

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[164] Creo 'Business and practice issues of US mediators' in Newmark & Monaghan n 11 above at 310.

[165] *Id* at 310.

[166] Boulle & Rycroft cite the following authors as authorities on some of the difficulties with definitions: Kurien 'Critique of myths of mediation' (1995) 6 *ADRJ* 43; Silbey 'Mediation mythology' (1993) 9 *Negotiation Journal* 349 and Wade 'Mediation, the terminological debate' (1994) 5 *ADRJ* 204. See Boulle & Rycroft *Mediation: principles, process, practice* (1997) at 3.

[167] Boulle & Rycroft n 166 above at 3.

conducted by well-qualified mediators, while institutionalised mediation often has none of these features and could be described as poor, short and nasty.[168]

Almost two decades ago Boulle and Rycroft believed that mediation in South Africa was still in the 'defining phase' of its development. This certainly remains true of commercial mediation. Working definitions are emerging from the actual practice of mediation, from those who promote it, and the attitudes and beliefs of mediation educators and trainers, and are being influenced by the various areas in which mediation is growing, such as the commercial and family realms both with and without the use of professional advisers.[169] While there is sometimes talk of the 'orthodox mediation process' or the 'standard model of mediation' or 'classical mediation', with other versions being regarded as variations from the norm, Boulle and Rycroft argue that, while there are limits to what can be classified as mediation, it is premature to draw a narrow definition from such phrases.[170]

Approaches to defining mediation

Generally speaking there are two approaches to defining the practice of mediation. The first is the *conceptualist approach* which defines the process in ideal terms, emphasising certain values, principles, and objectives. These definitions have a high normative content and may, consequently, not reflect what actually happens in mediation practice.[171] Folberg and Taylor's conceptualist definition of mediation is often quoted in the Australian literature and states:

> [T]he process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.[172]

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168 Hobbes *Leviathan* at 65 as cited by Boulle & Rycroft n 166 above at 4.

169 Boulle & Rycroft n 166 above at at 4.

170 *Ibid*.

171 *Ibid*.

172 Folberg & Taylor *Mediation: a comprehensive guide to resolving conflicts without litigation* (1984) 7, as cited by Boulle & Rycroft n 166 above at 4. Boulle and Rycroft also cite the following as references for other well-used definitions: Moore n 80 above at 15; Astor & Chinkin *Dispute resolution in Australia* (2002) 135–6.

Despite its popularity, it has been suggested that this definition has many questionable elements and internal tensions.[173] It would seem that mediation can often involve bargaining towards a compromise rather than the systematic isolation of issues in a dispute in order to resolve it effectively, and can sometimes have more to do with the efficient disposal of files in large organisations than accommodating 'needs'.[174]

Other conceptualist definitions asserting that mediation 'is empowering for the parties', that it 'reflects an alternative philosophy of conflict management', or that it strives to 'improve relationships between the parties', are misleading as these goals are not achieved in mediations per se.[175]

The second approach to defining mediation focuses on what actually happens in practice and is referred to as the *descriptive approach*. Boulle and Rycroft point out that descriptive definitions have a low normative content and accept that within the diversity of mediation practice, the values, principles and objectives of the conceptualists are often overlooked.[176] One descriptive definition describes mediation as 'a process of dispute resolution in which the disputants meet with the mediator to talk over and then attempt to settle their differences.'[177] It has been remarked that this definition is largely uninformative and has very little prescriptive content.[178]

The strength of the conceptualist approach would seem to lie in the fact that it highlights for users and practitioners the higher goals and values of mediation which distinguish it from other decision-making processes, while its main shortcoming is that it tends to pass off as *descriptive* those elements of mediation which are *prescriptive*, which makes it an ideological rather than an empirical approach to defining mediation.[179] Based on actual practice, the descriptive approach finds its main strength in reflecting reality while its main shortcoming is that it proves quite superficial and unhelpful given the diversity of mediation practice.[180]

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[173] See Boulle & Rycroft n 166 above at 4 who cite Astill 'On alternative significances of definition in dispute resolution' (October 1993) Paper presented at the Australasian Law Teachers' Conference, Canterbury, New Zealand.

[174] Boulle & Rycroft n 166 above at 4.

[175] *Id* at 5.

[176] *Ibid*.

[177] Roberts 'Systems or selves? Some ethical issues in family mediation' (1992) 10 *Mediation Quarterly* 11 as cited by Boulle & Rycroft n 167 above at 5.

[178] Boulle & Rycroft n 166 above at 7.

[179] *Id* at 5.

[180] *Ibid*.

The assistance of a definition

Most European parliaments have yet to provide a general definition of mediation.[181] While in some countries such as Austria,[182] Denmark, and Finland there is a legal definition of mediation, in other countries such as Belgium, Spain, Sweden, Greece, Portugal, the Netherlands and Italy,[183] there is no general legal definition.[184]

In France, the New Code of Civil Procedure (NCCP) distinguishes conciliation[185] from mediation.[186] While conciliation is a process by which the settlement of the dispute is decided directly by the parties or with the help of the judge whose mission is to concile parties,[187] mediation is deemed a voluntary process that always involves a third party, physical person, or 'association' which must listen to parties, compare their interests, and allow them to find a solution to their dispute.

Similarly, there is no exhaustive definition of either of these two methods in the French legislature. In Spain, conciliation is the process by which a dispute is resolved by the parties themselves, while in mediation parties accept a solution provided by the mediator, who is normally the judge before

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181 The reform of civil procedure in Germany, effective from 2000, does not mention the term 'mediation'. As expressed by Alexander, Gottwald Trenczek 'Mediation in Germany: the long and winding road' in Alexander n 13 above at 189, the lack of direction concerning the process is likely to have a negative effect on the quality of the process and the standard of performance.

182 Austria provides two different definitions of mediation. As pointed out by Mattl 'Mediation in Austria' in Alexander (Paleker n 101 above at 61), like in most other countries, Austria does not provide one single definition of mediation, which, it is suggested probably means that the process is not yet well established and codified.

183 The Italian legislator does not use the term mediation (*mediazione*) as a structured activity to find a settlement to a dispute, and the Italian Civil Code only uses the term 'mediator' (art 1754) to describe 'the one who puts in relation two or more parties for the conclusion of a business transaction, without being bound by any of them by relations of collaboration, dependence or representation'. The company law reform enacted by the Italian legislature with Legislative Decree 5/2003 to encourage mediation in commercial disputes, implemented by the Decree of 23 July 2004, no 222, offers a definition of conciliation as 'the service offered by one or more entities, different from judges or an arbitrator, under conditions of impartiality and having the aim to settle a dispute already arisen or that may arise between parties, through methods that promote an autonomous settlement' (art 1, lett d, Decree 222/04). The definition of 'conciliator' is very vague, focusing only on the fact that the mediator cannot issue a binding decision (Article 1, lett e, Decree 222/04). See also De Palo & Cominelli 'Crisis of courts and the mediation debate: the Italian case' in Paleker n 101 above at 213.

184 De Palo & Carmeli n 11 above at 342.

185 Articles 127–131. See also De Palo & Carmeli n 11 above at 343.

186 Article 131-1-131-15. See also De Palo & Carmeli n 11 above at 343.

187 Article 21. See also De Palo & Carmeli n 11 above 343.

whom the proceeding has been introduced.[188] Outside of the differences that exist across EU member states on mainland Europe, and unlike the English model where mediation is based on the idea that parties can achieve a better result by involving a neutral/impartial third party, the working definitions of mediation have as a common feature the idea of reciprocal concessions made by parties to reach an amicable solution.[189] The fact that even legal scholars only offer tentative definitions for mediation, illustrates the lack of normative definition, and demonstrates the elusive nature of the mediation process for definitional purposes.[190]

Many 'official' definitions of mediation exist in Australian statutes, rules of court and codes of conduct for mediators, and this is viewed as a significant development, as earlier laws used the term without clearly defining or describing the process.[191] It seems that in practice, there are very different forms of mediation process being used in different jurisdictions and subject areas (for example, the process of mediation is conducted quite differently in states such as Victoria and New South Wales) and the lack of clear legislative definition may mean that in different states and areas of jurisdiction, there is a tendency to adopt the process characteristics that are most used in practice in that state or jurisdiction.[192]

While the official definitions are quite varied, reflecting both conceptual and descriptive approaches, the practical question has been asked as to what assistance such a discussion offers in finding a suitable definition.[193] Reliance is sometimes put on the Folberg and Taylor definition referred to above.[194] Some are more general,[195] and some are specific on debatable

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188 It is difficult to distinguish between this kind of mediation and arbitration. See De Palo & Carmeli n 11 above at 343.

189 Manfredi 'Quel est l'état de la mediation dans l'Union Européenne?' in *Actes du Colloque soutenu par la Commission Européenne La mediation dans les conflits internationaux*. See also De Palo & Carmeli n 11 above at 343.

190 Nazzini 'Modelli conciliativi interni al processo (analisi comparativa e testi strutturali)' [2002] Riv Dir proc at 847. See also De Palo & n 11 above at 343.

191 See the Federal Court Rules 0 2 r 4: '"Mediation" means mediation conducted under a mediation order', which is not very descriptive, as cited by Boulle & Rycroft n 166 at 5.

192 Sourdin n 20 above at 37.

193 Boulle & Rycroft n 166 at 5.

194 Boulle & Rycroft cite an example of such a conceptualist definition which is provided in the New South Wales Guidelines for Solicitor Mediators: 'Mediation is a voluntary process in which a mediator independent of the disputants facilitates the negotiation by the disputants of their own solution to their dispute by assisting them systematically to isolate the issues in dispute, to develop options for their resolution and to reach an agreement which accommodates the interests and needs of all the disputants' Boulle & Rycroft 166 at 5. The definition appears at 2.1 of the guidelines, which are available at:

aspects of the process, such as the degree of intervention that the mediator is allowed.[196] Some refer to a mediation framework and provide for an official to give directions on how it will operate,[197] while others reflect the requirements of those who promote the process in order to manage cases efficiently within the litigation process.[198]

Mediation models

As a result of the difficulties in defining and describing mediation, Boulle refers to four separate mediation approaches or models in an effort to conceptualise different tendencies in practice.[199] The four approaches are settlement, facilitative, therapeutic, and evaluative.[200] Each 'model' serves a different objective. In settlement mediation, the objective is to reach a compromise. In facilitative mediation it is to promote a negotiation in terms of underlying needs and interests rather than legal rights or obligations. In a 'therapeutic' or transformative model, underlying causes of behaviour may be considered. In evaluative mediation, legal rights and entitlements and the anticipated range of court outcomes serve as a guide in reaching a settlement.

Boulle notes that they are not discrete forms of mediation practice but ways of conceptualising the different tendencies in practice, as a mediation may

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www.lawsociety.com.au/uploads/filelibrary/1048744833121_0.8990171634879579.pdf (last accessed 3 April 2015).

195 Boulle & Rycroft cite as an example the Supreme Court of Victoria O 50.07 (3): '[T]he mediator shall endeavour to assist the parties to reach a settlement of the proceeding … referred to him [sic],' Boulle & Rycroft n 166 at 6.

196 Boulle & Rycroft cite as example, the Supreme Court of South Australia O 56A.02: Mediation includes … any process … whereby a neutral presiding officer assists parties in dispute … by making positive recommendations … and options and/or suggesting possible bases for possible resolution of the dispute,' Boulle & Rycroft n 166 above at 6.

197 Boulle and Rycroft cite as an example the Federal Court Rules O 72 r 7(1): 'A mediation conference must be conducted … in accordance with any directions given by the Court or a Judge …' Boulle & Rycroft n 166 above at 6.

198 Boulle & Rycroft cite as an example, the County Court of Victoria, Building Cases Rules r 6.09(2), which refers to the mediation taking place 'expeditiously' in order to reach a 'speedy resolution' Boulle & Rycroft n 166 at 6.

199 Boulle & Nesic n 23 above at 43–47.

200 See Roberts 'Three models of family mediation' in Dingwall & Eekelaar (eds) *Divorce mediation and the legal process* (1988) 144 who refers to minimal intervention, directive intervention and therapeutic intervention models of family mediation, corresponding respectively to *facilitative*, *settlement* and *evaluative*, and *transformative* mediation, as cited by Boulle & Nesic n 23 above at 43.

commence in one mode and then adopt characteristics of another, for example it may become evaluative after a facilitative opening.[201]

A legislated model

The evaluative approach seems to be inconsistent with the defined key characteristic of mediation. Charlton has noted that:

> [Mediation] derived from the recognition that participants were quite capable of negotiating for themselves and reaching their own decision. The parties' ability in this regard was acknowledged and respected. As any solution was not imposed, but arose out of empowerment of the parties, it was more likely to be acceptable to both sides and adhered to.[202]

The definition contained in the EU Directive on Certain Aspects of Mediation in Civil and Commercial Matters, was largely drafted in this spirit, and reads in relevant part:

> Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.[203]

Similarly Article 1(3) of the UNCITRAL Model Law on International Commercial Conciliation[204] defines the process as follows:

> Conciliation' means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (the 'conciliator') to assist them in their

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201 There are also other theories of mediation that do not fit neatly into the four paradigm models. An example used by Boulle is the 'narrative' theory of mediation which focuses on the complex cultural stories through which conflict is constructed by the parties, see Winslade & Monk *Narrative mediation: a new approach to conflict resolution* (2000) as cited by Boulle & Nesic n 23 above at 47. See also Feehily n 56 above at 376–381.

202 Charlton *Dispute resolution guidebook* (2000) 8.

203 Article 3(a) Directive 2008/52/EC 'Directive on Certain Aspects of Mediation in Civil and Commercial Matters' of 21 May 2008. The Directive is effective throughout the EU (except Denmark).

204 The Model Law refers to conciliation and mediation interchangeably in the definition. This is unhelpful and leads to confusion as they are distinct processes and should be defined as such. The conciliation definition referred to is in fact a definition of the mediation process. For the purposes of distinction, conciliation is also a structured negotiation process involving a third party, but the distinguishing feature is that the third party will make a formal recommendation to the parties in order to settle the dispute. See Pretorius (ed) *Dispute resolution* (1993) 2–4.

> attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.[205]

The New Jersey standards approved by its Supreme Court, offer another example of where 'facilitative' mediation is required:

> Definition of Mediation: Mediation is a process in which an impartial third party neutral [mediator] facilitates communication between disputing parties for the purpose of assisting them in reaching a mutually acceptable agreement. Mediators promote understanding, focus the parties on their interests, and assist the parties in developing options to make informed decisions that will promote settlement of the dispute. Mediators do not have authority to make decisions for the parties, or to impose a settlement.[206]

There is also a requirement that the mediator 'always conduct mediation sessions in an impartial manner'. The rule continues:

> [A] mediator shall therefore avoid any conduct that gives the appearance of favouring or disfavouring any party. [Mediators] shall guard against prejudice or lack of impartiality because of any party's personal characteristics, background, or behaviour during the mediation.[207]

If this rule were to be interpreted and applied literally, it would preclude mediators from offering any evaluative comments or opinions, and from commenting on numerous matters, such as the credibility of participants as witnesses in the event that the case proceeds to trial. Similar provisions exist in a number of other jurisdictions, but in some places a contrary view dominates.[208]

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205 See also Sanders *UNCITRAL's Model Law on International Commercial Conciliation* (2007) Arbitration International 105 at 114–122 for a discussion on proposed revisions to this definition in the Model Law.

206 See Creo n 164 above at 315.

207 *Ibid*.

208 *Id* at 315–316. The California Dispute Resolution Council, a private non-governmental organisation of neutrals, developed Standards of Practice for California Mediators, which have been described as recognising the flexibility and diversity of mediation practice. Available at: www.sbcadre.org/neutrals/ethicsmed.htm (last accessed 3 April 2015). For a discussion on the standards see www.mediate.com/articles/cdrcstds.cfm (last accessed 3 April 2015).

The need for a definition

It has been remarked that definitions are significant in several practical and political ways.[209] In practical terms, governments provide funding for 'mediation' programmes, some 'mediators' are immune from liability for negligence, and codes of conduct and ethical standards are developed for 'mediators'. As mediation needs to be explained and justified in some circumstances, there would also seem to be good marketing reasons for defining and limiting the concept. Definitional clarity also benefits all who are involved in the process. Its political significance is seen in the way that different professions and organisations tend to define mediation relative to the self-interest of their members. Boulle and Rycroft give as an example that a 'social work' definition might imply that it is necessary for mediators to have counselling skills, while a 'legal' definition could imply that knowledge of the law is essential, so that the political significance of mediation being claimed by competing groups of potential service providers is reflected in the particular definition of mediation that prevails.[210]

One practitioner has noted that 'by definition, mediation will defy complete codification. Its inherent flexibility and strengths will continue to grow and applications will be discovered in new areas.'[211] It has also been suggested that mediation cannot be defined, as any attempt to *define* mediation is to *confine* it, given the inherent flexibility of the process. The approach taken in a mediation should be determined by the mediator to suit the nature of the dispute and the personalities of the disputing parties.[212]

While some would contend that mediation cannot, and it seems should not, be defined, it can be meaningfully described, and three criteria have been identified that characterise a process as a mediation:[213]

- The parties call in an independent person (mediator) who will, in conjunction with, and with the agreement of, the parties structure a process appropriate for the nature of the dispute, the stage it has reached, and the personalities of the key players; the mediator will meet privately with each party and discuss any aspect in utter confidence and will only reveal such confidential information to another party if expressly authorised to do so.

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209 Boulle & Rycroft n 166 at 5.

210 *Id* at 6–7.

211 Press 'International trends in dispute resolution: a US perspective' (2000) 3/2 *The ADR Bulletin* 23.

212 Street 'Commentary on some aspects of the advent and practice of mediation in Australia' in Newmark & Monaghan (eds) n 11 above at 361.

213 *Id* at 362.

- The mediator has no authority to impose a decision on the parties.
- The course of the process and, in particular, the outcome, are voluntary, pervaded throughout by the consensus-oriented philosophy.

Despite the logic behind the contention that any effort to define mediation is to confine it, it is imperative to establish a working definition of commercial mediation to avoid misunderstanding of the process and the consequent negative connotations. Consistent with the above description of the process, the revised definition of mediation given by Centre for Effective Dispute Resolution (CEDR) is as follows:

> Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and of the terms of resolution.[214]

One of the main objectives in the revised CEDR definition is to give more emphasis to the fact that parties are in ultimate control of both the decision to settle and the terms of resolution. Regardless of how strong the influences may be to get disputing parties to attend a mediation, once they are present it is important that they have a sense of ownership and responsibility.[215] This definition should serve as a working definition for the commercial mediation industry in South Africa. It should also serve as a guide to the legislature and the courts when defining the process.

Recent reforms – The Magistrate Court Rules

South Africa is currently piloting a court-annexed mediation scheme. The implementation of court-annexed mediation at pilot-site courts started on 1 December 2014 at certain sites in Gauteng and North West. It was anticipated that it would be rolled out to further pilot sites at a later stage.[216] More recently, the government seems to have made a policy decision not to introduce mandatory mediation, opting instead for voluntary court-referred mediation.[217] The new Magistrates Courts Rules provide the procedure for

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214 Available at: http://www.cedr.com/news/?item=CEDR-revises-definition-of-mediation (last accessed 11 April 2015).

215 Carroll 'The future belongs to mediation and its clients' in Newmark & Monaghan n 11 above at 404.

216 See http://www.lssa.org.za/?q=con,338,Court-annexed%20mediation (last accessed 9 April 2015).

217 See *Government Notice* R183, available at: http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf (last accessed 9 April 2015).

the voluntary submission of civil disputes to mediation in selected courts. These rules apply to the voluntary submission by parties to mediation of disputes prior to commencement of litigation, and to certain disputes in litigation which has already commenced.[218]

The rules define mediation as the process by which a mediator assists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities, exploring areas of compromise, and generating options in an attempt to resolve the dispute.[219] This definition is closer to the working definition proposed above and shows that the South African legislature has moved some distance in its understanding of the mediation process from the previous reforms contained in the High Court Rule 37 and the SPCA. There are, however, other defects in the rules that require amendment, such as the involvement of the mediator in drafting the settlement agreement, which is not viewed as best practice in other jurisdictions.[220]

Some may argue that it is sensible for the government to opt for a voluntary scheme, with consideration of mandatory mediation at a later stage when the process is better understood and has developed as a viable alternative to the court process and arbitration as a means of resolving commercial disputes.[221]

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[218] The rules are available at: file:///C:/Users/R730A~1.FEE/AppData/Local/Temp/new%20rules%20on%20mediation.htm (last accessed 9 April 2015).

[219] The definition is echoed in the form of Agreement to Mediate annexed as Form Med-6 to the rules which refers to mediation as a process in which the mediator 'facilitates communication between the Parties and, without deciding the issues or imposing a solution on the Parties, enables them to understand the issues and reach a mutually agreeable resolution of their dispute'. See Government Notice R183 at 6 and 30, available at: http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf (last accessed 9 April 2015).

[220] See Rule 80(1)(h) 'the mediator will assist to draft a settlement agreement if the dispute is resolved'. See Ronán Feehily 'The role of the Commercial Mediator in the mediation process; a critical analysis of the legal and regulatory issues' (2015) *SALJ* 374, 397–410. See *Taphoohi v Lewenberg* (No 2) [2003] VSC. For a comprehensive critique of the rules, see also Tony Allen 'A discussion of the new mediation provisions in the South African Magistrates Courts Rules' at 7, available at: http://www.conflictdynamics.co.za/SiteFiles/205/Discussion%20of%20SA%20CAMR%202014.pdf (last accessed 9 April 2015).

[221] See Hensler n 2 above at 188; Edwards 'Alternative dispute resolution: panacea or anathema?' (1986) 99 *Harvard Law Review* 668; Resnik 'Due process: a public dimension' (1987) 39 *University of Florida Law Review* 405; Resnik 'Many doors? Closing doors? Alternative dispute resolution and adjudication' (1995) 10 *Ohio State Journal On Dispute Resolution* 212.

However, experience from other jurisdictions suggests that there must be a degree of compulsion imposed on disputing parties at least to consider the process, with a reasonable refusal to mediate being an acceptable response in relevant cases. I have contended previously that commercial mediation is unlikely to become a prominent form of dispute resolution in South Africa until heavy costs penalties are imposed by the courts.[222] There is a clear distinction between some form of mandatory mediation, which is subject to valid criticism in circumstances where parties may be forced into a process against their will and coerced into accepting a settlement with which they do not approve, and a costs sanction that may be employed by the courts where a party unreasonably refuses to engage in a voluntary process that has the potential to result in a mutually acceptable settlement. As noted previously, a party is free to exit the process at any point if he or she is uncomfortable with how it is proceeding and there is no agreement until it has been reduced to writing, ordinarily reviewed by the parties' legal advisors, and ultimately signed by both parties.

The 2011 draft of the Magistrates Courts Rules included a provision that an adverse costs' sanction could be employed by the courts against a litigant who unreasonably refuses to mediate in appropriate circumstances. The omission of this provision in the final version of the rules has been appropriately described as a lost opportunity to develop a culture that obliges parties to consider mediation and to justify a refusal to participate.[223]

CONCLUSION

In light of the criticisms of the mediation process and the potential negative impact that the process may have, mediators should be conscious of the negative implications of their success as the process moves from the margins into the mainstream of dispute resolution in South Africa. While the process provides parties with a medium through which to express themselves, to identify their interests, and to achieve amicable solutions, it seems that there are occasions when parties in foreign jurisdictions complain that mediators

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222 Feehily n 9 above at 291–315.

223 Rycroft 'What should the consequences be of an unreasonable refusal to participate in ADR?' (2014) 131 *SALJ* 778 at 785. While court referred mediation schemes are not the focus of this article (and it would be premature in any event to engage in an assessment of the success of the scheme), for a useful discussion and comprehensive critique of the new rules, see Allen 'A discussion of the new mediation provisions in the South African Magistrates Courts Rules' available at: http://www.conflictdynamics.co.za/SiteFiles/205/Discussion%20of%20SA%20CAMR%202014.pdf (last accessed 9 April 2015).

are overreaching, coercive, or overly evaluative based on limited information about the dispute, and consequently deprive parties and their lawyers of the freedom to make decisions. It has therefore been suggested that mediators should take exceptional care not to convert a voluntary process of dispute resolution into a means of coercion to resolve disputes outside the public forum, when clients genuinely want and/or need a public and binding judicial resolution of an issue.[224]

Few would argue against the notion that trials unquestionably have positive qualities in providing precedents and serving as catharsis for litigants. ADR has sometimes been derided in the USA for this reason as an acronym for 'Attorney Deficit Revenue'.[225] Despite this, others believe that the justice system is fortunate to have had a reduction in trials, and, given the limited resources available, judges who demonstrate the ability and willingness to take on the challenge of case management and dispute resolution are performing an extremely valuable public service.[226]

I am not disputing that some commercial disputes need and ought to be tried, for example, a dispute that requires legal principles to be tested, where a precedent is needed, or where a dispute is unsuited to mediation.[227] A dispute involving a genuine zero sum game, is likely to be ideally suited to adjudication in court.[228] Similarly, a dispute resolution system based on negotiation requires some adjudication in order to provide the 'shadow of the law' that is required for efficient bargaining.[229]

The issues discussed above do not invalidate the rationale for encouraging the use of commercial mediation; they play an instrumental role in defining

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224 Atlas & Atlas n 43 above at 16–17.

225 Ludwig 'A judge's view, the trial/ADR interface' 2004 *Dispute Resolution Magazine* at 13.

226 *Ibid*.

227 An example of a situations where mediation has proved inappropriate in the environmental world involve conflicts over fundamental moral issues or high stakes distributional questions, such as disputes between committed ecologists and the 'fair use' movement in the USA, where interests are diametrically opposed and 'win-win' solutions do not exist and cannot be created. See Guy Burgess and Heidi Burgess 'Environmental Mediation: Beyond the limits applying dispute resolution principles to intractable environmental conflicts', *University of Colorado Working Paper 94–50* February 1994, available at: http://www.colorado.edu/conflict/full_text_search/AllCRCDocs/94–50.htm (last accessed 4 April 2015).

228 Trollip n 10 above at 12.

229 Hensler n 51 above at 96.

its appropriate limits.[230] While courts will always be needed to determine disputes that require judicial adjudication, commercial mediation should be encouraged to develop as a distinct process that will facilitate the resolution of disputes in appropriate circumstances. This will entail the simultaneous benefit of freeing up courts to concentrate on those cases that do require what US Justice Holmes called 'the magnificent deliberateness'[231] of a trial.

[230] Trollip n 10 above at 18.

[231] Justice Holmes quoted by Cuomo 'The truth of the "middle way"' (1984) 39 *Arbitration Journal* 4.