

**AN ANALYSIS OF THE THEORY AND PRINCIPLES OF ALTERNATIVE
DISPUTE RESOLUTION**

by

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SUMMARY

The system of Alternative Dispute Resolution, commonly known as ADR, comprises multiple informal processes. Traditional processes of negotiation, mediation and arbitration are primary processes within the system of ADR. The elements of the primary processes have been combined with one another or with those of public process to form hybrid ADR processes original only to the system of ADR. These hybrid processes are: rent-a-judge, the mini-trial, the summary jury trial, neutral evaluation and mediation/arbitration. Under the auspices of ADR, derivative processes have also been developed, such as expedited arbitration, documents-only arbitration, final-offer arbitration and quality arbitration.

Each process is distinct and separate, having its own unique form, function and method of transforming a dispute. Outwardly, this represents a diverse collection of disjunctive processes. Yet an introspective analysis shows that there is an innate centrality that originates in core principles that bind individual processes to each other and to a unified body of theory. These foundational principles of ADR are replicated in each of its processes. In these terms, ADR is therefore conceptualised as a pluralistic system of dispute resolution that consists of autonomous and individual systems of process that conform to a central body of general theory and consensual principles.

As a method of extracting the fundamental principles of ADR, the discontinuities and continuities between the theory and principles of civil procedure, as a unitary system of procedure, and ADR processes are explored. However, in its conclusions, the thesis rejects the premises of a unitary system of procedure as forming the basis for the theory and principles of ADR. Instead, the contrary notion is advanced that ADR is an independent system of dispute resolution which is based on a theory of processual pluralism and supported by cogent processual principles.

KEY TERMS

ADR; Alternative Dispute Resolution; Informal Process; Negotiation; Mediation; Arbitration; Mixed (Hybrid) Processes; Litigation; Adjudication; Civil Procedure; Processual Pluralism.

PREFACE

Often, when gratitude is expressed, it is not so much for what people have done but rather it is more about who they are and how they have touched one's life. Words describe the conduct yet, beyond the meaning of the words, there are emotions and feelings that words cannot convey for they dwell in the silent understanding between the giver and the receiver. So it is, that I thank all those that have been with me as I have written this thesis.

My wife, Nadia, has given her unfailing support and continuous encouragement, so characteristic of her fierce loyalty to me in good times and in bad. As between husband and wife, no more need be said. Although my daughters, Daniela, Lara and Alexia, are too young to understand what I have been doing, in their innocent ways they have comforted me. My mother, Nagla, in her quiet manner has also been there for me and notably in assisting with the technical editing.

I have been fortunate to have had two promoters: Prof JH Van Rooyen as internal promoter and Prof D Scott-Macnab in his capacity as external promoter. Their guidance and the sharing of their experience as senior academics have been invaluable. But, in particular, their enthusiasm about the subject matter of the thesis and their involvement in its progress have been exceptional. I consider it a privilege to have worked under two men who equally have such outstanding intellectual acumen.

Eileen Raffanti and I have worked together for many years. She knows exactly what to do when typing manuscript, with very little explanation on my part. I have always admired her skill and proficiency, especially when it came to the typing of this thesis.

And, lastly: "Deo gratias".

MODE OF CITATION

In the footnotes, abbreviated references are made to every work that is cited. This style of referencing has been selected in order to obviate unnecessary cross referencing to authority and to simplify the citation of multiple works written by the same author.

All abbreviated references have been consolidated and coupled to full bibliographical references under the heading: **BIBLIOGRAPHY AND MODE OF CITATION** contained on page 279 below.

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CHAPTER 1

EXPLORING THE THESIS

1.1 A pathology of civil procedure

1.2 The search for system

1.3 Methodology

1.4 Preview: the anatomy of Alternative Dispute Resolution

1.5 Conclusion: processual pluralism

1.1 A pathology of civil procedure

This thesis responds to the contemporary debate both in South Africa and other Anglo-American jurisdictions regarding the modification of existing litigious practices and the revision of the values underlying the public adjudicative process. Abundant reasons for dissatisfaction with the judicial process could be put,¹ but only the most salient will be advanced.

An initial reaction might be that a brief diagnosis of the ailments of civil procedure is an incongruous starting point for a work that deals with an analysis of the theory and principles of Alternative Dispute Resolution.² Yet, this is essentially a matter of

¹ For further details, see Erasmus "Reform of our law of civil procedure" 1 et seq, "Regspiegeling in die gedrang" 1 et seq; Kahn "Cause for discontent with the administration of justice" 602 et seq.

² For the sake of convenience and in keeping with normal usage, the term "alternative dispute resolution" will throughout this work be referred to by its accepted acronym of "ADR".

perspective. A narrow approach to civil procedure that regards it merely as a body of pragmatic procedural rules that regulate the conduct of an institutionalised form of dispute resolution, pre-empts any critical evaluation of the authenticity of alternative methods of dispute resolution.

The broader view is that, beyond the mechanistic application of procedural rules, civil procedure also has a social purpose. As a State-sponsored method of dispute resolution, it adjusts personal antipathies between litigants, apportions finite economic resources that are in contention, compensates for unlawful injury, regulates social behaviour on the grounds of public policy and, in general, obviates the need for self-help as a method of redress. To individual litigants the implications are personal, but in the aggregate, these implications have a broader societal significance.³

The consequences of functional and qualitative defects of the formal system of procedure are not necessarily restricted to the legal system. Procedural maladies afflict the whole body of society. A legal practitioner might shrug off a discontented litigant as an instance of an unfortunate miscarriage of process and procedure, forgetting that the cumulative effect of similar events erodes public confidence in the system of civil procedure as well as the credibility of the courts. Unfortunately, public disillusionment is becoming endemic.

The popular perception is that the legalese, adversarial posturing and technical subterfuges of lawyers, with the acquiescence of judges, form a barrier that isolates the average citizen from the public norms and institutions which have been designed to succour him. The ideals of justice, truth and the public good have become weak whimpering in a seemingly dysfunctionate system in which its beneficiaries perceive themselves to be its victims. The sophistication of litigious procedures and the complexity of legal adjudication often operate to defeat the very gravamen underlying their existence - the public redress of private grievances through the enforcement of substantive rights.⁴

³ See, further, James and Hazard **Civil Procedure** 279-280.

⁴ See, further, Carbonneau **Alternative Dispute Resolution** 1-5.

Many factors have compounded to justify this view. The alarmingly high transactional costs of legal services outstrips the financial resources of the average citizen, not to speak of indigent persons. The result is that in many instances the substantive rights of the individual remain alienated or infringed due to the exorbitant cost of public redress. The formality of proceedings and the technicality of procedures evident in strategic manoeuvres and tactical objections, cause undue delay that in turn exacerbates the problem of legal costs. These factors also impede the humanistic transformation of a legal dispute. In order to satisfy the stringent requirements of the system of procedure, the interests of litigants are translated by lawyers into highly technical procedural formulas that are most often beyond the comprehension of their clients and in conflict with their personal needs. The upshot is that generally the layperson conceives adversarial litigation and public adjudication as being essentially anti-social.⁵

In South Africa, the problem is aggravated by political and cultural factors. The legacy of apartheid ravaged the noblest principles of our common law that derived from the liberal legal systems of England and Holland, as the latter had received the Roman law of the Justinianean period. Rightly or wrongly, the majority of the population who until recently suffered under the yoke of apartheid, attribute part of the blame to the judiciary for having compromised the rule of law, thereby questioning the legitimacy of the courts as well as their ability to provide popular justice.⁶ But, apart from political considerations, the problem also has cultural dimensions.

The individualistic norms that underlie the adversarial system of litigation are alien to many members of our African population, especially those in the rural areas, who partake in a communal life-style and hence adhere to a more humanistic ethos. Adversarial values and public adjudication are basically foreign to a "folk" culture that has traditionally relied on informal indigenous processes as a means of lending credence to community norms and values. The mindset of the majority of the population is that informal indigenous processes are not on the periphery but at the core of dispute

⁵ See Editorial "Reforming the legal system" 1-3.

⁶ See, for instance, Glaeser "People's courts: popular participation and new legal forms" 86-88.

resolution and ironically, judicial dispute resolution is regarded by many as being the alternative.⁷

The conflict between the social purpose of civil procedure and the inability of its system of procedure to fulfil these purposes, is a perennial problem. As a social phenomenon, civil procedure is constantly in need of reform. As the renowned Anglo-American proceduralist, Professor Millar, aptly stated: "The history of civil procedure in any country is in essence a history of procedural reform".⁸ The policy of reform is to realign procedural functions with their underlying social purpose. However, in our time, civil procedural reform is complicated by the ADR movement. ADR also has a social purpose and retains a variety of processes that are posed as alternatives to court proceedings. As such, ADR challenges litigious practices and is sceptical of public adjudication. ADR privatises a dispute on the basis of the ethics of self-reliance and self-responsibility thereby promoting informal extra-curial processes that are private and confidential and which can be cost-effectively tailored to meet the personal needs of the disputants. The general assumption is that the mutual agreement of the disputants assures the durability of the outcome.

The crux of the matter is that ADR is unofficially effecting procedural reform by making it possible to exclude certain disputes from the public system of dispute resolution and to deal with these disputes privately. Irrespective of whether a narrow or a broad approach is taken of civil procedure, it is vital to come to terms with ADR because of the manner in which it intrudes upon the public system of dispute resolution. One of the most important aspects of this investigation is to determine whether ADR is merely a social movement that in time will lose its impetus and fade or whether it is an authentic and independent system of dispute resolution, based on a theory of process that is supported by cogent principles.

⁷ See, generally, Bennett *African Customary Law* 51-55 70-77.

⁸ "Editorial preface" xxxvii.

1.2 The search for system

This thesis commenced as a search for system in a field of study that as yet has no general systematic frame of reference. In the piles of journal articles and heap of textbooks devoted to the subject of ADR, a central theme had to be found. As a primitive science, ADR as yet has no coherent system of thought but is rather a seemingly unrelated mass of information contained in anecdotal accounts, empirical studies, books, in-depth research articles, commentaries, reports on ADR programmes and institutional newsletters. Many of these sources made great sense in their own contexts but were unconnected to any central theme, somewhat like dissonant notes, each on their own melodious, but without a melody that recurs and moulds the music into symphonic harmony. If there was a central theme it was hidden. Initially, there was no option but to start the thesis on the supposition that there is system: that ADR is in the first place an independent system of dispute resolution, that its processes are based on principles and that these principles are interconnected within a general theoretical framework. This then is the hypothesis of the work. The thesis turns on the supposition that ADR is an independent system of dispute resolution that is based on a theoretical structure of cogent processual principles.

The research and writing commenced with trepidation, for to predict in advance that the hypothesis will be proved, is daunting. The added risk was that any preconceived conclusions could taint the honesty of the work. Research should speak for itself. However, as the writing took shape, the need to cast the sources into some sort of system artificially, disappeared because the centrality of the subject seemed to become alive, giving the work its own meaning, illuminating its own intrinsic truths and establishing its own inner cohesiveness. Suppositions became propositions and a hypothesis turned into a thesis.

In retrospect, though, it is not quite true that the sources shaped themselves, for having content without form can sully any work, be it art, music, literature or even a thesis. A methodology was applied - there was a purposeful organisation of the sources and an ordered method for their interpretation.

1.3 Methodology

A very definite method of interpretation is applied. The method of interpretation responds directly to a particular characteristic of ADR.

ADR consists of a number of context-based applications. What this means is that ADR comprises of a portfolio of processes that may be applied in different contexts, depending on the needs of the disputants. Unlike court proceedings, ADR processes are not regulated by a uniform code of procedural rules that adapt the content of any cause to conform with the formal requirements of court procedure. The contrary is true in the case of ADR processes. An ADR process absorbs the culture of a dispute⁹ and adapts itself to meet the requirements of that dispute. ADR processes are therefore applied in a variety of different contexts. For instance, in regard to the process of mediation, it is possible to refer to divorce mediation, child custody mediation, family mediation, community mediation, environmental mediation, commercial mediation, school mediation. So the litany of applications may continue, both in regard to the process of mediation as well as in respect of the processes of negotiation and arbitration.

The difficulty is that most sources deal with a particular context-based application of ADR. Very few concentrate on the general principles of ADR. Consequently, in this thesis, context-based descriptions of ADR processes are interpreted by means of the excluding the context of a process, extracting the generic principles and integrating these principles into a general framework of processual theory. This explains the absence of detailed descriptions of any context-based applications of ADR, as for instance, divorce mediation or labour arbitration. In brief, every source dealing with a context-based application was considered and used if it illustrated the text by means of an example or contributed to the *general* body of theory and principles of ADR.

The use of dialectic was another distinctive method employed. In a field of study that has no developed system of theory and principle, use of the dialectic is one method of discovering these principles or establishing criteria for evaluating its theory. For

⁹

See, further, 1.4 below for a discussion of the phrase "culture of the dispute".

instance, an ADR/litigation dichotomy¹⁰ functioned as a model for determining the attributes of ADR processes by comparison to judicial proceedings. Likewise, a model of the various forms of third-party intervention indicated the unique forms and structures of different processes.¹¹ However, an approach based on the use of the dichotomy can lead to an overemphasis of discontinuities and in so doing, obscure the continuities between various forms of process. With this problem in mind, every effort has been made to maintain a balance between continuities and discontinuities in particular contexts.

Another problem stems from the basic fact that ADR in South Africa is still very much in an embryonic stage. Accordingly, ADR practice is still experimental and there is a dearth of academic literature. For this reason it was necessary to rely mainly on the ADR sources of other Anglo-American jurisdictions, notably those of the United States, the United Kingdom and Australia. Yet, this thesis is a South African work. Preference was therefore given to any South African source if it constituted primary authority and, if not, wherever possible, a South African source was cited in conjunction with other comparative sources.

The term "comparative sources" is a little ambiguous. Non-South African sources could be regarded as being comparative within a South African context. Certainly these sources have a functional value and introduce a body of knowledge that has the potential of developing and extending the system of ADR in South Africa. But there is an irony in this. The very lack of local sources forced a reliance on ADR literature extraneous to South Africa so that, in many ways, the thesis has become a consolidation of ADR sources from various jurisdictions. In this respect, the thesis is comparative in a wider sense.

A last point needs to be clarified. There is always tension between art and science - between the musician and composer, dancer and choreographer, practitioner and proceduralist and so forth. This thesis approaches ADR in its science-form. It is therefore

¹⁰ See 2.1.2 below.

¹¹ See, for instance, 7.2 below.

neither descriptive nor prescriptive in respect of ADR skills and techniques. Instead, the approach is analytical with the sole purpose of extracting, identifying, developing and synthesising the theory and principles of ADR. For this same reason, the thesis does not suggest any reform of the system of civil procedure nor make any proposals regarding the application of ADR processes. In brief, the thesis confines itself to ADR as a science-form.

1.4 Preview: the anatomy of Alternative Dispute Resolution

Acronyms are convenient expressions but at times can be extremely misleading. Frequently, because an acronym conveys only the ideological content of the words it represents, there is a failure to grasp the intrinsic meaning and truth that lies behind the initials of the relevant words.

What is hidden by the acronym "ADR"? The word "alternative" can be extremely deceptive. An alternative to what? To court proceedings or to other dispute resolution processes or merely, a choice of optional processes? So too, the intricate meaning of the word "dispute" could be glossed over. What type of dispute? A legal dispute or a dispute that is as yet in need of transformation or in stages of transformation? "Resolution" has a number of technical meanings relating to the quality of an outcome. As an acronym, "ADR" could be used glibly, encouraging rhetoric if the deeper meaning of the represented words is not analysed and critically evaluated. Although the acronym "ADR" is used throughout this thesis, this should not be misconstrued as a cosmetic treatment of the subject.¹² Indeed, the themes of this thesis can be reduced to an analysis of the words "alternative dispute resolution", used both separately and in combination.

The word "alternative" is rich in meaning, going to the core of the system of ADR, drawing out its principles and forming its theoretical grounds. A starting point is to be found in the dialectic. ADR processes are placed in a dichotomous relationship with

¹² For a detailed interpretation of the term "Alternative Dispute Resolution", see chapter 2 below.

court proceedings. The theory rests on an oversimplified logic: all ADR processes are alternatives to the process of litigation, therefore all ADR processes are by definition non-litigious.¹³ The result is extremely restrictive for no valid system of theory can be constructed on a negative theorem. The flaw lies in the use of the dichotomy as a model for reasoning. Once the exaggerated absolutes inherent in the dichotomy are detected, its importance diminishes. Yet, the dichotomy does serve a useful purpose, at least initially, since the counterbalancing of various processes establishes the basis for developing a classification of these processes.

In contradistinction to the process of litigation, ADR is founded on three primary processes: negotiation, mediation and arbitration.¹⁴ Prior to the development of ADR, there was no special connection between these processes nor are they original to ADR. Each existed separately and independently until appropriated by ADR when they became functionally associated with each other under its auspices. An unlikely coalition in a practical setting, yet co-ordinated within the system of ADR, the first tentative steps at coalescing these processes into some sort of coherent processual system were taken. An initial approach classifies the primary processes on the basis of their functional characteristics in respect of each other and in regard to the process of litigation.¹⁵ Evaluation based on the characteristics of the primary processes is useful yet limited in its potential to develop theory because only instrumentalist criteria are applied, which can progress no further than mere comparisons of the advantages or disadvantages of using a particular process. This work introduces the *form of process* as an additional dimension and combines form with the function of process.¹⁶

The form of process is the essence of processual theory. Analysis of the form of process delves into the primary elements of a process, extracts its foundational principles and formulates the theory that explains both its function and application. More specifically:

¹³ See, further, 2.1.2 below.

¹⁴ For the definitions of these processes and a discussion of their underlying concepts, see chapter 3 below.

¹⁵ See chapter 4 below and especially annexure A.

¹⁶ See 4.2 below as well as table 1.

according to its form, a process is in its nature either litigious or non-litigious and in respect of its method of application, a process is either adjudicative or non-adjudicative.¹⁷ This seemingly elementary classification affects every functional aspect of any form of process.¹⁸ A study of form in regard to function focuses attention on both the limitations as well as the positive attributes of the various forms of process. This in itself launches a further inquiry into the principles that determine the form, limits and functions of various processes that give each unique qualities.

Fundamental to the primary ADR processes of negotiation,¹⁹ mediation²⁰ and arbitration²¹ is that they are consensual. In the most basic terms, this means that the primary processes do not function on the basis of coercion - that they are governed by non-authoritarian principles. This is fundamental to any understanding of the theory and principles of ADR.

A core principle is that of disputant consensus. The mutual consent of the disputants is foundational. In the case of all three primary processes, the disputants by agreement select the process, devise or agree to the rules of conduct and accept the outcome. No external sanctions are applied as in the case of court proceedings. It is therefore possible for a party unilaterally to terminate the process.

In the case of the processes of negotiation, mediation and arbitration, the principle of disputant consensus is generative. From this cardinal principle, other subsidiary principles have evolved: disputant autonomy, self-reliance through problem solving, disputant participation, processual flexibility and fairness based on processual equality. To a greater or lesser extent, these consensual principles are infused into the primary processes. The generative quality of these principles not only inures in the primary

¹⁷ See, further, 4.3.1 below.

¹⁸ See, further, 4.3.2 below.

¹⁹ For a detailed discussion of the process of negotiation, see chapter 5 below.

²⁰ For a detailed discussion of the process of mediation, see chapter 6 below.

²¹ For a detailed discussion of the process of arbitration, see chapter 7 below.

processes but is also projected in their progeny, the hybrid ADR processes identified as rent-a-judge, the mini-trial and mediation/arbitration.²²

The discussion of the word "alternative" comes full circle. Commencing with contradictions expressed in an ADR/litigation dichotomy, it ends in harmonisation - a move from discontinuities to continuities. The progression explains the system inherent in ADR. Use of the dichotomy is necessary to discover the consensual principles of ADR but, having achieved this, these principles exert their own independence. By tracing the continuity of the consensual principles of ADR, it is evident that they create an affinity between the various context-based applications of ADR and form the foundations of a systematic and unitary structure of theory. Tested within a theoretical model, it will become evident that the consensual principles of ADR are authentic and independent, therefore being capable not of competing with, but rather complementing the institutionalised system of court proceedings.

The meaning of the word "dispute" also has intriguing dimensions.²³ From a legal perspective, the word "dispute" is problematic. The legal view of a dispute is extremely limited mainly because substantive and procedural requirements transform a dispute to meet the demands of the legal system. As a result, there is little understanding of the dispute in its non-legal context - as an event that expresses personal, community or social antipathies that originate in a grievance base that is transformed by a process of "naming, blaming and claiming". By means of this process of transformation, a rejected claim becomes a dispute that once again is transformed by non-legal processes, which if unsuccessful, recourse is then had to the legal system. The theory of the dispute and disputing contains some salient lessons. What it teaches is that, just as a dispute is transformed procedurally within the legal system, so too non-legal disputes are transformed by informal processes. The principles of dispute transformation are therefore also extremely important to the theory of ADR.

²² For a detailed discussion of the hybrid processes, see chapter 8 below.

²³ See, further, 2.2 below.

As mentioned above,²⁴ in practice ADR consists of a number of context-based applications that absorb the culture of the dispute - the process itself as well as the setting and context of a dispute are integrated. This speaks not only about the concept of a dispute but more importantly, about the manner in which ADR processes transform a dispute. Unlike the authoritarian and sanctioned rules of civil procedure that divorce the dispute from its culture to bring it into conformity with the formal procedural requirements of the system of court proceedings, the consensual underpinnings of ADR processes spurn any externally imposed institutional rules. This is true of all three primary processes. In negotiation, through their bilateral interaction, the disputants devise their own processual standards; in mediation, processual control vests in and is derived from the mediator while control of the content and outcome of the dispute rests with the disputants and lastly, in the case of arbitration, the arbitrator is bound by the contractually predetermined arbitration agreement. In no instances are externally imposed processual rules applied. The transformation of the dispute is internal to the process itself and the degree of intervention is commensurate to the competence vested in the neutral third party to transform the dispute. Once more the consensual principles of ADR emerge, as they are in this instance fused with the theory of dispute transformation.

The word "resolution" is difficult to interpret because its meaning is seemingly so plain and uncomplicated. However, in the vocabulary of ADR, "resolution" has technical nuances. ADR theory has it that every process produces an outcome and each outcome is in turn qualitatively distinct: binding or non-binding, coercive or consensual.²⁵ Once more a dichotomous classification is apparent. These emergent contradictions are resolved by reliance on a theory of decision making. The decisional methodologies of the processes of negotiation and mediation are purely consensual and therefore based on joint decision making. Even the intervention of the mediator does not alter the consensual decisional method of the process of mediation for the intervention remains unobtrusive, being confined to processual control. Consequently, in both instances the outcome is always consensual, non-binding and directed at the adjustment of

²⁴ See 1.3 above.

²⁵ See, further, 2.1.4 below.

relationships. The position is a little different in regard to arbitration: its decisional methodology is adjudicative and its outcome binding. However, the outcome remains consensual because the disputants agree to be bound by adjudicative decision making, choosing the certainty of a binding award rather than a consensual realignment of their relationship. In keeping with its theory and principles, ADR outcomes are consensual.

1.5 Conclusion: processual pluralism

ADR consists of systems within a system. The average lawyer would find this a difficult conundrum to solve because the legal notion of process is founded on the paradigmatic principles of the process of litigation. The legal conception of process is that it functions within a unitary system of consistent and uniformly applied rules that are directed at the resolution of single issues. Processual pluralism is therefore alien to conventional legal thought. The vital clue that solves the conundrum lies in the notion of processual pluralism.

In the text that follows, it will become evident that ADR is basically a system of procedural pluralism. ADR consists of multiple systems of process that share a single theoretical system of processual principles. Each process is within itself independent but not autonomous because ultimately each is dependant on a unifying body of theory and principle. Processually, ADR combines several processes within its system: negotiation, mediation, arbitration as well as the rent-a-judge, mini-trial and mediation/arbitration processes. Each process is distinct in its form and specialised in its function but all share common consensual principles in a central structure of processual theory. These principles have already been identified, the most salient being: disputant consensus, disputant autonomy and participation, processual flexibility and decision making through problem solving. The theory of ADR is thus based on the concept of processual pluralism.

Essentially, this thesis explores the theory and principles of ADR as a pluralistic system of dispute resolution. Because the concept of a unitary procedural system is so ancient and that of processual pluralism so new, this thesis is admittedly tentative and possibly even incomplete. Yet, this reflects not so much on the thesis but on the fact that the

theory and principles of processual pluralism are as yet under-developed in Western legal science. There will undoubtedly be others who will supplement the various themes of this thesis and even reject some of its premises. This would be a wholesome development because it would indicate that the system of ADR is maturing into a systematic field of science.

The thesis is therefore only a preliminary contribution to the development of the theory and principles of ADR. Hopefully, in time to come, ADR will be recognised as a science on its own and this will eventuate in the adjustment of the rigours of litigious practices as well as in the revision of public adjudicative norms.

CHAPTER 2

INTERPRETATION

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2.1 The alternatives within the alternative

2.1.1 The quest for perspective

The word "alternative" is very much in vogue these days. The terms "alternative housing", "alternative medicine", "alternative music", "alternative life-style" and the like, have become colloquial. "Alternative dispute resolution", commonly known by the acronym "ADR" is yet another phrase that can be added to the list.

A comprehensive description of ADR is difficult to formulate. ADR is an umbrella term that applies to numerous situations and means different things to different people. To the businessperson, ADR is a confidential and expedient method of resolving a commercial dispute without recourse to the unwanted publicity of a court hearing not to speak of the tardiness of its procedure. The same would apply to the corporate sector, the added advantages being that ADR offers an efficient means of settling disputes between parties who are involved in continuous relationships as in the case of inter-corporate disputes, differences between subsidiaries of the same holding company or even major disagreements between directors of the same company. Environmentalists regard ADR as a method of upholding the public interest in areas or situations where the environment is endangered. In the field of labour relations, ADR has become an established means of resolving disputes between management and labour. For those involved in community projects, ADR provides useful mechanisms for resolving neighbourhood disputes according to community values. Personal relationships are also affected: psychologists and social workers have discovered that ADR can be used to settle satisfactorily family and marital disputes. But what does ADR mean to the lawyer?

This is not an easy question. One of the purposes of the legal system is to resolve human controversy according to public norms and standards. The legal system not only defines and determines the nature and scope of these norms but also maintains them by means of their enforcement through the judicial system. Dispute processing is intrinsic to the judiciary. In functional terms, the method of judicial dispute resolution is conducted by means of the process of litigation.¹ Essentially, litigation is the institutionalised process adopted by the court system as the method of resolving public disputes. In this context, the word "alternative", as it is used in the rubric "alternative dispute resolution" could be contentious if its meaning is misunderstood. Does the use of the word "alternative" indicate an intrusion into the legal domain of dispute processing and dispute resolution? Does "alternative" signify that ADR is a system of dispute resolution directly

¹ In this work the term "litigation" is used in its widest sense to denote any form of contradictory proceedings heard in a court of law and commenced either by action on summons or application on notice of motion. The term is used in the knowledge that the process of litigation includes a number of stages that rarely lead to full adjudication at a trial.

in opposition to the system of judicial dispute resolution? Questions of this nature can only be clarified by a critical interpretation of the word "alternative".

The word "alternative" has a number of connotations: unorthodox, unconventional, different, informal, non-conformist. Although these words express some of the likely meanings of "alternative", they fail precisely to explain the relationship between ADR and litigation. A more technical meaning for the word "alternative" is needed. Reference to a dictionary definition seems to be a suitable starting point.

The *Oxford Concise Dictionary*² describes "alternative" as "(of two things) mutually exclusive; ... one of more than two possibilities". The word "alternative" is therefore capable of two meanings: either the choice between two possibilities, the one being exclusive of the other, or, the election of one possibility out of many. The word "alternative" can thus be given a restrictive or an extensive interpretation.

In the context of ADR, a restrictive interpretation of "alternative" assumes the existence of two systems of dispute resolution that are mutually exclusive to each other. Litigation is obviously the other mainstream system of dispute resolution to which ADR processes are offered as an alternative.³ Given a restrictive interpretation, the presumption is that the process of litigation and ADR processes are antithetical to one another. This interpretation assumes and intensifies an ADR/litigation dichotomy.⁴

Moreover, a restrictive interpretation of "alternative" also permits the isolation and comparison of one or more ADR processes as being mutually exclusive in regard to other ADR processes. The focus is transferred to whether or not certain processes should be recognised within the system of ADR. However, this approach maintains the ADR/litigation dichotomy because the process of litigation is still excluded as one of the

² 7 ed (1982).

³ Faris "Reconciling ADR and judicial dispute resolution" 7.

⁴ See, further, 2.1.2 below.

options for dispute resolution - the choice of alternative processes remains limited within the system of ADR.⁵

An extensive interpretation of "alternative" permits the selection of one dispute resolution process out of a choice of many others, including litigation. ADR processes are not regarded as substitutes for litigation but instead, litigation is treated as one of the available options that might be suitable for the resolution of a dispute in specific circumstances. This interpretation attenuates the ADR/litigation dichotomy.⁶

Each interpretation of "alternative" will be examined critically not only in theoretical terms to establish the scope of this work but also to determine the functional potential of the system of ADR in relation to the legal system.

2.1.2 The alternative to litigation

A restrictive interpretation of "alternative" emphasises the ADR/litigation dichotomy in its fullest sense. ADR processes and litigation are counter-positioned. This leads to the inevitable assumption that they are mutually exclusive. The result is an oversimplified equation: all non-litigious processes are ADR processes.⁷ Reasoning of this nature

⁵ See, further, 2.1.3 below.

⁶ See, further, 2.1.4 below.

⁷ The proposition that all non-litigious processes are ADR processes is not a precisely defined concept but is formulated by implication from the works of various commentators. Trollip **ADR 7** defines ADR in the following terms: "Alternative or appropriate dispute resolution generally refers to the processes involving the use of a neutral third party ADR facilitator to ease the settlement of disputes *outside court procedures*." (Own italics) The Bureau of National Affairs, in its authoritative report of 1985, expressly promotes the ADR/litigation dichotomy in the title of the report that reads: "Resolving disputes without litigation." This view is also promoted on 1 of the report: "ADR systems are essentially substitutes for the courts and federal agencies in resolving conflicts between the two or more parties." Pears **Beyond Dispute 1** defines ADR as "... the generic term that has been widely adopted in the English-speaking world to describe organised dispute resolution *outside the courts*." (Own italics) Reikert "ADR: quo vadis?" 32 concedes that: "ADR means different things to different people" and then proceeds to note three different perspectives relating to ADR, namely, "... all forms of dispute resolution other than litigation ... those processes which leave the form and content of the final settlement (if any) to the disputing parties themselves ..." and lastly "... those non-litigious processes which involve

leads to an adulteration of terminology and also dilutes the scope and function of ADR processes. Riskin and Westbrook⁸ aptly summarise the situation

Most people, lawyers included, are simply not familiar with the different processes and therefore tend to lump nearly all non-litigious methods into one large ADR blob.

In the context of the ADR/litigation dichotomy, ADR offers a portfolio of processes that may be applied as alternatives to litigation. The assumption is that all non-litigious processes are mutually exclusive of litigation. As a result ADR processes are posed as a viable alternative to the process of litigation. This reasoning is subject to stringent criticism.

There is no doubt that ADR processes are different to the process of litigation. If the word "alternative" is used to indicate these differences, then the ADR/litigation dichotomy is functional in that it accentuates instrumentalist considerations regarding the advantages and disadvantages of both systems of dispute resolution. However, if the word "alternative" is used in the context of the ADR/litigation dichotomy to indicate two parallel systems of dispute resolution in competition with one another, this interpretation simply does not reflect reality. The mere fact that the two systems are different from each

the intervention of an outside third party". After posing these three considerations, he opts for "all non-litigious forms of third party intervention". Similarly, Pengilly "ADR: the philosophy and the need" 81 comments: "There has to be a better way of doing it than resorting to litigation as the only way of solving problems." Further in the same work at 83 he pertinently contrasts ADR and litigation in the following terms: "ADR is not a 'soft' option to litigation. Rather ADR is a rapidly developing science in its own right. Despite its complexities, it is proving to be an effective alternative method to litigation ...". In this context, he remarks at 87: "... ADR is a process of solving problems without the assistance of the courts". The ADR/litigation dichotomy is based upon the distinction between non-litigious and litigious processes hence dividing the field of application into court-based processes and ADR processes.

⁸ **Dispute Resolution and Lawyers** 7. A similar view is held by Bush "Defining quality in dispute resolution" 343: "... the litigation/ADR dichotomy obscures the many important distinctions between *different* ADR processes, lumping them together as if ADR was one homogeneous institution set apart from the courts". See also Menkel-Meadow "For and against settlement" 485; Scott-Macnab "Terminology and ADR" 20-21.

other does not justify the assumption that they are in competition with one another or that the one is a substitute for the other.

ADR cannot replace or compete with the process of litigation. Litigation is an institutional method of dispute resolution; it is the conventional method of dispute resolution that serves the court system. The deliberative and adjudicative function of the judiciary is exercised through the medium of the courts. In constitutional terms, the judiciary, as one of the three components of government, is responsible for the interpretation, application and enforcement of the social values embodied in substantive legal principles contained in legislation and common law. Accordingly, the judiciary fulfils the dictates of its governmental function that are directed at the public ordering of society. In more specific terms, the judiciary is responsible for the maintenance of public norms and standards for the good of society as a whole. Even if ADR was construed as being in a position independent of the mainstream system, the authoritative standing of legal norms as well as their enforcement under the sanction of the State, establish the courts as the final arbiters of all disputes. Litigation is therefore the process that gives practical expression to public norms and values. No private system of dispute resolution can compete with or replace the process of litigation or exclude its public function.⁹ Hence to juxtapose ADR and the process of litigation and then to assume that the former is a suitable substitute for the latter, is to defy reality. This view by no means negates the distinction between non-litigious and litigious processes. Rather, it points to the futility of artificially maintaining the ADR/litigation dichotomy in its plenary form.

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This view is primarily based on the comments of Sir Laurence Street "The court system and ADR" 5. His standpoint is succinctly encapsulated on 6 as follows: "The indispensable starting point of co-relating the court system and ADR procedures is that proposition that the judicial institution with its inherent sovereign quality, cannot be confronted by any alternative mechanism. We cannot, for example, countenance any alternative parliament or legislature ... Again, we cannot countenance any alternative to the executive authority of the sovereign such as, for example, a military executive power structure; ... And so it is with the judicial branch of government, the court system; we recognise the need for, and we provide, additional mechanisms to assist the court system in the fulfilment of its sovereign dispute-resolving function. But these mechanisms are not, and cannot be recognised as alternative, in the true sense of the word, to the court system." See also Street "Language of ADR" 194.

There is yet another criticism which arises from a restrictive interpretation of the word "alternative". Any absolutisation of the ADR/litigation dichotomy is based on the supposition that litigation is the norm. This is not necessarily true. Although litigation might be the paradigm for dispute resolution, litigation is not the norm. This rather enigmatic statement is explained by the fact that courts are the final but not the only arbiters of a dispute. In fact most disputes are not resolved by the courts precisely because the majority of disputes are non-legal. Even legal disputes are rarely resolved by the courts. Reality is that most disputes are resolved within a non-legal context by means of informal dispute resolution processes such as negotiation and mediation. This applies even in the case of legal disputes. Consequently, very few disputes are filed as court proceedings and if so, approximately 95% are settled before trial by informal methods of dispute resolution. Those disputes that eventually do go to trial represent a minute fraction of the total number of disputes if measured on a dispute gradient.¹⁰ Seen from this perspective, litigation is not the norm for dispute resolution. The situation is inverted: informal methods encompassed within the system of ADR are actually the norm. Given this perspective, the ADR/litigation dichotomy based upon a restrictive interpretation of "alternative", is contrived because its premises are fallacious.

¹⁰ The view that litigation is not the norm is widely held by commentators. See Sander "ADR: an overview" 1-2 who on the basis of this assertion concludes that ADR is therefore not founded upon the need to find a substitute for litigation. Astor and Chinkin **Dispute Resolution** 29 respond in a similar manner: "[W]ithin Western society, where litigation is the dominant method of dispute resolution, lawyers and courts play only a marginal role in resolving disputes and only a small percentage of these disputes is ever brought into the courts". Goldberg, Green and Sander **Dispute Resolution** 5 argue that ADR should have very little effect on court congestion precisely because so many disputes are settled out of court by informal methods: "Only a small portion of [these] perceived injuries result in court filings and only a similarly small portion of the latter consume significant amounts of judicial resources. Some disputes that cannot readily be settled through negotiation are resolved by mediation or arbitration; of those that do lead to court filings, somewhere around 90 to 95 percent are settled without the need for a full trial." Numerous empirical studies support the statistic that 90 to 95 percent of the proceedings commenced in court do not reach the trial stage: Galanter "Landscape of disputes" 28; Pickering "Settlement negotiations" 31; FitzGerald "Grievances, disputes and outcomes" 29. See also Fulton **Commercial ADR** 13-15; Faris "Reconciling ADR and judicial dispute resolution" 14.

Although a restrictive interpretation of "alternative" as it is placed in the context of the phrase "alternative dispute resolution" points to the differences between ADR processes and the process of litigation, the maintenance of this position is purely academic. The ADR/litigation dichotomy is only functional when it establishes a model for assessing the practical application and limitations of the processes of both systems of dispute resolution.

2.1.3 The alternatives within the alternative

A restrictive interpretation of "alternative" commits the word to the election of one of two mutually exclusive options. Applied to the internal dynamic of ADR, a restrictive interpretation of "alternative" forces a selection of options between various non-litigious processes on the basis of their distinguishing characteristics. The emphasis is shifted. The issue no longer concentrates on the ADR/litigation dichotomy but is occupied with the question of whether or not all non-litigious processes fall within the scope of ADR.

This particular interpretation of "alternative" focuses on the intrinsic nature of various ADR processes. In many respects the discussion that follows partially pre-empts a later chapter dealing with the classification of ADR processes.¹¹ Both portions of the work are integral to each other. Common to both is an investigation of the internal dimensions of ADR as a system of dispute resolution.

ADR is founded upon three primary processes: negotiation, mediation and arbitration.¹² Each primary process is unique in itself but common to all is that they are consensual in nature. The disputants voluntarily agree to use a particular process and the dispute is settled on the basis of their mutual consent. Notwithstanding this common characteristic, the differences between each primary process are distinct. These differences form a basis for comparison which in turn identifies alternatives within an alternative.

¹¹ See 4.2 below for a classification of ADR processes.

¹² See 3.1 below for an overview of the primary processes.

A fundamental distinction between the primary processes relates to the relationship between the various participants. Quite clearly the relationship is dyadic as far as negotiation is concerned. On the other hand, mediation and arbitration point to a triadic relationship. Put differently: the parties to negotiation are involved in a bilateral relationship whereas in the case of mediation and arbitration the relationship is trilateral on account of the role played by the neutral third party.

The question arises as to whether or not negotiation is a substantive ADR process in the absence of a third-party neutral. This issue has some merit. Negotiation has established processual characteristics¹³ and is conducted according to specific strategies.¹⁴ However, the balance of power is uncontrolled, often leaving the weaker party at the mercy of the stronger party. In this sense, the process is subjective.

The same cannot be said of mediation and arbitration. The participation of a third party neutral is a determinant of the respective processes. The role of the third-party neutral is mainly to conduct and determine the process, move the process through its various stages and most importantly, balance the power positions between the disputants in order to ideally achieve a fair and lasting settlement. For these reasons, certain commentators regard mediation and arbitration as substantive ADR processes to the exclusion of negotiation.¹⁵ Although many non-arbitral ADR processes are regarded as

¹³ See, further, 5.2 below.

¹⁴ See, further, 5.3.2 below.

¹⁵ For an example of this type of reasoning, see Riekert "ADR: quo vadis?" 32. Riekert expressly excludes negotiation as a substantive ADR process, contending in the first place that negotiation may be conducted without the intervention of a third party neutral; secondly, when negotiation processes are used as a strategy by third party neutrals, the negotiation process is no longer discrete because of its assimilation within a process based on third party intervention. This line of reasoning enables Riekert to maintain that ADR consists of "all non-litigious forms of third party intervention". The BNA Report 11 acknowledges that negotiation is often regarded as an ADR process but does not regard negotiation as an independent ADR process: "[N]egotiation is a term that is associated with ADRs' but is essentially a combination of med-arb and conciliation. Negotiation can, and is often, undertaken without the presence of a third-party neutral. Negotiation in the context of ADRs implies the presence of a neutral ... Therefore, negotiation may be closer in some disputes to med-arb, and in other disputes to conciliation". Similarly, Street "Language of ADR" 196 distinguishes between the form of structured negotiation used when a third party neutral is involved and bilateral negotiation which he describes as "... the long-

being structured forms of negotiation, negotiation is not always recognised as a primary and independent ADR process. According to this view, the word "alternative", is restrictively interpreted to exclude negotiation as a legitimate ADR process.¹⁶

A restrictive interpretation of "alternative" also addresses the option of choosing between adjudicative and non-adjudicative processes.¹⁷ The dividing line is quite clear: arbitration is adjudicative whereas negotiation and mediation are non-adjudicative processes. Because the process of arbitration is adjudicative, this process is immediately associated with the process of litigation.¹⁸ On account of its adjudicative dynamic, arbitration is

established and well understood interlocutory procedure of formal or informal settlement or pre-trial conference". If by this, negotiation is acknowledged as a primary process, then a very limited view of negotiation as a substantive process is expressed. Notwithstanding these opinions, they remain individual since no general trend excludes negotiation as a primary process. For instance, two seminal Australian works respectively include and exclude negotiation as a substantive ADR process. Astor and Chinkin **Dispute Resolution** deal extensively with the process of negotiation whereas Fulton **Commercial ADR** makes no mention of negotiation. Except for the BNA Report above, this controversy does not arise in the American literature where, instead, the process of negotiation is given extensive treatment and approached critically; for a review of the American views on negotiation, see chapter 5 below. Because the ADR movement is yet in its initial stage of development in South Africa there is a related lack of domestic sources. Thus no definitive statement can be made in regard to the South African situation. Although this does not necessarily indicate a trend, Trollip **ADR**, deals only with ADR processes that involve third-party neutrals and negotiation is ignored as a primary process. Van Vuuren "Alternatiewe dispuutbeslegting", in his classification of ADR mechanisms, excludes the process of negotiation.

¹⁶ See Calver "Commercial arbitration" 36; Astor and Chinkin **Dispute Resolution** 59.

¹⁷ Riskin and Westbrook **Dispute Resolution** 2-6 clearly distinguish between adjudicative and consensual processes and classify arbitration as an adjudicative processes. This view is subject to criticism in that arbitration is a consensual adjudicative process in so far as the parties agree to submit to arbitration. The correct distinction is between adjudicative and non-adjudicative processes. However, there is unanimity among commentators that arbitration is an adjudicative process. See, for instance, Astor and Chinkin **Dispute Resolution** 115; Nolan-Haley **ADR** 119; Fulton **Commercial ADR** 21.

¹⁸ Goldberg, Green and Sander **Dispute Resolution** 189 differentiate between public and private adjudication and indicate that arbitration is the form of the privatised adjudication. Fulton **Commercial ADR** 67 comments that arbitration is an attempt to achieve a judicial outcome and that "... parties (and the courts) expect the arbitrator to act 'judicially'. Little wonder that arbitration is sometimes

regarded as being a hybrid of the process of litigation. The effect of this reasoning is to extend the ADR/litigation dichotomy: genuine ADR processes are not only non-litigious but also non-adjudicative.¹⁹

The maintenance of these distinctions leads to strained conclusions that tend to confuse theory and practice. Although a literal interpretation of "alternative" might contribute to a deeper understanding of the internal dynamic of ADR, reliance on these theoretical premises could severely restrict the scope and function of ADR.

2.1.4 The appropriate alternative

Committing the word "alternative" to a restrictive interpretation entrenches the ADR/litigation dichotomy. Very little can be achieved by positioning these two systems of dispute resolution in absolute terms. In practice, both systems are compatible. Disputants are not forced to choose unequivocally between either litigation or an ADR process. In the normal course of events, informal methods are usually applied and if they fail, recourse is had to litigation. However, in certain instances the dispute may be of such a nature that litigation is a first and only option for the resolution of a dispute.²⁰ The

referred to as "litigation without wigs". Calver "Commercial arbitration" 38 expresses the same opinion: "Governments have recognised that arbitration is the dispute resolution method closest to the judicial model and that they are able to save costs by legislating for the use of arbitration."

¹⁹ This is not a general approach and the debate is isolated to Australia only. An extreme view is expressed by Angyal "Alternative dispute resolution" *Legal Issues* (Australian Legal Group no 3, December 1987) 11 as cited in Fulton **Commercial ADR** 15: "The key difference between ADR and those traditional techniques of litigation and arbitration is that ADR techniques are used to produce a resolution by agreement to the dispute, while litigation and arbitration are processes by which a result is imposed upon the parties." Fulton discounts this approach as being too narrow and acknowledges arbitration as a substantive ADR process. Pears **Beyond Dispute** 3 26 takes an ambivalent stance in that he describes arbitration as a "semi-alternative". Pengilly "ADR: the philosophy and the need" 83 makes the rather obscure statement that ADR "... is proving to be an effective alternative method to litigation and *arbitration* ..." (own italics), thereby seemingly rejecting arbitration as a substantive ADR process.

²⁰ Astor and Chinkin **Dispute Resolution** 54-58 enlist some of the advantages of litigation: protection from power imbalance, the enunciation of public values and

nature of each type of dispute dictates the type of process that ought to be used for its resolution.

This approach lends itself to an extensive interpretation of the word "alternative": the election of one of a number of available dispute resolution options. In the context of an extensive interpretation, ADR and judicial dispute resolution are placed in a co-ordinate relationship.²¹ Litigation is merely one of a number of options that may be selected to settle a dispute.

By applying an extensive interpretation to the word "alternative" a functional element is introduced. Carping on issues regarding the ADR/litigation dichotomy becomes theoretical. The focus is on the functional assessment of a suitable process for the settlement of a particular type of dispute. The attributes of a particular process, including litigation, are carefully considered to determine what would best be suited to the resolution of the dispute in question. In this setting, the issue relates to the selection of an appropriate dispute resolution process. In no manner is litigation excluded as an option. Litigation is yet another dispute resolution process, albeit a conventional method of dispute resolution sanctioned by the State. The objective is to select an appropriate dispute resolution process, litigation being one of the considered alternatives.

An extensive interpretation permits the word "alternative" to include ADR processes as being additional to the mainstream system of dispute resolution. ADR processes are true alternatives to litigation but without the polarity expressed in the ADR/litigation dichotomy. They are recognised as being supportive of the system of judicial dispute resolution which remains the basic point of reference. ADR provides additional dispute resolution processes. If they should fail or are not suited to the needs of the disputants, recourse may be had to the formal justice system.²²

procedural safeguards. See also Pengilley "ADR: the philosophy and the need" 89; Banks "ADR: a return to basics" 572.

²¹ Faris "Reconciling ADR and judicial dispute resolution" 10.

²² See Sander "ADR: an overview" 2; Pengilley "ADR: the philosophy and the need" 93; Street "The court system and ADR" 10; Street "Language of ADR" 194 198.

This approach relates to the mainstreaming of ADR into the formal justice system. ADR is placed in a complementary relationship to the system of judicial dispute resolution. The result is to upgrade the function of ADR within the legal system and to give impetus to its development as a system of dispute resolution that has the potential for dealing with controversy even at the grievance level. Moreover, the integration of ADR within the formal justice system should, in economic terms, lead to a considerable saving of court time and court administration and reserve the valuable resource of judicial expertise for more serious cases. An extensive interpretation of "alternative" therefore renders the ADR/litigation dichotomy redundant. Consequently, both systems of dispute resolution become supportive of each other and could combine to create a functional dynamic for the resolution of disputes.

In the context of an extensive interpretation, the use of the word "alternative" is misleading. The words "appropriate" or "additional" are better suited for the acronym ADR because they aptly describe the functional importance of ADR within the mainstream system of dispute resolution. However, at this stage it is too late to recommit the wording of the rubric "alternative dispute resolution".²³

2.1.5 Conclusion: co-ordinate systems

A restrictive interpretation diverts ADR from the mainstream model, thereby promoting and maintaining an ADR/litigation dichotomy. The opposite applies in respect of an extensive interpretation of the word "alternative".

According to an extensive interpretation, the word "alternative" is expressed as the true alternative - the possibility of selecting one out of many processes (including litigation) on the basis of its form and function, in order to appropriately resolve a particular dispute. Consequently, the continuities between the system of ADR and judicial dispute resolution, rather than the discontinuities, are accentuated. An extensive interpretation

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On account of the futility of the ADR/litigation dichotomy, many commentators have indicated a preference for the words "appropriate" or "additional" as a replacement for the word "alternative": Astor and Chinkin **Dispute Resolution** 69-71; Street "The language of ADR" 194; Pears **Beyond Dispute** 1; Trollip **ADR** 7; Faris "Reconciling ADR and judicial dispute resolution" 11.

therefore regards both systems of dispute resolution as being co-ordinate rather than rival. As a result, the functional attributes of both informal and formal dispute resolution processes are emphasised, thereby confirming the continuity between informal processes and their institutionalised counterparts.

2.2 THE MEANING OF DISPUTE

2.2.1 Explaining the setting

One of the essential functions of the legal system is to deal with controversy and dispute. Yet, legal literature contributes very little to the broader debate relating to the meaning, origin, nature, content and transformation of a dispute. This is also true of South African legal literature. Perhaps the reason is that lawyers tend to take a very narrow view of a dispute. Understandably, a dispute is mainly conceptualised as a legal dispute. The technical demands of the system of procedure as well as the requirements of substantive law restrict the legal concept of a dispute to the ambit of rights and remedies. A dispute is therefore formulated as a legal abstraction that in many respects is at odds with the reality of a dispute within a particular social or cultural context. Consequently, the legal notion of a dispute tends to be based on a dichotomy between a legal and a non-legal dispute.

The tendency in the legal sphere is to regard a dispute as being unique to the legal system, thereby isolating the legal dispute from the universe of disputes and dispute processing. This mindset is extremely restrictive for essentially the continuities between the legal dispute and other types of non-legal disputes are disregarded. For present purposes, criticism lies not so much in the specific manner in which the legal system transforms a dispute but rather in its failure to regard the formulation of a legal dispute as a continuation of the transformation of a non-legal dispute.

The formulation of the legal dispute and the related method of dispute processing does not function beyond the normal boundaries of the social process but is in fact an integral part of that process. Within the legal environment, a dispute might justifiably be regarded as an ultimate event in the sense that recourse is made to the system of legal process in

order to ensure its final and authoritative disposition. However, this should not obscure the fact that a dispute does not originate within the legal system. A dispute has a critical path. By means of a process of “naming, claiming and blaming”²⁴ a grievance is transformed into a dispute; thereafter the dispute undergoes a number of transformations that are directed at its resolution, the final transformation occurring within the legal system if its resolution cannot be achieved by non-legal methods.

A distinctive feature of the source material is that it has been written mainly by sociologists, social psychologists and social anthropologists, and not by lawyers. Their research has produced a body of literature that conceptualises a dispute and dispute transformation as integrated social phenomena. This has important implications for any system of dispute resolution, albeit legal or non-legal, because the word “dispute” is explained in independent social terms, devoid of the norms and values that influence the definition and transformation of a dispute within a particular system of dispute resolution. On the basis of the source material it is thus possible to establish objective criteria for the evaluation of the word “dispute”.

The source material also has important consequences for both ADR and the legal system. In relation to the legal system, the continuity between a legal dispute and the broader social process is emphasised. For ADR, the conceptualisation of a non-legal dispute justifies its social objectives and validates its methods of dispute processing. Most important of all, though, is that the word “dispute” can be interpreted not only within the framework of a legal/non-legal dispute dichotomy but also as a broader social concept.

2.2.2 Contextualising the concept “dispute”

Definitions are excellent starting points but otherwise inadequate, because they are usually phrased to suit the demands of a particular theory. This is certainly true in regard to definitions of the term “dispute”.

²⁴ See, further, 2.2.2 below.

Mather and Yngvesson²⁵ refer to a dispute in the following terms: "By a dispute we mean a particular stage of social relationship in which conflict between two parties (individuals or groups) is asserted publicly - that is, before a third party." The authors are describing a dispute from their particular vantage point, namely, at the stage when a dispute has been submitted to a third party.²⁶ Miller and Sarat, on the basis of empirical studies done in respect of the grievances experienced by average households, explore the origin of disputes in grievances and claims. Against this background, "[a] dispute exists when a claim based on a grievance is rejected either in whole or in part".²⁷ Dealing with the specific topic of grievance processing, Lempert is of the view that "... disputes [are] controversies involving two (or more) parties, each making a special kind of claim: a normative claim of entitlement".²⁸ In an extensive study on dispute institutions in society, Abel gives the widest possible definition of a dispute, stating that "... a dispute is nothing more than a form of social relationship, a developmental stage through which any relationship may pass".²⁹ The ethnographic attitudes towards disputing in three small American neighbourhoods were studied by Merry and Silby. In this context, disputes are defined as "... cultural events, evolving within a framework of rules about what is worth fighting for, what is the normal or moral way to fight, what kinds of wrongs warrant action, and what kind of remedies are acceptable".³⁰ Lastly, Felstiner, Abel and Sarat, in their seminal work on dispute transformation, comment: "[D]isputes are not things: they are social constructs; their shapes reflect whatever definition the observer gives to the concept".³¹

A basic observation is that there is no correlation between any of these definitions. This is merely an observation and not a criticism, for each definition is valid in its own

²⁵ "The transformation of disputes" 776.

²⁶ 777.

²⁷ "Grievances, claims and disputes" 527.

²⁸ "Grievances and legitimacy" 708.

²⁹ "Dispute institutions in society" 226-227.

³⁰ "Reexamining the concept of dispute" 157.

³¹ "The emergence and transformation of disputes" 631.

particular context. However, the definition given by Felstiner and his colleagues is preferred. This might seem surprising because it is the vaguest of all. That is precisely why it has merit - it recognises that a dispute is beyond objective definition because every dispute has experiential dimensions.

Disputes and disputing are one of the many facets of interpersonal relationships and hence inextricably woven into the fabric of the larger social process. Every dispute is an event that is integrated in to the social dynamic. Any attempt at precise definition therefore of necessity becomes contrived. As in the case of loving, grieving, rejoicing and the like, a dispute forms an integral part of interpersonal and social relationships, based on feelings and emotions. A dispute is not a concrete event capable of statistical evaluation nor can it be measured like the molecules of an atom or the air pressure in a tyre. Ultimately, a dispute is beyond precise definition because in the final instance a dispute is composed of the differing perceptions and values of the disputants.³²

This leads to one other observation. A dispute is not an ultimate event. The dynamic underlying every dispute is that it is directed towards its own resolution. Being directed at its resolution, a dispute is necessarily in a state of flux. A dispute never remains static because the tendency towards its resolution moves the dispute through a process of transformation. The process of transformation alters the content of the dispute to such an extent that a disparity eventually exists between the original dispute and the dispute as it has been transformed to meet the demands for its resolution.

These particular characteristics of a dispute bear important consequences for any system of dispute resolution. Because a dispute is an event that defies precise measurement, the norms and processes of the system of dispute resolution to which the dispute is addressed, have a vital impact on the manner in which substance is given to a dispute by means of its reformulation. The reformulation of a dispute entails its

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This concept is eloquently expressed by Galanter "Landscape of disputes" 12: "They (disputes) are not some elemental particles of social life that can be counted and measured. Disputes are not discrete events like births and deaths; they are more like such constructs as illness and friendships, composed in part of the perceptions and understanding of those who participate in and observe them."

transformation according to the norms and procedural standards of the system of dispute resolution concerned.

A systematic analysis of dispute transformation has provided valuable information about the nature of a dispute. Mather and Yngvesson show that the definition of a dispute shifts and changes once it has been presented to a third party.³³ A dispute is redefined as a result of its being rephrased by means of a process of narrowing or expansion. Narrowing signifies the process through which categories that classify events are imposed on a particular event or series of events thereby defining the subject of a dispute to accommodate conventional systems of dispute management.³⁴ Expansion does not necessarily mean that the dispute is escalated. Rather, it refers to the redefinition of a dispute in order to incorporate changing conditions not previously accepted by a third party operating within the conventional framework.³⁵ What is confirmed is that a dispute is not a static event but is in a state of constant transformation as the perspectives of the disputants and other participants redefine and rephrase it.³⁶

Mather and Yngvesson focus specifically on dispute transformation after a dispute has been addressed to a third party.³⁷ The dispute itself is the starting point. However, there is another dimension of a dispute: the emergence and transformation of a grievance into a dispute.

Felstiner, Abel and Sarat responded to the need for a systematic examination of emergence and transformation of a grievance into a dispute. The sub-title of their article: "naming, blaming and claiming", clearly encapsulates the various stages of dispute transformation. Unique to their work is that the disputants are pivotal to their study of a

³³ "The transformation of disputes" 776-777.

³⁴ 778 783.

³⁵ 779 797.

³⁶ 776.

³⁷ 777.

dispute, representing a shift of emphasis from dispute-processing institutions as the subject of research.³⁸

The essential question posed by the authors is: by what process does an injurious experience become a dispute? The enquiry is therefore focused on the antecedents to a dispute. The first transformation necessary for the emergence of a dispute is that an "unperceived injurious experience" must be perceived as being injurious.³⁹

Once the experience has been perceived as being injurious, the transformation that occurs is labelled as *naming*. In this instance the transformation is founded upon the disputants' perceptions. This creates methodological problems because experiences are perceived differently. Similar events may be perceived differently and this in itself has an important impact on the creation of a grievance.⁴⁰ Merry and Silby remark in this respect that, although perception has an important effect on the generation of a grievance, the perceptions of disputes and the manner in which they are dealt with are entrenched in the habits and customs of particular social groups and cultures; this influences behaviour in a manner that cannot be described as rational choice making.⁴¹ Coates and Penrod, in response to the conceptual framework devised by Felstiner, Abel and Sarat, integrate social psychological theory and the dispute transformation model.⁴² The differential rates of perception are interfaced by showing the effect of relative deprivation,⁴³ equity,⁴⁴ and perceived control⁴⁵ on the manner in which individuals perceive injury and form a sense of "entitlement" to redress. Hence, *naming* - the

³⁸ "The emergence and transformation of disputes" 633-640.

³⁹ 632.

⁴⁰ 633-634.

⁴¹ "Reexamining the concept of disputes" 157.

⁴² "Social psychology and disputes" 658.

⁴³ *Ibid.*

⁴⁴ 659.

⁴⁵ *Ibid.*

identification of a perceived injurious experience - is influenced not only by sociological but also by social psychological and anthropological factors.

The next step in the process of transformation occurs when fault is attributed to another person or social entity. The process of attribution is identified as *blaming*.⁴⁶ *Blaming* distinguishes a grievance from a complaint. When a perceived injurious experience is attributed to a particular person or social entity, it is a grievance. There is no attribution involved as far as a complaint is concerned because it is not directed at a particular person or entity.⁴⁷ Coates and Penrod place the *blaming* transformation into a general theory of attribution. Once again the instability of the individual's perception is illustrated. Attributional bias is found in the tendency to blame personal causes rather than circumstances. There is also a tendency on the part of perpetrators to make biased attributions by distorting available information in order to convince themselves that their victims were in some manner to blame for the negative events.⁴⁸ However, there would seem to be an even stronger tendency to accept self-blame for negative events thereby explaining the reason for so many potential disputes never progressing beyond the *naming* stage.⁴⁹ The importance of the social psychological input is that it confirms that attribution is an important element of a grievance and that these attributions are unstable.

The last transformation is known as *claiming* - the grievant states the grievance to the person or entity believed to be responsible for the injurious experience and simultaneously seeks a remedy for the alleged wrong.⁵⁰ Important supplementary information has been contributed by Coates and Penrod. People who blame themselves for an injury are least likely to claim against the perpetrator.⁵¹ However, external and

⁴⁶ Felstiner "The emergence and transformation of disputes" 635.

⁴⁷ Ibid.

⁴⁸ "Social psychology and disputes" 664.

⁴⁹ "Social psychology and disputes" 665; Felstiner "The emergence and transformation of disputes" 636.

⁵⁰ Felstiner "The emergence and transformation of disputes" 635-636.

⁵¹ "Social psychology and disputes" 660.

internal⁵² attributions play a significant role in the *claiming* transformation. Stable or unstable⁵³ or intentional or unintentional⁵⁴ causes of events also affect the *claiming* process.⁵⁵ The combination of these attributions interact to determine the incidence of *claiming*.

At this stage of the process of transformation a clear description of a dispute becomes possible: "A claim is transformed into a dispute when it is rejected in whole or in part."⁵⁶ In these terms, a dispute is simply a claim that is rejected. However, its complexity lies in its antecedent emergence and transformation.

The dispute and its antecedent transformation are treated holistically by Felstiner and his colleagues with the emphasis being on the individual, thereby permitting an enquiry into perceptions, grievances and conflicts that within an institutional structure of dispute resolution would never qualify as disputes.⁵⁷ As a result it is possible to postulate that dispute processing by means of litigation or even in informal *fora* accounts only for a fraction of the antecedent events that might finally be transformed into disputes.⁵⁸ Finally, what this study also teaches is that a dispute cannot be reduced to an analytical definition because in the final instance, each of its stages of transformation should be regarded as being "subjective, unstable, reactive, complicated, and incomplete".⁵⁹

⁵² The terms "external or internal" refer to causes assigned to events relating outside environmental factors or that are personal to the person concerned: 660.

⁵³ The terms "stable or unstable" refer to causes ascribed to events that may or may not change in the future: 660.

⁵⁴ The terms "intentional or unintentional" refer to causes assigned to events that are either foreseen and wilful or accidental and not consciously desired: 660.

⁵⁵ 662.

⁵⁶ Felstiner "The emergence and transformation of disputes" 636.

⁵⁷ 649.

⁵⁸ 649-650.

⁵⁹ 631.

Miller and Sarat focus attention on grievances, claims and disputes with particular emphasis on the origins and contents of a dispute.⁶⁰ Their starting point is that disputes begin as grievances: "[A] grievance is an individual's belief that he or she (or a group or organisation) is entitled to a resource which someone else may grant or deny".⁶¹ The description of a grievance offered by Miller and Sarat differs on fundamental grounds from that of Felstiner and his colleagues. Whereas the latter place emphasis on attribution, the former focuses on "entitlement". The element of "entitlement" explains the normative content of a grievance. This conceptualisation of a grievance is similar to that of Lempert's. In Lempert's view a grievance arises when "a person claims he is normatively entitled to something another person possesses or controls, and the other has neither denied the claim nor asserted a normatively superior one".⁶² The normative underpinning of a grievance is so important for Lempert that he asserts that "[without] a normative basis, a grievance collapses into a mere injury".⁶³ Hence, for Lempert, the normative requirement emphasises the sense of entitlement inherent in the emergence of a grievance.

Miller and Sarat list some of the different responses to a grievance. In some instances, "lumping it" is one manner in which potential conflict is avoided. Redefinition of the problem in order to redirect blame is another manner of dealing with a grievance. So too, the grievant might register a claim in order to indicate a sense of entitlement to the other party.⁶⁴

The process of claiming is also analysed in some detail. A claim may be accepted in full thereby avoiding the dispute. A compromise amounts to a partial rejection of a claim and thus constitutes a dispute. Outright rejection of a claim establishes an unambiguous dispute because both parties are in conflict about the same resource. Delayed reaction

⁶⁰ "Grievances, claims and disputes" 526.

⁶¹ 527 537.

⁶² "Grievances and legitimacy" 708.

⁶³ 709 note 2.

⁶⁴ "Grievances, claims and disputes" 527.

or difficulty in obtaining satisfaction of an ostensibly recognised claim is tantamount to a rejection of a claim, thereby also creating a dispute.⁶⁵ This reasoning supports the assumption that unless a claim is made, a dispute cannot come into existence.⁶⁶ In these premises Miller and Sarat conclude: "A dispute exists when a claim based on a grievance is rejected in whole or in part".⁶⁷ Although the wording is different, the description of a dispute given by Miller and Sarat expresses the same meaning as that of Felstiner and his colleagues. Common to both is that the rejection of a claim transforms a grievance into a dispute.⁶⁸

A number of conclusions can be drawn. Sociological, social psychological and social anthropological research contextualises a dispute in terms that negate preconceived legal notions. A dispute cannot be analytically defined⁶⁹ because to do so would artificially limit its dimensions as a social process. A dispute, by the very nature of its emergence and subsequent transformation, is a dynamic event incapable of being charted or transcribed in precise terms. To the lawyer this is a rather alien concept because legally every dispute must be capable of being defined and categorised in substantive and procedural terms. In the legal sphere, a dispute is expressed in rational and abstract terms, detached from the broader social process that accounts for the origins of the dispute. For this very reason, the contextualisation of a dispute as described above, indicates the need to understand a legal dispute in its broader social setting as well as the continuity between non-legal and legal disputes. However, in order to attain this perspective, the meaning, content and scope of a legal dispute needs to be explored.

⁶⁵ Ibid.

⁶⁶ 539.

⁶⁷ 527.

⁶⁸ Lempert "Grievances and legitimacy" 709 note 2 differs from Felstiner and Miller and Sarat, contending that the maturation of a grievance into a dispute does not mean that the grievance will cease to exist because the dispute is settled because the dispute might not have been satisfactorily settled. Emphasis is placed on the qualitative nature of the claim since the original grievance is retained in circumstances where the claim has been neither disputed or satisfied.

⁶⁹ Fulton Commercial ADR 9.

2.2.3 The legal dispute

The language of rights and remedies is mainly that of lawyers and the courts. Every dispute that is directed to the legal system must be capable of being categorised in terms of its related rights and remedies. This is evident from the following passage taken from a standard textbook on Civil Procedure

The law of procedure is adjective law, ie it is accessory to substantive law, which defines the legal rights, duties and remedies ... A knowledge of substantive law ... will not itself enable a practitioner to secure redress for his client. It does however assist him to answer three questions which are in their nature preliminary, though, naturally, no less fundamental on that account: (1) Has my client a right? If so, (2) has there been an infringement of that right? What is his remedy?⁷⁰

The passage indicates that a dispute in its non-legal context must be redefined before it will be capable of being recognised as a legal dispute. A dispute only becomes capable of being classified as a legal dispute if it is possible to pigeonhole it into a category of substantive rights and a related procedural remedy must exist. The legal system will therefore only process a dispute if its social dimensions are reformulated to meet the substantive and procedural requirements of the legal order.

An essential characteristic of a legal dispute, then, is that it is tagged, labelled and classified according to the authoritative norms and procedures of the legal system. Hence, not every dispute in the broader social context qualifies as a legal dispute. A dispute only becomes justiciable if it is capable of being retranslated into the predictable and authoritative norms of the legal order. In many respects this can be attributed to the strict procedural demands of the system. The substantive rights pertaining to a dispute must be formulated as a cause of action in accordance with the dictates of the system of civil procedure. Should it not be possible to redefine a dispute as a cause of action, it cannot be assimilated into the system. The term "cause of action" exemplifies the institutionalised nature of a legal dispute. In technical terms, a "cause of action"

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Herbstein and Van Winsen *Civil Practice* 1.

describes a fact or group of facts that give rise to one or more rights to relief.⁷¹ Rephrased this means that the facts of a dispute are framed within a category of instances that the substantive law recognises as conferring grounds for relief in accordance with the prescribed procedural rules.⁷² In this particular context, the formulation of a legal dispute could be described as being anti-social. A dispute in its personal or social setting is redefined only on the basis of legal norms and values in order to guarantee its justiciability; the grievance and conflict underlying any personal, community or societal interests are irrelevant in legal terms unless it is possible to transpose them into a valid cause of action.

A further characteristic of a legal dispute is that the redefinition of a dispute into legal terms simultaneously predicts the related remedy. For instance, if the dispute is categorised as being over breach of contract then, if the breach is proved according to the prescribed rules of evidence, the substantive remedy is either rescission of the contract plus damages or specific performance plus damages.⁷³ The legal interpretation of the dispute is predicative of its remedy, irrespective of the fact that the related remedy might not be what the disputants desire as a suitable resolution of the dispute. The legal transformation of a dispute entails a synthesis of right and remedy, hence depersonalising the dispute and its outcome. No provision is made to accommodate the interests of the disputants especially if they are bound to each other in an inter-dependent or continuing relationship. Rights and not interests predominate and if the

⁷¹ For the technical meaning of the term "cause of action", see Herbstein and Van Winsen **Civil Practice** 297-298; Hazard **Civil Procedure** 143; Walker **Oxford Companion to Law** 193.

⁷² See Merry **Getting Justice** 98-99 in which the process of legal labelling as a means of re-interpreting a dispute in conformity with legal standards, is discussed. Galanter "Landscape of Disputes" 19 succinctly sums up this concept: "Disputes must be reformulated in applicable legal categories. Such reformulation may restrict their scope. Diffuse disputes may become more focused in time and space, narrowed down to a discrete set of incidents involving specific individuals. Or, conversely, the original dispute may expand, becoming the vehicle for consideration of a larger set of events or relationships." See also Felstiner "The emergence and transformation of disputes" 647; Trubek "Courts in context" 492.

⁷³ Gibson **Mercantile and Company Law** 102.

interests of the disputants are at all considered, they are interpreted on the grounds of public policy or in the public interest.⁷⁴

The case of *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd*⁷⁵ illustrates these considerations. On the facts, the farmers of the Tala Valley in Natal, acting through the Natal Fresh Produce Growers' Association, brought an action for an order interdicting Agroserve from "manufacturing and/or distributing within the Republic of South Africa products which are collectively referred to as 'hormonal herbicides'".⁷⁶ The plaintiff's particulars of claim stated, inter alia, that hormonal herbicides used within the Republic are spread by means of water and air and accordingly are deposited on the fresh produce growing in Natal and in particular, the Tala Valley.⁷⁷ The deposit of the herbicides has damaged and will continue to damage the produce grown by the members of the Association and that the damage is a direct result of the distribution and use of the herbicides in the Republic.⁷⁸ The only manner in which this damage can be prevented is by eliminating the use of hormonal herbicides in the Republic.⁷⁹ Consequently, the defendant had and continued to wrongfully cause damage to the fresh produce grown by the members of the Association.⁸⁰

The defendant raised an exception to the particulars of claim "as lacking averments which are necessary to sustain an action".⁸¹ In the first instance, the defendant argued that the hormonal herbicide is manufactured and distributed in accordance with the provisions of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies

⁷⁴ See also Mulligan "Alternative dispute resolution" 99 for a succinct differentiation between rights and interests.

⁷⁵ 1990 4 SA 749 (N).

⁷⁶ 752E.

⁷⁷ 753B-C.

⁷⁸ 753C-D.

⁷⁹ 753E-F.

⁸⁰ 753G-H.

⁸¹ 752D.

Act of 1947 and therefore that *prima facie* its activities are lawful and the products so manufactured are capable of lawful use.⁸² However, for present purposes, the second issue raised on exception is the most salient. The defendant submitted that the lawful manufacture and distribution of the hormonal herbicides is not rendered unlawful because they are used to the detriment of third parties for whose conduct the defendant is not responsible. To argue otherwise

would involve an extension of the concept of unlawfulness in Aquilian liability to a new situation, an extension which is not warranted by the general criteria of reasonableness, and which would be inimical to public policy as amounting to an unjustified interference with the defendants' freedom of trade and the right of legitimate users of the products to protect their crops.⁸³

The court per Howard JP upheld the defendant's exception contending, *inter alia*, that the scope of the Aquilian action should not be extended to new situations unless there were positive considerations of policy that justified such an extension and that the plaintiff had not discharged the onus in this respect.⁸⁴

This decision expresses in a practical setting many of the theoretical considerations relating to the characteristics of a legal dispute. The defendant's exception was upheld precisely because the plaintiff could not rely on a recognised category of Aquilian liability and by the same token was unable to prove the need on the ground of public policy for creating a further category of rights. In other words, the plaintiff had formulated a cause of action which did not meet the substantive and procedural norms of the system. Irrespective of the fact that hormonal herbicides are ostensibly detrimental to the environment and that these products had probably caused damage and continued to cause damage to the fresh produce of the farmers of the Tala Valley, these considerations were not justiciable because they could not be established according to the substantive and procedural standards of the legal order. The legal logic is quite clear: Because the plaintiff's subjective interests could not be classified within a

⁸² 754D.

⁸³ 754E-F.

⁸⁴ 753I-754C; 758B-F.

recognisable category of substantive rights, the plaintiff's cause of action could not be sustained and hence no remedy could be granted. Clearly evident is the inextricable link between right and remedy as well as a clear distinction between personal and public interests.

In a broader context, what comes to the fore is that for a dispute to qualify as a legal dispute, the dispute needs to pass through a process of transformation. This entails that the dispute must be redefined and translated according to the norms and values of the legal system. The effect of this reformulation creates disparity between the dispute as an existential reality and as an abstract formula that complies with imperative norms of the legal system.⁸⁵

A necessary conclusion is that in the legal sphere a dispute is formulated in abstract and rational terms that are often divorced from social reality. The origin of a dispute as well as its personal, community or societal dimensions exercises little influence on the content of a legal dispute. If they do, these non-legal values are assessed in regard to objective standards of public morality or in relation to the public benefit. A legal dispute is therefore confined to specific legal and procedural categories that redetermine the content of the dispute in order to qualify it to be received into the court system for dispute processing.

Given these attributes of a legal dispute, the impression is created that the legal dispute is isolated from the broader social process. This general impression changes if the legal dispute is contextualised within the universe of disputes and dispute transformation. What is evident is that the transformation of a non-legal dispute precedes the formulation of a legal dispute and that by a process of elimination, based on the stringent

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Fulton **Commercial ADR 13** differentiates between the meaning of the word "dispute" in its legal context and in other fields of dispute resolution: "What can be termed as a dispute at law is determined by the normative orders in the form of formally administered legal rules. Such rules, which differ from rules of custom or ordinary morality, are not only authoritative in determining what the legally sanctioned outcome of a dispute will be but, more fundamentally, are also authoritative in determining what disputes are justiciable. If no rule can be cited which addresses a person's perceived injury then, no matter how outraged or violated the person feels, the dispute will still not be justiciable. The dispute must fit into an acceptable legal category if the legal remedy is to be pursued."

application of legal norms and standards, only certain non-legal disputes will qualify for dispute processing within the legal system. If the process of dispute transformation is expressed diagrammatically as a pyramid, grievances occupy its base and the legal dispute, its apex.⁸⁶ The model places the legal dispute at the pinnacle of the disputing process precisely because the legal dispute represents the ultimate formulation and transformation of the original dispute. Because all other methods of dispute resolution have failed, final recourse is made to the legal system for the definitive settlement of the dispute. This gives some indication of the continuity between the legal dispute and the larger social process. Through the judicial component of government, legal norms and public standards are applied to definitively dispose of a dispute thereby ensuring the public ordering of society.⁸⁷

The continuity between a non-legal and legal dispute is apparent within the macrocosm of dispute transformation. The formulation of a legal dispute is merely a continuation of the process of the transformation of a non-legal dispute that cannot be resolved other than by legal means. In this context, the formulation and transformation of the legal dispute occupies an important position within the larger social context of disputes, disputing and dispute processing.

2.2.4 Towards a definition of "dispute"

Any attempt to define a dispute camouflages its situational context. Every dispute has experiential dimensions, whether personal or societal. This in itself complicates any definition of a dispute. But, paradoxically the lack of definition itself formulates, if not a definition, then at least a definitive concept of a dispute.

⁸⁶ Galanter "Landscape of disputes" 11-18.

⁸⁷ For the notion that the legal system is the mechanism employed for the public ordering of society, see Hahlo and Kahn *The SA Legal System* 26-29 at 26: "The first and foremost purpose of the law is to maintain peace and order in the community. Man needs to live in society if he is to achieve his full development. Society, however, cannot exist without law, for without rules of conduct there can be no order, and without order there cannot be peace and progress." For the concept of the legal system as a means of social control, see also 4-5.

As a starting point, it is possible to describe tentatively a dispute as an unstable social event that is in a state of continual transformation until it is resolved. Between the emergence of a dispute and its eventual resolution, a number of vital transformations occur. A dispute is essentially the product of grievance transformation, aptly described as a process of naming, blaming and claiming. A particular moment occurs when a claim is rejected; at this point a grievance is transformed into a dispute.

However, once a dispute has been submitted to a third party, a reformulation of the dispute of necessity occurs according to the norms and procedural standards of the system of dispute resolution concerned. In other words, the system of dispute resolution is a determinant of the formal content of that dispute. Upon its reformulation, a dispute becomes the expression of the policy considerations, objectives and values maintained by the particular system of dispute resolution to which recourse is made. A notable transformation is evident. The dispute, originating as an emotional and situational experience, is organised and delineated according to the definitive and often rational terms of the system of dispute resolution by means of which it is processed. The content of the word "dispute" is therefore directly influenced by the substantive norms and processual form that transforms the dispute to meet the demands of a particular system of dispute resolution.

In the final analysis, the word "dispute" has a technical meaning within the context of the rubric "alternative dispute resolution". For the purposes of ADR, a dispute is not a static and stable event but should rather be conceived as a dynamic process of transformation that is influenced by the form and function of the specific ADR process that is applied to resolve that dispute. This same notion applies to a dispute in a legal setting, with one notable exception. A legal dispute is expressed in rational and abstract terms that conform the dispute to the substantive and procedural standards of the legal system so that the legal formulation eventually has little bearing on the dispute as it is perceived in a purely social context. Because ADR is not constrained by the same considerations that transform a legal dispute, it is able to deal with a dispute at all levels of its transformation, even at the initial grievance base.

2.3 Resolution in context

2.3.1 The meaning of "resolution"

What does "resolution" mean in the context of "alternative dispute resolution"? An uncritical response would be that "resolution" refers to the settlement of a dispute.⁸⁸ This response fails to express the complexity of the word "resolution" in context.

A critical area relates to the nature of the settlement. In this respect there are only two options: a dispute may be resolved either consensually or by coercion. The first option refers to the resolution of the dispute on the basis of agreement; the second, to the use of sanction as a means of enforcing the resolution of the dispute. Each must be treated critically to fully understand the meaning of the word "resolution".

2.3.2 Consensual resolution

When is a dispute resolved consensually? There are a variety of situations. The disputants may settle the dispute by compromise. The result of compromise is a lose/lose situation. A dispute may also be resolved on a win/lose basis due to the imbalance of power between the parties that results in the stronger party forcing his will on the weaker party. Another possible means of resolving a dispute is when the one disputant in frustration simply "lumps it".⁸⁹ A last variant is a win/win situation when a dispute is resolved by the mutual agreement between the disputants.

In each instance the resolution of the dispute is directly related to the quality of the outcome. When "lumping" occurs the dispute is resolved but unilaterally so, hence indicating the total absence of mutual agreement between the disputants. The aggrieved party acknowledges that he is in a "lose" situation and reluctantly decides to accept it. In such circumstances, the dispute is resolved but when the quality of the resolution of that

⁸⁸ Fulton Commercial ADR 16.

⁸⁹ For the incidence of "lumping", see Galanter "Landscape of disputes" 14-16; Miller and Sarat "Grievances, claims and disputes" 527.

dispute is assessed, the total lack of any mutual agreement between the disputants indicates that the dispute has been resolved inadequately.

The position is slightly different in the case of a lose/lose situation based on compromise. The disputants accept a lose/lose situation - both lose and no one gains. On the face of it, the dispute has been resolved and in this instance mutual agreement is seemingly present. However, when the quality of the outcome is questioned, there is doubt as to whether the underlying issues between the parties have been explored and even accommodated to assure a fair and lasting settlement. Considerations relating to quality also arise in the instance where a dispute is resolved on a win/lose basis. Implicit in this instance is that one of the disputants is forced to accept a "lose" situation, with all the inherent unfairness involved. Ostensibly the resolution of the dispute is based upon mutual agreement but in reality the mutual agreement is defective because an imbalance of party power has forced the weaker party to accept a "lose" situation.

The win/win situation is self-explanatory. There are no "losers" - each disputant obtains what she needs on the basis of mutual agreement. Because in theory there are no "losers", the win/win result is regarded as the ideal outcome for the consensual resolution of a dispute. Morally, the win/win result justifies the need for a lasting resolution of the dispute, based on the fairness of a mutually beneficial outcome.

Unfortunately, the win/win outcome has been given ideological dimensions that are not always related to reality. In our competitive society a premium is placed upon "winning". Hence, in many instances the win/lose syndrome is inescapable either because resources cannot be divided or predetermined rules predict a win/lose result. This is known as a "zero-sum" condition. For instance, when a contract is put out to tender the inevitable result is that it will be awarded to only one contractor. Given the prevalence of the zero-sum condition, a win/win result is often neither a functional nor a realistic objective.⁹⁰ Be that as it may, the very concept of a win/win situation acts as an incentive

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See Keltner **Mediation** 4-6. Keltner on 5 also deals with "the semantic fallacy of win/win", contending that win/win is sometimes used as a manipulative ploy to induce a party to accept a settlement which he would not otherwise have done, when the win/win vocabulary is used in a win/lose situation.

for reassessing a value system that applauds "winning" at the expense of joint decision making. Instead, what are advanced are strategies that promote the sharing of resources and interaction based on mutual consent.⁹¹

What is the significance of these variants? The first observation is that contrary to expectation, mutual agreement is not a prerequisite for the resolution of a dispute. In instances of "lumping", mutual agreement is totally absent although the dispute is resolved. However, apart from "lumping", the element of agreement is common to the other methods of dispute resolution. But only agreement is necessary - not mutual agreement. As has been shown there are degrees of mutual agreement which affect only the quality of the settlement. The other common element is that agreement for the resolution of a dispute is obtained through the interaction of the parties with the notable exception of "lumping". Thus, in its consensual context, "resolution" refers to the voluntary settlement of a dispute on the grounds of an agreement obtained through the interaction of the disputants. Ideally, the quality of the resolution of a dispute would be enhanced if the dispute were settled by means of mutual agreement in order to ensure that the resolution of the dispute is fair and that it will endure on account of the willingness of the parties to honour the agreement.

2.3.3 Resolution by coercion

A dispute may also be resolved by coercion either by self-help or through intervention of the State by means of the use of sanction. The word "resolution" therefore also has a specific meaning in this particular context.

The relationship between the civil administration of justice and the social order is complex. In a society governed by the rule of law, the use of private violence as a means of enforcing a claim is prohibited. In every civilised system, the responsibility for maintaining public order is imposed upon the government. In the case of disputes relating to civil claims, the deliberative and adjudicative functions of government are exercised by the judiciary, acting through the court system. Hence every judgment or

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ibid 6.

order of a court is enforced by the sanction of the State either by means of the execution of a judgment debtor's property or by contempt proceedings.⁹² In brief, the sanction of the State has replaced self-help as a means of resolving a dispute. The judgment or order of a court is therefore dispositive of a dispute and enforced by the use or threat of coercion exercised by the State.⁹³

In this setting, the resolution of a dispute is not achieved by a settlement between the parties. Instead, the judgment or order of a court disposes of the dispute and brings it to finality, irrespective of whether or not one or all the disputants agree. Moreover, the resolution of the dispute is founded upon a written and reasoned judgment that is binding not only on the disputants but through the precedent system, is applicable by analogy to all future disputes of the same nature.

Within the framework of the legal system, the word "resolution" therefore has a technical meaning. Succinctly stated, the resolution of a dispute is imposed upon the parties and enforced by the power of State.

⁹² Herbstein and Van Winsen **Civil Procedure** 597.

⁹³ See also Hazard **Civil Procedure** 281-285 for a discussion of litigation as a form of coercion and at 297-298 for a brief synopsis of the functions of civil justice.

CHAPTER 3

THE PRIMARY PROCESSES: DEFINITIONS, CONCEPTS AND TERMINOLOGY

3.1 The primary processes

3.2 Exploratory analysis

3.2.1 Negotiation

3.2.2 Mediation

3.2.3 Arbitration

3.3 The primary processes as formative principles

3.1 The primary processes

ADR is founded upon three primary processes: negotiation, mediation and arbitration. Although this statement is academically neat and does correctly express a basic premise, the sceptic might rightly retort that not one of these processes is original to ADR. There is a great deal of truth in this response. The primary processes are certainly not novel to ADR. For centuries, negotiation, mediation and arbitration have been recognised as non-judicial methods of dispute resolution. This raises a number of foundational questions in relation to the place of the primary processes within the system of ADR: Is ADR an authentic system of dispute resolution if it uses traditional methods of dispute resolution as its primary processes? Does ADR genuinely contribute to the resolution of disputes if it relies on dispute resolution processes that have been and will be utilised irrespective of its existence as a system of dispute resolution? These are challenging questions that force an answer.

There is no quibble that the primary processes are orthodox methods of non-judicial dispute resolution. However, within the context of the ADR movement, these primary

processes have been thoroughly modernised. Each primary process has been re-interpreted to apply in instances that fall beyond its traditional domain. For instance, arbitration was mainly used to resolve commercial disputes but is now also recognised as an effective dispute resolution process in the field of labour relations and, whereas mediation was traditionally applied as a means of resolving ecclesiastical and international disputes, presently its scope has been extended to facilitate, inter alia, divorce settlements as well as the resolution of family and community disputes. Although negotiation, mediation and arbitration will always be recognised as traditional methods of dispute resolution, their incorporation in the system of ADR has resulted in an extension of their conventional fields of application. In brief, the conventional form and functions of negotiation, mediation and arbitration have been retained. However, as a result of their integration within the system of ADR, the scope of their application has been extended to areas of dispute that were never envisaged traditionally.

The other important point is that all three traditional dispute resolution processes have now been incorporated into a single system of dispute resolution. Prior to the inception of the ADR movement, each primary process functioned independently of the other. As in the case of many traditional usages, very little systematic or analytical consideration had been given to the primary processes. ADR has changed this. The combination of the three primary processes within one system of dispute resolution has engendered research into the nature of these processes, their form, function, objectives and classification as well as the type of dispute to which each relates. ADR research is backed by the widespread application of these processes in a variety of fields that hitherto had not been considered. This by no means implies that ADR has become a field of science; it is still in its initial stages of development. However, acting as a catalyst, the combination of the primary processes in a single system of dispute resolution has encouraged a body of research, albeit not always systematic, that holds promise for a science in the making.

However, research into and the popular practice of the primary processes in diverse fields of application does not of itself establish ADR as an independent system of dispute resolution. Such a development would have occurred irrespective of the existence of

ADR. Something more is needed to satisfy the sceptic. In this respect, two important factors need to be examined: the extension of a particular primary process into a variety of derivative processes as well as the mixing of certain elements of the primary processes to form hybrid processes.

There can be no doubt that the merging of the primary processes into the ADR framework has led to a great deal of creative experimentation with dispute resolution processes. The purpose is to achieve the optimum resolution of a dispute in terms of cost effectiveness, economy of time and the quality of the settlement. With these objectives in mind, the conventional form and function of the primary processes have been retained but their method of application has been diversified. An example would best illustrate this. The term "arbitration" is associated with a voluntary and private process that is, like litigation, formal and adjudicative in form, being therefore time-consuming and often expensive. Normally, arbitration in this form is referred to as "conventional" arbitration. But, with the emergence of ADR, the term "arbitration" is not any longer as clear. Under the direct influence of the ADR movement, a wide variety of arbitration techniques have been developed: expedited arbitration, final-offer arbitration, documents-only arbitration and quality arbitration.⁵ Similarly, negotiation is a general term that could refer to competitive, co-operative or integrative negotiation in a variety of social contexts.⁶ By the same token, structured mediation, conciliation and facilitation are derived from a generic concept of mediation.⁷ Although the primary processes are not original to ADR, their derivative processes are. The system of ADR has not simply borrowed processes - it has also generated derivative processes.

Given all these considerations, there is one that is overriding and alone validates the authenticity of ADR as an independent system of dispute resolution, notwithstanding its reliance on the primary processes. The ingenuity of ADR lies in the manner in which elements of negotiation, mediation and arbitration have been combined to form hybrid or

⁵ See, further, 3.2.3 and chapter 7 below.

⁶ See, further, 3.2.1 and chapter 5 below.

⁷ See, further, 3.3.2 and chapter 6 below.

mixed processes.⁸ The merging of certain characteristics and functions of two or more of the primary processes has created a rich variety of highly effective and efficient dispute resolution processes that are original only to the system of ADR. For example: the mini-trial⁹ is an off-shoot of the process of negotiation in combination with the process of litigation; the rent-a-judge process¹⁰ assimilates the principles of arbitration and litigation; mediation/arbitration¹¹ merges the primary processes of mediation and arbitration. The hybrid processes are distinct from the primary processes. As a direct result of the influence of ADR, they have acquired the stature of modern dispute resolution processes that cater for contemporary needs. Understandably, because they are modern, there is not much systematic research or even a comprehensive understanding of the hybrid dispute resolution processes. What is established though is that the hybrid processes are indisputably original to the system of ADR.

Although ADR is founded upon the processes of negotiation, mediation and arbitration, it is not totally dependent upon these processes. The invention of non-conventional dispute resolution processes has produced a portfolio of dispute resolution processes unknown to any other generation except our own. This in itself lends authenticity to the system of ADR and establishes it as an independent system of dispute resolution. The system of ADR thus stands on the foundations of the primary processes upon which a variety of authentic dispute resolution processes have been constructed.

⁸ See, further, 3.2.4 and chapter 8 below.

⁹ See, further, 8.3.2 below.

¹⁰ See, further, 8.3.1 below.

¹¹ See, further, 8.3.3 below.

3.2 Exploratory analysis

3.2.1 Negotiation

Compared to the other primary processes, negotiation is the dominant process. Negotiation is inherent in the nature of humankind. Since time immemorial, humans have negotiated about every conceivable aspect of life and still do so today. Viewed in this context, negotiation is as varied as the persons involved and as complex as the related situations it serves. Accordingly, definitions abound. However, a random sample of some definitive descriptions do explain the basic elements of negotiation

Negotiation is a basic means of getting what you want from others. It is a back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed.¹²

Negotiation, that is where two or more people together attempt to reach agreement on some matter.¹³

Negotiation may be generally defined as a consensual bargaining process in which parties attempt to reach agreement on a dispute or potentially disputed matter.¹⁴

Negotiation is a process of interaction between parties directed at reaching some form of agreement that will hold and that is based upon common interests; with the purpose of resolving conflict, despite widely dividing differences.¹⁵

[N]egotiation can be defined as the process in which two or more participants attempt to reach a joint decision on matters of common concern in situations where they are in actual or potential disagreement or conflict.¹⁶

Negotiation is one kind of problem-solving process - one in which people attempt to reach a joint decision on matters of common concern in situations where they are in disagreement and conflict.¹⁷

¹² Fisher and Ury **Getting to Yes** xi.

¹³ Astor and Chinkin **Dispute Resolution** 77.

¹⁴ Nolan-Haley **ADR** 13.

¹⁵ Pienaar and Spoelstra **Negotiation** 3.

¹⁶ Gifford **Legal Negotiation** 3.

Negotiation may be tentatively described ... as a process of adjustment of existing differences, with a view to the establishment of a mutually more desirable legal relation by means of barter and compromise of legal rights and duties and of economic, psychological, social and other interests. It is accomplished consensually as contrasted with the force of law.¹⁸

Diverse as this list of definitions may be, when read cumulatively a number of recurrent themes can be identified -

- (a) negotiation is a *process*
- (b) the process is *consensual* and hence voluntary
- (c) as a process, negotiation based is on the *bilateral interaction* of the disputants
- (d) the purpose of negotiation is to attempt to resolve a dispute relating to *interests or rights*
- (e) this objective is achieved on the basis of an *agreement* obtained by *joint decision making*.

A vital element of negotiation is that it is a process.¹⁹ In this respect emphasis is placed on the continuity of negotiation. Negotiation is not some *ad hoc* event - negotiation has a starting point and it reaches a point of termination signified by either agreement or the failure to settle. Whether this is attained within a few hours or over a period of months or even years is irrelevant. What is important is the element of continuity which is common to all forms of process. Moreover, within this time frame, negotiation passes through a number of distinct and recognised phases.²⁰ Admittedly, the phases of negotiation are

¹⁷ Gulliver **Disputes and Negotiations** xiii.

¹⁸ Mathews "Negotiation" 94.

¹⁹ See Pienaar and Spoelstra **Negotiation** 3 18-19; Mathews "Negotiation" 94; Gulliver **Disputes and Negotiations** 180-186.

²⁰ Although it is impossible to determine a definitive structural model for the different stages of negotiation, the literature indicates clearly that as a process negotiation must pass through various developmental stages. See Anstey **Negotiating Conflict** 127-157; Gifford **Legal Negotiation** 32-36; Leeson and Johnston

not comparable to those for legal process but this does not diminish the fact that the various phases of negotiation do constitute a form of process. These considerations underlie the use of the term "the process of negotiation".²¹

The process of negotiation is consensual. The disputants mutually agree to settle their dispute by means of the process of negotiation, thereby excluding any possibility of external coercion to force a settlement of the dispute. Although the process is consensual, this does not mean that it is always voluntary. The process of negotiation is sometimes, though not often, imposed upon the disputants. The best example would be the pre-trial conference that is mandatory under our rules of court.²² Then there is the case where the decision to enter into the process of negotiation is ostensibly voluntary. This occurs in instances where pressure is brought to bear upon the one disputant to enter into negotiations. In the legal sphere, litigation is sometimes commenced as a tactic to induce an opposing party to enter into negotiation and also to settle, given the expense and inconvenience of full-scale litigation.²³ Although the process of negotiation is not always voluntary, it is always consensual since one of the disputants may always terminate the process.

One of the distinguishing features of the process of negotiation is that it is based solely upon the bilateral interaction of the disputants. The term "bilateral" indicates that the process is dyadic in the sense that a neutral third party is not involved. The disputants themselves fill the role of advocate and decision maker: the disputants determine the rules that will govern the form of the proceedings, identify and argue the facts in issue, control the process and determine its outcome.²⁴

Dispute Resolution in America 105-106; Menkel-Meadow "Legal negotiation" 777; Pienaar and Spoelstra **Negotiation** 48-49.

²¹ See, further, 5.2 below.

²² See Uniform Rules of Court rule 37.

²³ Galanter "Negotiation and legal process" 268-269. See also Leeson and Johnston **Dispute Resolution in America** 104. See, further, 5.3.2 below.

²⁴ Astor and Chinkin **Dispute Resolution** 80; Leeson and Johnston **Dispute Resolution America** 103 107;

However, the bilateral nature of the process does not mean that only two disputants are involved. Multi-party negotiations may be conducted. In the case of multi-party negotiations, the dyadic character of the process is retained but opposing coalitions are formed between two or more of the disputants.²⁵ Accordingly, in the context of the process of negotiation, the word "bilateral" is a technical term which means that a third-party neutral is not involved in the resolution of the dispute between the disputants.

Interests and rights form the subject of the process of negotiation. At first, this distinction could be rather confusing. For instance, the title of a popular book **Everything is Negotiable**²⁶ by Gavin Kennedy, gives the impression that all disputes can be thrown into the same negotiation melting pot. Generally, this is what the average person would presume. And, up to a point the title of Kennedy's book is correct subject to an important qualification: technically, either interests or rights are negotiated. To the layperson this distinction might seem artificial but in a legal context the differentiation is material.

Eisenberg distinguishes between rule-making negotiation and negotiation for the purposes of dispute resolution.²⁷ In the case of the former interests are necessarily the subject of negotiation. Put differently, negotiation is transactional. The very purpose of negotiation in this instance is to create future rights or interests. Innumerable transactions can be mentioned but to mention only a few: deciding at which restaurant to dine, having a dress made by a dressmaker, forming a lift club, buying a motor vehicle or

²⁵ For the nature and functioning of coalitions, see Gifford **Legal Negotiation** 175-179; Raiffa **Science of Negotiation** 11-12 252-253.

²⁶ Arrow Books 1989 reprint.

²⁷ "Private ordering through negotiation" 637-638. Kanowitz **ADR** 39-41, by analogy to arbitration terminology, distinguishes between "interests" and "rights" negotiation. "Interests" negotiation refers to the situation where the parties "... enter into negotiations with one and another although there has been no prior legal relationship between them"; the purpose of the negotiations is purely transactional and therefore if the parties cannot or do not want to reach agreement, they can discontinue negotiations. On the other hand, in the case of rights negotiation there is no attempt to establish any legal relationships but rather the parties are in effect "... asserting pre-existing rights ... that normally may be vindicated in a lawsuit".

fixed property, leasing property, buying insurance or making an investment. The list is unending because in the majority of cases negotiation is transactional. Essentially, this means that future rights or interests form the subject of negotiation; that negotiation is directed at future events or performances; and lastly, that no dispute relating to the actual or alleged infringement of legal rights is involved. This is identified as rule-making negotiation.²⁸

On the other hand, negotiation is rights related when it deals with the occurrence of past events that have led to the actual or alleged infringement of legal rights. The disputants enter into negotiation in full knowledge of the fact that their discussions are being conducted against the background of legal rights and duties and should the negotiations fail, either of the disputants may resort to litigation to dispose of the dispute. In this sense, it is possible to speak of dispute negotiation.²⁹ Hence, to contend that "everything is negotiable" is too broad.

The basic purpose of negotiation is to reconcile interests or to settle a dispute by joint decision making. The notion of joint decision making is generally alien to common notions about negotiation. This attitude, which is often shared by lawyers, may be attributed to the adversarial culture instilled by the process of litigation. The general approach to negotiation is distributive, based on a competitive style. Yet, there is another approach which promotes co-operative or integrative negotiation which in turn is matched by a collaborative style. In this respect, it is possible to achieve the ideal objective of joint decision making founded on the understanding that negotiation is essentially a problem-solving process.³⁰

²⁸ See Eisenberg "Private ordering through negotiation" 665-680. See also Astor and Chinkin **Dispute Resolution** 77-79; Nolan-Haley **ADR** 13-14; Gifford **Legal Negotiation** 39-40 190-191.

²⁹ See Eisenberg "Private ordering through negotiation" 639-665; Nolan-Haley **ADR** 14; Gifford **Legal Negotiation** 39-40 190-191.

³⁰ For the influence of the adversarial mode of litigation on the negotiation process, see Hartje "Lawyer skills in negotiation" 138-139; Menkel-Meadow "Legal negotiation" 755-757. See 5.3.2 for a detailed discussion of competitive, co-operative and integrative strategies of negotiation.

Negotiation therefore has many facets: it is a bilateral and consensual process directed at rule making or dispute resolution which is ideally achieved through problem solving by means of joint decision making.

3.2.2 Mediation

When dealing with mediation, the divergence between practice, concept and terminology complicates a clear definition of the process. The terms "mediation", "conciliation", "passive and active mediation", and "facilitation" are used without much discretion to describe a particular type of mediation practice. Yet, reduced to basics, all these terms refer to a single generic concept. This generic concept of mediation entails a consensual process involving the intervention of a neutral third party who in a non-adjudicative capacity and without the authority to make a binding decision, assists the disputants to settle their dispute. What is disconcerting is that conceptually the differences between these terms are indistinct yet in practice each of these terms is seemingly related to separate processes that in their form relate generically to mediation.

Where the problem begins and ends is difficult to tell. Perhaps, the attempt to devise different terms for the various forms of mediation that are used in practice is at the root of the problem. Alternatively, the lack of concept might be the cause of the many variants being practised. The end result is muddled terminology.

The want of clear and unambiguous terminology is in itself problematic. Settled terminology is an essential prerequisite for the theoretical development of any field of study. The danger is that imprecise terminology could stunt conceptual development. Practice that is context based with scant regard for concept and the related determination of terminology, could seriously affect the credibility of the various forms of the process of mediation. Concept and practice are inseparably enmeshed. An imbalance between the two can cause untold problems. These issues are not purely academic. For instance, naming a process in itself designates a particular function to the third-party neutral. The lack of uniformly accepted terminology could lead to a serious

misunderstanding about the process named and that intended by the disputants. Moreover, the general public is the user of these mediation processes. If proponents and practitioners are unsure about terminology and confused about related concepts, it is doubtful that the public will be able to appreciate fully or be confident to use the related processes.

In particular there is widespread uncertainty about the use of the terms "mediation" and "conciliation". The issue is further complicated if the process of facilitation³¹ is drawn into the debate, especially because of the tenuous dividing line between this process and conciliation. The essence of the controversy is whether the terms "mediation" and "conciliation" are synonymous or whether each describes a distinct process. Although verging on the periphery of the debate, the same questions may be asked in relation to the use of the terms "conciliation" and "facilitation".

Confusion about terminology is particularly prevalent in the United Kingdom. Although the term "conciliation" is used to describe the consensual settlement of disputes through the intermediary intervention of a neutral third party, it is recognised as being a "somewhat confusing and unfortunate term".³² Part of the confusion stems from the completely reversed meaning given to the terms "mediation" and "conciliation" in other Anglo-American jurisdictions. As a result, both "conciliation" and "mediation" are frequently used interchangeably in the United Kingdom.³³ It is, however, recognised by some commentators that each term refers to processes that differ widely from each

³¹ "Facilitation" is a term used to describe the process whereby a person, known as the facilitator, assists two or more parties to communicate with each other with the object of enabling the parties to agree on a common course of conduct which might involve the a joint meeting to resolve the dispute or an undertaking to submit to an informal dispute resolution process. See further Astor and Chinkin **Dispute Resolution** 64; Newton "ADR and the lawyer" 562; Pretorius "Overview" 4.

³² Bevan ADR 15; Walker "Divorce mediation in Great Britain" 34.

³³ For instance, Littman "The resolution of serious disputes" 51-60 who consistently uses the term "conciliation" which in context could be replaced by the term "mediation", as it is understood in certain dispute sectors within the United Kingdom or in other Anglo-American jurisdictions.

other.³⁴ As far back as 1983, Lisa Parkinson, one of the most prominent practitioners in the field of divorce mediation/conciliation succinctly summarised the problem

There is a good deal of confusion in the use of terminology and the expectations achieved through conciliation. The word is being used as a kind of woolly blanket which covers, and partially conceals, a variety of procedures and methods.³⁵

In that same year, Simon Roberts took a definite stance in favour of the use of the term "mediation".³⁶ However, as yet, the term "mediation" has not replaced "conciliation" although there is a tendency in favour of using of the term "mediation". This approach is expressed by Karl Mackie

There is sometimes an overlap or confusion with the term "*conciliation*" - usually defined as a less proactive form of intervention where the third party aids the disputants to reach their own agreement rather than seeking, as in mediation, to suggest actively the terms of a possible agreement. ... For the purposes of this chapter, the subtlety of this distinction need not be explored other than as a way of illustrating that the process of mediation may take a number of forms.³⁷

But the use of imprecise terminology has seemingly become entrenched. In a genuine attempt to rectify the situation rather contorted explanations are offered. One suggestion is that a distinction should be drawn between "facilitative" and "evaluative" mediation. Facilitative mediation occurs when the mediator does not express an opinion but merely enables the parties to communicate with each other by introducing an element of objectivity to their dispute; evaluative mediation refers to the instance where the third-party neutral persuades the parties to settle by giving an opinion on law, facts and evidence.³⁸ This tends to confuse rather than clarify terms. Essentially, all forms of mediation are facilitative. Furthermore, the meaning of evaluative mediation is

³⁴ Walker "Divorce mediation in Great Britain" 34; Mackie "ADR in the UK" 9.

³⁵ "Conciliation: Pros and cons part II" 185.

³⁶ "Mediation in family disputes" 537.

³⁷ "Negotiation and mediation" 88.

³⁸ Bevan ADR 15-16.

misleading since in the United States it would be interpreted as a form of rights-based mediation which is basically an evaluative process as distinct from interest-based mediation that explores the underlying personal dimensions of a dispute.³⁹ In what may be regarded as a pragmatic move, the Centre for Dispute Resolution has adopted the policy that "mediation" will be used as a generic term to cover both types of process.⁴⁰ The problem of terminology is not restricted to the United Kingdom. A diversity of opinion also exists in other Anglo-American countries.

In the United States, the term "mediation" is used more consistently than "conciliation". A primary reason is that in the United States ADR focuses on the processual aspects of ADR processes, whereas in other countries, especially the United Kingdom, the emphasis is on context-based applications in divergent areas of dispute.⁴¹ Be that as it may, there is still a tendency to use the terms "mediation" and "conciliation" interchangeably.⁴² However, this is mainly limited to the use of these terms in legislation.⁴³ There are historical reasons that explain this. Originally, as far back as 1939, "conciliation" was used as a synonym for "mediation". But with the advent of court-sponsored programmes aimed at reconciling separating spouses, the parties disliked the idea of "reconciliation" conveyed by the word "conciliation"; it evoked the assumption that the process was aimed at minimising conflict and reconciling the parties, as opposed to resolving the issues underlying it.⁴⁴ The use of the term "mediation" also became preferable because of the shift of emphasis from reconciliation to divorce

³⁹ For rights-based and interests-based mediation, see Goldberg, Sander and Rogers **Dispute Resolution** 243-244 251.

⁴⁰ Mackie "ADR in the UK" 10.

⁴¹ Mackie "Dispute Resolution: the new wave" 6.

⁴² Rogers and McEwen **Mediation** 2; Rogers and Salem **Guide to Mediation** 4.

⁴³ Rogers and McEwen **Mediation** 2 note 4 read with appendix C at 293.

⁴⁴ Rogers and McEwen **Mediation** 32-33; Singer **Settling Disputes** 25. See also Singer **Divorce Mediation - A Comparative Perspective** 11; Scott-Macnab "Terminology and ADR" 23.

counselling and custody mediation.⁴⁵ Even though use of the term "mediation" is prevalent, the imprecise description of terms has the effect of confusing issues. For instance, Levin and Golash define mediation as "the conciliation of a dispute through the non-coercive intervention of a third party".⁴⁶ The use of the word "conciliation" is definitely misleading. By the same token the rare attempt to describe "conciliation" is clumsy to say the least

Unlike mediation, *conciliation* usually connotes only preliminary involvement by a third party. The outsider (sometimes called a "facilitator") may bring the parties together or carry a few messages back and forth. Facilitators also may act as moderators in large meetings, making sure that everyone is able to speak and be heard. Facilitators are not expected to volunteer their own ideas or participate in moving the parties to an agreement. In effect, conciliation and facilitation are less active forms of mediation.⁴⁷

The problem with this description of "conciliation" is that the conciliator is described as being a facilitator - the functions of the processes of conciliation and facilitation clearly overlap. Although one might agree with the comment that conciliation is a less active form of mediation, it remains vague because the boundaries between the two processes as they occur in practice are not clearly delineated.

In Australia there is no accepted understanding of what constitutes conciliation and how it differs from mediation. In fact there are a range of opinions. On the one hand there are very definite views about the differences between the two processes while on the other hand, these processes, as well as facilitation, are lumped together as being different forms of mediation in its generic sense. Reikert makes a clear distinction between the two processes by placing emphasis on the roles of the third-party neutrals. For the purposes of mediation, "[t]he mediator is a *process facilitator* and does not express

⁴⁵ Scott-Macnab "Terminology and ADR" 23.

⁴⁶ "ADR in the Federal Courts" 40.

⁴⁷ Singer *Settling Disputes* 24.

opinions or offer advice to the disputants, although he/she will usually probe their positions ...".⁴⁸ In regard to conciliation, he asserts

The conciliator is expected to contribute his/her own views and opinions during the process. The advisory role may range from the counsel of a respected *eminence grise* of a particular profession to the mandated, normative role of a conciliator under some statutes ...⁴⁹

However, Sir Laurence Street rejects outright that there are any substantial differences between the terms "mediation" and "conciliation",⁵⁰ asserting that if there are any distinctions between the two processes they are "extremely fine". Because these distinctions are not "relevant, practicable or useful", he concludes that the terms "mediation" and "conciliation" are synonymous. This view is based on the identification of "an identical genetic structure" for both processes

[B]oth have three fundamental characteristics. In the first place, both originate in an agreement between the disputants to call in the aid of a facilitator to assist in the structuring and conduct of settlement negotiations which will include, as part of their very essence, private consultations with each disputant. In the second place, the facilitator has no authority to impose a solution on the disputants as does a judge, arbitrator or expert appraiser. And in the third place, the whole process remains at all times entirely flexible and dependent upon the continuing willingness of the disputants to continue with it until such time as either they themselves agree upon terms of settlement or one or other of them terminates the negotiations; it is, in short, consensus-orientated.⁵¹

The views of Reikert and Street are balanced by Astor and Chinkin.⁵² In a descriptive analysis of various conciliation models prevalent in Australia, they indicate the diversity of concept ranging from services offered by private organisations to statutory schemes,

⁴⁸ Reikert "ADR: quo vadis?" 33.

⁴⁹ Ibid 33.

⁵⁰ "Language of ADR" 196.

⁵¹ Idem.

⁵² **Dispute Resolution** 61-64.

mainly under the Family Law Act of 1975 (Cth),⁵³ the Racial Discrimination Act of 1975 and the Sex Discrimination Act of 1984.^{54 55} What Astor and Chinkin show is that contradictions abound and that the views exemplified by both Reikert and Street, although instructive, do not fully encompass the diversity of the mediation process in its generic sense. In full awareness of these contradictions, Fulton grapples with the problem of the various forms of mediation and conciliation. He suggests that the solution lies in distinguishing between "passive" and "active" mediation instead of "conciliation" and "mediation". He justifies this distinction on the basis of the lack of any general agreement as to whether conciliation is "an active or passive pursuit".⁵⁶

Variance between terminology, concept and practice is also a feature of the fledgling ADR movement in South Africa. This is especially evident in respect of the various forms of mediation that have been devised. A major problem is that there is no historical analogue for mediation in the country. The upshot is the indiscriminate use of the term "mediation" resulting in disparity between what is practised and the conceptual understanding of this term. In fact, there is a distinct preference for the use of the term "mediation" as it is applied in private practice or for official use in the title of statutes. What is actually meant by the use of the term "mediation" is another matter.

The legislative use of the word "mediation" is a major area of controversy. So far, two statutes contain this term in their official titles: the Mediation in Certain Divorce Matters Act⁵⁷ and the Short Process Courts and Mediation in Certain Civil Cases Act.⁵⁸ Neither of

⁵³ For a detailed description of conciliation in terms of this Act, see Astor and Chinkin **Dispute Resolution** 245-246.

⁵⁴ For a detailed description of conciliation in terms of this Act, see Astor and Chinkin **Dispute Resolution** 245-246.

⁵⁵ For a comprehensive survey of conciliation legislation in Australia, see Evatt "Conciliation in Australian Law" 1-4.

⁵⁶ **Commercial ADR** 74-75.

⁵⁷ 24 of 1987.

⁵⁸ 103 of 1991.

the two statutes furnishes a definition of the term "mediation" but they rather describe a procedure which is indistinctly named as "mediation".

In terms of the Mediation in Certain Divorce Matters Act of 1987, the Minister of Justice may appoint one or more family advocates at each division of the Supreme Court of South Africa.⁵⁹ Family counsellors may also be appointed to assist the family advocate.⁶⁰ The family advocate, assisted by family counsellors, acts under a statutory duty to protect the best interests of a minor or dependent child.⁶¹ Once a divorce action has been instituted or application made for the variation, rescission or suspension of a custody order or arrangements regarding access to a child,⁶² either party to the action on application or the court, can request the family advocate to institute an inquiry that will result in a report and recommendation concerning the welfare of a minor or dependant child that is affected by the proceedings.⁶³ The family advocate may also apply to court for the authority to conduct an inquiry if in her opinion the inquiry would be in the best interests of a minor or dependant child.⁶⁴ Moreover, if the family advocate considers it to be in the best interests of a minor or dependant child she may, or if so ordered by the court, must appear at the trial or hearing in order to give any evidence that has a bearing on the proceedings and cross-examine any witness.⁶⁵

This prescribed process is certainly not mediation in any of its recognisable forms. By no stretch of the imagination can the investigative and representative functions of the family advocate be classified as being akin to any form of the mediation process. Yet, the legislature has labelled these proceedings as "mediation". The term simply does not fit

⁵⁹ s 2(1).

⁶⁰ s 3(1).

⁶¹ s 4(1)(b).

⁶² s 4(1)(a).

⁶³ s 4(2)(a)-(b).

⁶⁴ s 4(3).

⁶⁵ *ibid*

the process of mediation in any of its recognised concepts or its accepted methods of practice. The prescribed process is not consensual, its scope is restricted to pursuing the best interests of minor or dependant children, intervention by the family advocate is only for the purposes of investigation or representation and not primarily to facilitate a negotiated settlement between the parties and the process itself is conducted in the public and adversarial setting of the courts. Although the legislative intention to protect the minor or dependant child involved in divorce proceedings is commendable, the appointment of an advocate for a child is not and never will be mediation in any of its forms. To argue otherwise would be to confuse representation with the mediatory function of non-adjudicative and non-binding intermediary intervention to facilitate the settlement of a dispute. This is precisely what the Act has done: it has mismatched terminology and the related process which it prescribes.⁶⁶

The Short Process Courts and Mediation in Certain Civil Cases Act of 1991 provides for the appointment of mediators and "mediation proceedings" that are to be conducted within the structure of the magistrates' courts. Only a person who is legally qualified may be appointed as mediator.⁶⁷ The mediator so appointed is obliged to take an oath or make an affirmation of office in terms of which the mediator undertakes, inter alia, to "administer justice to all persons alike without fear, favour or prejudice and ... in accordance with the law and custom of the Republic ...".⁶⁸ Mediation proceedings may be instituted at any time prior to or after the issuing of a summons, but before judgment, by the mutual consent of the parties.⁶⁹ The clerk of the court must give notice to the

⁶⁶ For a critical appraisal of this Act, see Coertze "Huwelike, kinder, egskeiding, huwelike" 525; Mowatt "News but nothing new" 611. See also the critical comment by Cohen "Divorce mediation" 73 note 3. Bosman "The family advocate and mediation" 56 58 asserts that mediation is implied under the provisions of the Act but concedes that the form of mediation so applied differs from the process as it is commonly understood; mediation is not voluntary; the family advocate participates in decision-making process; facts are established with which the parties might disagree; the process includes an evaluation of the parenting abilities of the parties and lastly, children may be involved directly in the process.

⁶⁷ See s 2(1)-(2) read with s 7.

⁶⁸ See s 3(1)(a).

parties or their representatives of the time, date and place for the conduct of the proceedings which are to be held in chambers before the mediator.⁷⁰ The mediator must then investigate and enquire into the matter.⁷¹ After the completion of the interview and the investigation, the mediator must make an order in respect of the settlement reached between the parties as well as in respect of other related matters.⁷² The order is of record⁷³ and will be binding in any subsequent proceedings.⁷⁴ If any party fails to attend at the interview before the mediator, the mediator may issue an appropriate order which might include judgment for the plaintiff.⁷⁵ An order for costs may also be given by the mediator.⁷⁶ Any order so issued will be final and no appeal will lie from it.⁷⁷ An order, however, is subject to review.⁷⁸

The form of the process invented by the legislature contradicts many of the conceptual notions of mediation. Conceptually, a mediator must act in a non-adjudicative capacity without authority to make a binding decision on behalf of the parties. Yet, the mediation model prescribed under the Act endows the mediator with the power to make orders and give judgments. The necessary conclusion is that the relevant official, though named as a mediator, is in fact a quasi-adjudicator. This is confirmed by the wording of the affirmation or oath of office which obliges the official to "... administer justice to all persons ... in accordance with the law and customs of the Republic ...".

69 *Ibid.*

70 See s 3(1)(b).

71 See s 3(1)(d).

72 See s 3(2)(a).

73 See s 3(2)(b).

74 See s 3(3).

75 See s 3(5).

76 See s 3(6).

77 See s 3(7).

78 See ss 11-12.

The contradiction is especially evident on the conceptual level. Mediation is essentially anti-legal for its main thrust is interest based and its objective is to achieve a settlement of a dispute by probing the underlying issues between the parties.⁷⁹ Adjudication relates to law and mediation to interests; it is doubtful whether this dichotomy can ever be satisfactorily bridged without altering the essential nature of each. By tampering with the recognised role and function of the mediator, the Act has created a new process which, although a contradiction in terms, may for the sake of convenience be called adjudicative mediation. This is borne out by the process named in the Act as "mediation proceedings" that have all the trappings of mediation but which are totally alien to this process. True enough the proceedings are consensual because they may only be commenced by the mutual consent of the parties. But that is as far as it goes. After the proceedings have been commenced, the element of coercion typical of all legal proceedings, is introduced: the proceedings are commenced by summons that must be served in the manner as prescribed;⁸⁰ the parties become subject to the authority of the "mediator" who may make orders that are binding on both of them, even to the extent that a judgment may even be granted against a defendant who fails to attend any of the proceedings⁸¹ and, any such order is enforceable by execution.⁸²

Further, contradictions abound: the proceedings are not private but are held in court chambers and any settlement or offer is of record; the parties need not negotiate their own settlement through the intervention of a mediator since they are entitled to appoint legal representatives; normally the disputants through the mediator agree to the costs of the mediation whereas under the act the "mediator" may make an order as to costs; the order or judgment of a "mediator" is subject to review thereby bringing the "mediation

⁷⁹ Mowatt "High price of cheap adjudication" 84.

⁸⁰ Rules of Courts for Short Process and Mediation Proceedings rules 11-12 in regard to the commencement of proceedings and rules 14-15 in relation to the service of process.

⁸¹ See s 3(2)(a) (5)-(6).

⁸² See rule 26.

proceedings" within the structure of the legal process as well as the norms and standards of the legal system itself.

The disparity between the concept of mediation and the proceedings devised by the Act are obvious: the official called a "mediator" is for the purposes of the Act a quasi-adjudicator and the purported "mediation proceedings" in fact amount to quasi-legal proceedings. There is no basis of comparison at all. The memorandum to the bill states its purpose as being "the establishment of an alternative dispute adjudication procedure".⁸³ However, the use of the term "mediation" raises undue ADR expectations. This is in fact at the root of the problem. The legislative use of the term "mediation" is a misnomer. In reality what has been established is a sophisticated form of the settlement conference that is conducted by a judicial official and this reality ought to have been reflected in the title of the Act.

Reviewed cumulatively, both Acts do more harm than good for the development of the ADR movement in South Africa, and especially for the practice of any form of mediation. The processes invented by these Acts imitate the process of mediation only in so far as they provide for the intervention of a third party to settle a dispute. The use of the term "mediation" in the title of these Acts is therefore deceptive and could easily create the mistaken impression in the mind of the public and uninformed practitioners that the processes offered are in fact mediation processes in the context of ADR. Especially if negative experiences are encountered, this could have a damaging effect on the practice of the process of mediation in the future.

There is one other misapplication of the term "mediation" that must be noted. However, in this instance, it relates to the private sector and more specifically, the construction industry. The dispute resolution clauses of two standard contracts need to be examined:

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See par 1 of the **Memorandum on the Objects of the Short Process Courts and Mediation in Certain Civil Cases Bill, 1991**; see also Mowatt "High price of cheap adjudication" 77 note 4. In general, see also the critical comments of Cohen "Mediation terminology is important" 221.

the contract of the Joint Building Contract Committee of 1991⁸⁴ and the General Conditions of Contract for Works of Civil Engineering Construction of 1990.⁸⁵

Both contracts establish a three-tier structure for dispute resolution. In the event of a disagreement arising between the client and contractor, the first step is for the architect/engineer to consider the disagreement and give a written decision; if the architect/engineer fails to give his decision or either of the parties rejects the decision, then a dispute is declared.⁸⁶ The parties may then submit the dispute to mediation⁸⁷ and if either of the parties rejects the mediator's opinion, the dispute must, in the case of the JBCC 1991, be referred to arbitration⁸⁸ or in respect of the GCC 1990 to either arbitration or to the division of the court having jurisdiction.⁸⁹

In terms of the JBCC 1991, the parties must submit written representations to a mediator who has been appointed jointly; thereafter, the mediator must give his opinion but not before he has attempted to reconcile the opposing views.⁹⁰ The mediator's opinion is binding on both parties, unless either one of the parties disputes the opinion by giving notice thereof in writing within the prescribed period.⁹¹ The process is subject to two important qualifications: the parties are not entitled to be represented by legal practitioners⁹² and most importantly, the mediator in giving his opinion will be deemed to be acting as an expert and not as an arbitrator.⁹³

⁸⁴ Hereinafter referred to as the JBCC 1991.

⁸⁵ Hereinafter referred to as the GCC 1990.

⁸⁶ See JBCC 1991 cl 37.1; GCC 1990 cl 61(1).

⁸⁷ See JBCC 1991 cl 37.2; GCC 1990 cl 61(2).

⁸⁸ See JBCC 1991 cl 37.3.

⁸⁹ See GCC 1990 cl 61(3)-(4).

⁹⁰ See JBCC 1991 cl 37.2.3.

⁹¹ See JBCC 1991 cl 37.3.

⁹² See JBCC 1991 cl 37.2.2.

Although the GCC 1990 contains similar provisions, they differ slightly in detail from those of the contract of the JBCC. The mediator may in his discretion follow either a formal or informal procedure and receive submissions either orally or in writing, sworn or unsworn, at a joint meeting or separately from, any person whom he believes can assist him in the formulation of his opinion.⁹⁴ However, each party to the dispute must be given an opportunity to present evidence or submissions and also be given full details of the evidence and submissions produced by an opposing party.⁹⁵ Legal representation is not allowed.⁹⁶ The mediator is entitled to propose compromise settlements in order to dispose of the whole or part of the dispute.⁹⁷ As soon as is practically possible, the mediator must give his written opinion to both parties.⁹⁸ The mediator's opinion will be binding on both parties only to the extent that it is agreed as being binding.^{99 100}

The essential question is whether the processes determined by these contracts is mediation as it is known under its generic model described above, or whether the term "mediation" is used to describe a totally different concept and process. Some of the deviations from the conceptual model for mediation proposed in this work are obvious: the proceedings are commenced by the presentation of written or oral submissions or evidence; the mediator must first attempt to reconcile the parties; the mediator may act in an investigative capacity; the mediator is bound to furnish the parties with a written opinion. However, these matters are of secondary importance compared to the

⁹³ See JBCC 1991 cl 37.2.4.

⁹⁴ See GCC 1990 cl 61(2)(c).

⁹⁵ See GCC 1990 cl 61(2)(c) proviso (i)-(ii).

⁹⁶ See GCC 1990 cl 61(2)(b).

⁹⁷ See GCC 1990 cl 61(2)(d).

⁹⁸ See GCC 1990 cl 61(2)(e).

⁹⁹ See GCC 1990 cl 61(2)(f).

¹⁰⁰ For a general commentary on the provisions for mediation contained in both contracts, see Finsen **New Building Contract** 126-127; Hyman **Engineering Contracts** 166-167; Finsen "Arbitration and mediation in the construction industry" 184-186.

extremely active interventionist role accorded to the mediator. The mediator is entitled to conduct independent investigations. Moreover, he is master of the proceedings to such an extent that the concept of the disputants negotiating their own settlement through the mediator seems to be of minimal importance. The purpose of the process is that the mediator should ultimately prepare and furnish the parties with a written opinion. In both instances, the mediator's opinion is binding in so far as the parties agree to be bound.¹⁰¹

The question that must be raised is whether the process named as "mediation" is in fact mediation or either independent expert appraisal or non-binding arbitration. Theoretically, at least, the process identified under the JBCC 1991 ought to be classified as independent expert appraisal especially in view of the fact that it is specifically stated that the mediator will "be deemed to be acting as an expert and not as an arbitrator". This reservation is not contained in the GCC 1990. Instead the GCC 1990 provides that the mediator's opinion is not binding on the parties except in so far as they agree to be bound. The most likely assumption that can be drawn from this provision is that the process so described is that of non-binding expedited arbitration. However, the processes set out in both contracts are described by the term "mediation". Once more the imprecise use of terminology plays havoc with the concept of mediation and raises serious doubts about the actual role of the third-party neutral. Had careful attention been given to the use of correct terminology in the first place, the need for conjecture would have been obviated. The actual identification of the process of independent expert appraisal and non-binding expedited arbitration, respectively, if these processes were intended, would have simplified matters considerably and delineated with clarity the actual role of the third-party neutral in each instance.

The term "conciliation" is not commonly used in South Africa, and if so, it is referred to in either a highly specialised context or in an exploratory manner. The former relates to the statutory practice of conciliation in terms of the Labour Relations Act of 1956;¹⁰² the latter alludes to the Hoexter Commission Report dealing with the structure and functioning of

¹⁰¹ Finsen **New Building Contract** 127; Finsen "Arbitration and mediation in the construction industry" 185; Hyman **Engineering Contracts** 167;

¹⁰² 28 of 1956 s 35 provides for the *ad hoc* appointment of a conciliation board on which the disputants to a labour dispute are equally represented.

the courts,¹⁰³ which under its chapter dealing with proposals for a family court,¹⁰⁴ proposed the use of conciliation as a means of resolving family and divorce disputes.¹⁰⁵ For the rest, the preferred term is "mediation" and particularly so in private practice. The official handbook of the Alternative Dispute Resolution Association of South Africa¹⁰⁶ in its definition and description of ADR processes makes no mention of the process of "conciliation".¹⁰⁷ Likewise, in the field of private family and divorce mediation, only the term "mediation" is used. In fact, the term "mediation" is contained in the official title of South Africa's most highly recognised association in this particular field, the South African Association of Mediators in Family Matters.¹⁰⁸ The conciliation/mediation debate that plagues so many other Anglo-American countries is therefore not at all contentious

¹⁰³ **Fifth and Final Report Part A of the Commission of Enquiry into the Structure and Functioning of the Courts** RP 78/83, commonly referred to as the Hoexter Commission Report.

¹⁰⁴ **The Desirability or Otherwise of the Establishment of a Family Court**, RP 78/83 part VII.

¹⁰⁵ The report at 522-523 describes conciliation in the following terms: [T]he *conciliation process*, which, in cases of irreparable rift in the marriage, is aimed at helping estranged spouses to communicate directly and to good purpose with each other to make their parting less traumatic for them as well as their children; and to resolve by agreement disputed points (such as custody of and access to minor children and the division of matrimonial assets." **Scott-Macnab Mediation Arbitration** 223-236 identifies in this description of conciliation two distinctive forms of process: the first urges a conciliatory and supportive approach while the second relates to the resolution of specific disputed points eg the custody and control of minor children. Conciliation is not described as a unitary but rather as a binary process of which mediation is the more specialised form and therefore at the very least the two forms of process should "be kept conceptually, if not actually apart". In regard to the correct use of terminology, it is preferable to use the term "mediation" generally while at the same time "recognising conciliation as that part of the process which deals with its supportive and therapeutic aspects". See also Scott-Macnab and Mowatt "Family mediation" 49-51.

¹⁰⁶ Commonly known by the acronym of ADRASA and is a lawyer organisation that has been founded to promote the concept and practice of efficiently resolving disputes other than by litigation. For further details, see Steadman "Directory of organisations" 208.

¹⁰⁷ The **ADRASA Handbook** was published by ADRASA in 1993.

¹⁰⁸ Commonly known by the acronym of SAAM and is a multi-disciplinary professional body that specialises in the field of family and divorce dispute resolution. For further details, see Steadman "Directory of organisations" 5.

in South Africa and is mainly raised in academic works dealing with family and divorce disputes.¹⁰⁹

Although the terms "mediation" and "conciliation" are sometimes used loosely,¹¹⁰ there is a genuine attempt in the local legal literature to distinguish between these two terms. Van Vuuren defines "mediation" and "conciliation" vaguely but does acknowledge that the differences between these terms are not always clear. His distinction is based on the function of the neutral third party and the level of participation of the disputants. In regard to mediation, he contends that the mediator may objectively advise the parties and make proposals for settlement but essentially the disputants must resolve their own dispute; conciliation entails mediation but differs in that the conciliator facilitates communication between the disputants, assists them to agree on a possible method for resolving the dispute and if so requested, may give a non-binding opinion.¹¹¹ According to Pretorius, mediation is a continuation of the structured negotiation process involving the services of a neutral third party who assists the disputants in reaching an agreement based on their own decision-making powers; conciliation is distinguished on the grounds that "the conciliator will, in addition to playing the role of mediator, make a formal recommendation to the parties for settlement of the dispute".¹¹² Mowatt, in describing these terms in relation to family matters, refers to conciliation as "an informal process whereby parties meet with a neutral third party to explore amicably the possibilities of a reasonable settlement".¹¹³ But his most telling remark is that, in legal terms, there is such vagueness in respect of the meaning of conciliation that it prevents the formalising of

¹⁰⁹ See Scott-Macnab **Mediation Arbitration** 223-236; Scott-Macnab and Mowatt "Family mediation" 49-51; Mowatt "Family court and mediation" 290-294; Scott-Macnab **Mediation in the Family Context** 5-10; Scott-Macnab "Terminology and ADR" 21-25.

¹¹⁰ For instance, Burman and Rudolph "Repression by mediation" 252 note 3 expressly state that for the purposes of their work the terms "mediation" and "conciliation" are used interchangeably. See also Schäfer "Alternative divorce procedures" 308 note 72.

¹¹¹ "Alternatiewe Dispuutbeslegting" 276.

¹¹² "Overview" 4.

¹¹³ "Family court and mediation" 290.

terminology as well as the structuring of content.¹¹⁴ Against this background, his remarks about divorce mediation should be considered

[M]ediation in divorce ... can be regarded as a process whereby the parties are encouraged, with the assistance of a neutral third party, to reach decisions on disputed issues ... It is a process of legal decision making and should be distinguished from counselling ... It is of the essence of mediation, as understood in this sense, that the validity of the process stems solely from the agreement between the parties; it is not derived from the authority of the mediator. This does not mean that the mediator may not add his own proposals to those which have been volunteered by the parties. But it is important that the decision should not be imposed upon the parties.¹¹⁵

The ADR movement in South Africa is still in its experimental stage of development and therefore the attempt to distinguish between mediation and conciliation is in itself encouraging. Irrespective of the shortcomings of these descriptions, they form the basis for further research and discourage the facile assumption that the terms "mediation" and "conciliation" are synonymous.

This comparative survey illustrates the confusion that results from the absence of precise terminology. The variety of views and explanations that attempt to differentiate between the terms "mediation" and "conciliation" tend more to obscure the issues than to resolve them. At either end of the spectrum the debate ranges from whether these two terms are synonymous and are therefore interchangeable, to the view that these terms represent distinct and separate processes. There is also the problem of the reversed use of these terms which is quite different from using the terms interchangeably. The reversed use of terms in no manner negates the individuality of each process but rather points to the confusion that ensues in different dispute sectors when a particular process as it is commonly understood and practised, is called by another name. Another anomaly is the disparity between the use of a particular term and the process that is practised. This observation relates in particular to legislation that uses the term "mediation" but in fact the process that is prescribed is different to the generally accepted generic concept

¹¹⁴ Idem.

¹¹⁵ "Family court and mediation" 293.

of mediation.¹¹⁶ Similarly, certain contractual provisions for dispute resolution provide for a method of non-binding third-party intervention that is called "mediation" and has its attributes but in reality deviates substantially from the conceptual model.¹¹⁷

There is also the use of descriptive labels - terms that are devised to explain the differences between "mediation" and "conciliation". The best examples would be the distinctions made between "active and passive mediation" as well as between "evaluative and facilitative mediation". Although these descriptions might add to the existing confusion, they should not be rejected outright because they do attempt to distinguish between the terms "mediation" and "conciliation". What is clearly acknowledged is that mediation and conciliation are separate and different processes and that each of these processes are derived from the same generic concept of mediation. Moreover, the words "active" and "passive" indicate that in practice there are differing degrees of mediatory intervention and the words "evaluative" and "facilitative" explain the differing functions of the third-party neutral. The significance of these labels is that they focus on the divergence between theory and practice; they indicate that concept has not kept pace with developments that arise out of context-based applications of the general mediation model.


The controversy may be reduced to two basic questions: firstly, are different terms used to describe the same concept or secondly, do the different terms actually describe different concepts? The first question goes to the root of the problem. The generic concept is so wide that it accommodates all the variants that occur in practice. For the sake of convenience, the generic concept will be restated: mediation entails a consensual process that involves the intervention of a neutral third-party who in a non-adjudicative capacity and without the authority to make binding decisions, assists the disputants to settle their dispute.

¹¹⁶ As for instance in the case of the Mediation in Certain Divorce Matters Act of 1987 and the Short Process and Mediation in Certain Civil Matters Act of 1991.

¹¹⁷ As for instance in the case of the dispute resolution clauses contained in the JBCC and GCC contracts.

Quite clearly the processes of mediation and conciliation both fall within the ambit of this generic description. However, this does not validate the view that both these terms are synonymous and are therefore interchangeable. There is one critical factor that has been overlooked. The generic concept fails to distinguish between the differing functions and degrees of intervention of the third-party neutral as is reflected in the practice of these processes. The answer lies in recognising that, apart from the generic concept of mediation, further conceptualisation is necessary to encompass the differing activities of the third-party neutral that occur in a practical setting. The findings of this brief comparative survey support this view.

The weight of opinion is that the process of conciliation, especially when applied in the context of a legislative support programme, imposes an evaluative and often a therapeutic function on the conciliator and, depending on the degree of third-party intervention, permits the conciliator to give advice to the disputants in order to bring them to a point where they are able to determine the main issues in dispute and to decide on a method for resolving these issues. On the other hand, in the case of the process of mediation, the mediator facilitates the negotiations between the disputants on the substantive issues in dispute that are capable of being integrated into a system of legal decision making and the mediator's intervention is confined to controlling and giving momentum to the process so that the disputants may settle the dispute on their own terms.

This work adopts the approach that the words "conciliation" and "mediation" are distinct terms that describe separate and individual processes. This view fully recognises the generic concept of mediation but relegates its function to that of a theoretical model of first reference only. Moreover, in keeping with the legal and procedural emphasis of this work, a specific meaning is attributed to the term "mediation" that generally reflects the standards of practice in Anglo-American countries, notwithstanding the reversed use of terminology.  The process of mediation is therefore defined as a consensual and private process that involves the intermediary intervention of a neutral third party, known as a mediator, who, in a non-adjudicative and non-advisory capacity and without the authority to make binding decisions, controls and structures the process of negotiation that occurs

between the disputants so as to assist the parties to reach mutual agreement on substantive points of dispute that are capable of being integrated into a system of legal decision making.¹¹⁸

3.2.3 Arbitration

There is no confusion about the term "arbitration". Through the centuries, arbitration has been a term familiar in ancient systems of law as a legal proceeding. Other than in the case of the primary processes of negotiation and mediation, the very definition and concept of arbitration is ensconced in the legal system. As a primary process, arbitration has a long history in which its concept and definition were continually adapted to meet the changing demands of the legal system which it served. The history of arbitration therefore explains its modern concept and definition.

Because of its colonial past, the analogue for arbitration in South Africa is traced to the law of England and that of Holland, as it had received Roman law of the Justinianian period into its domestic system of Germanic law. The concept of arbitration in South Africa is therefore based on the dual heritage of English law and Roman-Dutch law but in a very specific sense: the legislative tradition of arbitration is derived from English law and the related common-law principles are inherited from the Roman-Dutch law.

A remarkable phenomenon is that the basic concept of arbitration as it is currently understood remains the same as in previous centuries. Johannes Voet in his *Commentaries* 4.8 interprets the Digest of Justinian's *Corpus Iuris Civilis* in relation to the practice of arbitration recognised by the courts of Holland. The substantive and procedural details differ from modern practice yet Voet clearly describes arbitration as a legal proceeding that had been devised to obviate the cumbersome procedures, frustrating delays and exorbitant expense of court proceedings

The reason being, so it has been said, that some persons are frightened of the too heavy expense of law suits, the din of legal proceedings, their harassing

¹¹⁸

See, further, chapter 6 that deals in detail with the process of mediation.

labours and pernicious delays, and finally the burdensome and weary waiting on the uncertainty of law.¹¹⁹

Although occurring in a different setting, similar circumstances led to the evolution of arbitration in English law.

Initially the royal courts were primarily concerned with disputes about land, or conduct that disturbed the king's peace and were therefore not adapted to meet the needs of commerce. Debts or commercial credits owed to or by foreigners were wholly unenforceable, the procedure of the royal courts was tardy and technical and therefore inadequate for settling disputes between traders who were continuously travelling from one fair to the next, and so too, for this reason jurisdiction was normally ousted because of the need to prove venue so as to accommodate the sitting of a jury.¹²⁰ The result was that merchants and traders began to rely on their own special tribunals to settle commercial disputes outside the normal jurisdiction of the courts.¹²¹ The best known commercial tribunals were the pie-powder courts and the courts of staple.¹²² These developments occurred in England during the Middle Ages. Although Voet is describing the practice of the courts of Holland, his commentary is based on what had already occurred in Roman law. The English experience was not particularly novel - Roman law pre-dated these developments.

Arbitration has a history and that shows that it is an ancient procedure. Obviously, the ancient forms of arbitration must have differed in their detail from the modern concept of arbitration, but essentially the concept remains the same. Arbitration was developed as a flexible procedure to obviate the cumbersome and time-consuming processes of the ordinary courts. This in itself points to a fundamental principle: arbitration was devised as

¹¹⁹ Commentaries 4.8.1; Gane 1 Selective Voet 736.

¹²⁰ Parker "History of Commercial Arbitration" 6.

¹²¹ Parker "History of Commercial Arbitration" 6; Jones "History of arbitration" 130.

¹²² Parker "History of Commercial Arbitration" 6-7.

an alternative to the procedure of the courts. Voet is astute to differentiate between arbitration and litigation

Yet it should not be passed over that in many things arbitration proceedings differ from judicial. I say so because a state of *lis pendens* is not brought about by the former; nor is reconvention allowed, since a submission has its own limits, beyond which an arbitrator settles nothing. ... since it was never embraced in the submission. This applies to appeal ... Nor are arbitrators furnished with public authority, so that they can neither compel litigants nor force witnesses to give evidence. Furthermore when arbitrators have been corrupted by one or other of the parties to the submission, the action on fraud asserts in its place, and is granted to the person damaged against the person corrupting; whereas when judges are corrupted, the decision is *ipso jure* null and void and there is no need of an action on fraud against the corrupting opponent.¹²³

In a contemporary context, these distinctions are not particularly relevant. Over the centuries the form and content of both arbitration and litigation have changed and, so too, the relative advantages and disadvantages of each process. However, the value of the distinctions drawn by Voet illustrates that historically arbitration and litigation were recognised as separate and independent procedures.

Voet's **Commentaries** were published at the turn of the 17th century.¹²⁴ At approximately the same time in England, the Arbitration Act of 1697¹²⁵ was passed. This Act introduced an important principle; it provided that an arbitral award could be enforced by the courts if this was agreed upon by the parties in their submission to arbitration.¹²⁶ Voet shows that a similar principle applied in the Roman-Dutch law. The parties in their submission to arbitration could agree to have the award made an order of court.¹²⁷ Arbitration was recognised (although not definitively expressed as such) as a

¹²³ **Commentaries** 4.8.1; Gane 1 **Selective Voet** 737.

¹²⁴ Hahlo and Kahn **The SA Legal System** 556.

¹²⁵ 9 & 10 Will 3 c 15. See also Gill **Law of Arbitration** 1-2 for a brief background to the Arbitration Act of 1697.

¹²⁶ Parker "History of Commercial Arbitration" 14.

¹²⁷ **Commentaries** 4.8.31; Gane 1 **Selective Voet** 763.

consensual procedure in that it was based on a submission that set out the mutual agreement of the parties to arbitrate their dispute. Voet is careful to define what is meant by a submission

An arbitrator is appointed by submission of the parties, that is an agreement by which the contestants promise that they will abide by an arbitrator's decision ...¹²⁸

The submission is regarded by Voet as being extremely important for the conduct of arbitration proceedings: the submission may be expressed or tacit;¹²⁹ only certain persons were competent to enter into a submission;¹³⁰ not every cause could be the subject of a submission;¹³¹ the award had to be given in the time fixed in the submission;¹³² and the arbitrator had to dispose of every issue contained in the submission and could not exceed its limits.¹³³

One of the natural consequences of enforcing the decision of an extra-curial tribunal as an order of court would be that the parties request the court to revise that decision or the courts themselves assume that responsibility. The Arbitration Act of 1697 initiated the development of substantive principles in this regard. At the time of the Act, the grounds for refusing to enforce an arbitral award were limited to a review of whether the arbitrator had acted within the terms of the submission, thereby restricting the issues to the personal obligations between the parties.¹³⁴ Only in the early 18th century did it become

¹²⁸ **Commentaries** 4.8.3; Gane 1 **Selective Voet** 738-739. Van der Linden in his commentary on the cited passage confirms that arbitration is a voluntary and consensual procedure but subject to the reservation that it can be compulsory as in the case of a will that stipulates that disputes between heirs must be resolved through arbitration. Van der Linden's comment confirms that voluntary and compulsory arbitration were recognised in his age.

¹²⁹ **Commentaries** 4.8.3; Gane 1 **Selective Voet** 739.

¹³⁰ **Commentaries** 4.8.4-4.8.5; Gane 1 **Selective Voet** 740-741.

¹³¹ **Commentaries** 4.8.10; Gane 1 **Selective Voet** 743-744.

¹³² **Commentaries** 4.8.17; Gane 1 **Selective Voet** 749-750.

¹³³ **Commentaries** 4.8.18; Gane 1 **Selective Voet** 740.

settled practice that a court could intervene to set aside an arbitral award on the grounds of a mistake in law.¹³⁵ Although occurring in a different setting, similar considerations applied in the Roman-Dutch law.

Voet distinguishes between three distinct matters: revision, correction and appeal.¹³⁶ If an aggrieved party was dissatisfied with the award, it was possible to deliver a protest within the prescribed period which had the effect of commencing judicial proceedings for the review of the award. Once the prescribed period had expired, only correction was possible. Voet is quite definite that an arbitral award can never be taken on appeal. In the case of appeal the issues are heard by a judge of a higher court whereas in the case of revision only an ordinary judge of the court that would have heard the matter had it not been submitted to arbitration, is competent to conduct the revision.¹³⁷ As in the case of appeal, execution of the arbitral award is stayed until the decision on revision has been given. However, the issue regarding an appeal in respect of an arbitral award does not seem to be totally settled in the Roman-Dutch law. The general principle was that no appeal lies against an arbitrator's decision.¹³⁸ However, whenever an arbitral award had been confirmed or altered by a judge of revision, the aggrieved party was entitled to appeal to a judge of a superior court should that party contend that he had suffered damage.¹³⁹ Furthermore, it seems that the issue of whether an appeal was permitted or not, was dependent on whether the parties agreed to have the award enforced by an inferior or superior court; appeal to a superior court was possible if the parties had agreed to the jurisdiction of a lower court.¹⁴⁰

¹³⁴ Parker "History of Commercial Arbitration" 15.

¹³⁵ Parker "History of Commercial Arbitration" 16-18.

¹³⁶ **Commentaries** 4.8.25; Gane 1 **Selective Voet** 259-260.

¹³⁷ **Commentaries** 4.8.25 read with 4.8.27; Gane 1 **Selective Voet** 759-761.

¹³⁸ **Commentaries** 4.8.1 read with 4.8.25; Gane 1 **Selective Voet** 737 759.

¹³⁹ **Commentaries** 4.8.28; Gane 1 **Selective Voet** 762.

¹⁴⁰ **Commentaries** 4.8.31; Gane 1 **Selective Voet** 763-764.

As far as legislation is concerned, the Arbitration Act of 1889¹⁴¹ is a major landmark. Firstly, it amended and consolidated all prior legislation, including the provisions of the Common Law Procedure Act of 1854¹⁴² which, in relation to arbitration, was a first attempt at recognising and integrating arbitration into the legal system. The Arbitration Act of 1889 finally achieved the objective of establishing arbitration as part of the law of England.¹⁴³ Secondly, the Arbitration Act of 1889 is also focal to the history of arbitration in South Africa since it formed the model for the statutory development of arbitration in this country.

In South Africa, the Arbitration Act of 1965¹⁴⁴ regulates any written agreement to arbitration¹⁴⁵ excluding matrimonial causes or matters relating to the status of a person.¹⁴⁶ The Act consolidated and repealed¹⁴⁷ all prior legislation that applied in the Cape, Natal and the Transvaal.¹⁴⁸ The Arbitration Act of 1889 effectively applied in South Africa until 1965 because, apart from minor variations, the provisions of the provincial legislation were based on those of the English statute of 1889.¹⁴⁹ There was

¹⁴¹ 52 & 53 Vict c 49.

¹⁴² 17 & 18 Vict c 125.

¹⁴³ Parker "History of Commercial Arbitration" 19. See also Jones "History of arbitration" 133.

¹⁴⁴ 42 of 1965. The Arbitration Act of 1965 is modeled on its English counterpart, the Arbitration Act of 1950: Jacobs **Arbitration in SA** 1.

¹⁴⁵ s 1(i) "arbitration agreement" means any written agreement providing for the reference to arbitration or any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not.

¹⁴⁶ See s 2.

¹⁴⁷ See s 42(1).

¹⁴⁸ Arbitration Act 29 of 1898 (Cape); Arbitration Act 24 of 1898 (Natal); Arbitration Ordinance 24 of 1904 (Transvaal).

¹⁴⁹ Jacobs **Arbitration in SA** 1.

one notable exception. Until 1965, arbitration in the Orange Free State was dealt with according to the principles of the Roman-Dutch law.¹⁵⁰

The statutory regulation of arbitration based on the model of English legislation effectively restricted the scope of application of Roman-Dutch law. But this in no manner detracts from the fact that Roman-Dutch law and not English law is the common law for arbitration. The Arbitration Act of 1965 does not expressly set aside the Roman-Dutch law.¹⁵¹ Although English case law was introduced as persuasive authority in respect of those South African provisions that contained terms similar to those of the English legislation, the general tendency of South African courts is to interpret the legislation concerned in accordance with the Roman-Dutch law.¹⁵² Moreover, in terms of its definition of an "arbitration agreement", the Arbitration Act of 1965 is restricted to the regulation of only written submissions to arbitration.¹⁵³ The implication is therefore that all submissions that are not in writing are governed by the Roman-Dutch law.¹⁵⁴

The modern definition of arbitration is therefore rooted in its historical concepts. Every modern definition is based on concepts that can be traced to the historical foundations of arbitration. These concepts may be enumerated as follows -

¹⁵⁰ 1 **LAWSA** par 406.

¹⁵¹ **Davis Law and Practice of Arbitration** 3; **Jacobs Arbitration in SA** 1-2 3; 1 **LAWSA** 407.

¹⁵² **Jacobs Arbitration in SA** 1 3-4. For instance, **Jacobs** 3 notes that whereas in English law an award can be set aside if a mistake of law appears on its face even if that mistake does not amount to misconduct, in South African law a mistake in law not amounting to misconduct on the face of the award does not justify setting it aside.

¹⁵³ See note 145 above.

¹⁵⁴ **Davis Law and Practice of Arbitration** 3; **Jacobs Arbitration in SA** 6-7; 1 **LAWSA** par 407.

- (a) arbitration is an extra-curial procedure aimed at expediting the resolution of a dispute by avoiding the formality, technicality, delays and expense of litigation;
- (b) the related procedure is mainly regulated by legislation;
- (c) the arbitrator acts a neutral third party who in his private capacity exercises a judicial function;
- (d) the method of dispute resolution is adjudicative;
- (e) the process is based on the mutual consent of the parties as expressed by the terms of their agreement to arbitration;
- (f) the award is binding on the basis of the mutual agreement of the parties but it may be made an order of court and be enforced as such;
- (g) an award is not subject to appeal but may be reviewed on application to court.

These basic concepts, ancient though they may be, are contained as the elements of every modern definition of arbitration.¹⁵⁵

Full arbitration, expedited arbitration, documents-only arbitration, final-offer arbitration: these are all modern terms that would have flummoxed our Roman, Dutch and English precursors. And yet, if the meaning of these terms was briefly explained, they would have understood the concept because the principle and practice of arbitration, no matter how rudimentary it might have been, was part of their system of legal dispute resolution.

¹⁵⁵


For instance, see Jacobs **Arbitration in SA** 1: "An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction." Astor and Chinkin **Dispute Resolution** 63 give the following definition: "Arbitration is an adversary process whereby an independent third party (or parties) chosen by the parties makes an award binding on the parties after having heard submissions from them." Kanowitz **ADR** 304 offers the following definition after having noted the distinction between non-binding and binding arbitration: "Binding arbitration ... is a system under which disputing parties choose a neutral third party to hear their dispute and to resolve it by rendering a final and binding decision or award." All these definitions contain one or more of the elements contained in the conceptual model for arbitration stated in the text.

3.3 The primary processes as formative principles

Existing in isolation from each other, the processes of negotiation, mediation and arbitration were limited to the scope of their conventional functions and traditional fields of application. However, combined as primary processes within a unified system of dispute resolution, these three processes have taken on new dimensions that give momentum to the formation of the system of ADR. As has been noted, within the system of ADR, the context and scope of the primary processes have been extended into derivative processes and hybrid processes have been devised. Within the ambit of the system of ADR, the primary processes have been reinterpreted thereby establishing the formative principles that generate its development and propagate its maturation.

However, the formative function of the primary process has mainly occurred by means of experimentation at the context-based level of application. The experimental stage of development is characterised by the expansion of ADR techniques and processes in substantive areas of dispute to the neglect of theoretical underpinnings. A tension between theory and context-based applications is inevitable. However, serious problems arise if theory does not keep pace with practice and vice versa. The confusion regarding concept, definition and terminology is particularly obvious in those dispute sectors which rely on the process of mediation. A preoccupation with experimentation at the expense of theory runs the risk of dissipating the formative influence of the primary process. These formative principles ought to be projected into a developmental stage in which the process-related dimensions of the system of ADR are explored and extended within a general structure of theory. Emphasis on theory and process promotes a critical evaluation of the content, structure and the internal dynamics of ADR processes, raises issues of quality and formulates standards of practice and ethical norms for professional conduct. A stable theoretical framework consisting of cogent principles and well-defined concepts, forms a secure base from which the institutionalisation of ADR can proceed systematically. Institutionalisation entails the mainstreaming of ADR into the court system, the statutory regulation of ADR, the introduction of court-annexed processes, the funding of state-sponsored ADR programmes as well as the formal regulation and control of private dispute resolution organisations and their members.

In many respects this model for development indicates the route that the fledgling ADR movement should take in South Africa. If there is a general failure to create a developmental base of theory and principle and instead the emphasis falls on context-based applications, it is likely that ADR will stultify and lose its impetus to change the dynamics of dispute resolution in this country.



CHAPTER 4

ADR PROCESSES: CLASSIFICATION

4.1 Principles underlying the classification

4.2 Methodology

4.3 Explanation of the gradients

4.3.1 The horizontal gradient

4.3.2 The vertical gradient

4.4 Final remarks

4.1 Principles underlying the classification

The content of the preceding chapters contains primary principles that, if extracted, establish a framework for the classification of primary dispute resolution processes. The themes developed in these chapters will therefore be briefly summarised in order to establish the primary principles which they contain. These principles will be used to construct the framework of the schematic classification that follows.¹

The interpretation of each word of the rubric "alternative dispute resolution" brings a number of salient principles to the fore. A restrictive interpretation of the word "alternative" raises two important aspects. The first introduces the ADR/litigation dichotomy by posing that non-litigious and litigious processes are antithetical to each other.² The result is to counterposition the systems of ADR and judicial dispute

¹ See 4.3 below.

² See 2.1.1 above.

resolution as being mutually exclusive. As has already been stated,³ this view is more a matter of fiction than of fact. However, the ADR/litigation dichotomy does create a useful theoretical model that distinguishes between non-litigious and litigious processes.

The second restrictive interpretation that may be applied to the word "alternative" deals with the internal dynamic of the system of ADR. In this respect, the issues relate to the distinction between substantive and non-substantive ADR processes, depending on whether or not the intervention of a third-party neutral is required, or whether the ADR process concerned is adjudicative or non-adjudicative.⁴ Although these issues are highly theoretical, they do introduce principles relating to third-party intervention as well as the distinction between adjudicative and non-adjudicative processes.

Finally, the word "alternative" is given an extensive interpretation. This interpretation introduces the concept of appropriate dispute resolution: one of a number of process-related options, including litigation, may be selected to meet the requirements of the dispute concerned. In this setting, the form and function of a particular dispute resolution process is the determining factor. Consequently, all dispute resolution processes, including litigation, are integrated into a system of dispute resolution that promotes the functional selection of a particular process to suit the nature and content of the dispute concerned. On the grounds of this principle, litigation is acknowledged as a dispute resolution process and therefore justifies its inclusion in a classification of the primary dispute resolution processes of negotiation, mediation and arbitration.⁵

The interpretation of the word "dispute" forces an analysis of the origin, nature, meaning and transformation of a dispute. Principles for two major themes are developed. The one is the distinction between a non-legal and a legal dispute,⁶ the other relates to dispute transformation.⁷ These principles are interrelated. A dispute is eventually transformed

³ See 2.1.2 above.

⁴ See 2.1.3 above.

⁵ See 2.1.4 above.

⁶ See 2.2.2 and 2.2.3 above.

⁷ See 2.2.2 and 2.2.4 above.

according to the norms and values of the system of dispute resolution to which it is addressed. This is a continuous process that accounts for the transformation of a grievance into a dispute and the eventual transformation of a dispute in its social setting into a legal dispute, the latter being placed at the apex of the dispute resolution pyramid. This model explains the continuity between a grievance and a non-legal dispute and a non-legal dispute and a legal dispute. These principles indicate the manner in which the form and function of a particular process transforms the dispute and directly influences its outcome.

The word "resolution" has a number of dimensions in regard to the outcome of dispute processing. The examination of the outcome of a dispute introduces diverse factors relating to its enforcement and its qualitative attributes. A guiding principle is to determine whether the outcome is binding or non-binding. A binding outcome entails enforcement through the coercive power of State. Moreover, qualitative evaluation may be applied to a non-binding outcome because the absence of coercion makes such an outcome reliant on the mutual agreement of the disputants. This evaluation determines whether the outcome results in a win/lose, lose/lose or win/win situation.⁸

At this stage it is possible to identify a number of dichotomies: litigious/non-litigious processes, adjudicative/non-adjudicative processes, legal/non-legal disputes, binding and coercive/non-binding and non-coercive outcomes. The principles which these distinctions raise form the basis for analysis and classification.

Litigation has already been identified as an important dispute resolution process.⁹ Further, within the ambit of the system of ADR there are three recognised primary processes: negotiation, mediation and arbitration.¹⁰ In an integrated system of dispute resolution, the primary ADR processes, along with litigation, form major categories for classification. Each individual process establishes the framework for classification in regard to the form of process.

⁸ See 2.3 above.

⁹ See 2.1.4 above.

¹⁰ See 3.1 above.

There are some remaining points that need to be clarified. The first is that principles relating to procedure have not been dealt with yet. These principles permeate the work and will therefore be systematically evaluated in the chapters that follow. The classification contained in this chapter anticipates the content of subsequent chapters.

In the light of the above, the following are extracted as the primary principles for classification -

- (a) the form of process
- (b) procedure
- (c) the dispute
- (d) third-party intervention
- (e) disputant participation
- (f) outcome

These primary principles form the basis for further classification. However, before any classification can be attempted it is necessary to determine issues relating to methodology.

4.2 Methodology

The classification of ADR process is based upon two interdependent factors. The first relates to the primary principles that are selected to form the framework of the classification. This matter has already been dealt with.¹¹ The other factor concerns the method of reasoning that should be applied. Two options are available: either an inductive or a deductive method. Each method directly influences the compilation of the classification.

There are a number of ways to approach ADR. One recognised approach is to concentrate on context-based applications of ADR processes in various dispute sectors. This means that ADR processes are classified according to substantive areas of

¹¹

See 4.1 above.

dispute.¹² This has a restrictive effect. The related research is necessarily either anecdotal or empirical. Useful though this research might be, its method is inductive, demanding that general principles be abstracted from particular experiences or results. This particular approach is therefore not conducive to establishing universal criteria as the basis for classification because it is unable to place ADR processes within a general structure of theory.

The other approach to ADR is process related. This approach is based on the premise that ADR establishes a system of process that is alternative to, but not exclusive of, the system of judicial dispute resolution. In this context, ADR processes are assessed in relation to legal process. The emphasis is on process which in turn forces an evaluation of ADR processes within the structure of the general principles of procedure. The adoption of this approach has a direct impact on the structure of any classification. The method of reasoning is deductive, commencing with the general principles of process and procedure and then working to the particular principles applicable to specific processes.

Both approaches have their own merits, depending on the aim that each intends to achieve. However, for the purpose of this work, the process-related approach which is deductive, is adopted. This approach is in keeping with the purpose of proving that ADR is a system of process.

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See, for instance, Nagel "Multi-criteria dispute resolution" 6-29 in which a systematic analysis of dispute processes is applied in relation to particular substantive areas of dispute (eg family disputes, labour-management disputes, merchant-consumer disputes, neighbourhood disputes, disputes between a government agency and a private firm, disputes between business firms, disputes between governmental agencies, international disputes); dispute resolution processes are analysed according to the substantive nature of the dispute. An even better example is to be found in Mills **Conflict Resolution and Public Policy** which concentrates solely on public sector dispute resolution; the content consists of a mixture of anecdotal or empirical research as is evident from a random selection of some of the chapters of the work: "The hazardous waste dilemma and the hazards of institutionalising negotiation"; "Utility consumer dispute settlement: a regulatory model for mediation, arbitration and class advocacy"; "Competition, negotiation, or co-operation? Three alternative models for contracting services".

A process-related classification of ADR processes is not without its own problems. A critical factor relates to the method that will control and direct the classification of the subject matter. On the basis of existing research, two recognised methods of classification emerge. The one method classifies ADR processes according to individual characteristics; the other uses comparison as a method of classification. The merits of each method are assessed before an alternative method is proposed.

Classification on the basis of the characteristics of the various ADR processes is useful and should not be summarily rejected.¹³ In fact, every classification of ADR processes is dependent on an analysis of the characteristics of the processes concerned. However, a characteristic-based classification is normally incomplete because the various characteristics that form the framework for classification are isolated from the body of general theory. Put differently, the inadequacy relates to the failure to relate the various characteristics to the general principles from which they are derived.

Comparison is yet another method for classifying the subject matter of ADR processes. In this instance, two methods of comparison are possible. The first relies on a comparison of similarities and dissimilarities of the elements of the various processes involved;¹⁴ the second method is based on a qualitative comparison that grades the processes concerned in relation to their efficacy in terms of a given list of elements.¹⁵ Comparison is an important component of any classification. An evaluation of the similarities and dissimilarities of the subject matter of various processes leads to a deeper insight into their different functions. So too, a qualitative comparison emphasises in functional terms the advantages and disadvantages of using a particular process. However, both methods have serious defects. Both restrict the content of the

¹³ See Goldberg, Sander and Rogers **Dispute Resolution 4** for a characteristics-based classification. This classification is appended at the end of this chapter and marked as annexure A for the purposes of identification.

¹⁴ For a classification based on the same method of comparison, see Brand "Nature of arbitration process" 100-101. This classification is appended at the end of this chapter and marked annexure B for the purposes of identification.

¹⁵ See Street "Comparison of dispute resolution processes" 117 for a classification based on a qualitative comparative method. This classification is appended at the end of this chapter and marked annexure C for the purposes of identification.

classification since the subject matter so classified is limited to the similarities and dissimilarities of individual elements of the processes concerned. But most importantly, the individual elements compared are not traced to their source of origin that is derived from the structure of the general principles of procedure. This has the effect of restricting the scope of the classification because only the elements of the various processes that are capable of comparison, are considered.

An analytical method of classification is applied in this work.¹⁶ The subject matter relating to various ADR processes is integrated by interrelating the form of process to the general principles of procedure. The classification is therefore composed of a horizontal and a vertical gradient. The form of process is represented on the horizontal gradient and the general categories of procedure are contained on the vertical gradient. The subject matter is contained beneath the horizontal gradient and to the right of the vertical gradient and may be analysed by simultaneously cross-referencing both gradients.

A notable feature of the classification is that both gradients contain an internal sub-classification. This permits a more precise analysis of the subject matter. A concrete example taken from the schematic classification below¹⁷ would best illustrate this working method. If **arbitration** is the subject for analysis, then the following method should be applied. By reference to the horizontal gradient it may be established that **arbitration** is a **FORM** of process that is *non-litigious* and *adjudicative*. A further analysis of **arbitration** is possible by applying the vertical gradient. For instance, it is possible to determine that in respect of its **OUTCOME**, **arbitration** (as a *non-litigious* and *adjudicative* process) produces a win/lose result. Individual elements of the subject matter may therefore be analysed according to the particular classification and sub-classification of the information contained in both gradients. This application simultaneously involves the reduction of any individual element back to its source of origin within the framework of the general principles of procedure.

¹⁶ See also table 1 below.

¹⁷ See table 1 below.

TABLE 1 - CLASSIFICATION OF APPROPRIATE DISPUTE RESOLUTION PROCESSES

		FORM				
		PROCESS	LITIGATION	ARBITRATION	MEDIATION	NEGOTIATION
		NATURE	LITIGIOUS	NON-LITIGIOUS		
		METHOD	ADJUDICATIVE		NON-ADJUDICATIVE	
PROCEDURE	NATURE	technical, formal and adversarial	formal, but not necessarily technical or adversarial	informal and non-adversarial		
	NORMS	public and legal	private and legal	private and community standards		
	PROCEDURAL GUARANTEES	rules of natural justice regulated by court	rules of natural justice	no guarantees; mediator maintains power balance	no guarantees	
	STANDARDS OF PROOF	rules of evidence	standards of proof agreed between disputants and arbitrator	burden of persuasion only, resting on disputants		
	RULES	predetermined and rigid	rules of procedure and substantive criteria may be determined by disputants	mediator determines rules of conduct with disputants	disputants determine own rules	
	CONFIDENTIALITY	public proceedings	private except when taken on review	private	highly private	
	COMMENCEMENT	summons on action application on motion	by mutual agreement			
	TIME-LIMITS	rigidly applied	flexible			
	VENUE	supplied by State and determined by jurisdictional factors	private, as arranged by disputants			
	REDRESS	appeal	no appeal, only review	no appeal or review		
DISPUTE	NATURE	legal	non-legal or legal	non-legal; rights-, interest- or grievance-based		
	FORMULATION	cause of action	arbitration agreement	identified by disputants	agenda	
	SECTORS	all	mainly commercial, industrial and labour	commercial, labour, divorce and family, environmental	all	

THIRD-PARTY INTERVENTION	ROLE	public adjudicator	private adjudicator	facilitator	no third-party involvement
	CONTROL	coercive power of court	disputants by agreement submit to procedural and substantive control.	disputants subject to mediator control but determine their own bargaining parameters	
	APPOINTMENT	state imposed judicial official	party selected, usually with specialist knowledge	party selected, usually with specialist knowledge and mediator skills	
	FINDING	state	privately by disputants		
DISPUTANT PARTICIPATION	AUTONOMY	party prosecution and presentation regulated by rules	prosecution and presentation regulated by disputants	mediator controls process, disputants control content and outcome	disputants have total control over process, content and outcome
	REPRESENTATION	legal representation	self-representation or legal representation	self-representation	
	RELATIONSHIPS	impersonal; adversarial presentation heightens conflict	permits on-going relationships	permits, maintains or enhances on-going relationships	permits on-going relationships, if style not competitive
OUTCOME	FORM	judgment / order	award	deed of settlement	
	BINDING / NON-BINDING	binding	mainly binding but can be non-binding	contractually binding	
	RESULT	win /lose		mutually acceptable agreement sought	
	REMEDIES	limited range of legal remedies determined by court	possible remedies identified by disputants and determined by arbitrator	actual remedies identified and determined by disputants	
	ENFORCEMENT	execution under sanction of State	award on application enforced as order of court	enforcement only under law of contract	

There is another important feature of this method of classification. The analytical method of classification also permits a subsidiary classification either of the characteristics of a particular process or on the basis of a comparison of the various processes involved. The characteristics of a particular form of process may be referenced by reading down the columns of the vertical gradient. So too, by reading across the columns of the horizontal gradient it is possible to compare the various processes on the basis of their similarities and dissimilarities.

Noticeable by its absence is the classification of the hybrid processes.¹⁸ Numerous problems complicate the inclusion of the hybrid processes into the classification of the primary ADR processes. The intrinsic nature of the hybrid processes prevents their inclusion into the main classification. The overriding reason is the manner in which the hybrid processes combine elements of the primary processes. This alters the method of classification. Each hybrid process must be classified according to the elements of the primary processes that have been combined to create the hybrid process itself. For these reasons, a separate classification of the hybrid processes will follow in a subsequent chapter.¹⁹

4.3 Explanation of the gradients²⁰

4.3.1 The horizontal gradient

The horizontal gradient relates to the classification of the **FORM** of process. Every aspect of the classification is influenced by it. There is one cardinal reason that accentuates the importance of the horizontal gradient: the transformation of a dispute is directly influence by the **FORM** of process. **FORM** is at the heart of process - its substance, nature and method of application. The **FORM** of process is therefore focal to any process-related classification.

¹⁸ See, further, 8.3 below.

¹⁹ See further 8.2 below.

²⁰ In order to facilitate a clear description of both the horizontal and vertical gradients, key terms have either been capitalised, italisised or printed in bold.

The category process is sub-classified under the headings *litigation*, *arbitration*, *mediation* and *negotiation*. Ostensibly, this sub-classification may be regarded as merely naming the major dispute resolution processes. However, the naming of an individual process has more important implications. Each process predicts the nature and method of the transformation that will occur as well as the process-related implications. These implications are expressed in the vertical gradient.

The nature and method of application constitute a further classification in regard to the FORM of process. The nature of the FORM of process is either *litigious* or *non-litigious* and the method of application in respect of a particular process is either *adjudicative* or *non-adjudicative*.

The sub-classification of the nature of the FORM into categories of *litigious* and *non-litigious* may be misleading if not qualified. The distinction between litigious and non-litigious processes could be associated with the ADR/litigation dichotomy. As mentioned above,²¹ the ADR/litigation dichotomy is not at all relevant to this classification apart from introducing this distinction. For the purpose of this classification, *litigious* and *non-litigious* are not used as oppositional terms but instead have a technical meaning. In their technical sense these terms indicate whether or not a particular process is capable of sustaining a dispute on the basis of substantive legal principles and court-sanctioned rules of procedure. In terms of the classification, *litigation* is the only FORM of process that is *litigious*. *Arbitration*, *mediation* and *negotiation* are *non-litigious*. This conclusion is obvious in respect of *mediation* and *negotiation* but needs to be qualified in regard to *arbitration*. Although it is possible that an arbitral award may be based on principles of law, it is equally possible that the award could deal only with the merits of the facts in dispute. Moreover, sanctioned rules of court do not apply to arbitration proceedings unless the disputants mutually agree to adopt these rules. What is evident is that *arbitration* does have some of the attributes of a litigious process but not in plenary form. *Arbitration* is therefore classified as a *non-litigious* process.²²

²¹ See 4.1 above.

²² For the distinction between litigation and arbitration as forms of adjudication, see Bayles "Principles of legal procedure" 38-39.

The terms *adjudicative* and *non-adjudicative* may also be misunderstood. A misconception is that the term adjudication indicates whether an outcome is binding or not. This is not a correct description of adjudication but rather expresses a consequence incidental to the selection of a process that is either *adjudicative* or *non-adjudicative*. Within the context of the classification, *adjudicative* and *non-adjudicative* refer to the method of decision making in regard to a particular form of process. The category *adjudicative* entails the method whereby the issues in dispute, as they have been formulated by the parties, are appraised by a neutral third party on the basis of the evidence presented and resolved in favour of one of the disputants, on the grounds of an objective and often reasoned decision. The meaning of *non-adjudicative* is self-explanatory.

The function of the horizontal gradient may be illustrated by the following example: if *mediation* is selected as the **FORM** of process, then according to its nature it is *non-litigious* and its method of decision making is *non-adjudicative*. The same type of analysis may be applied to the processes of *litigation*, *arbitration* and *negotiation*.

4.3.2 The vertical gradient

The vertical gradient is classified according to five categories relating to process: **PROCEDURE**, the **DISPUTE**, **THIRD-PARTY INTERVENTION**, **DISPUTANT PARTICIPATION** and **OUTCOME**. Each category is subject to a further sub-classification. Whereas the horizontal gradient deals with the method of dispute transformation, the vertical gradient relates to the content of that transformation.

The vertical gradient commences with the category: **PROCEDURE**. The word "procedure" is used in its broadest sense to indicate the manner in which a process is conducted as well as the values that underlie that process. The stated sub-classification of **PROCEDURE** into *standards of proof*, *rules*, *confidentiality*, *commencement*, *time limits*, *venue* and *redress*, relates directly to the formal conduct of a specific process. These are self-evident and do not need any further comment. The philosophical underpinnings are expressed under the elements of *nature*, *norms* and *procedural guarantees*.

The *nature* of **PROCEDURE** is classified as being either technical, formal, informal or adversarial. The major determinant regarding the *nature* of **PROCEDURE** is whether a process is either adversarial or non-adversarial. The term "adversarial" refers to the presence of a third-party neutral who in an adjudicative capacity plays the role of an umpire within the Anglo-American setting of trial proceedings. Moreover, "adversarial" alludes to the principles of party prosecution and party presentation whereby each of the disputants is responsible for prosecuting the complaint or defending it, as the case may be, as well as investigating and presenting proofs or arguments.²³ In an adversarial setting, each disputant takes a partisan stance in regard to his own cause or defence, as the case may be, on the assumption that truth may be established by synthesising opposing views.²⁴

Although not always evident from the practical rules of procedure, all forms of procedure are based on normative precepts. The practical rules of procedure have a significance beyond their verbal meaning. These values are sometimes formulated as public and legal norms that have been devised to safeguard public morality or the public interest. Similarly, procedural norms are formulated to express private or community standards. The *norms* of **PROCEDURE** are therefore an important indication of the value system that supports the objectives of a particular process.

The aspect of *procedural guarantees* deals with the issue of whether or not a particular process maintains and protects the rights or interests of disputants.²⁵ Once the

²³ For the principles of party prosecution and party presentation, see Hazard **Civil Procedure** 4-5; Millar "Formative principles" 19-21 9-11.

²⁴ See, further, Berman "Western legal science" 909-911 921 930; Calamandrei **Procedure and Democracy** 72 75 79; Couture "Judicial process" 19-20. In regard to the dialectical nature of process, Couture writes: "... that which constitutes the structure of process is the dialectical order. The judicial process and the dialectical process appear to us to be united by a firm bond. The truth is arrived at by oppositions and refutations: by thesis, antithesis and synthesis. Justice employs dialectic, because it is by the principles of contradiction that the truth can be reached, the confrontation of opposites."

²⁵ Although the principles relating to procedural guarantees have not been systematically developed in Anglo-American systems, the following works express certain aspects of these principles: Baxter **Administrative Law** 542-557; Bayles "Principles for legal procedure" 57-57; Delgado et al "Fairness and

disputants have committed themselves to the choice of a particular process, the procedure that determines the content of that particular process also controls the conduct of the disputants. The rights and interests of a disputant could be infringed or alienated if rules for the conduct of procedure were not applied to maintain the balance of power between the disputants. The term "procedural guarantees" might be a misnomer in regard to the process of negotiation since in this instance the disputants maintain the balance of power between themselves, the acknowledged risk being that the weaker party might well be in a less favourable bargaining position. However, in situations where a procedure is dependent upon third-party intervention, the disputants submit themselves to the control of the third party. The conduct of the third party is therefore crucial to the maintenance of the balance of power between the disputants who could have their rights or interests alienated if the third party did not manage power imbalances or enforce the rules of process that do so. The maintenance of the balance of power between the disputants ensures a fair hearing or an open and honest exploration of the issues in dispute, as the case may be. In adjudicative processes the rules of natural justice are applied to ensure that procedural guarantees are maintained. It is in this context that *procedural guarantees* are analysed as a category of **PROCEDURE**.

The **DISPUTE** is divided into three categories: *nature*, *formulation* and *sectors*. The *nature* of a dispute is indicated as being either legal, non-legal or grievance-based. This amounts to a summary of the stages of dispute transformation. Each stage of the transformation is indicated on the horizontal gradient by reference to a particular type of process and this in turn is integrated with the differing methods relating to the *formulation* of the dispute for the purposes of dispute processing. The interrelationship illustrates the intimacy between the dispute as a social event and the manner in which it is transformed by the system of process to which it is addressed for its resolution. The category relating to **DISPUTE sectors** analyses the prevalence of certain types of disputes in relation to the processes contained in the horizontal gradient.

In terms of the classification, the following are represented as separate categories: *third party intervention*, *disputant participation* and *outcome*. For the purposes of analysis, the individual representation of each is justified provided that it is borne in mind that the separation of these elements is artificial. In a practical setting all three categories are integrated: as the degree of third-party intervention decreases, disputant autonomy increases. This formula also relates to the outcome. The greater the degree of intervention on the part of the third-party neutral, the less the disputants are able to control the outcome. The opposite is also true. These principles are illustrated by means of the following matrix.²⁶

		WHO CONTROLS THE OUTCOME		
		DISPUTANTS	THIRD PARTY	RULES
WHO CONTROLS THE PROCESS	DISPUTANTS	Private negotiation		
	THIRD PARTY	Mediation	Conciliation Arbitration	
	RULES			Litigation

Figure 1

The matrix is governed by two gradients: the horizontal gradient that relates to control of the outcome and the vertical gradient that determines control of process. Both gradients are categorised in relation to disputants, third party and rules. Each segment of the matrix indicates the relationship between the principles expressed by both gradients. However, there is an aspect of the matrix that needs to be clarified. The diagonal

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Adapted from Bryson "Conflict, law and alternative" (1988) *Community Quarterly* 25 cited in *Fulton Commercial ADR* 21.

representation²⁷ shows private negotiation as being the only form of process that permits full party autonomy as well as absolute control over the outcome of the process. The degree of disputant autonomy diminishes progressively (as well as control over outcome) by moving downwards to the segment that represents the process of litigation. The matrix indicates that when the process of litigation is used, party autonomy decreases to such an extent that the outcome of the process is regulated totally by rules and hence by the coercion that underlies their enforcement.²⁸ These principles underlie the analysis contained under the related categories of the vertical gradient.

4.4 Final remarks

Any classification of ADR processes is at the most tenuous because ADR, as a system of dispute resolution, is still a primitive science. Compared to a classification that might be compiled in the future, any current classification is necessarily preliminary. However, what the schematic classification does teach is that the primary ADR processes are capable of being integrated into the general theory of procedure and that its principles of process are of general application.

For some ADR is a social movement, for others it is merely a method for managing disputes within a specific dispute sector. But, ultimately, if ADR is to be recognised as an independent system of dispute resolution, it should be possible to rely on principles of process that have been systematically developed and that may be uniformly applied in practice. If this goal cannot be attained, ADR will amount to no more than the unsystematic application of informal dispute resolution techniques that are only relevant in certain dispute sectors and dependant on the policy and values prevalent in a specific dispute sector.

The schematic classification shows that the primary ADR processes can be analysed in the context of the general structure of procedure. Consequently, ADR is much more than

²⁷ ie reading the matrix from the top left segment to the bottom right segment.

²⁸ See, further, Fulton **Commercial ADR** 21-22.

a broadly based social movement or a convenient portfolio of dispute resolution processes that can be applied at random in specific dispute sectors. A process-related classification points to ADR as having an internal dynamic that functions on the basis of independent principles of process. From a legal perspective, this ought to lend authenticity to ADR as a system of process that can meet and serve the demands of the legal system primarily because its various forms of process are capable of supporting legal decision making.

“Primary” Dispute Resolution Processes

<i>Characteristics</i>	<i>Adjudication</i>	<i>Arbitration*</i>	<i>Mediation</i>	<i>Negotiation</i>
Voluntary/ Involuntary	Involuntary	Voluntary	Voluntary	Voluntary
Binding/ Nonbinding	Binding; subject to appeal	Binding, subject to review on limited grounds	If agreement, enforceable as contract	If agreement, enforceable as contract
Third party	Imposed, third-party neutral decisionmaker, generally with no specialized expertise in dispute subject	Party-selected third-party decisionmaker, often with specialized subject expertise	Party-selected outside facilitator	No third-party facilitator
Degree of formality	Formalized and highly structured by predetermined, rigid rules	Procedurally less formal; procedural rules and substantive law may be set by parties	Usually informal, unstructured	Usually informal, unstructured
Nature of proceeding	Opportunity for each party to present proofs and arguments	Opportunity for each party to present proofs and arguments	Unbounded presentation of evidence, arguments and interests	Unbounded presentation of evidence, arguments and interests
Outcome	Principled decision, supported by reasoned opinion	Sometimes principled decision supported by reasoned opinion; sometimes compromise without opinion	Mutually acceptable agreement sought	Mutually acceptable agreement sought
Private/ Public	Public	Private, unless judicial review sought	Private	Private

*Court-annexed arbitration is involuntary, nonbinding, and public.

**TABLE OF ARBITRATION, COURT ADJUDICATION
AND MEDIATION CHARACTERISTICS**

Arbitration	Court adjudication	Mediation
It is voluntary in its initiation and compulsory in its continuation	It is compulsory in its initiation and in its continuation	It is voluntary in initiation and continuation
The disputants choose the adjudicator	The State chooses the adjudicator	The disputants choose the mediator
The adjudicator may be selected for his knowledge in the dispute subject	The adjudicator may not be selected by the parties and is often not a specialist in the dispute subject	The mediator may be selected by his expertise and is often a specialist in the dispute subject
There is no appeal to a higher court, only a review	There is an appeal or a review	There is no appeal or review
The adjudicator determines the outcome in accordance with terms of reference	The adjudicator determines the outcome in accordance with precedent	The disputants determine the outcome
The disputants determine the issue prior to the arbitration	The issue must correspond with a specific legal cause of action	The disputants can fashion the issue and vary it during the mediation process
The arbitration procedure is determined by the disputants and may be relatively simple and informal	There is a formal, rigid and predetermined procedure prescribed by law	The procedure is informal and flexible
Arbitrators do not necessarily apply public norms	Court adjudicators apply public norms	Mediation does not necessarily apply public norms
Precedent does not apply strictly	Precedent is applied strictly	Precedent is of little importance
The disputants determine possible remedies	There is a limited and inflexible range of remedies prescribed by law	The disputants determine the actual remedies
The outcome can be determined by law, principle or equity	The outcome is usually governed by law and principle (sometimes equity)	The outcome can reflect the concerns and priorities of the disputants and may ignore law and be unprincipled
Power can affect the outcome	Power has little effect on the outcome	Power has a major effect on the outcome
The outcome is enforceable	The outcome is enforceable	An agreement arising out of mediation is enforceable
There is a relatively high rate of compliance with the outcome	There is a lower rate of compliance with the outcome	There generally is a very high rate of compliance with the outcome
Arbitration is generally held in private	Court adjudication is held in public	Mediation is generally held in private
The disputants must establish the forum	The forum is established by the State	The disputants must establish the forum
Time and place is flexible	Time and place is rigid	Time and place is flexible
The forum is privately funded	The forum is funded by the State	The forum is privately funded
Arbitration can be relatively inexpensive	Court adjudication is seldom inexpensive	Mediation is usually relatively inexpensive
Arbitration can be relatively time-efficient	Court adjudication is usually very time-consuming	Mediation is usually relatively time-efficient
Arbitration is often less adversarial	Court adjudication is usually very adversarial	Mediation can be relatively non-adversarial
Arbitration can allow ongoing relationships to be maintained	Court adjudication often strains or destroys ongoing relationships	Mediation is often positive for relationships
Disputants often represent themselves	The disputants are almost always legally represented	Disputants are seldom represented by lawyers

DISPUTE RESOLUTION IN COMMERCIAL MATTERS

<i>Element</i>	<i>Litigation</i>	<i>Arbitration</i>	<i>Expert Appraisal</i>	<i>Mediation</i>
1 Confidentiality	No	Yes	Yes	Yes
2 Choice of adjudicator or appointee	No	Yes	Yes	Yes
3 Range of issues	As pleaded	As particularised	As stated	Open ended
4 Flexibility of procedure	Moderate	High	Very high	Very high
5 Delay potential	Moderate	Low	None	Very low
6 Control by parties	Low	Moderate	Very high	Very high
7 Susceptibility to tactics	Moderate	Low-Moderate	None	Very low
8 Control over parties	High	Moderate	None	None
9 Control over witnesses	High	Moderate	None	Not applicable
10 Power to compel consolidation	Yes	No	No	No
11 Width of remedies	Wide	Restricted	Not applicable	Not applicable
12 Binding decision	Yes	Yes	Yes	No
13 Enforceability of decision	Direct	Almost direct	Indirect.	Not applicable
14 Susceptibility to appeal	Open	Restricted	None	Not applicable
15 Liability for opponent's costs	As ordered	As awarded	None	None
16 Cost of tribunal	Free	Parties as awarded	Parties as agreed	Parties as agreed
17 Level of costliness	Relative to length	Relative to length	Low	Low
18 Level of time required of parties	Relative to length	Relative to length	Very low	Low
19 Preservation of business relationship	Doubtful	Doubtful	High	Very high

CHAPTER 5

NEGOTIATION, LEGAL NEGOTIATION AND ADR

5.1 The concept of legal negotiation in the context of ADR

5.2 Processual characteristics

5.3 Negotiation strategy

5.3.1 Terms and concepts

5.3.2 Descriptive analysis

5.3.3 Critical evaluation

5.4 Contextualising legal negotiation

5.5 The structure of legal negotiation

5.6 Strategy selection

5.7 Negotiation and legal negotiation

5.1 The concept of legal negotiation in the context of ADR

Negotiation is the predominant method of private ordering. As a result there are a multitude of negotiation techniques that cover a variety of social relationships. In its broader sense, negotiation is a process of communication that entails either bargaining to reach an agreement or interaction to resolve psychological confrontation. Negotiation applications relate to political deals, commercial transactions, bargaining for the release of hostages, framing governmental rules and regulations, resolving family and marital disputes, settling community and environmental problems, and so the list of applications

can continue. What is immediately evident is that negotiation is an extremely flexible and adaptable process that can be contextualised in a variety of social situations.

Negotiation has always been associated with lawyers and the legal system. But, never before has negotiation as it is applied in a legal setting been specifically identified as legal negotiation - a method of negotiation that functions within a legal environment according to its own unique standards, values and structure. If reasons are to be sought, then there is one that is outstanding: the dimension that has been given to legal negotiation has occurred contemporaneously with the emergence and development of the system of ADR.¹

ADR has provided the framework within which different values and points of reference could converge and cross-fertilise each other with regard to the theory and practice of negotiation. Legal negotiation is a product of this process. Through the influence of ADR, negotiation as it occurred in a legal setting was reassessed not only from a legal perspective, but also on the basis of inter-disciplinary studies. Legal negotiation theorists turned to social anthropological, psychological and sociological sources to make sense of the process of negotiation as practised in its legal environment.

As a social anthropologist, Gulliver² established the notion that negotiation, in all its forms and in all cultures, is not an indefinite, formless and random event that is used on an *ad hoc* basis but instead has distinct processual characteristics. Negotiation is therefore a structured process that is capable of being utilised and managed rationally as it progresses through a number of predefined stages, though not according to a rigid model. Because of the emphasis on the processual nature of negotiation, it is possible to analyse both the process of negotiation and legal process as decision-making models.

Eisenberg³ explored the normative issues that arise from an analysis of the continuities and discontinuities between legislation and adjudication, on the one hand, and

¹ See Gifford "Strategy selection in legal negotiation" 42 note 11.

² See **Disputes and Negotiation**.

³ See generally "Private ordering through negotiation".

negotiation as an informal decision-making process, on the other hand. On this basis it is possible to differentiate between rule-making or transactional negotiation as an extension of the legislative function and dispute negotiation as an informal analogy of formal decision making. The distinction is fundamental because it contextualises legal negotiation as relating to either the creation of legal rights or the resolution of disputes concerning legal rights. Rule-making negotiation relates to future conduct while the dispute negotiation deals with disputes arising from past events.

Eisenberg's work also raises an important question about the nature of negotiation in the context of the system of ADR. The distinction between rule-making negotiation and dispute negotiation establishes a normative basis for contextualising the two forms of negotiation. Negotiation as a primary ADR process relates to dispute negotiation. As its name indicates, ADR is focused on the resolution of disputes. In no manner is the significance of rule-making negotiation denigrated. Both forms of negotiations are equally important. However, as a primary alternative dispute resolution process, negotiation should be interpreted as dealing with the resolution of disputes, irrespective of whether their content is legal or non-legal. A specific meaning is therefore attached to negotiation as a primary ADR process.

The emergence of the system of ADR has also led to a critical evaluation of the traditional structure of and strategy for legal negotiation. The conventional competitive approach to legal negotiation is typified by the standard work of Bellow and Moulton.⁴ In direct contrast, Ury and Fisher⁵ devised the method of principled negotiation and Raiffa⁶ developed the notion of integrative bargaining. These innovative approaches to negotiation represent a trend that moves away from the linear structure of distributive bargaining that is characteristic of legal negotiation coupled to a competitive strategy. The response is evident in the legal literature that followed. The co-operative strategy was given prominence by Williams,⁷ affirming that a strategy other than a competitive

⁴ See generally **The Lawyering Process: Negotiation.**

⁵ See generally **Getting to Yes.**

⁶ See generally **Science of Negotiation.**

⁷ See generally **Legal Negotiation and Settlement.**

strategy could be applied within the adversarial structure of legal negotiation. Similarly, the application of an integrative strategy on the basis of a problem-solving model was developed and promoted by Menkel-Meadow.⁸ From different perspectives, Lowenthal⁹ and Gifford¹⁰ provide rational grounds for strategy selection in relation to legal negotiation.

There is a dry irony in the work of Mnookin and Kornhauser.¹¹ The content of their work has little to do with negotiation theory but one single idea that they expressed made their work famous. Negotiation that relates to a legal dispute occurs "in the shadow of the law", thereby creating a bargaining endowment for the disputants. The "shadow of the law" concept once more narrows the meaning of negotiation as a primary ADR process whenever it is applied in a legal environment. Apart from being understood as a form of dispute negotiation, a distinctive type of negotiation that may be described as "legal negotiation" is the product of the "shadow of the law" concept. This succinct phrase encapsulates the very essence of the negotiations that occur against the background of legal process. Legal negotiation anticipates the outcome of an adjudicative decision thereby introducing precedent, substantive law, evidence as well as the delays inherent in litigation, its uncertain outcome and its exorbitant transactional costs, as factors that directly influence the substance of the negotiations.

The concept of legal negotiation is given an interesting twist by both Kritzer¹² and Galanter.¹³ Working on the assumption that the majority of legal disputes are settled by negotiation, these commentators observe that the compelling presence of the courts presents an adjudicative alternative should the negotiations fail. This idea provokes thought about the purpose and function of negotiation as a primary dispute resolution

⁸ See generally "Legal negotiation".

⁹ See generally "General theory of negotiation".

¹⁰ See generally "Strategy selection in legal negotiation".

¹¹ See generally "Bargaining in the shadow of the law".

¹² **The Negotiation Process in Ordinary Litigation** 136-137.

¹³ "Negotiation and legal process" 268-269.

process within the system of ADR and points the way for further research regarding the relationship between legal negotiation and adjudication.

What each of these commentators teach is that negotiation is not a haphazard social event or an indistinct method of communication. Negotiation has an art-form and a science-form. In its science-form it is possible to identify definite processual stages, differentiate between certain forms of negotiation, recognise its potential as a problem-solving method and analyse the course of its conduct by means of the selection of different strategies. Because of its prominence as a method of dispute resolution, increased attention has been focused on the role and function of the process of negotiation as it is applied in a legal context. In fact, labour relations negotiations or any other context-based application of negotiation could have been chosen other than legal negotiation as the subject of this text. In each instance the specialised context of that particular form of negotiation would have been related to the theoretical model of negotiation. However, because of the predominant processual theme of this work, negotiation in its legal setting has been selected. This offers an opportunity to explore the continuities between negotiation as an informal process with legal process as a formal counterpart.

5.2 Processual characteristics¹⁴

A common perception among lawyers is that any valid form of process ought to be formal, technical, adversarial, rule bound, uniformly applied and subject to the external control of a neutral third party. Any other form of process is suspect if it does not meet the standards of legal process. The effect is to isolate legal process from informal processes. Consequently, the continuities and discontinuities between legal process and informal processes are disregarded.

¹⁴ This portion of the chapter is no doubt tedious to read. However, it is necessary to minutely analyse the processual nature of negotiation because of its fundamental importance within the system of ADR as a primary process, along with mediation and arbitration. Mediation and arbitration are regarded as substantive ADR processes (see, further, 2.1.3 above) and hence their processual integrity is not in doubt. It is therefore important to prove that negotiation also has a definitive processual structure.

This holds true for negotiation as a process. Merely because the process of negotiation does not conform to the stringent requirements of legal process, does not alter the fact that it does have processual characteristics. A comparison of the characteristics of negotiation and legal process clearly shows that these forms of process differ fundamentally from each other. Negotiation is informal, bound only to the rules and standards agreed upon by the parties themselves, need not be adversarial and is conducted by the parties themselves without the intervention of a neutral third party. However, these differences do not negate the inherent processual characteristics of negotiation. An analysis of the internal dynamic of negotiation indicates that it is a form of process. The internal dimensions of the negotiation process therefore need to be explored before it may be summarily assumed that it does not have processual characteristics.

An analysis of the internal dynamic of the process of negotiation shows that it functions by means of the uniform application of stylised procedures. By this is meant that negotiation moves through a number of recognised developmental stages. The weight of authority of both legal and non-legal scholars confirms the consistency of identifiable developmental stages in their descriptions of negotiation. The detail might differ but if examined as whole, the recognition of distinct stages for negotiation is common to all the texts that have been reviewed.

Menkel-Meadow abstracts the following stages of negotiation from her survey of "adversarial" writings¹⁵ -

- (a) pre-negotiation strategising or planning to determine target and resistance points, location and timing of negotiation;
- (b) offers and responses (expressions of differences and issue definitions);
- (c) information exchange (positions, arguments and objectives);

¹⁵ The "adversarial writings" referred to by the author include **Williams Legal Negotiation and Settlement** (see text to note 17 below); **Raiffa Science of Negotiation** (see text to notes 24-28 below); **Gulliver Disputes and Negotiations** (see text to notes 29-34 below). **Gifford Legal Negotiation** (see text to notes 18-21 below) was not considered because his work was published later, in 1989.

- (d) bargaining where concessions are made and analysed;
- (e) closure or agreement, where agreements are made and parties allocate final responsibilities for negotiated relations.¹⁶

Responding to the findings of extensive empirical studies conducted among lawyers, Williams identifies four distinct negotiation stages -

- (a) orientation and positioning;
- (b) argumentation;
- (c) emergence and crisis;
- (d) agreement or final breakdown.¹⁷

According to Gifford, the process of negotiation also consists of four distinct stages -

- (a) orientation and positioning,¹⁸
- (b) exploration of issues;¹⁹
- (c) bargaining or "convergence",²⁰ and
- (d) final or concluding stage.²¹

¹⁶ "Legal negotiation" 777.

¹⁷ **Legal Negotiation and Settlement** 70-85.

¹⁸ This stage is the same as that stated by Williams (see text to note 17 above). However, in interpreting this stage, Gifford describes it as the phase when the "tone" of the negotiations is set by the parties; initial encounters indicate the styles and tactics that will follow.

¹⁹ Compared to Williams, Gifford at 34 expands the scope of this stage by describing it as that of the exploration of issues, which includes argumentation as well as information exchange on the basis of selectively disclosed information.

²⁰ For the meaning of the term "convergence", see note 32 below.

²¹ **Legal Negotiation** 32-36.

Non-legal scholars consistently agree that negotiation is a process that progresses through identifiable stages of development. In this respect, the most prominent writers are Raiffa²² and Gulliver.²³ Raiffa also allocates four developmental stages to the negotiation process²⁴ when it occurs in a competitive setting in which two parties are negotiating over a single issue in dispute. These four stages are -

- (a) preparation for negotiation,²⁵
- (b) opening gambits;²⁶
- (c) the negotiation dance,²⁷ and

²² Raiffa, is a mathematician, who has developed a game theoretical model for negotiation that to date remains influential.

²³ Gulliver is an anthropologist who has approached the subject of negotiation from a cross-cultural perspective. His work presents perhaps the most objective assessment of the negotiation process primarily because of its multi-cultural scope.

²⁴ Raiffa describes the four stages of negotiation in a particular context that should be clarified. He has adopted an asymmetrically prescriptive/descriptive approach. A symmetrically descriptive approach examines the behaviour of all the negotiators on both sides without prescribing how they should behave; the symmetrically prescriptive approach examines how rational negotiators should behave in competitive, interactive situations in terms of game theoretical models. The asymmetrically prescriptive/descriptive approach focuses on advice to only one party to the negotiation about how to behave in order to achieve a specified outcome. It is asymmetrical in that attention is paid to one party alone; prescriptive for the party receiving the advice and descriptive of the probable behaviour of the opposing party. See Raiffa **Science of Negotiation** 20-22 359.

²⁵ Because of the asymmetrically prescriptive/ descriptive approach adopted by Raiffa, his description of the first stage of negotiation and indeed, also of the other stages that follow, deviates considerably from that of the other writers. In respect of the first stage, described as "preparing for negotiation, the individual negotiator is advised to consider the following: know yourself; know your adversary; think about negotiating conventions relating to the behaviour of the opponent, location, language and the negotiation team; consider the logistics of the situation; realise the value of simulated role playing as a method of preparation and lastly, set personal aspiration levels". See **Science of Negotiation** 126-127.

²⁶ Once again, this next stage is described in highly prescriptive terms: determine who should make the first offer, control your reaction to an extreme first offer and protect your integrity by avoiding the disclosure of information as an alternative to giving false information. **Science of Negotiation** 127-128.

²⁷ "The negotiation dance" is a rather obscure term for describing a stage of the negotiation process and needs to be explained. In essence, this stage is akin to the bargaining stage identified by the other writers, which is interpreted by Raiffa

- (d) end play (closure).²⁸

Gulliver's stages of negotiation are more detailed by comparison to those of other writers. Eight stages are identified -

- (a) the search for arena,²⁹
- (b) composition of agenda and definition of issues;³⁰
- (c) establishing maximal limits to the issues in dispute;³¹
- (d) narrowing the differences;
- (e) preliminaries to final bargaining;
- (f) final bargaining;³²

as encompassing an awareness of the pattern of concessions as well as the continuous reassessment of perceptions. **Science of Negotiation** 128-129.

²⁸ "End play" is a term that signifies the closure of the negotiation process or the final stage. Once again Raiffa's prescriptive approach prevails and his advice to the negotiator during this stage is to make commitments or gracefully break a commitment; help an opponent to break a commitment; introduce an intermediary if a deadlock is suspected and finally, to broaden the domain of negotiation in instances where there may be no way of achieving a solution because of stated commitments. **Science of Negotiation** 129-130.

²⁹ "The search for arena" is defined by Gulliver as the first stage of negotiation in which the parties agree on the location where the negotiation will take place as well as the social, legal and cultural rules that will regulate the process. **Disputes and Negotiation** 122-126.

³⁰ The negotiation cannot commence until the agenda has been formulated, even provisionally, on the understanding that it may be reviewed at a later stage by the introduction of other issues. Agenda formulation can obviously not occur until the parties have defined the exact nature of the issues in dispute. **Disputes and Negotiations** 126-135.

³¹ The tone of the negotiations having been set in the first two stages, the third stage signifies more than a mere exploration of the issues but rather attempts to establish maximal limits and demands - "demands or claims that a party has some calculated expectation of obtaining in the eventual outcome" as well as "demands or claims by the opponent that a party accepts as representing the opponent's calculated expectations". **Disputes and Negotiation** 135-141.

³² The three stages (d)-(f) named by Gulliver **Disputes and Negotiation** 141-168, cumulatively represent what the other writers express as a single stage. Gifford **Legal Negotiation** 34 describes the third of the four stages that he identifies, as "bargaining or convergence". He expressly uses the term "convergence" to

- (g) ritual affirmation;³³ and
- (h) execution of outcome.³⁴

In the South African context, the major work on negotiation by Anstey *Negotiating Conflict* similarly recognises four developmental stages³⁵ -

- (a) preparation;³⁶
- (b) opening the negotiation;³⁷
- (c) bargaining; and
- (d) closure and agreement.³⁸

describe in a single stage what Gulliver defines in three separate stages. The same applies to the third stage described by the other writers.

³³ This stage represents the outcome produced by the negotiations. The outcome may be either a total breakdown of the negotiations or an affirmative agreement between the parties. If the negotiations culminate in the settlement of the dispute, some form of formal affirmation is effected through the memorialisation of the agreement. **Disputes and Negotiation** 168-170.

³⁴ The final stage of Gulliver's developmental model has been overlooked by the other writers. Quite correctly, Gulliver identifies a post-negotiation stage that relates to the execution of the settlement.

³⁵ See 130-157. See also Anstey "The negotiation process" 17-29.

³⁶ The "preparation stage" as defined by Anstey is in its emphasis somewhat different to what is described by Williams (see text to note 17 above) and Gifford (see text to note 18 above) as "orientation and positioning". Anstey regards the preparation for negotiation as being of major importance for the success of the negotiations. In this respect, he enumerates the following as basic steps for the conduct of this stage: the identification, analysis and partialisation of issues; the establishment of bargaining ranges and strategic planning in regard to power relativities, concessions, opening moves, setting the climate for negotiation. **Negotiating Conflict** 130-139.

³⁷ This stage is expressed quite differently by Anstey in comparison to the other writers. Williams (see text to note 17 above) identifies the second stage as the argumentation stage and Gifford (see text to note 19 above) as the stage when the exploration of issues occurs. However, stage 3: establishing maximal limits to the issues in dispute, as identified by Gulliver (see note 31 above), expresses some of the elements of stage two described by Anstey. For Anstey stage two entails the following: the establishment of bargaining boundaries; setting the bargaining climate; arguing, defending, clarifying positions and manipulating expectations of the process. **Negotiating Conflict** 139-145.

³⁸ Anstey's identification of the third stage as "bargaining" and the fourth stage as "closure and agreement" is in line with the descriptions of the other writers,

However, it should be noted that Anstey's stages of development are explicitly placed in the context of distributive bargaining from the perspective of labour and industrial relations.

Another important South African work dealing with negotiation is that written by Pienaar and Spoelstra *Negotiation: Theories, Strategies and Skills*. The sub-title gives a clue to the major thrust of the work. It has been written as a practical guide for negotiation-skills workshops. The content is dominated by a psychological and clinical perspective as is evident from the description of the stages of negotiation enumerated by the authors -

- (a) the emotional phase;³⁹
- (b) the political phase;⁴⁰
- (c) the problem definition phase;⁴¹
- (d) the constructive phase;⁴² and
- (e) the final socio-emotional phase.⁴³

Although these various descriptions of the stages of negotiation might seem repetitive, they do have a functional value. Writers from different disciplines consistently affirm that

except for Gulliver who in any event differs from the others. See **Negotiating Conflict** 145-157.

³⁹ The emotional stage signifies the first encounter between the parties; the initial relationships that are established determine the climate for the negotiations that follow. The leader of the negotiations team plays a dominant emotional role during this particular stage. **Negotiation** 48.

⁴⁰ During this stage common ground is established: the roles of individuals are defined; the rules and agenda are agreed upon and, depending on the expertise required, a task leader emerges. **Negotiation** 48-49.

⁴¹ This stage is identified with group cohesiveness: the group defines the problem and trade-offs are offered. **Negotiation** 49.

⁴² The problem is dealt with constructively during this stage and the task leader plays an active role while that of the team leader diminishes. **Negotiation** 49.

⁴³ That is, closure occurs during this final stage; the team leader dominates and the climate for re-entry or implementation is established. **Negotiation** 49.

negotiation is a process which progresses through distinctive stages of development. Every stage has a specific content and an identifiable purpose as well as processual significance for the conduct of the negotiations. However, these descriptions give a fragmented view of the stages of development of the negotiation process. In order to attain a more comprehensive perspective, the various stages of negotiation as expressed by individual writers, are consolidated below.

The first stage is aptly characterised in psychological terms by Pienaar and Spoelstra as being the emotional phase when interpersonal contacts establish the future negotiation relationships.⁴⁴ On the substantive level, this is identified by Menkel-Meadow as the pre-strategising stage used to determine "target and resistance points, location and timing of negotiation".⁴⁵ Menkel-Meadow fairly reflects Gulliver's first two stages, respectively dealing with the search for arena⁴⁶ as well as the composition of the agenda and the definition of issues.⁴⁷ The political phase identified by Pienaar and Spoelstra also fits these descriptions.⁴⁸ Williams describes the activity during this stage as relating to the establishment of a working relationship between the disputants and the adoption of initial positions.⁴⁹ According to Gifford, during this stage initial proposals are made by the parties and preliminary encounters indicate the style and tactics that will follow.⁵⁰ Both Anstey and Raiffa emphasise the importance of preparation during stage one. Anstey is meticulous in his description of the detail required for thorough preparation;⁵¹ Raiffa offers prescriptive advice to the individual negotiator about how to adjust to the negotiations that will follow.⁵²

⁴⁴ See note 39 above.

⁴⁵ "Legal negotiation" 77.

⁴⁶ See note 29 above.

⁴⁷ See note 30 above.

⁴⁸ See note 40 above.

⁴⁹ **Legal Negotiation and Settlement 72-77.**

⁵⁰ **Legal Negotiation 34.**

⁵¹ See note 36 above.

⁵² See note 25 above.

The second stage is marked by a shift of emphasis from procedural to substantive issues. During this stage Gifford identifies the exploration of issues which includes the presentation of arguments, the gathering of information as well as the narrowing of issues.⁵³ Williams similarly associates stage two with arguments and persuasion, the making of the first concession and the search for alternative solutions.⁵⁴ Raiffa's labelling of stage two as the "opening gambit" is expressive of the approach that an individual negotiator might adopt during the second stage: deciding which party should make the first offer, the manner of dealing with an exorbitant demand made by an opponent and controlling the disclosure of information.⁵⁵ Both Anstey and Gulliver concentrate on the establishment of maximal limits during this stage.⁵⁶ Pienaar and Spoelstra's description of the problem definition phase⁵⁷ generally describes the trade-offs and process of problem definition that occurs during the second stage.

The term "bargaining" sums up the interactions during the third stage. Both Gifford⁵⁸ and Menkel-Meadow⁵⁹ relate stage three to a period of serious bargaining between the parties. The apt use of the word "convergence" by Gifford summarises the three stages recorded by Gulliver: narrowing the differences, preliminaries to final bargaining and final bargaining.⁶⁰ The bargaining is induced by the pressure of approaching deadlines. The intensity of the negotiation increases as the deadline approaches eg a trial date or an arbitral hearing. Because of the external factors that pressurise the negotiations, this moment in the negotiations is more akin to a point of crisis than a stage of the negotiations.⁶¹ The element of urgency is confirmed by Williams who describes this

⁵³ **Legal Negotiation 34.**

⁵⁴ **Legal Negotiation and Settlement 79-81.**

⁵⁵ See text to note 26 above.

⁵⁶ See, respectively, text to notes 37 and 31 above; see also comment in note 37.

⁵⁷ See text to note 41 above.

⁵⁸ **Legal Negotiation 34.**

⁵⁹ "Legal negotiation" 777.

⁶⁰ See text and note 32 above.

⁶¹ **Leeson and Johnston Dispute Resolution in America 105.**

stage as that of emergence and crisis that is marked by the pressure of approaching deadlines, the adaptation of positions along with alternative offers as well as the formulation of final demands.⁶² Anstey also identifies the bargaining process as the dominant activity of the third stage. According to his description, the third stage entails signalling,⁶³ proposing,⁶⁴ as well as packaging and bargaining.⁶⁵ Pienaar and Spoelstra describe this stage as the constructive phase,⁶⁶ a term which at first seems rather vague until it is placed in the context of the parties bargaining with the serious intention of concluding the negotiations. Raiffa's flamboyant use of the phrase "the negotiation dance"⁶⁷ captures the mood of the third stage: trade-offs, concessions and the continuous re-assessment of changing perceptions.

The final stage of the negotiations is expressively named by Raiffa as "end play",⁶⁸ by Pienaar and Spoelstra as the "final socio-emotional phase"⁶⁹ and by Gulliver as "ritual affirmation".⁷⁰ The conclusion of the negotiations involves either the agreement to settle

⁶² **Legal Negotiation and Settlement** 81-83.

⁶³ Signalling means the method of "informing the other party of a willingness to move provided that this is reciprocated, in other words, a process of two-way movement is being undertaken. It means breaking out of unproductive circular arguments ... and opening the way to a course of bilateral concessions". **Negotiating Conflict** 146.

⁶⁴ Proposing is explained by Anstey in the following terms: "A reciprocation of signals of willingness to move allows the parties greater confidence in moving from argument to making proposals. While argument locks them into defend-attack exchanges, proposals initiate an active search for remedies". **Negotiating Conflict** 147.

⁶⁵ Packaging and bargaining is explained by Anstey in the following terms: "As proposals begin to firm it is suggested that they be bargained as packages rather than as individual items. This initiates a process of concession exchanges and trade-offs, allowing each party to secure certain benefits or guarantees in exchange for movement on the same or other items". **Negotiating Conflict** 148.

⁶⁶ See text to note 42 above.

⁶⁷ See text to note 27 above.

⁶⁸ See text to note 28 above.

⁶⁹ See text to note 43 above.

⁷⁰ See text to note 33 above.

or a deadlock.⁷¹ A temporary impasse may occur at various stages of the negotiations but a final breakdown signifies a refusal to re-enter and continue with negotiation. On the other hand, where the parties agree to settle, their agreement is formalised. Gulliver's model goes beyond formalisation and includes a distinctive stage that accommodates the execution of the outcome.⁷²

Although these stages of negotiation are distinct, they do not establish a rigid model.⁷³ The conceptual model differs from the real-life model. Social interaction is never very tidy. Consequently, the stages of negotiation may follow in order of sequence but often the sequence varies according to the content and context of the substantive issues in dispute. The various stages may at times overlap. For instance, during the bargaining stage the parties might need to revise the agenda, thereby reverting to an activity that is characteristic of the first stage. Another situation that arises in practice is that the negotiations normally relate to multiple issues with the result that the parties may have concluded the negotiations on some issues but not have reached the bargaining stage in regard to other issues.⁷⁴ Moreover, the manner in which the negotiations are conducted in each stage is influenced by the strategies and personal styles adopted by the negotiators.⁷⁵ Furthermore, a particular strategy need not be maintained throughout the four stages but negotiators may change strategy from one stage to the next, depending on the opportune timing for the alteration of strategy.⁷⁶ The developmental model for negotiation is therefore a first approximation of the total process based on the assumption of a positive outcome and without any indication of absolute or relative time-frames involved for each stage.⁷⁷

⁷¹ Gifford **Legal Negotiation** 35; Menkel-Meadow "Legal Negotiation" 77; Williams **Legal Negotiation and Settlement** 84-85; Anstey **Negotiating Conflict** 145-147.

⁷² See text to note 34 above.

⁷³ Gifford **Legal Negotiation** 33; Gulliver **Disputes and Negotiation** 171-173.

⁷⁴ Gifford **Legal Negotiation** 33.

⁷⁵ Williams **Legal Negotiation and Settlement** 41-42.

⁷⁶ Gifford **Legal Negotiation** 35.

⁷⁷ Gulliver **Disputes and Negotiation** 173.

The identification of the stages of negotiation and their consistency confirms the processual characteristics of negotiation. Negotiation is a process and not some random event.⁷⁸ As process, negotiation is a continuous event, having a point of departure and ending when agreement is reached or the process is abandoned because of a deadlock that causes a breakdown.⁷⁹ Moreover, the progression is not arbitrary or haphazard.⁸⁰ Between the moments of commencement and termination, there is a discernible and continuous form of orderly progress. The internal dynamic of the process moves it through consistent, though not always sequential, stages that create order and structure.⁸¹ Although various stages may overlap or be applied simultaneously, their processual interdependence is confirmed by anecdotal accounts that the negotiation process may be delayed, jeopardised or even abandoned if any stage is not applied or side-stepped.⁸²

The identification of consistent stages of negotiation indicates that it is conducted within a processual framework. This has important implications for negotiation as a process. The first is that the recognition of a processual framework for negotiation leads to a normative appreciation of the continuities between negotiation as an informal process, and legal process as its institutionalised and official counterpart. Another equally important implication is that, because negotiation occurs within a definable processual structure, it is possible to regulate the substantive issues in dispute by means of identifiable strategies that determine the method by which the negotiations are conducted.

⁷⁸ See Pienaar and Spoelstra **Negotiation** 3.

⁷⁹ *Ibid* 18.

⁸⁰ **Gulliver Disputes and Negotiation** 175.

⁸¹ *Ibid* 174-175.

⁸² See Gifford **Legal Negotiation** 33; **Gulliver Disputes and Negotiation** 175-177.

5.3 Negotiation strategy

5.3.1 Terms and concepts

Just as commentators consistently state that negotiation has processual characteristics that move the process through definitive stages, so too it is universally recognised that the manner in which negotiations are conducted throughout the various stages is determined by the strategy adopted by the negotiators. In order to appreciate critically the dimensions of legal negotiation, it is necessary to describe briefly and appraise the strategies that are commonly identified by social scientists and legal negotiation theorists. On account of the theoretical nature of this work, the approach to strategy is purely descriptive. Prescriptive admonitions are therefore avoided because they are more in keeping with an approach that focuses on negotiation skills, techniques and tactics.

A description of strategy is fraught with problems relating to terminology. Negotiation theorists use different labels to describe the same term or similar terms that actually differ very slightly from each other. For instance, Lowenthal refers to competitive and collaborative strategies⁸³ and seems to equate the collaborative strategy with "problem solving negotiation".⁸⁴ "Competitive/hard bargaining" and "co-operative bargaining" are terms used by Hartje⁸⁵ who also recognises that there is a "co-operative problem-solving" approach.⁸⁶ Fisher and Ury use the terms "hard" and "soft" negotiation to describe positional bargaining⁸⁷ and propose an alternative which they name "principled negotiation" or "negotiation on the merits" as a method of problem solving.⁸⁸

⁸³ "General theory of negotiation" 73-75.

⁸⁴ Ibid 72.

⁸⁵ "Lawyer's skills in negotiation" 170-175.

⁸⁶ Ibid 174.

⁸⁷ **Getting to Yes** 8-10. See also at 9 for a table that lists the differences between soft and hard negotiation.

⁸⁸ Ibid 10-14. See also at 13 for a table that compares positional bargaining with principled negotiation.

Williams accentuates these difficulties by using the terms "competitive" and "co-operative" to describe the personal styles of negotiators⁸⁹ in relation to negotiation strategy.⁹⁰ William's approach is approved by Teply⁹¹. Moreover, on the basis of this approach, Leeson and Johnston advocate that a distinction should be made between substantive and personal styles of negotiation - a distributive or collaborative strategy relates to the substance of the dispute whereas a competitive or co-operative style relates to the personal attributes of a negotiator.⁹²

In the light of the above, two issues need to be clarified: the first relates to the correct usage of terms for the various strategies that may be adopted and the second, to the distinction between personal style in relation to negotiation strategy. The latter is less important than the former and will be addressed first. Although recognising that personal style and strategy are closely interrelated,⁹³ Gifford is critical of William's approach. Personal styles of negotiation need to be distinguished from negotiation strategies. For instance, it does not necessarily follow that a competitive style of a negotiator determines that a competitive strategy will be adopted. There is room for flexibility since it is feasible that a negotiator who has a co-operative style, may successfully adopt a competitive strategy, and vice versa. Indeed, style and strategy are not static but are often interchanged during the various stages of negotiation.⁹⁴

In regard to terminology, the views of the leading negotiation theorists mentioned above indicate that there is a common understanding of what is entailed by the competitive strategy but that there is little or no consistency in respect of non-competitive strategies. Different terms are used to describe the non-competitive strategies: co-operative,

⁸⁹ **Legal Negotiation and Settlement** 18-40.

⁹⁰ *Ibid* 47-54.

⁹¹ **Legal Negotiation** 88 and 95, respectively.

⁹² **Dispute Resolution in America** 106.

⁹³ "Strategy selection in legal negotiation" 47.

⁹⁴ *Ibid* 47-48.

collaborative, integrative, soft negotiation, problem-solving and principled negotiation.⁹⁵ The problem, though, is that the differences relate not only to terminology but more importantly to the method of negotiation. For instance, principled negotiation advocated by Fisher and Ury could be applied to both competitive and non-competitive strategies. By the same token, distributive principles apply in respect of both competitive and non-competitive strategies because the aim of negotiation is to share fixed resources.

The classification proposed by Gifford resolves many of these problems. Three strategies are outlined: competitive, co-operative and integrative.⁹⁶ The value of Gifford's classification of negotiation strategy is that it clearly distinguishes co-operative and integrative strategies as derivatives of a non-competitive strategy, thereby resolving the related problems in regard to terminology.

With these distinctions in place, what remains is to briefly explore each strategy in a little more detail.

5.3.2 Descriptive analysis

The competitive strategy

The psychology underlying the competitive strategy is to undermine an opponent. This stems from a basic assumption that the competitive strategy relates to the division of finite resources which both parties value equally and that the one party aims to obtain the greater share at the expense of the other party. In negotiation theory, this is known as a zero-sum game which strictly speaking means that the total gain for the one party minus the loss to the other party equals nought, or zero,⁹⁷ to use the American term.⁹⁸

⁹⁵ Ibid 43.

⁹⁶ Idem.

⁹⁷ Numerically a zero-sum is expressed in the following manner: if on a hypothetical figure of 10 points, party A scores 7 points and party B receives 3 points then A's total gain is 2 points above a constant of 5 points and B's loss is -2 below that constant, the final sum therefore being nought or zero.

Reduced to its essentials, the competitive strategy consists of distributive bargaining in conjunction with competitive negotiation between the parties to gain the greater part of fixed or constant resources. These theoretical perspectives find practical application in a number of negotiation methods that are generally associated with the competitive strategy.

Negotiators who choose a competitive strategy adopt a maximalist position.⁹⁹ This is expressed by a high initial demand that is realistic.¹⁰⁰ The approach of opening with a high demand is designed to conceal a negotiator's minimum settlement point and thereby prevent an agreement being reached on less favourable terms because of a commitment to a modest evaluation of a negotiation situation.¹⁰¹ Underlying this method is the assumption of a real base and an aspiration base. The aspiration base represents the highest (or lowest) realistic demand which a negotiator makes and the real base signifies the minimum at which negotiator is willing to settle. In negotiation literature, the aspiration base and the real base are also referred to as a "target point" or a "resistance/reservation point", respectively. The negotiating ground between each negotiation's real base is known as the bargaining zone in which agreement is likely to occur.¹⁰² The negotiators reach the bargaining zone by means of a process of demand and counter-demand.¹⁰³ The diagram below graphically represents the manner in which the competitive strategy functions.¹⁰⁴

⁹⁸ For descriptions or comments on the zero-sum game, see Lowenthal "General theory of negotiation" 95-98; Menkel-Meadow "Legal negotiation" 756 note 4.

⁹⁹ Williams **Legal Negotiation and Settlement** 73 .

¹⁰⁰ Gifford "Strategy selection in legal negotiation" 49.

¹⁰¹ Gifford "Strategy selection in legal negotiation" 49; Williams **Legal Negotiation and Settlement** 73-74 .

¹⁰² Bellow and Moulton **The Lawyering Process: Negotiation** 58-63; Pienaar and Spoelstra **Negotiation** 26-28.

¹⁰³ Bellow and Moulton **The Lawyering Process: Negotiation** 100-101.

¹⁰⁴ Most of the literature on negotiation contains similar graphic representations in some or other form. This diagram has been adapted from those of Anstey "The negotiation process" 19 and Pienaar and Spoelstra **Negotiation** 27.

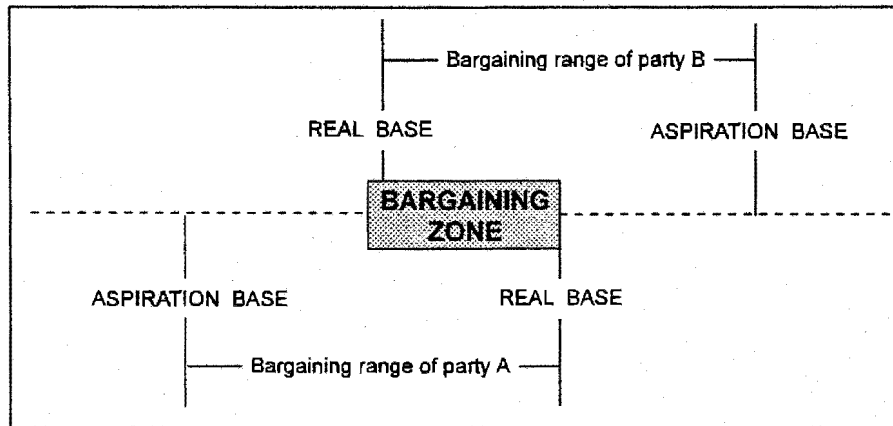


Figure 2

There are a number of justifications for adopting a maximalist approach. A high initial demand allows a negotiator to make concessions without relinquishing the goal of attaining the objectives of the real base.¹⁰⁵ Moreover, if the demand that is set is high but realistic, the negotiator is educated about the manner in which an opponent evaluates her own position.¹⁰⁶

A maximalist stance also has another advantage: it creates a situation within which concessions can be made.¹⁰⁷ Few and minimal concessions¹⁰⁸ are made but when they are made they have strategic value. A negotiator using the competitive strategy carefully times a concession to benefit his own position either to show goodwill and co-operation, to break an impasse or to place pressure on an opponent to reciprocate with a

¹⁰⁵ Gifford "Strategy selection in legal negotiation" 49.

¹⁰⁶ Williams *Legal Negotiation and Settlement* 75.

¹⁰⁷ *Ibid* 74.

¹⁰⁸ Gifford "Strategy selection in legal negotiation" 50 rightly comments that a negotiator who has adopted a competitive strategy reluctantly grants concessions because of the adverse effects of either "position loss" or "image loss". "Position loss" can occur because a concession once granted cannot be withdrawn and further, a concession that is granted untimeously might result in a lost opportunity at a later stage of the negotiations when a counter-concession is needed from an opponent. "Image loss" creates the impression that the concession has been granted because of a negotiator's flexibility or that the granting of a concession may raise the expectation that more concessions will follow.

corresponding concession.¹⁰⁹ Because of the variance between a negotiator's aspiration base and real base, the granting of a concession is very often fictitious in the sense that it does not affect the negotiator's position in respect of the real base.¹¹⁰ Concessions may also be forced from an opponent by means of threat or argument which are used as offensive tactics.¹¹¹

A limited disclosure of information is another method that is associated with the competitive strategy. Information is shared selectively and strategically.¹¹² By withholding information or choosing the strategic moment for disclosing it, a negotiator is able to conceal her real base and simultaneously strengthen her own negotiating position.¹¹³

The co-operative strategy

The co-operative strategy is the antithesis of the competitive strategy. Even though distributive bargaining is common to both, the co-operative strategy involves collaboration by the negotiators to achieve a mutually fair outcome based on non-competitive interaction.¹¹⁴ Rather than taking a maximalist stance, the negotiators commence with a moderate opening bid and each moves to their real base as quickly as possible.¹¹⁵ The basic assumption is that the parties will not exploit each other by maximising gains to the detriment of one another.¹¹⁶ Concessions are used as an affirmative technique and are made in order to place a moral obligation on the other party to similarly grant concessions.¹¹⁷ Likewise, the interaction is characterised by an

¹⁰⁹ Gifford "Strategy selection in legal negotiation" 50-51.

¹¹⁰ Ibid 50-51.

¹¹¹ Ibid 51.

¹¹² Gifford "Strategy selection in legal negotiation" 49-50.

¹¹³ See generally Bellow and Moulton **The Lawyering Process: Negotiation** 87-90.

¹¹⁴ Williams **Legal Negotiation And Settlement** 75.

¹¹⁵ Gifford "Strategy selection in legal negotiation" 53.

¹¹⁶ Lowenthal "General theory of negotiation" 74.

¹¹⁷ Gifford "Strategy selection in legal negotiation" 52.

open and full disclosure of information.¹¹⁸ Although the element of threat should be absent because of the defensive positions it evokes,¹¹⁹ argument is not only permissible but in fact necessary for negotiators to establish the credibility of their stances and to persuade each other of the rational and objective merits of their committed positions.¹²⁰ The co-operative strategy therefore capitalises on the common desire of the parties to maintain sound relationships, especially if they are continuous, as well as a mutual commitment to reach a fair solution.¹²¹

The integrative strategy

Prominence has been given to the integrative strategy by the research done independently by Raiffa as well as Fisher and Ury. The value of their research is that it forces a critical evaluation of competitive and distributive bargaining methods used in both legal and non-legal environments. Although the negotiation models differ significantly from each other, common to both is the promotion of negotiation as a method of problem solving. From the perspective of legal negotiation, this research underlies the problem-solving model devised by Menkel-Meadow that is posed as an alternative to the competitive and adversarial attributes of legal negotiation.¹²²

The research models commence from divergent premises. Raiffa provides a game-theoretic¹²³ framework for the integrative strategy. A major contribution of Raiffa's work is his perceptive categorisation of negotiation into three basic situations: two parties, one

¹¹⁸ Bellow and Moulton *The Lawyering Process: Negotiation* 155-157; Gifford "Strategy selection in legal negotiation" 52. See also Lowenthal "General theory of negotiation" 89 for the potential harm that full disclosure can cause to the disputant's respective interests.

¹¹⁹ Bellow and Moulton *The Lawyering Process: Negotiation* 155.

¹²⁰ Lowenthal "General theory of negotiation" 89.

¹²¹ Gifford "Strategy selection in legal negotiation" 52; Lowenthal "General theory of negotiation" 91; Williams *Legal Negotiation and Settlement* 74.

¹²² "Legal negotiation" 794-841.

¹²³ For a brief explanation of the game-theory model and lawyer bargaining, see Bellow and Moulton *The Lawyering Process: Negotiation* 40-45.

issue,¹²⁴ two parties, many issues¹²⁵ and many parties, many issues.¹²⁶ The situation comprising two parties, one issue is described as being distributive and two parties, many issues as being integrative.¹²⁷ Raiffa's treatment of the two parties, many issues scenario is one of the clearest expositions of the integrative strategy. Although negotiators may not be able to share "zone agreement",¹²⁸ they can introduce flexibility by exploiting their different perceptions about the future and attitudes concerning risk. As a result, they enter into a process of "converting a single-factor problem into a multiple-factor problem" which, in Raiffa's terms, forms the basis of integrative bargaining.¹²⁹ Probably most important of all, the flexibility introduced by the negotiation of more than one issue introduces a different value structure in regard to concessions¹³⁰ and risk sharing.¹³¹ This permits the invention of solutions that maximise outcomes, generally known as a parento optimum outcome.¹³²

Like Raiffa's *The Science and Art of Negotiation*, Fisher and Ury's *Getting to Yes* is also a valuable source for formulating an integrative strategy. Targeted at the lay readership, *Getting to Yes* consists of pithy chapters that are mainly prescriptive and at

¹²⁴ **Science of Negotiation** part II 33-130. Raiffa 33-34 identifies the application of the competitive strategy in respect of the situation where two parties negotiate in regard to a single issue.

¹²⁵ *Ibid* part III 131-255.

¹²⁶ *Ibid* part IV 257-334.

¹²⁷ **Science of Negotiation** 33.

¹²⁸ "Zone agreement" is the equivalent of the term "bargaining zone" that is used in this work. See figure 2 above.

¹²⁹ **Science of Negotiation** 131.

¹³⁰ *Ibid* 144-165.

¹³¹ *Ibid* 187-204.

¹³² A parento optimum outcome means that there is no other agreement that would make one party better off without diminishing the outcome of the other party. Parento optimum agreements therefore maximise the outcomes of both parties: Neale and Bazerman **Cognition and Rationality in Negotiation** 23 29 and 137; Nagel and Mills **Systematic Analysis in Dispute Resolution** xi; Menkel-Meadow "Legal Negotiation" 789 note 128 and 811 note 220.

times even border on the self-righteous.¹³³ The brevity and simplified language of the work does not detract from its content which contains novel advice for both legal and non-legal negotiators who have experienced the unsatisfactory and often futile results of what the authors refer to as "positional bargaining".¹³⁴ In fact, the one critical stance that is consistent throughout the work is the authors' pejorative treatment of positional bargaining.¹³⁵ "Principled negotiation" is posed as the alternative.¹³⁶

What should be clearly understood is that principled negotiation is not the equivalent of an integrative strategy; it is based on some of the components of integrative bargaining. Fisher and Ury place this matter in perspective. Principled negotiation is "an all-purpose strategy" which can be used "whether there is one issue or several; two parties or many; whether there is a prescribed ritual, as in collective bargaining, or an impromptu free-for-all, as in talking to hijackers".¹³⁷ However, intrinsic to principled negotiation are sound principles of problem solving and some solid advice on integrative bargaining which, if applied, can produce substantive outcomes that are able to survive in the long-term because they are less costly both in respect of time, money and in regard to sound human relationships when compared to some of the results of positional bargaining.¹³⁸

¹³³ See **Getting to Yes** 134-149 for the authors' treatment of "dirty tricks". See also White "Pros and cons of 'Getting to Yes'" 117-118.

¹³⁴ For an outline of "positional bargaining", see **Getting to Yes** 1-10.

¹³⁵ See for instance **Getting to Yes** xii 21 43 59-62 112-118 143-149.

¹³⁶ **Getting to Yes** 10-14. At 11 principled negotiation is expressed in four succinct principles -

People:	Separate people from the problem.
Interests:	Focus on interests and not positions.
Options:	Invent options for mutual gain.
Criteria:	Insist that the results be based on some objective criteria.

¹³⁷ *Ibid* xiii.

¹³⁸ *Ibid* 154.

5.3.3 Critical evaluation

The competitive strategy is distinct. It concentrates exclusively on maximising individual gains and is characterised by high demands, a limited disclosure of information as well as minimal concessions being given. The object is quite clear: the exercise of superior power in order to win the greater part of the finite resources in dispute. A winner and a loser is always conceived when the competitive strategy is applied. For this reason, there is a notional association between competitive bargaining and adversarial litigation.

Apart from a few notable exceptions,¹³⁹ legal negotiation theorists have assimilated the co-operative and integrative strategies into a single collaborative strategy that functions in two different non-competitive contexts.¹⁴⁰ Clearly the continuities between the co-operative and integrative strategies tend to blur the discontinuities. In each instance the disputants function in a non-competitive atmosphere in order to achieve a mutually respected settlement. However, the differences between the two are fundamental. The reciprocal exchange of concessions involved in the co-operative strategy is directed at reaching a compromise in regard to the distribution of limited resources. The co-operative strategy is therefore essentially a method of distributive bargaining within a non-competitive context. The integrative strategy functions within a totally different framework. The emphasis is neither on the exchange of concessions to achieve a compromise nor initially on the division of fixed resources. Instead, the integrative strategy is goal directed, concentrating on the disputants' potential for problem solving in order to reach a solution by joint decision making. However, in respect of all three strategies, the issues remain distributive with the notable difference being the method of distribution.

¹³⁹ Fisher and Ury **Getting to Yes** seemingly recognise the existence of the co-operative strategy by contrasting the competitive strategy (hard negotiation) and the co-operative strategy (soft negotiation) with their proposed alternative of principled negotiation. Menkel-Meadow "Legal negotiation" 757-759 perceptively notes that negotiation theorists have tended to confuse collaborative strategies with negotiation goals that are accommodated in a problem-solving model of negotiation.

¹⁴⁰ See, for example, text and notes 83-92 above.

In order clearly to understand the structure of legal negotiation,¹⁴¹ the manner in which each strategy deals with distributive issues needs to be examined in more detail. The hackneyed simile is that of dividing the proverbial pie which represents the fixed sum of finite resources.¹⁴² When a competitive strategy is applied, the object is to divide the pie in order to gain the greater part of it. The co-operative strategy is not very much different. The issues remain distributive subject to the qualification that the aim is to divide the pie equitably. In contrast, the principle applied in regard to the integrative strategy is not initially to divide the pie but rather to expand it before dividing it.¹⁴³

The competitive and co-operative strategies both represent linear models of negotiation.¹⁴⁴ Either competitively or non-competitively, negotiators on both sides by compromise typically reach a settlement at a stereotyped midpoint within a bargaining zone. Both strategies are founded on the assumption that finite resources must be distributed by compromise based on the trading of concessions. In both instances the emphasis is on the method of distribution rather than on the goals of the parties. A pre-occupation with distributive considerations diverts attention from the substance of the negotiations. As a result, the actual goals and interests of the parties are obscured. In these respects the integrative strategy differs radically from both the competitive and co-operative strategies. The dominant thrust of an integrative approach is to invent solutions that meet the joint needs of the parties and thereby reconcile their underlying interests instead of restricting the outcome to the division of fixed or limited resources.¹⁴⁵ Distributive solutions come into play only once the parties have exhausted goal-directed methods of joint problem solving.¹⁴⁶

¹⁴¹ See 5.5 below.

¹⁴² See Lowenthal "General theory of negotiation" 73 for an example of the "fixed pie" simile in regard to the distributive attributes of both the competitive and co-operative strategies.

¹⁴³ See generally Gifford "Strategy selection in legal negotiation" 46-47.

¹⁴⁴ See figure 2 above in 5.3.2 above.

¹⁴⁵ For a resume of the integrative strategy, see Gifford "Strategy selection in legal negotiation" 54-57.

¹⁴⁶ Raiffa **Science of Negotiation** 131 concisely sums up the integrative strategy in the following terms: "It is no longer true that if one party gets more, the other

From a legal perspective, this analysis of negotiation strategy indicates that the process of negotiation, like any other process, is conducted according to established forms and methods. Moreover, as in the case of adversarial litigation, the issues in negotiation are also distributive. These factors, along with the theory that shows that negotiation moves through distinct processual stages,¹⁴⁷ illustrate the basic continuities between negotiation as a process, and legal process. On the basis of this general model of negotiation, the investigation turns to the manner in which the process of negotiation is applied in a legal context as well as to the relationship between the structure of legal negotiation and negotiation theory.

5.4 Contextualising legal negotiation

Whenever negotiations occur in a legal setting, a number of important contextual questions arise that relate to the differences between negotiation in a broader social environment and negotiation in the legal sphere. What are the distinctions between negotiation and legal negotiation? How do these distinctions affect the form and content of legal negotiation? Is legal negotiation totally separate from or integrated into the conduct of legal process? Does the adversarial ethos influence the structure of legal negotiation? To what extent does the unique structure of legal negotiation affect strategy and strategy selection? These are the critical questions that will be examined in order to contextualise the form, function and structure of legal negotiation.

An obvious difference between ordinary negotiation and legal negotiation is the environment in which the negotiations occur. Standard texts on negotiation emphasise the importance of the climate for negotiation: the effect of location and colour, table shape, the influence of space, the composition of the negotiation teams, the effect of verbal and non-verbal communication.¹⁴⁸ These are only some of the factors that create

necessarily has to get less: they can both get more. They can co-operate in order to enlarge the pie that they eventually will have to divide."

¹⁴⁷ See, further, 5.2 above.

¹⁴⁸ For instance, see Pienaar and Spoelstra *Negotiation* 47-81 for the numerous factors that influence the climate for negotiation.

the proper climate for negotiation and are equally important for legal negotiation. Likewise, the legal environment is also an external factor that fundamentally influences the climate for legal negotiation. At least one of the disputants involved is represented by a lawyer, the location for negotiation is normally the office of a law firm, an advocate's chamber or, in many instances, the foyer of the court. An added consideration is that the negotiations are conducted in a closed professional milieu in which the lawyer negotiators are often personally known to each other. Moreover, strict rules of professional ethics regulate the conduct of the lawyer negotiators. The legal environment therefore provides a setting that is distinct from that in which any other form of negotiation occurs.

But apart from the influence of the legal environment, differences in the negotiation relationships can also be identified. Legal negotiation is representative because it occurs in the context of the lawyer/client relationship. The representative characteristic of legal negotiation arises from the fact that the disputants to the negotiations do not confront each other in their individual capacities but rather do so indirectly through their legal representatives. The negotiations are conducted by legal representatives who engage each other as agents for their clients. Agency is therefore an essential element of legal negotiation that directly influences the tenor of the process: client consulting and counselling, client authority that determines the scope of the mandate between agent and principal, the ethical standards to which the lawyer is bound professionally as well as the constraints imposed by substantive rules and legal procedures. The term "representative negotiation" therefore describes a specific attribute of the negotiations that occur in a legal setting.¹⁴⁹

Legal negotiation also differs from ordinary negotiation in respect of the substantive content of the issues that form the subject of the negotiations. In the context of legal negotiation, a definitive distinction exists between rule-making negotiation and dispute negotiation.¹⁵⁰ Rule-making negotiation is transactional, dealing with the creation of

¹⁴⁹ For descriptions of the lawyer/client relationship in the context of legal negotiation, see Gifford **Legal Negotiation** 3-7 184-200; Hartje "Lawyer's skills in negotiations" 122-123 125 146-154; Tepy **Legal Negotiation** 7-20.

¹⁵⁰ See Eisenberg "Private ordering through negotiation" 638; see also 5.1 above.

future rights or interests eg buying and selling a business; dispute negotiation relates to past events that are in contention on account of the alleged infringement of the rights involved eg the division of the matrimonial property in a divorce case.¹⁵¹ The differences between rule-making negotiation and dispute negotiation are fundamental. In an instance where the parties reach a deadlock in respect of a transaction that affects future rights and interests, no neutral third party can compel either or both of the parties to accept the agreement. However, the situation is different in respect of dispute negotiation. If the parties should negotiate to impasse over past events that have led to the infringement of existing rights, one of the parties has the option of commencing proceedings in a court of law. Unlike any other form of negotiation, dispute negotiation in its legal context anticipates adjudicatory outcomes that could become reality if the negotiations fail.¹⁵²

The setting in which legal dispute negotiation occurs is unique. In South Africa, the courts are an important forum for the resolution of disputes. An aggrieved party may commence proceedings to compel an opponent to appear and answer the claim; a court is competent to try the dispute in law and is endowed with the authority to make a binding order or judgment that is enforceable under the sanction of the State. The image of the court is that of power - power to interpret and apply the law.

However, the irony is that the image of the court is more symbolic than real.¹⁵³ Most cases that are filed are settled privately rather than by means of the public adjudicatory process. This does not mean that the function of the court is irrelevant; the relevance of litigation ought not to be measured against the number of cases that reach trial stage and that are fully adjudicated.¹⁵⁴ The parties to litigation do not negotiate in a vacuum.

¹⁵¹ See also 3.2.1 above for the distinction between rights-based and interest-based negotiation.

¹⁵² See, further, 5.1 above for the position regarding rule-making negotiation and dispute negotiation in the context of the system of ADR.

¹⁵³ Kritzer *The Negotiation Process in Ordinary Litigation* 130.

¹⁵⁴ Galanter "Landscape of disputes" 32; Kritzer *The Negotiation Process in Ordinary Litigation* 130.

Legal process and its implications impact on the negotiations. The application of substantive law and legal procedures expressed through the adjudicatory process provides the backdrop for negotiation. It is in this sense that Mnookin and Kornhauser state that the parties "bargain in the shadow of the law".¹⁵⁵ Negotiation occurs in an environment in which the disputants are aware of the outcome that the legal system will impose if they fail to reach an agreement.¹⁵⁶ The courts, the law that they apply and the power at their disposal to enforce their decisions, confer on the parties what Mnookin and Kornhauser refer to as a "bargaining endowment".¹⁵⁷ The example they give relates to the case of divorce

[t]he legal rules governing alimony, child support, marital property and custody give each parent certain claims based on what each would get if the case went on trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips - an endowment of sorts.

Hence, the authoritative standing of legal rules and their adjudicatory application confers on the parties a substantive entitlement that directly influences the content and outcome of their negotiations.

The "shadow of the law" concept also has other dimensions. Kritzer rightly observes that the threat of legal adjudication and its potential outcome creates an environment in which "agreements *can* occur; that is, without the threat of adjudication, it is unlikely that most of what we think of as civil disputes would lead to any agreements".¹⁵⁸ The threat of the commencement of court proceedings or their continuance, the prospect of a full trial as well as the potential for an uncertain win/lose result, coerce the parties to enter into settlement negotiations. Moreover, the delay, cost and uncertainty involved in obtaining an adjudicated settlement are considerations that affect negotiation that occurs within the law's expansive shadow.¹⁵⁹ For instance, in an action for damages, the defendant's

¹⁵⁵ "Bargaining in the shadow of the law" 968.

¹⁵⁶ *Idem.*

¹⁵⁷ *Idem.*

¹⁵⁸ **The Negotiation Process in Ordinary Litigation** 130.

¹⁵⁹ Galanter "Landscape of disputes" 33.

liability might be relatively simple to prove but the delay, cost and uncertainty of proving the quantum of damages is an overriding factor that acts as an incentive to enter into settlement negotiations. Of these three variables, the transactional cost of litigation is probably the most important determinant that compels the parties into settlement negotiations. In many instances, if not in most, the parties are forced to negotiate their differences because the substantive legal issues in dispute are outweighed by the exorbitant litigation costs involved in vindicating those rights before the courts.¹⁶⁰

Furthermore, the "shadow of the law" concept emphasises the continuity between litigation and negotiation. The actual or potential threat of litigation and the related outcome of an adjudicated decision sets legal standards that dominate the substance of legal negotiation, provides an environment that coerces the parties into settlement negotiations and imposes a cost factor that dissuades the parties from impulsively ventilating their dispute before a court. There are other continuities as well.

The adversarial system of litigation¹⁶¹ creates the ethos in which legal negotiation is conducted. The assumptions underlying legal negotiation are therefore adversarial which, in turn, are transformed into behaviour. Menkel-Meadow, a critic of the adversarial style of negotiation, describes the situation as follows

Because litigation negotiations are conducted in the "shadow of the law," that is, in the shadow of the courts, the negotiators assume that what is bargained for are the identical, but limited, items a court would award in deciding the case. Typically, it is assumed that all that is bargained for is who will get the most money and who can be compelled to do or not to do something. Indeed, it may be that because litigation negotiations are conducted in the shadow of the court that they are assumed to be zero-sum games.¹⁶²

¹⁶⁰ Kritzer **The Negotiation Process in Ordinary Litigation** 131.

¹⁶¹ For a brief summary of the adversarial system of litigation, see James and Hazard **Civil Procedure** 4-8; see also 5 below.

¹⁶² "Legal negotiation" 765-766.

The recognition of these adversarial assumptions is extremely important for a critical analysis of the structure of legal negotiation as well as the related issue of strategy and strategy selection. Being influenced by the adversarial ethos, the strategy for legal negotiation is either competitive or co-operative, based on principles of distributive bargaining within a linear negotiation structure,¹⁶³ to the virtual exclusion of the integrative strategy that emphasises problem solving.¹⁶⁴

There is also another perspective. Not only are the continuities between negotiation and litigation acknowledged, but it is contended that both these forms of process are part of a single integrated process. This view is based on the assumption that most of the activity relating to litigation is concentrated in negotiation and settlement. Negotiation forms the background to most civil proceedings and those that are fully litigated indicate that there has been a failure to arrive at a viable settlement.¹⁶⁵ Goodpaster summarises this view

Litigating a dispute is both a major alternative to negotiating it and a way to force its negotiation. Litigation arises when the parties to a "mature" dispute have attempted to negotiate it and failed, or have ignored, or refused, the possibility of negotiating it.... Since most lawsuits settle before trial, it is useful to view litigation not solely as a way to reach an adjudicated result, but also as a highly structured negotiation game, a refined and constrained version of competitive bargaining.¹⁶⁶

In fact, Mackie suggests that the system of litigation could disintegrate were it not for negotiated settlements and cites the following passage from 1987 report¹⁶⁷ of the Lord Chancellor's Department to support his contention

In practice it is recognised universally that the functioning of the system of Civil Justice depends on the propensity of most cases to settle. Were it otherwise, the burden on the system, and the resulting delays, would become intolerable.¹⁶⁸

¹⁶³ See generally Menkel-Meadow "Legal negotiation" 768-775.

¹⁶⁴ See, further, 5.6 below for a detailed treatment of strategy selection in the context of legal negotiation.

¹⁶⁵ Friedman "Analysis of settlement" 67.

¹⁶⁶ "Lawsuits as negotiation" 221.

¹⁶⁷ **Civil Justice Review: General Issues** (1987) 135, 51.

Galanter takes the matter a step further by asserting that legal negotiation and litigation are not two separate processes but rather a single process which he names *litigotiation*, that is "the strategic pursuit of settlement through mobilising the court process".¹⁶⁹ Legal negotiation is therefore not some marginal activity vaguely related to the litigation process - it is at the core of legal process.¹⁷⁰

The continuity between the process of litigation and the negotiation process as its informal complement, contextualises legal negotiation as a unique form of dispute negotiation. However, only factors that influence the substance of the negotiations have been explored to the exclusion of those factors that affect the structure of legal negotiation as well as the selection of an optimal strategy. Consequently, the continuity between the structure of legal negotiation and the norms that underlie the process of litigation, need to be explored.

5.5 The structure of legal negotiation

Legal negotiation occurs in a milieu in which the norms and standards of the system of adversarial litigation prevail. The application of a number of principles converge to create an adversarial mindset to negotiation. South Africa, in keeping with the practice of other countries that are part of the family of Anglo-American civil procedure, employs a negative system of pleading whereby every allegation of fact is joined by denial (and thus subsequently tested a trail) and any allegation that is not so denied is deemed to be admitted.¹⁷¹ Individualism is bred by the application of the principles of party prosecution

¹⁶⁸ "Negotiation and Mediation" 75. A similar view regarding the position in the United States of America is expressed by Teply **Legal Negotiation** 3: "Negotiation of legal disputes has a broader institutional and economic significance that extends beyond a particular client's interests. From an institutional perspective, negotiated settlements reduce the workload placed on the judicial system. Because of negotiated settlements, both trial and appellate courts have more time to consider cases that require trial and appellate review".

¹⁶⁹ "Negotiation and legal process" 268.

¹⁷⁰ Ibid 269.

¹⁷¹ See Millar "Principles of the *ficta confessio*" 215; Faris "The *ficta confessio* in South African civil procedural law" 76-80 129-135.

and party presentation that respectively make each party accountable for the prosecution of the related cause or defence as well as for the investigation and presentation of evidence that is adduced at a trial, which also implies the burden of refuting the evidence presented by the other party.¹⁷² The principle of dialectic underlies the conduct of the trial thereby promoting partisan argumentation and debate in favour of either a cause or defence, as the case may be.¹⁷³ The process of adjudication and its outcome is based on the ethics of conscience that accordingly recognises only a binary solution to a dispute. This means that there is not an opportunity for conciliation because the outcome of a court's decision is always that there will be a winner and a loser, and the winner takes all.¹⁷⁴ These principles not only sustain the system of adversarial litigation but also mould the behaviour of its participants. Legal negotiation does not stand immune - it is part of the system.¹⁷⁵ Adversarial behaviour as it relates to litigation does not suddenly cease when negotiations are to be conducted. The upshot is that the norms of the system of adversarial litigation are transposed as assumptions that underlie legal negotiation. The structure of legal negotiation is the product of these adversarial assumptions.

The system of pleading focuses on various material allegations of fact that are brought to issue by a conclusive admission or denial in regard to each allegation. Although the system of fact-pleading determines with particularity the various factual issues that are in dispute for the purposes of the trial, each allegation of fact that is in issue may be traced to a single cause or defence that is founded on substantive legal principles eg breach of contract, liability on the grounds of a delict, the division or forfeiture of the joint estate in respect of the dissolution of a marriage in community of property and the like. The inevitable assumption is that two parties are involved in the determination of a single issue in dispute. This same assumption is transferred to the process of legal negotiation,

¹⁷² James and Hazard *Civil Procedure* 4-6; Millar "Formative principles" 9-11 19-21.

¹⁷³ See Berman "Western legal science" 909-911 921-930; Calamandrei *Procedure and Democracy* 72 75 79; Couture "Judicial process" 19-20.

¹⁷⁴ Eisenberg "Private ordering through negotiation" 654-655; Gulliver *Disputes and Negotiations* 13.

¹⁷⁵ See text to notes 165-170 above.

thereby casting the process into the competitive and distributive terms of Raiffa's situational analysis of "two parties, one issue".¹⁷⁶

The application of the principles of party prosecution and party representation accentuate a practitioner's responsibility for taking a partisan stance to both serve and protect the interests of a client. With regard to legal negotiation and especially in respect of its representative attributes,¹⁷⁷ the assumption is that a legal practitioner must take a maximalist stance on behalf of a client which is in keeping with the method of the competitive strategy.

The conception of negotiation strategy is also influenced by the dialectic nature of the trial process. The adversarial system promotes the principle that the truth will be established by a neutral third party if contradictory versions of the same dispute are argued and debated. By thesis and antithesis, synthesis occurs in the form of a judgment.¹⁷⁸ This might be true in an ideal situation but this philosophical principle is not actualised in practice. To the contrary, the dialectical principle has been interpreted as an invitation for competitiveness in order to achieve the greatest advantage for a client. However, at the core of the adversarial principle is the assumption that each party values the limited resources in dispute equally and the argumentation, both in law and in fact, is directed at establishing the grounds for awarding the total sum or the greater part of these resources to the party who is able to achieve this objective. This same assumption accounts for the application of a competitive strategy for legal negotiation and forms the basis of distributive bargaining that is so characteristic of legal negotiation.

Two aspects of the adjudicative process are particularly relevant to the process of legal negotiation. The first relates to the outcome of adjudication. The very reason for a party resorting to adjudication is to obtain a definitive and conclusive outcome. The binary character of adjudication accommodates this need: given propositions are treated as being conclusive or inconclusive; when norms are in conflict, the dominant norm is

¹⁷⁶ See text and note 124-127 above.

¹⁷⁷ See text to note 149 above.

¹⁷⁸ Couture "Judicial process" 19-20.

preferred and ultimately, the case put by each party is either "right" or "wrong".¹⁷⁹ Court-based adjudication always produces a win/lose outcome.¹⁸⁰ In game theoretic terms adjudication may therefore be described as a zero-sum game - one party's gain is the other party's loss.¹⁸¹ Another aspect of an adjudicative outcome¹⁸² is that it is mainly expressed in fungible commodities, usually in the form of money.¹⁸³ Unquantifiable claims are converted into monetary terms eg claims for pain and suffering, defamation, personality infringement, and indeed, even child and spouse maintenance in cases of divorce. These two aspects of the adjudicative outcome are reflected as basic assumptions that underlie legal negotiation: negotiation is a zero-sum game and outcomes are expressed as monetary solutions.

Reviewed cumulatively, these adversarial assumptions are expressed in the form of a linear structure for legal negotiation.¹⁸⁴ Negotiation is conceptualised as dealing with only single issues in dispute between two parties thereby introducing the element of distributive bargaining.¹⁸⁵ This enhances a polarised view of negotiation based on the assumption that the parties are in conflict because they value equally the limited resources in dispute. The object of the negotiations is to distribute the fixed sum of finite resources which is normally expressed in money and if not, then quantified in monetary

¹⁷⁹ Eisenberg "Private ordering through negotiation" 654.

¹⁸⁰ The Apportionment of Damages Act 34 of 1956 provides for the apportionment of damages in instances of contributory negligence in order to obviate binary adjudicative solutions in such cases, thereby waiving the common law in this respect. See 7 **LAWSA** par 29.

¹⁸¹ See text and notes 97-98 above.

¹⁸² In the present context, the term "adjudication" is distinguished from a court's deliberative function eg deciding on the correctness of its own procedure or granting minors permission to marry without parental consent, admitting a person as a sworn translator of the court, and the like.

¹⁸³ **Teply Legal Negotiation** 105.

¹⁸⁴ See figure 2 in 5.3.2 above.

¹⁸⁵ See Raiffa **Science of Negotiation** 33: "In ... distributive [bargaining] one single issue, such as money, is under contention and the parties have mostly strictly opposing interests on that issue: the more you get, the less the other party gets, and - with some exceptions and provisos, you want as much as you can get."

terms. Normally, due to the partisan ethics of the adversarial system, a maximalist approach is taken to negotiation. Typically each party bargains for a maximal (best) result: the plaintiff commences with a high demand and the defendant counters by conceding the minimum. Accordingly, an aspiration base and a real base are focal for proper planning of the negotiations. Moreover because the outcome of adjudication is a zero-sum, each party attempts to obviate a potential adjudicative outcome as well as the transactional costs involved in litigation. This creates the incentive for the parties to make concessions in order to reach an agreement within the bargaining zone where each party's real base overlaps. Agreement at the hypothetical midpoint within the bargaining zone is considered an advantage when compared with the uncertain outcome of a binary adjudicative solution to which transactional costs are added. In this particular context, a negotiated settlement also avoids the potential of a minus-sum game which entails one party winning but both parties losing because each must pay the exorbitant costs of litigation.¹⁸⁶ The structure of legal negotiation is therefore highly stylised, being restricted to linear solutions for the distribution of the finite resources in dispute in terms of which bargaining occurs on the basis of a competitive strategy.¹⁸⁷

5.6 Strategy selection

Having established an outline of the structure of legal negotiation, it becomes possible to deal with strategy selection for legal negotiation. Objectively, a competitive, co-operative or integrative strategy should in theory be applicable to any negotiation situation. Essentially, what needs to be determined is whether the structure of legal negotiation sets pre-conditions for the selection of a negotiation strategy or whether it is able to accommodate any negotiation strategy.

A preliminary response is that the competitive strategy is best suited to the structure of legal negotiation. All the elements of the competitive strategy are satisfied within the

¹⁸⁶ See Kritzer *The Negotiation Process in Ordinary Litigation* 67; Menkel-Meadow "Legal negotiation" 767 note 44.

¹⁸⁷ This particular form of negotiation has been described by Menkel-Meadow "Legal negotiation" 576 note 3 as "adversarial negotiation" and instead promotes a problem-solving negotiation model as an alternative.

structure of legal negotiation: the presumption of conflict, a maximalist approach to the negotiations, distributive bargaining and the ritualised granting of concessions.¹⁸⁸ Indeed, because of the unique structure of legal negotiation, the competitive strategy is traditionally applied. However, this need not necessarily indicate that strategy selection for legal negotiation is inflexible. The traditional association between the competitive strategy and legal negotiation is a symptom of a mindset that has been conditioned by adversarial behaviour rather than a rigid usage.¹⁸⁹

At first glance it might seem that the competitive and co-operative strategies are antithetical to each other. By comparison with the competitive strategy, the co-operative strategy is non-competitive and therefore shuns a maximalist approach to the negotiations instead favouring collaboration as means of achieving a fair solution to the dispute.¹⁹⁰ Given this vital difference, the continuities between the two strategies should not be overlooked. A major continuity between the competitive and the co-operative strategies is that both function within the linear structure of distributive bargaining based on a pattern of concession making in order to compromise on the sharing of finite resources. Essentially the differences relate to negotiation style rather than to the actual structure of the negotiations. This would be in keeping with Williams's distinction between competitive and co-operative styles of negotiation.¹⁹¹ What is evident is that

¹⁸⁸ See, further, 5.3.2 above.

¹⁸⁹ Hartje "Lawyer's skills in negotiations" 139 succinctly sums up the position which fairly reflects the situation in South Africa : "Law schools, whatever the merits regarding reaching rigorous thought patterns, may be the spawning grounds for competitiveness, aggressiveness, and selfishness. ... Academic success there, which in turn opens the door to prestigious professional positions, is extremely competitive, leading to a ranking order of graduating students. Most of the material for study are, or concern, judicial decisions, usually appellate opinions which are seen as contests between parties who are regarded, often because of the result of the contest, as right or wrong, winners or losers. Professional education seems to inculcate in students a competitive view of themselves and explicitly teaches competitive partisan advocacy as an ultimate process. ... The danger for lawyers is that the mind set of partisan advocacy imputes to clients a very limited set of objectives and a narrow scope of alternatives to resolve those objectives, often pulling clients kicking and screaming into the adversarial arena."

¹⁹⁰ For the co-operative strategy, see text to notes 114-121 above.

¹⁹¹ Williams **Legal Negotiation and Settlement** 18-40 on the basis of empirical studies dealing with negotiation effectiveness in respect of legal disputes, distinguishes between negotiators who adopt either a competitive or co-operative

competitive strategy need not monopolise legal negotiation because of the nature of its negotiation structure. Distributive bargaining is common to both strategies and therefore both are amenable to the linear structure of legal negotiation.

In order to circumvent the traditional choice of automatically adopting a competitive strategy for legal negotiation, legal negotiation theorists suggest that the negotiations should be *contextualised* before deciding on an appropriate strategy. Lowenthal limits the scope of his work to only the competitive and co-operative (or as he calls it, collaborative) strategies. What is recognised is that the choice between one of the two strategies is "influenced strongly by certain characteristics of the particular negotiation". In this respect the following factors are identified: "(1) the subject matter of the negotiation; (2) the normative constraints on the negotiators; (3) the on-going relationship between the parties; and (4) the personality and values of the respective negotiators".¹⁹² For the purposes of the present discussion, the emphasis falls on the subject matter of the negotiations. In this respect, Lowenthal distinguishes between the "pay-off structure" and the "trade-off structure" of the negotiations. The first relates to "the extent to which the negotiators must share or ration the items bartered" that in turn forces an assessment of whether the negotiations are zero-sum or non-zero-sum.¹⁹³ The second consideration relating to the subject matter of the negotiations deals with the number of items on the bargaining agenda. This is an important factor because when a multiple agenda contains a number of non-zero-sum items, there is a greater opportunity to employ a co-operative strategy on account of the trade-offs arising from the relative value of different items to each party.¹⁹⁴ In brief, zero-sum negotiations normally necessitate the adoption of a competitive strategy, non-zero-sum negotiations allow for "problem-solving approaches" and lastly, "many rationing situations permit limited collaborative negotiation when it is possible to add agenda items".¹⁹⁵ Although

negotiation style. However, there is no indication in his work that either a competitive or co-operative style affects the structure of legal negotiation.

¹⁹² "General theory of negotiation" 73.

¹⁹³ *Ibid* 94-96.

¹⁹⁴ *Ibid* 96-98.

¹⁹⁵ *Ibid* 96.

Lowenthal furnishes useful grounds for strategy selection, he confines himself to the linear structure of distributive bargaining that is characteristic of legal negotiation. This is evident from his equivocation regarding "problem-solving approaches" as forming part of a distinct and independent integrative strategy.¹⁹⁶

The competitive and co-operative strategies present different sides of the same coin because both share a common linear structure of distributive bargaining. The differences between the two relate to negotiation style rather than to structure. Both are therefore compatible with the structure of legal negotiation which makes strategy selection a relatively uncomplicated task when the choice is a toss up between one of these two strategies. However, the matter of strategy selection becomes a little more complicated when the integrative strategy is introduced as another option.

The purpose and function of the integrative strategy are in diametrical opposition to those of the competitive and co-operative strategies. The integrative strategy is goal directed, based on methods of joint problem solving and concerned with outcomes that give effect to mutual decision making. The objective is articulately expressed by Menkel-Meadow

In addition to focusing on the parties' needs as a source of solutions, negotiators can attempt to expand the resources that the parties may eventually have to divide. In essence, this aspect of problem-solving negotiation seeks whenever possible to convert zero-sum games into non-zero-sum or positive-sum games. By expanding resources or the material available for division, more of the parties' total set of needs may be satisfied.¹⁹⁷

Distributive issues are therefore only of secondary importance.

¹⁹⁶ Gifford "Strategy selection in legal negotiation" 46 note 40 interprets Lowenthal's use of the term "collaborative strategy" to include both the co-operative and the integrative strategy.

¹⁹⁷ "Legal negotiation" 809. Lowenthal (in text to notes 192-200 above) also uses the conversion of a zero-sum game to a non-zero-sum as a means of justifying the adoption of a co-operative strategy. Somewhere along the line it seems that Lowenthal has conflated the means and ends of the co-operative and integrative strategies.

A major criticism of the integrative strategy is its failure to address the reality of distributive bargaining. However the criticism is not unqualified. According to Eisenberg's contextualisation of rule-making negotiation and dispute negotiation,¹⁹⁸ an integrative strategy would suit the circumstances of rule-making negotiation which is directed at the creation of future rights that usually determine in advance the manner in which resources or material will be distributed by mutual agreement between the parties. As its name indicates, dispute negotiation relates to the re-allocation of a finite sum of resources as a result of past events that led to the infringement of rights. In most instances of dispute negotiation, distributive issues are a practical reality which proponents of the integrative strategy tend to underestimate.

Ury and Fisher's **Getting to Yes** serves as an extreme example of a problem-solving approach that overlooks distributional issues. White's criticism of the book is telling

Unfortunately the book's emphasis upon mutually profitable adjustments, on the "problem-solving" aspect of bargaining, is the book's weakness. It is a weakness because emphasis of this aspect of bargaining is done to almost the total exclusion of the other aspect of bargaining, "distributional bargaining," where one for me is minus one for you. ... One can concede the authors' thesis (that too many negotiators are incapable of engaging in problem solving or finding adequate options for mutual gain), yet still maintain that the most demanding aspect of nearly every negotiation is the distributional one in which one seeks more at the expense of the other.¹⁹⁹

The essence of the controversy is whether distributional issues are amenable to joint problem solving. In response to this point of criticism, Fisher contends that White has overemphasised substantive issues in respect of which the parties' interests are directly opposed and accordingly "overlooks the shared interests that the parties continue to have in the process for resolving that substantive difference". Distributional issues

¹⁹⁸ See, further, 5.1 above.

¹⁹⁹ "Pros and cons of 'Getting to Yes'" 118. For another review of **Getting to Yes**, see McCarthy "Power and principle in 'Getting to Yes'" 59 and Fisher's reply in "Beyond Yes" 67. For the sake of completeness, reference is made to "Negotiating power" in which Fisher responds to the general criticism that **Getting to Yes** does not adequately address the issue of power in negotiation.

should therefore be treated as a shared problem.²⁰⁰ White and Fisher obviously evaluate the integrative approach from totally different vantage points: the former from the harsh reality of adversarial and distributive bargaining within the arena of legal negotiation,²⁰¹ the latter from an idealistic and morally prescriptive conception of negotiation.²⁰² Polarised approaches such as these make strategy selection an extremely difficult task, particularly because the compatibility between distributional issues and joint problem solving is not directly addressed. The lack of clarity is especially pertinent in the context of the distributive principles applicable to the linear structure of legal negotiation.

Menkel-Meadow is highly critical of the linear structure of legal negotiation along with the adversarial orientations which it promotes. As an alternative, she has developed a problem-solving model. The passage that follows concisely summarises the contrast between both approaches

The adversarial structure encourages compromise in its conventional sense; that is, both parties must give up something in order to reach agreement. In contrast, the problem-solving model substitutes a negotiation structure that does not require unnecessary compromise but permits the parties to come to an agreement without having to give up their preferences.²⁰³

Although biased in favour of a problem-solving structure for legal negotiation, Menkel-Meadow acknowledges the limits of the problem-solving model²⁰⁴ and concedes that in

²⁰⁰ "Comment" 121.

²⁰¹ In conjunction with Edwards, White is the co-author of the book **The Lawyer as a Negotiator: Problems, Readings and Materials** (St Paul Minn, West Publishing Co 1977) which is noted for its competitive or adversarial approach to legal negotiation.

²⁰² This is evident from an extract contained in Fisher's "Comment" 120: "To some extent, I believe, White is more concerned with the way the world is, and I am more concerned with what intelligent people ought to do. One task is to teach the truth - to tell students the unpleasant facts of life, including how people typically negotiate. But I want a student to negotiate better than his or her father. I see my task as to give the best possible prescriptive advice, taking into account the way other human beings are likely to behave as well as one's own emotions and psychological state."

²⁰³ "Legal Negotiation" 794.

²⁰⁴ *Ibid* 829-840.

certain instances a binary solution is the only manner of resolving a dispute.²⁰⁵ Even though Menkel-Meadow's trenchant criticism of "adversarial negotiation" does expose its defects, a major flaw in the structure of problem solving that is proposed as the alternative, is that it is not in all cases an adequate substitute for distributive bargaining within the linear structure of legal negotiation. Only polarised options for strategy selection are posed: either adversarial negotiation or the structure of problem solving, with an obvious bias for the latter. Consequently, strategy selection for legal negotiation is not contextualised in regard to the specific attributes of a particular dispute. Gifford's contribution to strategy selection deals pertinently with this problem.

Proponents of a particular negotiation strategy usually argue that the adoption of their approach will achieve the best results. For instance, Fisher and Ury steadfastly promote principled negotiation, Bellow and Moulton support the competitive strategy and Menkel-Meadow favours the structure of problem solving for legal negotiation. Gifford's approach is systematic rather than dogmatic. If he does hold any fixed viewpoint, it would be that strategy selection should be flexible and that the context of the negotiations is a critical variable for the selection of the optimal negotiation strategy. He sums up his context-based theory of strategy selection in legal negotiation as follows

Within each substantive area of negotiation, certain systematic characteristics recur; in choosing a negotiation strategy, the importance of these characteristics outweighs the effects of idiosyncratic facts in most negotiations. Accordingly, by applying these factors to be used in choosing a negotiation to the characteristics of a particular type of negotiation, a negotiator can determine systemically a recommended strategy. Although a somewhat different strategy may sometimes be dictated by the particular facts of a specific transaction, the recommended strategy for the context in which the negotiation occurs can serve as a guideline or starting point for the negotiator. The ability to prescribe a strategy for a specific type of negotiation enables negotiation theory to provide meaningful advice for the real world negotiator: by doing so, the study of negotiation in professional education is legitimated.²⁰⁶

In order to illustrate these principles Gifford analyses negotiation strategy in the context of the defence attorney's strategy in plea bargaining,²⁰⁷ the plaintiff's attorney's

²⁰⁵ Ibid 835-836.

²⁰⁶ "Strategy selection in legal negotiation" 45.

²⁰⁷ Ibid 73-82.

negotiation strategy in personal injury negotiations²⁰⁸ and lastly, the management attorney's strategy in labour relations.²⁰⁹ In each instance, the analysis of the context of the negotiations prescribes the predominant strategy to be adopted as well as the combination of strategies that may be used during the various stages of the negotiation process.

Gifford teaches some important lessons. Strategy selection for legal negotiation ought not to be confined to preconceived notions about a particular negotiation structure. Because of his insight into the fluidity of the process of negotiation, the selection of a competitive, co-operative or integrative strategy need not be an irrevocable choice. Strategy should alter as the circumstances of the negotiations dictate. Although most negotiations commence by means of a competitive approach, any combination of the three strategies might be used during the various stages of the negotiation process. The competitive, co-operative and integrative strategies are therefore not mutually exclusive since more than one of these strategies may be used in a single negotiation.²¹⁰ The only parameters are those that are naturally set by the context in which the negotiations occur.

These insights challenge conventional perceptions about the linear structure of legal negotiation that is dominated by adversarial assumptions and the habit of treating disputes as distributional issues that are mainly concerned with the division of the total sum of finite resources. So too, the contributions of Fisher and Ury and Menkel-Meadow point to the need for an attitudinal change that regards the lawyer negotiator as a problem solver rather than a pugilist.

²⁰⁸ Ibid 82-88.

²⁰⁹ Ibid 88-92.

²¹⁰ See, further, Gifford "Strategy selection in legal negotiation" 57-58.

5.7 Negotiation and legal negotiation

The legal mind is prone to sorting its rules and procedures into neat packages that exclude any social concepts, models or institutions that do not meet the abstract and rational standards of legal thought. Consequently, there is a general failure to recognise the continuities and discontinuities between legal and private institutions. Some of the resultant dichotomies have already been explored: non-litigious/ litigious processes, the non-legal/legal dispute, non-adjudicative/adjudicative decision-making. Although dichotomies are useful for constructing analytical models, they tend to absolutise discontinuities and disregard continuities. Similarly, a negotiation/litigation dichotomy has until recently veiled the continuity between litigation as a public legal institution and negotiation as a private institution.

Dating back to 1976, Eisenberg perceived the fallacy inherent in these strained dichotomies and their tendency to artificially divorce the legal process from the social system. In this vein of thought, he commented as follows, specifically in the context of legal negotiation

Little attention ... has been given to the continuities between specific legal processes and their official counterparts. Indeed, these categories are often viewed as essentially dichotomous. Yet the two great tasks of the legal system - the settlement of disputes that have arisen out of past actions, and the establishment of rules to govern future conduct - are also performed daily without resort to that system, and it would be surprising if processes as integral to the social fabric as those of the law failed to exhibit significant continuities with private institutions directed toward accomplishing these tasks.²¹¹

In retrospect, Eisenberg's ideal has been fulfilled in some measure.

The sources cited in this text indicate the progress that has been made in the field of negotiation and in particular, legal negotiation. Negotiation research over the past two decades is changing myopic conceptions about the process of negotiation in relation to legal process. One salient aspect of these developments is the growing understanding

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"Private ordering through negotiation" 673.

of the continuity between legal negotiation and the process of litigation as informal and formal methods of dispute processing and dispute resolution. Legal negotiation can no longer be regarded as some random event vaguely related to the process of litigation and public adjudicative decision making nor as a totally private occurrence that lacks processual structure.

Moreover, these developments have occurred within the context of the system of ADR in which negotiation is posed as an alternative to litigation and legal decision making. However, legal negotiation theorists go even further. The one view is that, in terms of "the shadow of the law" concept, the substance and structure of legal negotiation anticipates adjudicative outcomes should the negotiations fail; the other is view that legal negotiation is not merely an alternative to litigation but an integral part of its informal processes.²¹²

The heightened awareness of the interdependence between legal negotiation and the litigation process creates some very interesting dilemmas for both ADR and the litigation system. If legal negotiation and litigation are inseparably connected, then in the context of ADR, it is misleading to assert that legal negotiation is a process alternative to litigation. On the other hand, because most civil proceedings are settled by negotiation in anticipation of adjudicatory outcomes, the litigation system therefore provides a non-voluntary adjudicative alternative should the negotiations fail.²¹³ This inverted logic is not merely a matter of verbal gymnastics but rather raises pertinent issues about the context of negotiation in relation to both ADR and the system of litigation. From the vantage of ADR it may be asserted that negotiation is an important alternative process that may be used in support of legal decision making; from the perspective of the litigation system, a particular form of negotiation, characterised as legal negotiation, may be identified as being inseparably intertwined with legal process.

²¹² See 5.4 above.

²¹³ Kritzer *The Negotiation Process in Ordinary Litigation* 137.

CHAPTER 6

THE FOUNDATIONAL PRINCIPLES OF MEDIATION

6.1 Mediatory intervention

- 6.1.1 The nature of third-party intervention
- 6.1.2 Mediatory intervention as structured negotiation
- 6.1.3 The scope and limits of mediatory intervention

6.2 The nature of the mediation process

- 6.2.1 Mediation: process without an external structure
- 6.2.2 Consensual nature of mediation
- 6.2.3 Mediation and the nature of a dispute

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- 6.3.1 Neutrality
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- 6.3.3 Processual equality

6.4 Evaluation of the process of mediation

6.1 Mediatory intervention

6.1.1 The nature of third-party intervention

Mediation is a form of process that relies on the intermediary intervention of a neutral third party for the resolution of a dispute. Although this statement does describe a fundamental attribute of the process of mediation, it remains vague because there are a variety of processes that also rely on third-party intervention for the resolution of a dispute: expert appraisal, neutral fact-finding, the ombudsman, umpiring by a referee, valuation, arbitration and court-based adjudication, to name but a few. Common to all is

a process of trilateral interaction for the transformation and resolution of the dispute. Therefore in theory, every form of process that depends on third-party intervention for the resolution of a dispute may be posed as an alternative to mediation.¹ Accordingly, the intrinsic nature of mediatory intervention must be established in order to distinguish the process of mediation from other forms of third-party intervention.

The extent to which the disputants submit the dispute to a neutral third party and grant authority for its settlement, directly determines the form and function of any interventionist process. The submission of the dispute to an outsider realigns the original bilateral relationship between the disputants. On the basis of their bilateral relationship, the disputants retain their independent decision-making powers. However, when a trilateral relationship is effected, the disputants' decision-making powers are diminished in proportion to the scope of authority granted to the neutral third party to resolve the dispute.² Within the framework of a trilateral relationship a number of variables operate to determine the degree of intervention by the third party.³ The third party may be competent either to give a non-binding opinion, impose a binding decision or merely facilitate the resolution of the dispute. According to this construction, the nature of the outcome envisaged by the disputants determines the degree and intensity of the intervention as well as the extent to which the parties surrender their decision-making powers. Against this background, the processual form of mediatory intervention may be assessed.

By comparison to other forms of third-party intervention, mediatory intervention does not result in the imposition of a binding decision or produce a non-binding opinion.⁴ As a

¹ Mackie "Negotiation and mediation" 87. See also Moore **The Mediation Process** 8-9.

² See Roberts "Mediation in family disputes" 548-549.

³ Rogers and Salem **Mediation and the Law** 245-254 describe the various methods of third-party intervention by means of a continuum "ranging from purely consensual procedures to adjudicative ones". Although a continuum is a useful tool for analysing the characteristics of the various forms of third-party intervention, it should be regarded only as a method of analysis rather than as a prediction of the development of a dispute.

⁴ See Mowatt "Thoughts on mediation" 730.

starting point, mediatory and adjudicative intervention may be compared. Paradigmatically, both share the same trilateral structure for the transformation and resolution of a dispute but conceptually, mediation and adjudication have nothing in common. Adjudicative intervention is supported by a systematic power base originating in jurisdictional rules or a contractual submission consenting to the implementation of an adjudicative process. The authoritative standing of adjudicative intervention hence permits the imposition of a binding decision thereby effectively divesting the disputants of their decision-making powers.⁵ Mediatory intervention has no recourse to any such structured authority. If mediatory authority is sought, then it can be traced only to the individual and mutual consent of the disputants to enter into the mediation process.⁶ Likewise, the power that sustains the intervention of the third party is not external to the process or sanctioned but is rather reliant on the skill and personal authority of the mediator to effect a realignment of private relationships as a means of resolving the dispute.⁷ What is immediately apparent is that the outcome of mediatory intervention can never be imposed on the disputants as a binding decision. Whether a non-binding opinion may be an outcome of mediatory intervention, is a separate issue.

In its purest form, mediatory intervention should not produce a non-binding opinion. Theoretically, the third-party neutral to the process of mediation should intervene only as an intermediary between the disputants in order to facilitate the resolution of the dispute.⁸ Ideally speaking, the intermediary function and mediatory intervention should be synonymous. Should the third-party neutral's intervention extend beyond the role of that of an intermediary, strictly speaking, the form of the process is something other than mediatory intervention.

⁵ Fulton **Commercial ADR** 78

⁶ Newton "ADR and the lawyer" 564.

⁷ Fulton **Commercial ADR** 78; Riskin "Mediation in alternative dispute processing" 25.

⁸ Levy and Mowatt "Mediation in the legal environment" 64.

However, the underpinning of the intermediary role and function is not always clear because certain processes that rely on third-party intervention combine in varying degrees elements of both mediatory and adjudicative intervention. Prime examples are expert appraisal and neutral fact finding. The outcome of these processes is invariably a non-binding opinion that is reminiscent of either adjudicative fact determination or decision making. By the same token, the very reason for the selection of such processes is to enable the disputants to resolve their dispute through interaction with a third-party neutral whose conduct is more in keeping with mediatory rather than adjudicative intervention. As a result, in other contexts, the predominant intermediary purpose and function of mediatory intervention are often dissipated by granting the third-party neutral the competence to give a non-binding opinion. The "mediation" clause contained in both the JBCC and GCC may once again be used as an example.⁹ Both clauses describe a process of mediation in which the neutral third party has an intermediary function.¹⁰ However, these clauses go beyond the theoretical limits of mediatory intervention by placing a positive duty on the third-party neutral to prepare a non-binding opinion which each disputant may either accept or reject.¹¹ The unfortunate part of the matter is that these and similar processes are called "mediation" and are purportedly based on mediatory intervention when in fact they deviate considerably from the paradigm for mediatory intervention in terms of which a non-binding opinion is a foreign element. Any form of third-party intervention that produces a non-binding opinion is thus in theory in conflict with the principle of mediatory intervention because in effect the means of the mediatory function has been crossed with the ends of adjudicative intervention. Accordingly, a non-binding opinion ought not to be the outcome of any form of mediatory intervention.

By means of this process of elimination, the model for mediatory intervention therefore indicates that the mediation process relates solely to third-party intervention for the purposes of facilitating the negotiations between the disputants.

⁹ See 3.2.2 above at text to notes 84-101.

¹⁰ See JBCC 1991 cl 37.2; GCC 1990 cl 61(2).

¹¹ See JBCC 1991 cl 37.3; GCC 1990 cl 61(2)(e).

6.1.2 Mediatory intervention as structured negotiation

Mediatory intervention transforms the bilateral negotiation process into a trilateral process in which the intermediary function of the neutral third party predominates in order to facilitate the furtherance of negotiations between the disputants and to assist them in achieving a final settlement that is the product of independent and joint decision making on their part alone.¹² This principle is confirmed by Gulliver

The intervention of a mediator turns the initial dyad of a dispute into triadic interaction of some kind. The disputing parties retain their ability to decide whether or not to agree to and accept proposals for an outcome, irrespective of the source of the proposals.¹³

Mediatory intervention therefore transforms the bilateral structure of negotiation into a trilateral format that provides a more elaborate processual framework within which the disputants may pursue the negotiation process. The change is structural.¹⁴ The process of inter-party negotiation is extended through the intervention of the mediator without limiting the disputants' decision-making powers. The outcome belongs to the disputants because they retain their independence to settle the dispute according to their own norms and standards.¹⁵ Moore supports this principle

Mediation is essentially negotiation that includes a third party who is knowledgeable in effective negotiation procedures, and can help people in conflict to co-ordinate their activities and to be more effective in their bargaining. Mediation is an extension of the negotiation process in that it involves extending bargaining into a new format and using a mediator who contributes new variables and dynamics to the interaction of the disputants. Without negotiation, however, there can be no mediation.¹⁶

¹² Levy and Mowatt "Mediation in the legal environment" 65.

¹³ **Disputes and Negotiations** 213.

¹⁴ Camevale "Strategic choice in mediation" 42.

¹⁵ Moore **The Mediation Process** 6.

¹⁶ *Ibid* 14.

The fact that mediation is an extension of the process of negotiation does explain a fundamental characteristic of mediatory intervention. The continuities between the processes of negotiation and mediation are clearly evident. For example, the processual stages of negotiation and mediation are similar to each other;¹⁷ both processes are consensual with the result that party control of the outcome is common to both. However, an uncritical reliance on these continuities perpetuates the notion that mediation is an adjunct to the process of negotiation.¹⁸ Any such notion is flawed because it assumes that the interventionist role of the mediator is merely passive.

Designating the mediator as an intermediary for the furtherance of the negotiations does not necessarily imply that in all instances the role of the mediator is static, passive and impersonal.¹⁹ Although the process of mediation might be the least intrusive form of third-party intervention,²⁰ mediatory intervention is not always unobtrusive. The analogy between bilateral negotiation and mediation remains feasible only when the mediator's function is strictly that of a passive and impartial intermediary between the disputants, as in the case of facilitation or chairing a meeting between disputants. But these forms of mediation are rare.²¹ Whenever active control of process becomes a feature of mediatory intervention, the dynamics of the bilateral negotiation process is changed. Control of process assumes that a directive form of intervention occurs. The more directive the form of mediatory intervention becomes, the more the mediator will direct the outcome of the dispute and the less any analogy to bilateral negotiation remains.²²

¹⁷ Compare 5.2 above and Moore **The Mediation Process** 29-30, 32-33.

¹⁸ See Roberts "Mediation in family disputes" 548 where he rightly comments: "Studies of the structure of settlement institutions have [also] generally indicated that the most important contrast is between negotiation and adjudication; between processes, on the one hand, in which the power to determine the outcome remains with the parties themselves, and, on the other, is surrendered to an umpire. One reason for this treatment of mediation appears to be that it is generally regarded as a sub-category of negotiation, or as a process *auxiliary* to negotiation."

¹⁹ See Gulliver **Disputes and Negotiation** 213-219.

²⁰ Goldberg, Green and Sander **Dispute Resolution** 91.

²¹ See Roberts "Mediation in family disputes" 549.

²² *Ibid* 550.

The above comments might seem to negate the initial premise that mediatory intervention is an extension of the process of bilateral negotiation and that the disputants retain their competence to independently settle the dispute. This is only partially true. Negotiation between the disputants is a fundamental characteristic of mediation, subject to the qualification that the negotiations are no longer bilateral. Moreover, although the mediator participates in a directive capacity in the outcome of the dispute, mediatory intervention does not permit the imposition of a decision, thereby protecting the independence of the disputants' decision-making powers. The analogy to negotiation in general is therefore valid but not to the extent that mediatory intervention is an extension of bilateral negotiations. Mediatory intervention is chosen by the disputants precisely because bilateral negotiation has failed. Mediation does not and cannot continue negotiations in bilateral form. Bilateral negotiation and mediation are processes that are distinct and separate. To reason otherwise would be to admit that mediation is an adjunct or accessory to the process of bilateral negotiation.²³

Mediation is an independent process. Although negotiation is an intrinsic part of the mediation process, negotiation in the context of mediation differs in form from bilateral negotiation. The reason is that mediatory intervention structures the negotiations between the parties and as a result the dynamics of bilateral negotiation is altered. Mediatory intervention provides a processual frame of reference within which the mediator participates with the disputants in their negotiation of the dispute. There is the temptation to name this form of negotiation "trilateral negotiation". Despite the fact that this term represents the reality of the interaction between the mediator and the disputants, it is technically incorrect because ultimately the mediator does not share in the settlement, which is based solely upon the joint decision making and mutual agreement of the disputants. The negotiation that occurs within the process of mediation is not bilateral negotiation but rather a distinct form of structured negotiation. Mediation may thus be aptly described as *a process of structured negotiation* that is facilitated through the intervention of a third party, known as a mediator.

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See, further, note 18 above.

6.1.3 The scope and limits of mediatory intervention

In contrast to adjudicative forms of intervention, mediatory intervention is not bound by the uniform application of stylised procedures and to conventional or institutionalised methods for the conduct of process. By comparison to adjudicative processes, mediatory intervention can be adapted according to the context of the dispute and the needs of the disputants. Accordingly, mediatory intervention cannot be reduced to a single comprehensive description. The scope of intervention is infinitely varied - from the perfunctory attempt of a friendly neighbour or teacher to settle a dispute to the directive and assertive intervention of a professional.²⁴ So too, the context of mediatory intervention is equally varied. Mediatorial intervention for the purposes of resolving labour unrest is essentially different from the form of intervention directed at resolving family disputes.²⁵ The literature is replete with examples of the diverse contexts to which mediatory intervention is suited: environmental,²⁶ gender²⁷ and discrimination²⁸ issues; corporate and commercial disputes;²⁹ the settlement of the personal and proprietary consequences of divorce³⁰ and community dispute resolution.³¹ The list is unending,

²⁴ Astor and Chinkin **Dispute Resolution** 96; Roberts "Mediation in family disputes" 550.

²⁵ See Mowatt "Thoughts on mediation" 738-739.

²⁶ See, for instance, Lyster "Environmental dispute resolution" 156-160; BNA Report 47-48.

²⁷ See Astor and Chinkin **Dispute Resolution** 109-112.

²⁸ *Ibid* 261-276.

²⁹ See, for instance, Antrobus and Sutherland "ADR in commercial disputes" 163-173; Green "Corporate ADR" 264-266; Finsen "Arbitration and mediation in the construction industry" 184-186; Fulton **Commercial ADR** 74-110; Singer **Settling Disputes** 72.

³⁰ Burman and Rudolf "Repression by mediation" 251; Cohen "Divorce mediation" 73; Hoffmann (ed) **Family Mediation in SA** 35-79 104-111; Mowatt "The Mediation in Certain Divorce Matters Act 1987" 611; Mowatt "Divorce mediation" 47; Mowatt "The family court and divorce mediation" 289; Scott-Macnab **Mediation Arbitration** 210-242; Scott-Macnab "Mediation in the family context" 709; Scott-Macnab and Mowatt "Mediation and arbitration as alternative procedures" 313; Scott-Macnab and Mowatt "Family mediation" 41.

³¹ For the position in South Africa, see Steadman "Settling disputes in communities" 124.

creating the impression that the scope of mediatory intervention is as expansive in its application as is bilateral negotiation. This is not the case. Enthusiasm for the process of mediation tends to blur the fact that mediatory intervention is not a panacea for all forms of conflict and dispute. As a form of third-party intervention, the process of mediation is restricted to the interventionist functions that the mediator may perform and limited by the nature of the outcome that can be achieved by this particular form of intervention.

An essential feature of mediatory intervention is the intermediary function of the third-party neutral. This quality distinguishes mediation from other forms of third-party intervention and also determines the scope and limits of the intervention. Accordingly, any function that overreaches the intermediary role of a mediator alters the process into something other than mediation. Within the processual framework of third-party intervention, obvious examples would be instances where the mediator might give a non-binding opinion or impose a decision on the disputants.³² However these examples are too elementary because they do not distinguish the intermediary function of the process of mediation from other non-processual activities involving a third party who fits the description of an intermediary.

According to the legal construction of agency and representation, an agent acts as an intermediary between the principal and third party. The agent may act as a broker, an auctioneer, an estate agent, a factor or a legal representative. The role of the agent merely indicates the nature of the mandate involved. The crucial point is that the agent enters into a transaction on behalf of the principal thereby intervening in the otherwise normal bilateral relationship between the contracting parties. Although the ensuing contractual obligations bind only the two contracting parties, the agent is responsible for the formation and at times, even the execution of the contract when the authority to perform a juristic act on behalf of the principal has been conferred. The intermediary function is clearly evident not only from the perspective of contract formation and its execution, but also in respect of the pre-contractual stage when the agent acts as a go-between or might even resolve differences and disputes between the parties in order to ensure the eventual execution of the contract. However, the agent's intermediary role is

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See, further, 6.1.1 above.

not neutral and impartial nor does it relate to the directive control of dispute negotiations. As an intermediary, the agent has a definite interest, be it financial or otherwise, in the outcome of her mandate and moreover, acts as a partisan for the principal.³³ If any dispute happens to be resolved on account of the agent's intermediary function, this is coincidental to the agent's mandate and not in any manner related to any expressed process of dispute resolution.

The agent is an example of an intermediary in a commercial setting. Pertinent to mediation and particularly divorce and family mediation, is the situation of a social worker or psychologist in counselling spouses or parents and their children.³⁴ As an intermediary, the counsellor attempts to resolve the personal conflict between the parties by therapeutic means. The social services professional has no direct interest in the outcome of the dispute but has an obligation to analyse the source of the conflict in psychological terms in order to resolve the dispute. Clearly, the professional is involved as an intermediary for the purposes of dispute resolution. However, the outcome is measured in therapeutic terms, depending on the extent to which the parties are capable of altering their behaviour.³⁵

The intermediary function is therefore not unique to mediatory intervention. Both the agent and social services professional are examples of intermediaries. However, the

³³ See, further, Neale and Bazerman *Cognition and Rationality in Negotiation* 142-146. See also 146-153 for a critical analysis of the manager as an intermediary.

³⁴ Counselling in the context of social services is a common situation and problematic in regard to family and divorce mediation. For instance, Astor and Chinkin *Dispute resolution* 63-64 245-246, commenting on the situation in Australia, explain that under the Family Law Act of 1975 (Cth) the term "conciliation counselling" is used but that the term is not defined. The practice that has evolved is described as follows: "The role of the counsellor is to resolve disputes, and will, in many cases, have elements of both mediation and therapy. It will be directed to changing the behaviour of the parties, to improve their relationship with each other and with their children."

³⁵ See Pears *Beyond Dispute* 41; Keltner *Mediation* 9; Kelly "Mediation and psychotherapy" 44. See also Roberts "Mediation in family disputes" 551-553 for a discussion of "mixed interventions" as well as Coombs "Noncourt-connected mediation and counseling" for a critical analysis of mediation as practised by mental health professionals.

intermediary function of the agent and social services professional cannot be equated with mediatory intervention for the purposes of dispute resolution. As a partisan for the principal, the agent has a direct financial interest in the outcome of the transaction concerned. The agent's mandate might include the settlement of disputes between the principal and the third party. Should this be the case, dispute resolution is only incidental to the main object of the transaction which is to conclude the contract successfully. The agent therefore does intervene as an intermediary but not for the sole purpose of dispute resolution.

On the other hand, the social services professional fulfils a therapeutic and support function in an attempt to directly resolve personal conflict. The interventive intermediary function is, in contradistinction with that of the agent, directed at the resolution of a dispute thereby presenting a closer analogy to mediatory intervention than the intermediary model of agency. However, dispute resolution is the only element common to mediatory intervention and counselling. With specific reference to divorce mediation, Kelly draws a definitive line between mediatory intervention and counselling

The role of the therapist is to encourage exploration of the meanings and levels of dysfunctional psychological reactions. In contrast, the role of the mediator is to manage and contain emotional expression so that the process of reaching settlement can proceed.³⁶

The intermediary function of the social services professional operates within the context of the counsellor/client relationship and therefore in professional terms is client centred and therapeutically orientated, with the aim of assisting the clients to cope psychologically with the causes underlying the dispute.³⁷

By comparison with other types of intermediaries, the intermediary function of mediatory intervention is therefore concerned with dispute resolution for the purposes of achieving a settlement of a dispute on the basis of the mutual agreement of the disputants. Conceptually, this occurs within the broader processual context of third-party

³⁶ "Mediation and psychotherapy" 44.

³⁷ Keltner **Mediation** 8.

intervention. Within this framework, the interventionist role of the mediator is that of an intermediary whose principal function is to structure and control the process of negotiation between the disputants, thereby empowering the disputants to control the content and outcome of the process. The intermediary function of the mediator is therefore concerned with the consensual resolution of a dispute. This determines both the scope and limits of mediatory intervention. The mediatory intermediary function is neither representative nor therapeutic. As an intermediary, the mediator's intervention may be active or passive, directive or persuasive or a combination of any of these at any stage of the mediation process. Beyond this there is little room for manoeuvre. Ultimately, the disputants determine the outcome of the dispute. Processually, this is both the strength and weakness of mediatory intervention: flexibility of decision making by the disputants is retained but at the same time a joint decision cannot be guaranteed.

6.2 The nature of the mediation process

6.2.1 Mediation: process without an external structure

Mediatory intervention provides the framework for the mediation process. Apart from this framework there is no other identifiable structure, for mediation is "all process and no structure".³⁸ The search for structure is in fact futile for it does not exist in any formal body of rules. And indeed, any attempt to predetermine a structure for the mediation would not only be contrived but would negate the intrinsic nature of the mediation process.³⁹ Essentially, there are no formal rules that sustain any processual structure for the mediation process and hence there are no processual norms that are imposed to structure the process. The concept is articulated by Lon Fuller

³⁸ Fuller "Mediation - its forms and functions" 307.

³⁹ Meggs "Divorce mediation methodology and ethics" 199 describes the various instances of what he regards as being the "high degree of methodological structure in mediation", referring to, for instance, "(a) the maximum focus on content and the overt issues drawn up in the form of an agenda of matters to be discussed". Thereafter he makes the following oblique statement on 200: "No author that I know argues that there should be no structure at all. The only discussion is over the issue of how much structure there should be." Seemingly, Meggs has confused process with structure because what he identifies as structure are not processual rules imposed externally to the mediation process, but rather norms of conduct generated by and within the mediation process itself.

[M]ediation is commonly directed, not towards achieving conformity with norms, but towards the creation of the relevant norms themselves. This is true, for example, in the very common case where the mediator assists the parties in working out the terms of a contract defining their rights and duties towards one another. In such a case there is no pre-existing structure that can guide the mediation; it is the mediational process that produces the structure.⁴⁰

If structure for mediation is to be sought, then ironically it is not to be found within the structure of its own process but instead within the structure of the process of negotiation. Mediatory intervention is sought by the disputants precisely because bilateral negotiations have failed or are at a deadlock. Conceivably, the disputants could submit the dispute to adjudication by means of arbitration or litigation or any other informal ADR process for that matter. However, where there is a continuum between the process of bilateral negotiation and the process of mediation, the disputant's private agenda is merely transferred from the former to the latter process. Negotiation continues but in the altered format of mediatory intervention. The intermediary intervention of the mediator structures the content of the negotiations between the disputants with the object of achieving a consensual outcome. It is in this particular sense that "the mediational process produces the structure".⁴¹ The structure of the mediational process is produced in each individual instance because it is not pre-existent to the process. Mediation is therefore a process without any structure and if any structure does eventually come into existence, it is created in each individual instance by the mediation process itself. This does not at all imply that the mediation process is unstructured in an absolute sense. Mediation is structured by the process of intermediary intervention and not by rules external to or imposed upon the process.

A number of important elements of the process of mediation arise from the principle that mediation is "all process and no structure", namely, that the mediation process is -

- (a) consensual in its nature; and
- (b) suited to only certain types of disputes.

⁴⁰ "Mediation - its forms and functions" 308.

⁴¹ See quotation to note 40 above.

Each of these elements explains the intrinsic nature of the mediation process. Essentially, the absence of structure and the emphasis on process is a feature of mediation that distinguishes it from other forms of third-party intervention.

6.2.2 Consensual nature of mediation

A central quality of the mediation process is that it is consensual in its nature. As obvious as this statement might seem, it needs to be explored because it raises a number of important aspects relating to the form of dispute processing and the method of decision making that are characteristic of the mediation process. In this respect, a primary principle may be formulated but in negative terms. Dispute processing for the purposes of mediation is *not* based on the adversarial determination of the facts in dispute nor is its method of decision making founded on the rational evaluation of evidence and the application of substantive rules within a conventional procedural structure. In this context, the word "consensual" is understood in contrast to other forms of process that are either litigious or adjudicative. But, beyond the dichotomy between forms of process that are either litigious/adjudicative or consensual, no other useful analysis can be made to explain the meaning of the term "consensual". A comparison with the process of negotiation is more suitable.

Like mediation, the process of negotiation is also a consensual process. Dispute processing is based on the interdependent participation of the disputants who determine their own procedural and substantive agenda for the negotiations and the resultant outcome is the product of joint decision making. The mediation process also transforms a dispute by means of the same consensus-producing dynamic with one notable exception: the interdependent participation of the disputants in the process is replaced by the intermediary intervention of a neutral third party, the mediator, who structures the negotiations. For the rest, the consensual foundations of both processes are identical. In these terms, the word "consensual" describes a process that is *not* directed at the unilateral imposition of a decision or a non-binding opinion but instead at joint decision making achieved by interactive communication between the disputants. In the case of mediation, this process is guided and controlled by the mediator with the purpose of

effecting a realignment of personal relationships. Lon Fuller captures the essence of the consensual nature of the process of mediation by describing its "central quality" as

... its capacity to reorientate the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitude and dispositions toward one another.⁴²

The term "consensual" classifies mediation as an agreement-producing process. The process itself therefore affords the disputants the right to the self-determination of the dispute in order to attain the pragmatic ends of adjudication by means of mutual agreement based on their direct and active participation in the process.

The consensual nature of the mediation process is reflected as a shift from the ethics of conscience resulting in a binary adjudicative solution, to the ethics of self-responsibility expressed through a shared outcome founded on mutual agreement.⁴³ The mediation process is disposed to the principle of self-responsibility. The disputants bear only the burden of persuasion.⁴⁴ The evidential burden of proof is therefore irrelevant. Accordingly, the attribution of blame for past events has no place in the process.⁴⁵ The emphasis is instead on the personal needs of the disputants and on redefining their future relationship as the basis for settlement. Culpability for past events is accordingly not characteristic of the mediation process. The process is rather future orientated. Because the proof of past events as the basis for civil liability is not in issue, the law and the legal rights that are endowed, are not directly relevant to the process. Where there is fault, and there is always fault, the underlying causes of grievances are probed not to eventually apportion blame but rather to enable each disputant to understand the other's

⁴² "Mediation - its forms and functions" 325.

⁴³ See Trollip ADR 3.

⁴⁴ Leeson and Johnston **Dispute Resolution in America** 140-141.

⁴⁵ Fulton **Commerical ADR** 79. Rosenberg "Resolving disputes differently" 814 explains, in contrast to litigation, the reason for proof of past events being irrelevant to the mediation process: "There is no need to reach a decision as to whose version of the facts is correct. Each party can be allowed to retain a different perception of the facts as long as agreement is reached."

needs and interests. The substantive content of the process is therefore personal to the disputants and the resultant remedies promote the interests of the parties rather than the principled pursuance of legal rights. Based on the principle of intermediary intervention, the mediation process itself acts as the medium for the attainment of disputant consensus which, in turn, cannot be achieved if the disputants do not or are unwilling to take responsibility for the outcome of the process. The term "consensual" therefore describes the intrinsic nature of the mediation process and not merely its form in contradistinction with other litigious/adjudicative forms of process.

Mediation is also described as being a voluntary process.⁴⁶ The temptation is to regard the words "consensual" and "voluntary" as being interchangeable. To do so would distort the meaning of each term. Both descriptions should be kept analytically distinct. The term "voluntary" indicates that a mediator will intervene in the dispute only by the expressed invitation of the disputants.⁴⁷ The disputants initiate the process, choose the mediator and in conjunction with the mediator, select the venue, determine the operative rules and apportion costs.⁴⁸ But in this particular context, the term "voluntary" is only one particular description of the process of mediation. Mediation can also be mandatory in cases where the disputants are compelled by statute to enter into the process of mediation⁴⁹ or in instances where, by an order of court, the disputants are referred to mediation.⁵⁰ The words "consensual" and "voluntary" are therefore not equivalent descriptions of the mediation process. For instance, the process of mediation remains consensual even though it is mandatory. Similarly, the process of arbitration is voluntary but not consensual. Conceptually then, the terms "consensual" and "voluntary" express distinct and separate aspects of the mediation process.

⁴⁶ See Moore **The Mediation Process** 19: "Voluntary refers to freely chosen participation and freely chosen settlement. Parties are not forced to negotiate, mediate, or settle by either an internal or external party to a dispute".

⁴⁷ Anstey **Negotiating Conflict** 278.

⁴⁸ Leeson and Johnston **Dispute Resolution in America** 133 135. See also Bevan **ADR** 27-28.

⁴⁹ See, for instance, the Labour Relations Act 28 of 1956 s 44.

⁵⁰ See, for instance, Astor and Chinkin **Dispute Resolution** 161-165; Leeson and Johnston **Dispute Resolution in America** 141-142; Levin and Golash "ADR in the Federal Courts" 36-38 40-41; Moore **The Mediation Process** 19.

Because it is a consensual process, only certain types of disputes can be resolved by means of the process of mediation.

6.2.3 Mediation and the nature of a dispute

The principle of selecting the appropriate process to accommodate the nature of the dispute concerned⁵¹ is especially relevant in the case of the process of mediation.⁵² An equilibrium must be achieved between the nature of the process and that of the dispute. Built-in limitations are inherent in the nature of every process. These limitations must be weighed against the nature of the dispute and the envisaged outcome.

In regard to the mediation process, a major limitation is that it has no formal structure based on predetermined and formal rules of conduct.⁵³ Consequently, the mediation process is open-ended in the sense that the disputants make and accept their own decision through the intermediary intervention of the mediator. The consensual nature of the process is an inherent functional limitation. For this reason, the mediation process is altogether inappropriate for disputes that need to be resolved by means of adjudicative decision making. More specifically, any dispute that is based on a disputant's legitimate legal claim cannot be satisfactorily resolved by the process of mediation because the resolution of this type of dispute is dependant upon the vindication of rights. In such an instance, an adjudicative process would probably be the most appropriate method for resolving a rights-based dispute.

In no manner does this imply that a rights-based dispute cannot be resolved by the process of mediation. Indeed, both rights-based and interest-based disputes can be mediated⁵⁴ subject to the reservation that the consensual nature of the mediation process would in both instances produce an outcome based on an integrative solution.

⁵¹ See, further, 2.1.4 above.

⁵² See, for instance, Riskin and Westbrook **Dispute Resolution and Lawyers** 244-247.

⁵³ See, further, 6.2.1 above.

⁵⁴ See Goldberg, Sander and Rogers **Dispute Resolution** 243-244 251.

An integrative solution to interest-based dispute is the optimum outcome. However, the same cannot be said in respect of the mediation of a rights-based dispute.⁵⁵ The tension between the divergent outcomes of consensual and adjudicative processes comes to the fore. The crux of the problem is that should a dispute be based on a disputant's legitimate claim of right, the rights involved will most likely remain alienated or compromised even if the mediation process produces an integrative solution for the rights-based dispute. Quite simply, the reason is that mediation is not an appropriate process for vindicating and enforcing legal rights. The incompatibility between consensual and adjudicative processes is expressed by Lon Fuller

It is not difficult to see why, under a system of state-made law, the standard instrument of dispute settlement should be adjudication and not mediation. If the question is whether A ... has paid his grocery bill ..., even the most ardent advocate of conciliative procedures would hardly recommend mediation as the standard way of dealing with such problems. A persuasive use of mediation could here obliterate the essential guideposts and boundary markers men need in orientating their actions toward one another and could end by producing a situation in which no one could know precisely where he stood or how he might get to where he wanted to be. As between black and white, grey may sometimes seem an acceptable compromise, but there are circumstances in which it is essential to work hard toward keeping things black and white. ... It is, then, not in the making of legal rules, but in their enforcement and administration that a certain incompatibility may be perceived between mediative procedures and "the rule of law". We may express something of this incompatibility by saying that whereas mediation is directed towards *persons*, judgments of law are directed towards *acts*; it is acts, not people, that are declared proper or improper under the relevant provisions of the law.⁵⁶

The process of mediation is therefore person-orientated and not act-orientated. This is a crucial distinction because functionally the mediation process is personal rather than authoritative in its style; its method of dispute processing is conciliative and not

⁵⁵ See Bevan ADR 69: "Unlike litigation and arbitration, the mediation is not primarily aimed at discovering what happened and then imposing a decision based solely on the principles of law and justice. It is a *process* where lawyers/disputants invite a trained neutral to assist them to *negotiate*. Thus, a lawyer taking part must appreciate that he will not win a legal argument, and if the process ends in a settlement, there may never be a clear statement as to who was right and what the 'true' legal position was."

⁵⁶ "Mediation - its forms and functions" 328.

adversarial and its outcome results in an integrative instead of a binary solution to the dispute.

In this context, only certain types of disputes can be resolved by mediation. An important category relates to disputes that involve disputants who are bound to each other in an interdependent or continuing relationship as in the case of a manufacturer and retailer, subsidiaries of the same holding company, divorcing spouses (especially if children have been born of the marriage) and neighbours or members living in the same community. In these and similar instances, a binary solution typified by adjudicative methods of dispute resolution would resolve the dispute only on the basis of objective or public norms but fail to conciliate the disputants. In all probability, a binary solution has the potential of damaging the future relationship between the disputants and heightening the tension, especially because of the adversarial nature of adjudicative processes. The consensual nature of the mediation process is better suited to disputes that require the reconciliation of the conflicting *interests* of the disputants which in the first place precipitated the dispute, irrespective of any legal issues involved. By means of the mediation process, it is possible for the mediator to probe the underlying issues of the dispute, to uncover hidden agendas, clarify different perceptions of the facts in dispute, enable the disputants to discard the emotional baggage of the past and generally bring them to the realisation that by revising their relationship it is possible to accommodate each other's continuing needs in the future. In this manner, the mediator facilitates the negotiations between the disputants and directs the process to a consensual outcome. What is immediately evident is that the mediation process itself is not at all inhibited by formal rules of process, adversarial posturing or the tedium of proving past events. In such a setting it is possible for the disputants to take responsibility for their own decisions, formulate the boundaries of a continuing relationship and pro-actively determine the rules of their future behaviour toward each other.

An obvious conclusion is that the consensual nature of the mediation process makes it amenable to the resolution of disputes involving interdependent or continuing relationships. However, analysis of the dispute itself shows that there are other intrinsic reasons. An adjudicatory approach is not the most appropriate method of resolving these

type of disputes because inevitably these disputes are "polycentric" in nature. The term "polycentric" is attributed to Lon Fuller who explains its meaning as follows

We may visualise this kind of [polycentric] situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the remaining tensions but will rather create a different complicated pattern of tensions. This will certainly occur, for example, if the double pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centred" - each crossing of strands is a distinct centre for distributing tensions.⁵⁷

For example, one of the most complex disputes involving interdependent or continuing relationships relates to divorce. The polycentricity of the dispute is evident from the variety of issues that need to be determined: the division of the matrimonial property, spouse and child maintenance, custody and control of minor children, access and visitation rights. Each of these issues is a "centre" which directly affects the resolution of other related issues - a single issue cannot be resolved without being integrated with the resolution of the other issues.⁵⁸ Although these and similar issues can be and are determined by court-based adjudication,⁵⁹ it is important to realise that the dispute is polycentric and would be best resolved by consensual processes, such as negotiation or mediation, because of the capacity of these processes to achieve an integrative outcome.⁶⁰

⁵⁷ "Forms and limits of adjudication" 395.

⁵⁸ See also Rogers and Salem **Mediation and the Law** 50.

⁵⁹ Fuller "Forms and limits of adjudication" 397-398.

⁶⁰ Fuller "Forms and limits of adjudication" 394 gives the example of a testamentary donation to two art galleries of a valuable but miscellaneous art collection "in equal shares". The crux of the problem, which classifies it as a polycentric dispute, is as follows: "[T]he disposition of any single painting has implications for the disposition of every other painting. If it gets the Renoir, the Gallery may be less eager for the Cezanne but all the more eager for the Bellows, etc. If the proper apportionment were set for legal argument, there would be no clear issue to which either side could direct its proofs and contentions. Any judge assigned to hear such an argument would be tempted to assume the role of mediator ...".

In this particular context, an analysis of the nature of the dispute determines whether the selection of mediation is the most appropriate process for its resolution. Whenever the dispute relates to interests rather than the pursuit of rights, is "polycentric" and arises between disputes who are committed to each other in an interdependent or continuing relationship, then the consensual rationale of the process of mediation should dictate its selection.

6.3 Basic Principles

6.3.1 Neutrality

The principle of neutrality is generally accepted as being one of the cornerstones of the mediation process. On the level of concept, the mediator is perceived as being a neutral intermediary. However, as the practice of mediation has expanded and been applied in a variety of ADR contexts, differing views on the essential nature of mediator neutrality have emerged, leading to a revision of the traditional concept of the principle of neutrality.⁶¹

The prevalent Anglo-American view is that the mediator should be neutral and impartial.

Moore succinctly summarises this approach

Impartiality refers to the attitude of the intervenor and is an unbiased opinion or lack of preference in favour of one or more negotiators. *Neutrality*, on the other hand, refers to the behaviour or relationship between the intervenor and the disputants. ... Neutrality also means that the mediator does not expect to directly gain benefits or special payments from one of the parties as compensation for favours in conducting the mediation. People seek a mediator's assistance because they want procedural help in negotiations. They do not want an intervenor who is biased or who will initiate actions that are detrimental to their interests.⁶²

Moore is seemingly explaining the principle of neutrality in conceptual terms because he does concede that in practice a mediator does have personal opinions about the

⁶¹ Rogers and Salem *Mediation and the Law* 137.

⁶² *The Mediation Process* 15.

outcome of the dispute and cannot be entirely impartial.⁶³ This has important implications for mediation as a process of structured negotiation.⁶⁴

Although the disputants interact through the mediator, by reacting to the disputants the mediator becomes another party to the process and hence part of the negotiations.⁶⁵ The mediator cannot remain absolutely neutral. As part of the process of transforming the dispute, the mediator inevitably offers opinions and makes suggestions, evaluates the positions of the disputants, introduces options as incentives for settlement, controls power imbalances between the disputants, clarifies areas of uncertainty, diffuses conflict by pointing to objective criteria and assesses whether the outcomes proposed by the disputants are realistic. Only in exceptional instances will the role of the mediator be totally passive, if this is possible at all. Reality is that the principle of neutrality is directly related to the person and personality of the mediator. In the setting of a process of structured negotiation, the mediator is not a neutral umpire but rather a participant in the capacity of an intermediary who controls the process and moulds the content of the dispute to achieve a consensual agreement between the disputants. The image of the mediator as a totally disinterested intervenor is therefore ill-conceived for ultimately the status, rank, personality and expertise of the mediator also modifies the behaviour of the disputants and their perception of the dispute. Accordingly, the principle of neutrality has a subjective quality.

The human tendencies of the mediator preclude fixed notions of impartiality or disinterested status as moral requirements for neutrality. Anthropological studies affirm the subjective element inherent in the principle of neutrality. With reference to a broad cross-cultural perspective, Gulliver asserts that

... he (the mediator) is not, and cannot be neutral and merely a catalyst. He not only affects the interaction but, at least in part, seeks and encourages an

⁶³ Idem.

⁶⁴ See 6.1.2 above.

⁶⁵ Gulliver Disputes and Negotiations 213.

outcome that is tolerable to him in terms of his own ideas and interests. He may even come into conflict with one or both of the parties.⁶⁶

In fact, Gulliver casts aside the stereotyped Western notion of the mediator having to be an impartial or disinterested intervenor.⁶⁷ On the basis of ethnographic examples, he depicts the mediator as having either an disinterested or interest-related status. Disinterested status is derived from -

- (a) an institutionalised social role eg mediators appointed from a panel established by ADRASA, SAAM or IMMSA;
- (b) a mediator's acknowledged prestige or ability along with the assurance that the mediator would have no direct interest in the issues or outcome of the mediation;
- (c) the fact that the mediator is an outsider who has no attachment to the social structure of a particular group or grouping; or
- (d) expertise in respect of the issues in dispute eg a lawyer or professional engineer.⁶⁸

On the other hand, it is equally possible that a mediator may have an interest-related status as would be the case in the following instances -

- (a) a person whose interests are affected by the continuation of the dispute and would like to affect its speedy resolution irrespective of the outcome;
- (b) an intervenor may not only have an interest in the resolution of a dispute but may also be partial to one of the parties yet at the same time be acceptable as a mediator because of the influence and control that she is able to exercise over the disputants without renouncing her partiality;
- (c) a person may seek to protect her own interests by acting as a mediator in circumstances where she is structurally an intermediary between both

⁶⁶ Ibid 213-214.

⁶⁷ Ibid 217.

⁶⁸ Ibid 214-215.

parties who are involved in a network of relationships eg kinsmen or a political ally of both parties; or

- (d) a mediator may sometimes be a leader in a particular community and intervenes in the dispute not only to resolve it for the sake of the disputants but also to promote the interests of the community as well as her own moral values.⁶⁹

What Gulliver teaches is that from a cross-cultural perspective, Western notions of the principle of neutrality tend to be too dogmatic. His personal opinion is that "the truly disinterested, impartial mediator is in fact rather rare".⁷⁰

Apart from subjective factors regarding the individual standing of a mediator, situational ethics also play their part in diluting the principle of neutrality. The tension between neutrality and fairness is ever present, especially as the growing importance of ADR extends the process of mediation beyond the scope of its traditional domain.⁷¹ A mediator cannot stand immune to the interests of third parties who are not directly involved in the mediation process. An outcome that might be fair from the point of view of the disputants may be detrimental to the interests of a third party. For instance, the interests of minor children in relation to divorce mediation or those of co-partners or co-directors in regard to commercial mediation, could be seriously compromised if they are not considered during the process of mediation. By raising issues concerning the interests of third parties, the mediator is likely to introduce personal values and norms of fairness that might be in conflict with those of one or both of the disputants. Ethical considerations could demand that traditional notions of impartiality or disinterested status be waived by a mediator to safeguard the interests of non-participating parties.⁷²

⁶⁹ Ibid 215-217.

⁷⁰ Ibid 217. Riskin "Mediation in alternative dispute processing" 25 expresses a similar view: "In many situations, the mediator may have personal or professional interests which interfere with his neutrality. Most mediators will see their professional advancement enhanced by achieving agreements in cases they mediate."

⁷¹ For the extension of the process of mediation beyond the scope of its traditional application, see 3.1 above.

⁷² See in this regard Rogers and Salem **Mediation and the Law** 143-144 147 148.

Working in tandem with the principle of mediator neutrality, is the acceptance of the mediator by the disputants.⁷³ This aspect of the mediation dynamic is often disregarded or at least, underrated. Mediator acceptability explains Gulliver's categorisation of the mediator who has an interest-related status.⁷⁴ Although the maintenance of neutrality through the disinterested status of the mediator is the ideal, the absence of neutrality is counterbalanced by mediator acceptability, failing which, the mediator will most likely be rejected by the disputants. Moore confirms the importance of mediator acceptability

The final test of impartiality and neutrality of the mediator ultimately rests with the parties. They must perceive that the intervenor is not overly partial or unneutral in order to accept his or her assistance.⁷⁵

In South Africa, acceptance of the mediator by the disputants tends to override the requirement of neutrality. Given the general lack of trust prevalent in labour relations and the current socio-political climate, mediator neutrality is difficult to achieve.⁷⁶ The remarks by Radford and Glaser are instructive

In South Africa, with the very low levels of trust between the parties in labour, and broader socio political contexts, the issue of trust in mediator acceptability has come under focus. Linked to the issue of trust is the impartiality of the mediator. Although this concept has been explained as the extent to which the mediator is believed to be truly neutral by both sides, it is our belief that it is impossible (at least within the South African context) to be truly neutral. ... From a psychological understanding of the dispute system, it makes more sense to view the mediator's impartiality as the extent to which he/she is able to empathize with the perceptual positions of both parties.⁷⁷

Nupen is also of the opinion that the mediator need not be neutral but that "mediators derive their acceptability by being perceived as independent and impartial by the parties

⁷³ For an extensive treatment of mediator acceptability, see Anstey **Negotiating Conflict** 250-259.

⁷⁴ See text to note 69 above.

⁷⁵ **The Mediation Process** 15.

⁷⁶ Possible exceptions would be the case of commercial as well as divorce and family mediation.

⁷⁷ "The psychology of mediation" 64.

and having the necessary skills to facilitate agreements".⁷⁸ Essentially, mediator acceptability means the confidence of the disputants in the integrity, if not in the neutrality, of the mediator to control the mediation process in a fair and equitable manner.

Taking into consideration the personal and situational factors that influence mediator neutrality as well as the disputants' perceptions in regard to mediator acceptability, it is clearly evident that the principle of neutrality is infused with subjective elements. Irrespective of these subjective elements, the principle of neutrality does have a minimum content. Structurally, the mediator is neutral in the particular sense of a "stranger"⁷⁹ who enters the process as a third-party intervenor in the capacity of an intermediary. As a "neutral", the functional role of the mediator is to control directly the mediation process. Control of process entails that the mediator must establish the ground rules and ensure their compliance, direct the process through its various stages, allow a fair exchange between the disputants during each stage, control the balance of power between the disputants, maintain transparency and trust in regard to private consultations or caucusing with a disputant and direct the process towards a consensual outcome that will be both enforceable and durable over time. In the broader setting of the principles of third-party intervention⁸⁰ and the more specific context of mediatory intervention,⁸¹ the fair conduct of process and its processual equity therefore establishes objective grounds for assessing mediator neutrality and hence forms the basis of the principle of neutrality.

In brief, the essence of mediator neutrality is a commitment to process if not to the substantive content of the mediation. Undoubtedly, subjective elements relating to the content of the process, do intrude. This is not a direct threat to the principle of neutrality

⁷⁸ "Mediation" 41.

⁷⁹ See Eisenberg "Private ordering through negotiation" 655-660 for the concept of the "stranger" in relation to third-party intervention and more specifically, in relation to the process of adjudication.

⁸⁰ See 6.1.1 above.

⁸¹ See 6.1.2 above.

because mediator acceptability functions to maintain a semblance of neutrality in regard to the mediator's involvement in the substance of the mediation. However, when processual standards are compromised, the principle of neutrality is placed in jeopardy and indeed the process itself. For instance, even if a mediator is partial to a particular disputant's position, the processual standard of impartiality would demand that the mediator must nevertheless ensure a fair exchange between both disputants. In the final analysis, because mediation is all process without structure,⁸² only processual standards can sustain the principle of neutrality irrespective of whether the mediator's status is disinterested or interest-related or the mediative style is active or passive, directive or accommodative. The principle of neutrality should therefore not be equated with an absence of involvement by the mediator but rather with the mediator's commitment as a third-party intervenor to the control of the mediation process and the maintenance of its processual integrity.

6.3.2 Confidentiality

Confidentiality is an important principle of the mediation process. The underlying rationale is that, because mediation is a consensual process, free and open communication should occur between the mediator and the disputants as well as between the disputants *inter se* without the threat that any admissions or documents pertaining to the mediation process will be used as evidence in legal proceedings, especially if the mediation should fail. The principle of confidentiality therefore promotes open negotiation in good faith between the disputants, acting through the mediator, concerning their respective perceptions of the dispute as well as the revision of their common interests.⁸³

The principle of confidentiality has internal and external dimensions.⁸⁴ Confidentiality internal to the mediation relates to the ethical duty of a mediator not to disclose information obtained during a private consultation or caucuses with an individual

⁸² See 6.2.1 above.

⁸³ Levy and Mowatt "Mediation in the legal environment" 73.

⁸⁴ Astor and Chinkin **Dispute Resolution** 232.

disputant who does not wish to reveal this information to the other disputant.⁸⁵ As a confidante to both disputants, the mediator would breach the position of trust if confidential information given privately by the one party was disclosed to the other party without the necessary consent to do so.⁸⁶ This would have disastrous consequences for the mediation process itself. In this context, the principle of confidentiality as it applies to the internal dynamics of the mediation process, is actually ancillary since it is directly subsumed under the principle of mediator neutrality and the related issue of mediator acceptability.⁸⁷

The crux of the problem deals with confidentiality external to the mediation. In South Africa, there is limited common-law protection and no direct statutory regulation of confidential information disclosed during the mediation process.⁸⁸ This problem is not confined to South Africa. Astor and Chinkin, writing from the Australian perspective which is common to other countries where ADR is practised, explain the limits of confidentiality in the absence of legal protection

Confidentiality may be challenged by a request from a party or third party for production in court of notes, evidence, a transcript of matters that took place in the mediation or details of the agreement. Such a request might occur if no agreement was reached, and the parties, or one of them, proceeded to litigation, if a third party wished to make claims arising out of some aspect of the mediation or if one of the parties wanted to bring an action against the mediator, for example for breach of contract.⁸⁹

In the United States there is considerable statutory protection given to the confidentiality of the mediation process,⁹⁰ very limited protection is afforded in Australia⁹¹ and, as in South Africa, statutory regulation is non-existent in the United Kingdom.⁹²

⁸⁵ See Moore **The Mediation Process** 267-271 for the various strategies of dealing with confidential information revealed during caucusing.

⁸⁶ See the **ADRASA CODE OF CONDUCT** cl 3, for details, see text to note 93 below.

⁸⁷ See 6.3.1 above.

⁸⁸ See also Nupen "Mediation" 49.

⁸⁹ **Dispute Resolution** 232.

⁹⁰ Roger and McEwan **Mediation** 243-272.

Three aspects pertaining to the application and limitations of the principle of confidentiality are involved, each relating to different parties: the mediator, the disputants and lastly, third parties. In the first instance, the application of the principle of confidentiality is reliant upon the co-operation of the mediator and both disputants. In practice, an accredited mediator must comply with a code of ethics that invariably contains a confidentiality clause. The ADRASA Code of Ethics clause 3⁹³ is typical of many others⁹⁴

A mediator shall respect the confidentiality of the parties and their dispute and shall make no disclosure to any other person concerning the fact of the dispute, or that he is mediating between the parties in question and shall also not communicate any fact or circumstance to any party in dispute which has been communicated to him by any other party in dispute, without express and unequivocal authorisation so to do. Provided that, in circumstances where the mediator is of the view that adherence to this Rule would lead to circumstances which are in his opinion manifestly repugnant to the public interest, it will lead to intolerable justice, the mediator may apply to the Professional Committee for a directive as to whether or not in the given circumstances, a refusal to abide by this Rule is justified, and in regard thereto the Professional Committee will authorise such disclosure as in its opinion is appropriate to balance the interests of the integrity of the mediation process, and the moral imperative not to thwart justice.

The responsibility for maintaining the confidentiality of the mediation process is also placed on the disputants. This is effected by means of a mediation agreement that must be signed by the mediator and the disputants before the mediation process commences. Standard mediation agreements contain a confidentiality clause. Once more ADRASA source material may be used to illustrate the usual content of these types of clauses

⁹¹ See Astor and Chinkin **Dispute Resolution** 233.

⁹² See commentary by Levy and Mowatt "Mediation in the legal environment" 75.

⁹³ **Code of Conduct for Mediators Admitted to the General Register of Mediators of the ADRASA ADR Service**, contained in annexure B of the **ADRASA General Statement of Policy of Procedures 1992**.

⁹⁴ See for example clause 6 of the **Guidelines for Solicitors Who Act as Mediators** prepared by the Dispute Resolution Committee of the New South Wales Law Society (1988) as cited by Astor and Chinkin **Dispute Resolution** 311.

All communication made by the disputants to the mediator during or in connection with the mediation or to each other are made without prejudice to any rights which they have and form part of *bona fide* settlement negotiations. The mediator shall not be compelled by any disputant to disclose any fact learnt by the mediator in the course of the mediation in any subsequent legal proceedings which may take place. In this regard, all disputants shall by their signatures to this agreement, waive any rights which they may have to require a mediator to testify regarding what transpired in the mediation or to produce any information or documents used in the mediation before any authority, including a court of law.⁹⁵

No matter how finely worded a code of mediator ethics or a confidentiality clause might be, they do not guarantee the confidentiality of the mediation process. In the final analysis, disinterested third parties may use legal methods to force a disclosure of confidential information pertaining to a mediation, for evidentiary purposes in legal or administrative proceedings. In certain instances, one or both disputants can similarly gain access to confidential information. This is definitely the case in South Africa and other jurisdictions in which limited or no statutory protection of the confidentiality of the mediation is accorded.

The most vulnerable party is the mediator. It is often said that mediators have short memories. Jocular as this quip might be, feigned loss of memory does not stave off the demand to give evidence or produce the relevant documents in legal or administrative proceedings. There is very little that a mediator can do in the South African context to protect the integrity of the mediation process since mediator privilege is neither regulated by statute nor recognised at common law. By analogy to arbitration proceedings in terms of which an arbitrator can be compelled to give evidence regarding the content of the arbitration process (though not to contradict or vary the award), it is likely that a mediator could be similarly compelled to give evidence regarding the negotiations that occurred during the mediation process.⁹⁶ The unenviable position of an intermediary tends to perpetuate itself. In this particular instance, the mediator is the person in the middle who can be badgered either by third parties or by one or both of the disputants, notwithstanding agreements to the contrary.

⁹⁵ Draft Mediation Agreement clause 9 contained in the *ADRASA Handbook* 32.

⁹⁶ See Levy and Mowatt "Mediation in the legal environment" 73-74.

On the other hand, the disputants have a limited right at common law to withstand a demand to disclose confidential information directly related to the mediation process. Since mediation is a consensual process of structured negotiation, the likely judicial interpretation would be to equate the process of mediation with settlement negotiations. Consequently, both disputants may rely on the "privilege" afforded to parties who conduct *bona fide* settlement negotiations "without prejudice". The "without prejudice" rule is formulated on the grounds of public policy that discourages litigation by protecting the parties to *bona fide* settlement negotiation against the threat of any admissions made during the negotiations being held in evidence against either of them should the negotiations fail.⁹⁷ The effect of the rule is to render admissions inadmissible in so far as they are directly relevant to the content of the negotiations.⁹⁸

However, the "without prejudice" rule has a number of limitations in regard to the process of mediation. The "privilege" belongs to the disputants and does not extend to third parties. Therefore, in theory, a mediator may be compelled to testify at a trial.⁹⁹ Moreover, the scope of the privilege is confined to matters directly relevant to the settlement negotiations.¹⁰⁰ In this regard, the application of the "without prejudice" rule to the mediation process is unsatisfactory because in any typical mediation underlying issues need to be probed in order to resolve disputes that have been explicitly defined, with a result that admissions relating to issues latent to the dispute would fall outside the ambit of the rule.¹⁰¹ Lastly, because the extent of the protection under the rule is restricted to admissions made in respect of settlement negotiations that have failed, the grounds for non-disclosure no longer serve any purpose if the negotiations result in a settlement.¹⁰² From the point of view of the disputant, this aspect of the rule could be

⁹⁷ Hoffman Zeffertt **SA Law of Evidence** 197; Schmidt **Bewysreg** 529.

⁹⁸ Hoffmann and Zeffertt **SA Law of Evidence** 197-198; Schmidt **Bewysreg** 529 530-532.

⁹⁹ Nupen "Mediation" 49.

¹⁰⁰ Hoffmann and Zeffertt **SA Law of Evidence** 197; 9 **LAWSA** par 486.

¹⁰¹ See Levy and Mowatt "Mediation in the legal environment" 74.

¹⁰² Hoffmann and Zeffertt **SA Law of Evidence** 199; 9 **LAWSA** 486; Schmidt **Bewysreg** 532.

advantageous in instances where it might be necessary to prove breach of the agreement¹⁰³ but at the same time could severely compromise the position of the mediator if compelled to testify. Although the "without prejudice" rule affords a degree of protection against disclosure to the disputants to a mediation, its adaptation for the process of mediation clearly offers less protection than in the case where it is applied to settlement negotiations. The reason is obvious: the rule has been devised to accommodate the circumstances of settlement negotiations and not with the specific intention of upholding the principle of confidentiality as it relates directly to the process of mediation. Consequently, should the "without prejudice" rule be applied to the process of mediation, this should be regarded as an *ad hoc* measure in the absence of any statutory provisions that expressly recognise and support the principle of confidentiality in mediation.

Although the common perception is that mediation is confidential, the scope and limits of the principle of confidentiality are technically so indistinct that its relevance can be seriously questioned. This is certainly the case in South Africa where there is obviously a dire need for statutory intervention to define and prescribe mediator privilege. However, both in this and other countries, it would be far too idealistic to expect complete confidentiality of the mediation process. Tension continually exists between public policy demanding the disclosure of information and the right to prevent the revelation of confidential communications.¹⁰⁴ Within this broad perspective, there is no reason for singling out mediation confidentiality as the exception when the public interest would be defeated by non-disclosure.¹⁰⁵ Reduced to its essentials, mediation

¹⁰³ Levy and Mowatt "Mediation in the legal environment" 74.

¹⁰⁴ See Rogers and Salem **Mediation and the Law** 63-71 for a summary of the related policy debate.

¹⁰⁵ See for instance, the Child Care Act 74 of 1983 s 42(1) that places a duty on certain professionals, notably a social worker, to report any circumstances that give rise to the suspicion that a child has been ill-treated or suffers from nutritional deficiency. Likewise, the Prevention of Family Violence Act 113 of 1993 s 4 places an obligation on any person who examines, treats, attends to, advises, instructs or cares for any child, to report any instance of the ill-treatment of such child. These provisions are so widely stated that it is conceivable that a mediator might be obliged to report the ill-treatment of a child on the basis of information obtained during the process of mediation.

confidentiality relates to the content of the process of mediation. For this reason, it will never be immune to competing public interests and hence policy on mediation confidentiality is likely always to be in a state of flux.

Irrespective of the flaws in the application of the principle of mediation confidentiality, no matter how serious they might be, the processual principles that sustain it, remain intact. The principle of confidentiality is rooted in the notion that mediation is a private process. In this respect, the ADR/litigation dichotomy is useful for analytical purposes because in the present context it emphasises the distinction between private and public processes. Litigation is a public dispute resolution process that is conducted in an open court of record under the direct supervision of the judicial arm of government.¹⁰⁶ In contrast, as an extra-curial form of dispute resolution, the process of mediation is conducted at a private venue without official transcripts and supervised solely by the mediator with the co-operation of the disputants. No matter the extent to which the content of the process of mediation might be subject to public scrutiny in order to prevent the loss of information to the public and the court system, this in itself does not impinge upon the related principles of processual privacy. Processual privacy is the permanent baseline upon which the principle of mediation confidentiality is founded. In the final instance, processual privacy is maintained and safeguarded only by the commitment of the mediator and both disputants to the integrity of the mediation process. Although statutory protection establishes the boundaries of mediator privilege, the best guarantee of the principle of processual privacy is the voluntary respect of all the participants for the confidentiality of information disclosed during the mediation process.

6.3.3 Processual equality

The very characteristics of the process of mediation that make it attractive as a dispute resolution process at the same time raise concerns about whether it is a fair process that produces an equitable result. As a non-adversarial, anti-legal and non-structured process based on the consensual resolution of disputes, the process of mediation is

¹⁰⁶

See the Supreme Court Act 59 of 1959 s 16 and the Magistrates' Courts Act 32 of 1944 s 5.

devoid of any formal checks and balances that are inherent in adjudicative processes.¹⁰⁷ Because mediation is a person-orientated process,¹⁰⁸ private standards of process are applied. Precedent, substantive law or considerations of public policy consequently need not directly affect the conduct of the process of mediation or its outcome. Moreover, the privacy of the process of mediation,¹⁰⁹ places it beyond public scrutiny. Sanctioned rules of conduct (comparable to the rules of court) that give notice of the complaint as well as due notice of material allegations and counter allegations in order to guarantee compliance with the natural rules of justice under the *audi alteram partem* rule, are absent from the mediation process. Similarly, rules of evidence that determine the admissibility, relevance and weight of factual allegations as well as methods for testing their veracity, have no bearing. In brief, the long historical development of public processes has established structures of procedure (which in the case of litigation has been institutionalised) that guarantee the fundamental rights of the disputants and ensure adherence to standards of due process.¹¹⁰ The same cannot be said of the process of mediation. This is disconcerting for any proceduralist because one of the tests for the efficiency of any process is the extent to which it meets the standards of due process.

It is difficult to compare the process of mediation and adjudicative processes on the level of due process. The reason has already been discussed: "mediation is all process without structure".¹¹¹ If the intrinsic quality of mediation is that it is not subject to any recognised or sanctioned structures, then the structures of adjudicative processes should not be raised as a definitive basis for comparison. The search for due process in mediation must therefore start and end with the mediation process. In other words, the

¹⁰⁷ See further Folberg and Taylor **Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation** cited in Goldberg, Green and Sander **Dispute Resolution** 113.

¹⁰⁸ See Fuller "Mediation - its forms and functions" cited in text to note 56 above.

¹⁰⁹ See 6.2.3 above.

¹¹⁰ For the historical development of the adversary system, see Landsman **The Adversary System** 7-25.

¹¹¹ See further 6.2.1 above.

enquiry should be directed at the standards of due process inherent in the mediation process itself.

Enshrined in the mediation process are principles akin to the structures of due process. The principle of neutrality¹¹² is one, but it is limited to the personal capacity of the mediator to conduct the process of mediation. There is also the principle of confidentiality¹¹³ that ensures the privacy of the process, yet once again is restricted to the protection of confidential information disclosed during a mediation. Neither of these principles satisfactorily explains the control of the mediation process in a fair and equitable manner. In this respect, fairness may be regarded as a relevant principle¹¹⁴ but being endemic to all forms of process based on third-party intervention, it is certainly not unique to the process of mediation. However, processual equality is one aspect of fairness which relates specifically to the maintenance of the balance of power between the disputants, that is particularly relevant to the mediation process. This might best be illustrated by reference to adjudicative processes.

In adjudicative processes, the principles of party prosecution and party presentation permit each disputant to independently pursue a cause of action or raise a defence; the structures of due process level the playing field by means of checks and balances that acknowledge and maintain equality between both disputants.¹¹⁵ Because there are no pre-existing structures of due process in mediation that ensure equality, it is therefore incumbent upon the mediator to control the mediation process by maintaining the balance of power between the disputants in such a manner that equivalence or fairness is reflected in the outcome of the mediation. The maintenance of the balance of power in mediation therefore ensures processual equality between the disputants.

¹¹² See, further, 6.3.1 above.

¹¹³ See, further, 6.3.2 above.

¹¹⁴ For a discussion of the various aspects of the principle of fairness, see Rogers and McEwan *Mediation* 233-239; Rogers and Salem *Mediation and the Law* 140-144.

¹¹⁵ James and Hazard *Civil Procedure* 4-5.

The principle of maintaining the balance of power in mediation cannot be properly understood unless it is placed in the broader context of the function and exercise of power common to all forms of process based on third-party intervention. Power is an inevitable ingredient of all forms of third-party intervention. The institutionalised authority of a judge originates in the constitutive powers conferred by statute or the rules of court;¹¹⁶ the power of the arbitrator is derived from the arbitration agreement that is contractually binding.¹¹⁷ In mediation there is also power but of a different nature. It is neither constitutive nor contractual but rather personal. Mediator authority is based on the personal consent of both disputants to permit intermediary intervention as a method of resolving the dispute.¹¹⁸

In all instances, the power to resolve the dispute may be traced to the failure of the disputants to maintain or control the balance of power in bilateral negotiations. In the case of court-based adjudication and arbitration, the disputants divest themselves of their power to settle the dispute by vesting it in the adjudicator whereas in the case of mediation, the power to facilitate the negotiation of the dispute is transferred by the disputants to the mediator. By submitting the dispute to a third-party intervenor, the disputants either seek the imposition of power through adjudicative processes as a means of settling the dispute because of their failure to resolve it or alternatively, resort to mediation in order to restore the balance of power that they were unable to achieve on their own in bilateral negotiations.

There is a vast difference between the imposition of power and the restoration of the balance of power. Adjudicative forms of third-party intervention eventuate in an outcome that is coercive, which in the case of court-based adjudication, is imposed under the sanction of the State or in the case of arbitration is binding under the rules of contract, if the award is not made an order of court. In addition, the power emanating from court-based adjudication encompasses the rectification of social inequalities, applies or extends existing public norms or conclusively determines individual disputes on the

¹¹⁶ See Nagan "Civil process and power" 456-461.

¹¹⁷ See generally Davis **Law and Practice of Arbitration** 25-38.

¹¹⁸ See Mayer "The dynamics of power in mediation" 80.

basis of legal principles. So too, arbitration produces a definitive and binding decision within the ambit of the arbitration agreement. However, as a consensual process, mediation is non-coercive and therefore can only effect the resolution of a dispute through the realignment of personal relationships that is accomplished through the mediator's control of the balance of power between the disputants.

In the light of the above, the dynamics of power is integral to all forms of process that rely on third-party intervention. However, its application differs, depending on the nature of the process concerned. In respect of adjudicative processes, the dynamics of power between the disputants is tightly controlled and constrained by rules of due process external to these processes. In regard to the mediation process, the dynamics of power still functions between the disputants because the substance and outcome of their negotiations belong to them but it is restrained by the mediator who is responsible for maintaining processual equality in order to restore the balance of power that had gone awry in bilateral negotiations. It is evident that the control and exercise of power in adjudicative processes and the process of mediation is analytically distinct. Power in adjudicative processes is consolidated and externally regulated. In mediation there is a duality of power: the dynamics of power functions between the disputants in the same manner as it does in bilateral negotiations and power is also exercised by the mediator to control the balance of power in the negotiations between the disputants. This accentuates the importance of maintaining the balance of power in the mediation process. On the one hand, if the mediator dominates the substance of the negotiations between the disputants under the guise of controlling the balance of power, the process is no longer consensual. Yet, on the other hand, if the dynamics of power between the disputants in their negotiations is left unfettered processually, the equivalence or fairness of a consensual outcome is open to doubt because it could reflect the will of the stronger party over the weaker party.¹¹⁹ Evidently, there is yet a deeper dimension to the balance of power in mediation: it relates not only to the negotiations between the disputants but also to the relationship between the mediator and the disputants.

¹¹⁹

A similar view is expressed by Mowatt "Thoughts on mediation" 735: "The mediator's role should not eclipse the roles of the disputants, as the essential nature of the mediation process may be lost. However, if he does not assume sufficient control, he may not achieve the balance of power, and the resulting settlement may be inequitable."

In this context, the maintenance of the balance of power in both its dimensions is achieved by the mediator's commitment to process and more specifically, by ensuring processual equality as a means of promoting fairness. Processual equality is based on the presupposition that the disputants must be treated equally but that inequalities between them do exist. Equal treatment cannot be realised if the inequalities, whether expressed or latent, are ignored. Inequalities are manifested as discrepancies in financial resources, inexperience in bargaining skills, different levels of intelligence, education or self-expression, the threat of physical violence or emotional abuse as well as an individual's own feelings of inadequacy.¹²⁰ If a continuum is presumed, then the inequalities prevalent during the process of bilateral negotiation are merely transferred to the process of mediation.¹²¹ These and similar inequalities affect the power relations between the disputants.

The effect of power relationships on the mediation process should not be underestimated. Power does not exist in a vacuum but rather in terms of a relationship. Moore defines power or influence as "... the capability of a person or group to modify the outcome, benefit, or costs of another in the context of a relationship".¹²² Mayer¹²³ identifies ten sources of power as follows:

- (a) Formal authority which is derived from given formal or official status within a recognised structure that confers a decision-making competence.
- (b) Expert/information power based on expertise in a particular field of study or information in respect of a certain matter.
- (c) Associational or referent power that is derived from an association with other people who are powerful.

¹²⁰ See generally Clarke and Davies "Mediation - when it is not appropriate" 72-73; Mowatt "Thoughts on mediation" 733; Pears **Beyond Dispute** 52.

¹²¹ Keltner **Mediation** 33.

¹²² Moore **The Mediation Process** 271.

¹²³ "The dynamics of power in mediation" 78.

- (d) Resource power refers to control over "valued resources" (eg money) or in its negative sense, the power to withhold these resources or compel another to expend them.
- (e) Procedural power indicates control over decision-making procedures but without control of the decisions themselves as in the case of judge in a jury trial.
- (f) Sanction power is the actual or potential ability "...to inflict harm or to interfere with a party's ability to realise his or her interests".
- (g) Nuisance power is the ability to cause discomfort to another person but "... falling short of the ability to apply direct sanctions".
- (h) Habitual power is that of "... the status quo that rests on the premise that it is normally easier to maintain a particular arrangement or course of action than to change it".
- (i) Moral power is derived from "... an appeal to widely held values" and is also related to the conviction that one is right.
- (k) Personal power "... derives from a variety of personal attributes that magnify other sources of power, including self-assurance, the ability to articulate one's thoughts and understand one's situation, one's determination and endurance, and so forth".

As in bilateral negotiations, power is a very real factor in the mediation process. It is therefore of the utmost importance that a mediator should be aware of the effect of its dynamics upon the mediation process.¹²⁴ Unless a mediator is sensitive to the resultant power relationships, difficulty will be experienced in rectifying the inequalities between the disputants which consequently determines the mediator's ability to maintain processual equality.

Moore distinguishes between two forms of power relationships ie symmetric or asymmetric.¹²⁵ Symmetrical power relations are more the exception than the rule and occur in instances when the disputants are equally matched. The tendency is that equal

¹²⁴ Ibid 82.

¹²⁵ The Mediation Process 278.

power produces greater co-operation between the disputants, reduces manipulative behaviour and enables the disputants to function more effectively.¹²⁶ The problems that are encountered relate to "(1) perceptual difficulties between the parties about symmetry and (2) the negative residue of emotions resulting from past exercise of coercive power within the relationship".¹²⁷ Because the disputants are on an equal bargaining footing, the mediator's approach should be to develop an accurate assessment of power mechanisms in order to shift the emphasis of power relations and to focus on the disputant's mutual interests.¹²⁸

In instances when the power relationship is asymmetrical, which is in the majority of cases, two situations are likely to arise

(1) perceptual problems - situations in which the stronger party believes that the weaker party has equal power, or situations in which the weaker party has an inflated view of his or her strength; and (2) extremely asymmetrical relationships - situations in which a party is in a much weaker position, and both parties know it.¹²⁹

In these situations, the mediator's task is to "work with both the weaker and the stronger party to minimise the negative effects of unequal power".¹³⁰ For instance, if the weaker disputant resorts to bluffing in order to exert influence and the stronger disputant believes the bluff, the mediator should educate the weaker disputant about the consequences of such a deception. Moreover, the mediator may also cause doubt in the mind of both disputants in regard to the accuracy of their assessment of the power balance.¹³¹ However, by far the greatest problem for the mediator relates to extreme divergence in the power relationship between the weaker and the stronger disputant. In these cases the mediator is tempted to become an advocate for the weaker which

¹²⁶ Idem.

¹²⁷ Ibid 279.

¹²⁸ Ibid 282.

¹²⁹ Ibid 280-281.

¹³⁰ Ibid 281.

¹³¹ Idem.

should be resisted because of the ethical problems it would create in respect of mediator neutrality. Instead, the mediator should assist the weaker disputant in utilising the power that is already possessed.¹³²

Moore's analysis explains the inequalities inherent in the power relationships between the disputants. The crucial question is the extent to which the mediator must accommodate inequalities within the mediation process yet simultaneously ensure that each disputant is treated equally. The use of various tactics by the mediator is advised,¹³³ but their description falls beyond the scope of this work.¹³⁴ Yet, essentially the answer lies in the principles of process. Other than in the case of adjudicative processes that rely on formal and external rules to enforce due process, the necessary checks and balances of the mediation process are concentrated in the person of the mediator.¹³⁵ This follows from the basic principle that the mediator is primarily responsible for controlling the mediation process. However, the principle is subject to the important reservation that mediator control applies in theory only to process and not to the consequences of such control. To argue otherwise, would extend mediator control over the substance and outcome of the mediation process which would be inconsistent with its consensual nature.¹³⁶ These same qualifications apply to the maintenance of processual equality. Mayer notes the distinction

Mediation ... can provide procedural equality but cannot usually alter the division of resources or the structural conditions that determine the basic relations between the parties.¹³⁷

¹³² Ibid 281-282.

¹³³ See, for instance, Mayer "The dynamics of power in mediation" 82-83; Moore **The Mediation Process** 272-278.

¹³⁴ The reader is reminded that this work deals with the theory and principles of ADR processes and not tactics and skills.

¹³⁵ See Folberg and Taylor **Mediation: A Comprehensive Guide to Resolving Conflict without Litigation** cited in Goldberg, Green and Sander **Dispute Resolution** 115.

¹³⁶ For the consensual nature of mediation, see 6.2.2 above.

¹³⁷ "The dynamics of power in mediation" 81.

Processual equality therefore ensures a commitment to fair process as a means of redressing any imbalance of power but fair process does not entail the alteration of the substantive realities of the negotiations.

By no means does this imply that the processual and substantive components of the process of mediation are divorced from each other. Admittedly the distinction is subtle. A mediator may legitimately educate the weaker disputant to understand and deal with the mediation process itself but would transgress the boundaries of processual equality if she assists that weaker disputant in regard to the substance of the negotiations. Yet, process and substance remain interrelated: by empowering one or both the disputants in regard to and by means of process, the substance of the negotiations is affected and the outcome, while still reflecting the agreement of the disputants, is markedly different to what it might have been in bilateral negotiations. Although the maintenance of procedural equality might not always produce a substantive outcome to the satisfaction of the weaker party or even the mediator, it should in processual terms be characterised by its equivalence or fairness.

The standards of equivalence or fairness should also be assessed within the context of the process of mediation itself, taking into consideration all its limitations as a dispute resolution process. By comparison to public adjudication, mediation cannot, because of its consensual nature, impose a binding decision, vindicate and enforce legal rights, alter the position of third parties or apply public norms to cure systemic social problems. Whenever problems of a structural nature are involved, the outcome of mediation can rarely result in equivalence since it is beyond the scope of the mediation process to deal with inequalities and power relationships that can only be rectified by means of coercion or on the basis of public policy. Under these circumstances, only a fair outcome can be guaranteed on the understanding that mediation has provided the weaker party with the best outcome in comparison with other available processual options. Mayer is similarly aware of the limitations of mediation in dealing with certain types of power

When basic structural inequalities in power do exist, mediation may be the vehicle through which the weaker party has to choose between two unfavourable outcomes. Such a choice may be inevitable regardless of the conflict resolution processes used. If mediation provides someone with the best (albeit not always entirely favourable) outcome, then this process may still be the preferable one. If,

however, mediation increases the power differential, it should probably not be used.¹³⁸

The process of mediation is therefore limited in its exercise of power and the resultant outcomes that it can produce. In the final analysis, it provides processual equality as a means of balancing the inequalities and power relationships between the disputants in order to achieve the single objective of realigning their future relationship on a consensual basis through a process of structured negotiation. If more is required than the equivalence or fairness of a consensual outcome, then recourse should be made to other informal or institutionalised dispute resolution processes.

6.4 Evaluation of the process of mediation

Distinctive continuities and discontinuities exist between mediation and negotiation on the one hand, and adjudication and mediation, on the other hand. An analogy between negotiation and mediation shows that both are consensual processes but that they differ from each other in that negotiation is based on the bilateral interaction of the disputants whereas mediation is a process of structured negotiation on account of the intermediary intervention of the mediator. Common to mediation and adjudication is that both are forms of third-party intervention. However, adjudication is authoritative in its style and renders a definitive binary decision in contrast to mediation which is consensual both in its nature and outcome. The process of mediation therefore takes a rather ambivalent position in the hierarchy of dispute resolution processes.

The processual model of mediation posits a highly individualised form of third-party intervention. It is based on the supposition that the disputants may privatise their dispute by taking self-responsibility for its content and outcome on the basis of their own rational decisions, facilitated through the intermediary intervention of a third-party neutral who channels and controls the process. This is consistent with the dominant Anglo-American notion that the object of the process of mediation is the attainment of private consensus. Although classified as a form of third-party intervention in the ilk of arbitration and court-

based adjudication, the nature of the intervention is by comparison unobtrusive because the process of mediation is intrinsically consensual.

Compared to other formal methods of third-party intervention, the process of mediation permits and encourages the full participation of the disputants in the resolution of the dispute. Without regard for public policy or legal rules, the disputants may through the mediator devise a private agreement that revises or realigns their future relationship without being involved in the expense, delay, publicity or procedural technicalities of other public and formal processes. Although the mediated agreement is not enforced by means of public sanctions, the absence of standards of fault and of any attribution of liability compensate for the lack of certainty and finality of outcome. The extent to which the disputants are able to compromise on the basis of self-interest is the only measure of the durability of the outcome. This is inevitable because the consensual dynamic of the mediation process of necessity elicits personal compromise at the expense of legal principle, precedent or public policy. The needs and wants of the disputants are paramount, thereby sublimating the vindication of their legal rights. The process of mediation is therefore an anti-legal and anti-normative method of dispute processing. Within the broader normative and processual setting of third-party intervention, mediation may accordingly be interpreted as a process through which the individual interests of private parties are permitted to predominate over the interests of third parties as well as considerations of law and public policy.

The above analysis of the process of mediation reflects an instrumentalist view of disputing. A dispute is regarded as being private and discreet. As a result it is divorced from the social and cultural setting which gives it substance and meaning. In this context "many or most interpersonal problems are fundamentally conflicts pursued by rational actors making choices between sets of instrumental goals".¹³⁹ The disputants are conceived as being rational actors who participate in a normless and anti-legal problem-solving process on the bases of self-interest, economy of cost, expediency and a risk evaluation of probable outcomes.¹⁴⁰ Whenever a mediated settlement is reached, it is

¹³⁹ Merry and Silby "Reexamining the concept of dispute" 154.

¹⁴⁰ See generally Ellison "Dispute resolution and democratic theory" 253-254 for an appraisal of the rational-actor model.

achieved by means of a private compromise between the disputants which in turn may be construed as compromising public and legal values.¹⁴¹ Although the rational-actor approach promotes the process of mediation as a useful adjunct to legal decision making, it should not be absolutised. For to do so, would "create a culture of mediation without public purpose", thereby encouraging "privatised forms of public policy".¹⁴²

An uncritical acceptance of the rational-actor approach to mediation would establish a dangerous principle in the context of the South African situation. As this country discards its legacy of apartheid, there is a definite need to develop a normative framework that propagates common values based on principles of reconciliation. Disputes and disputing should therefore not be regarded as being private and discreet but rather as events that are deeply rooted in culture and the social fabric of this country. The rational-actor approach privatises a dispute by separating it from its historical and cultural context that in fact explains the substance of the dispute and gives meaning to its resolution. Disputes are not isolated events. To the contrary, they occur within the culture of the family, marital relations, the group, a neighbourhood, the township, a rural community, the public or the private sectors, and so on. Each entity has its own set of individual values and social norms. Disputes arise within the unique context of these cultures, most often because of the interdependent or continuing nature of the relationships formed in these closed environments. In many cases, disputes of this nature might need to be processed by the courts on the basis of legal and public norms in order to uphold and maintain public values. Yet, by the same token, there might equally be a need to resolve these types of disputes by means of informal and consensual dispute resolution processes. In this latter respect, the process of mediation is capable of effecting a realignment of relationships within a particular culture or social setting, thereby altering future behaviour without recourse to formal or public structures of dispute resolution.

¹⁴¹ See generally, Faris "Reconciling ADR and judicial dispute resolution" 10: "The real danger lies in the supposition that non-legal values are an adequate replacement for legal norms and related institutions. The mere fact that a dispute has been resolved informally does not mean that the broader public interest has been served. In fact the opposite could prove true: The application of non-legal values by means of informal dispute resolution processes could legitimise existing power imbalances that could otherwise have been corrected by the application of legal principles through judicial procedures."

¹⁴² Ellison "Dispute resolution and democratic theory" 254.

Furthermore, because its consensual nature makes it inherently flexible, the process of mediation may be assimilated easily into community dispute resolution programmes, as in the case of community dispute resolution centres.¹⁴³

Somehow a balance must be struck between the rational-actor approach to mediation and the approach that regards mediation as having the potential of fulfilling a public purpose. On the one hand, the process of mediation by its very nature privatises a dispute on the basis of compromise and self-interest, yet it also has the capacity to deal with structural or social problems within a particular cultural context. The greatest mistake of the fledgling ADR movement in this country would be to divorce the process of mediation from the cultural context within which disputes arise. At risk would be the development of a culture of mediation without public purpose.

Probably because of its ambivalent position in the hierarchy of dispute resolution processes, the process of mediation abounds with contradictions. One last issue needs to be examined in this respect. A question that is often posed is whether mediation is an art or a science. Mediation as an art-form is based on the highly individualistic skills of the practitioner in conducting the inter-party negotiations in order to achieve a consensual agreement. These skills involve an intuitive understanding of the power balance, supplying structure where there is no structure, timing interventions when there is no system to dictate the timing, discerning the underlying causes of the dispute and probing needs and wants to test reality. Crossing from art to science-form, the emphasis is on research relating to the effectiveness of mediation in certain contexts,¹⁴⁴ the durability of its outcome¹⁴⁵ and generally an analytical and systematic understanding of mediation as a process.¹⁴⁶ Some commentators conclude that mediation is a mixture of

¹⁴³ See, for instance, Van der Merwe and Mbebe **The Alexandria Justice Centre**; Steadman "Settling disputes in communities" 128-129.

¹⁴⁴ See, for instance, Kolb "Expressive tactics in mediation"; Kressel and Pruitt "Mediation of social conflict".

¹⁴⁵ See, for instance, Kelly "Mediated and adversarial divorce resolution processes".

¹⁴⁶ The most comprehensive study of this aspect of mediation is by Moore **The Mediation Process**.

both art and science.¹⁴⁷ This is basically true because there is continual tension between theory and practice. However, a personal preference is to opt for mediation as a science for one salient reason. As a form of process based on third-party intervention as well as on the consensual principles of negotiation, mediation is founded on a complex amalgam of processual principles that should be the subject of intensive research not only to enable practitioners to improve their skills but more especially, to fully understand the systematics of the process of mediation as well as the importance of its processual function in the broader domain of dispute processing and dispute transformation.

¹⁴⁷

See Nupen "Mediation" 41-42.

CHAPTER 7

THE PROCESSUAL NORMS AND VALUES OF ARBITRATION

- 7.1 Arbitration in the context of ADR**

- 7.2 Arbitration and third-party intervention**
 - 7.2.1 Introduction
 - 7.2.2 Structure of power
 - 7.2.3 Decisional methodology
 - 7.2.4 Role and function of the third-party neutral

- 7.3 Contextualised applications**

- 7.4 Derivative extensions**

- 7.5 Arbitral norms and values**

7.1 Arbitration in the context of ADR

The process of arbitration is universally accepted as being an established institution of the legal system.¹ Law students in the course of their studies become aware of the process of arbitration. In substantive terms, the theory of arbitration is developed and systematic, deriving authority from common-law writers, statutory law and decided cases. The practice of arbitration compliments the related substantive principles. Every well-drafted contract usually contains an arbitration clause and as process, arbitration is

¹ For a resume of the history and concept of arbitration, see 3.2.3 above.

applied in both the public and private sectors in its mandatory or voluntary forms,² as the case may be. As such, arbitration is part of every lawyer's professional map.

However, within its legal frame of reference, arbitration is mainly understood in its conventional form.³ Consequently, as a form of process, arbitration is regarded as a method of avoiding the ordinary jurisdiction of the courts of law in order to facilitate the swift extra-curial determination of disputes in a judicial manner.⁴ On the processual level, arbitration is conducted adversarially and hence given to procedural technicalities and formalities, resulting in delays and often inordinate expense.⁵ This mindset extends to its method of decision making, which being adjudicative, is exploited to obtain the advantage of a binding and often binary decision.⁶ Consequently, within the theoretical structure of ADR, there are valid reasons for rejecting the process of arbitration as one of the primary ADR processes.

As an alternative to the judicial model of dispute resolution, the process of arbitration could be considered as a misfit in the context of ADR.⁷ On account of its adjudicative structure and its affinity with the process of litigation, the general assumption is that

² See **Davis Law and Practice of Arbitration** 1; Brand "Nature of arbitration process" 94. See, further, note 46 below for details regarding compulsory statutory arbitration.

³ The word "conventional" as it is used in relation to arbitration, refers to the formal conduct of the arbitration process in a manner that emulates judicial proceedings. Referring to English practice, Shilston "Modern commercial arbitration" 62 expresses what arbitration in its conventional forms entails: "Apart from privacy, there was no procedural difference between arbitration and litigation, since the pleading practices necessarily adopted in the civil courts were being followed unnecessarily in arbitration, through the lawyers' habits. ... Hence the use of the traditional English adversary system was unquestioningly being applied to private commercial arbitration - and probably more often than not, still is."

⁴ See **Jacobs Law of Arbitration in SA** 1.

⁵ See, for instance, Brand "Nature of arbitration process" 95; Butler and Finsen **Arbitration in SA** 26-28. See also Astor and Chinkin **Dispute Resolution** 121.

⁶ See the Arbitration Act 42 of 1965 s 28. See also **Davis Law and Practice of Arbitration** 48-49; **Jacobs Law of Arbitration in SA** 130-131.

⁷ See Bevan **ADR** 7.

arbitration is a hybrid of the judicial model⁸ and therefore has very little in common with the consensual nature of other ADR processes. This view cannot be summarily discounted because, according to its conventional practice, the process of arbitration does mimic the judicial model. This is clearly evident from its procedural attributes described above.

Apart from these procedural considerations, the process of arbitration functions in a co-ordinate relationship with the judicial model as its official alternative operating within the legislative framework of the Arbitration Act of 1965.⁹ The integration is evident in many respects, but mainly, in that court proceedings may be stayed if an arbitration is pending in regard to the same dispute,¹⁰ an abuse of the arbitral process is subject to judicial review¹¹ and an arbitral award may be judicially enforced.¹² Small wonder that conventional arbitration has been described as "litigation without wigs".¹³

Because conventional arbitration is such a close imitation of the judicial model, there are diverse opinions regarding the acceptance of the process of arbitration within the system of ADR. Some commentators reject arbitration outright as a primary ADR process. Another takes the rather ambivalent view that the process of arbitration is a "semi-alternative". And lastly, arbitration is unconditionally recognised as one of the primary ADR processes. This apparent divergence of opinion¹⁴ would be best resolved by diagnosing the norms and values that underlie the process of arbitration.

⁸ See, further, 2.1.3 above.

⁹ 42 of 1965.

¹⁰ s 6. See also Butler and Finsen **Arbitration in SA** 63-64; Davis **Law and Practice of Arbitration** 19-21; Jacobs **Law of Arbitration in SA** 48-56.

¹¹ s 33. See also Butler and Finsen **Arbitration in SA** 291-295; Davis **Law and Practice of Arbitration** 55-60; Jacobs **Law of Arbitration in SA** 137-145.

¹² s 31. See also Butler and Finsen **Arbitration in SA** 272-275; Davis **Law and Practice of Arbitration** 50-52; Jacobs **Law of Arbitration in SA** 132-136.

¹³ See Fulton **Commercial ADR** 55.

¹⁴ For details of these various views, see 2.1.3 note 17 above.

On level of concept, arbitration may be explained as a process that excludes a dispute from the court system by diverting it to a private adjudicative forum.¹⁵ Consequently, the process of arbitration establishes an adjudicative framework that functions as an alternative to the traditional reliance on a judge-centred adjudicative process.¹⁶ Although the process of arbitration and the judicial model share the same procedural and adjudicative paradigm, the differences between the two are fundamental. The most intrinsic difference is that the process of arbitration accommodates the principle of disputant autonomy in its most plenary form.¹⁷ Although arbitration is not wholly a consensual process in the nature of negotiation and mediation, it may be characterised as being fundamentally a procedure by consensus. Precisely because a private adjudicative forum is established, the disputants retain the fullest control of the proceedings. They are able to make meaningful decisions about the manner in which the dispute is to be adjudicated¹⁸ without being fettered by the formalities, technicalities and delays of judicial proceedings. Irrespective of the continuities that exist between the process of arbitration and the judicial model, the principle of disputant autonomy is the most salient distinguishing feature that poses arbitral adjudication as an alternative form of dispute resolution to the judicial model.

Although the external attributes of the arbitration process correspond closely to those of the judicial model, its internal dynamic is essentially consensual. An emphasis on the quasi-judicial characteristics of the arbitration process in its conventional form does not detract from the fact that its inner dimensions are consensual. Disputant autonomy still remains intact as an independent principle that both expresses and affirms the consensual nature of the process of arbitration. The arbitration agreement underlines the consensual nature of the arbitration process. It indicates the mutual agreement of the parties to surrender themselves to the process of arbitration as well as their intention of accepting a binding adjudicative outcome.

¹⁵ Carbonneau **Alternative Dispute Resolution** 136; Du Plessis "Arbitration - a new approach" 378.

¹⁶ Ibid 138-139.

¹⁷ Ibid 105.

¹⁸ Ibid 139.

Furthermore, the principle of disputant autonomy encourages the disputants to collaborate in prosecuting the arbitration. In terms of their mutual consent, the disputants select the arbitrator,¹⁹ in conjunction with the arbitrator delineate the applicable process and procedure for the arbitration and also take responsibility for conducting the process.²⁰ Intervention by the court is restricted.²¹ However, in the main, a court is permitted to apply the rules of natural justice in instances of alleged arbitral abuse.²² Even in this regard, judicial intervention is kept to a minimum for a court is permitted only to regulate any processual abuse and not to interfere with the content of an arbitral award.²³ This same rationale explains the prohibition of an appeal from an arbitral award for to concede that an award is appealable would violate the content of the process.²⁴

In addition, the principle of disputant autonomy accounts for the fact that the process of arbitration is private and confidential.²⁵ The disputants processually pursue their dispute and resolve it, outside the public domain. The substance of the dispute remains the

¹⁹ See Butler and Finsen **Arbitration in SA** 79-80; Davis **Law and Practice of Arbitration** 22-23; Jacobs **Law of Arbitration in SA** 58-59. However, it is possible for an arbitrator to be nominated: Butler and Finsen *ibid* 80-83; Jacobs *ibid* 60. In terms of the Arbitration Act 42 of 1965 s 12, a court may in certain prescribed instances appoint an arbitrator: Butler and Finsen *ibid* 84-85; Jacobs *ibid* 65-68.

²⁰ See Butler and Finsen **Arbitration in SA** 22.

²¹ The balance between disputant autonomy and curial intervention is extremely delicate: Christie "Arbitration: party autonomy or curial intervention: historical background" 144. For a discussion of the instances in which a court may justifiably intervene, see Christie "Arbitration: party autonomy or curial intervention III: domestic arbitration" 552-526.

²² Arbitration Act 42 of 1965 s 33. See also Butler and Finsen **Arbitration in SA** 290-295; Davis **Law and Practice of Arbitration** 55-60; Jacobs **Law of Arbitration in SA** 137-145.

²³ For a discussion of the finality of an arbitral award, see Cowling "Finality in arbitration" 306 et seq; Scott-Macnab **Mediation Arbitration** 52-56.

²⁴ See Butler and Finsen **Arbitration in SA** 271; Jacobs **Law of Arbitration in SA** 128.

²⁵ See Butler and Finsen **Arbitration in SA** 21 55-56 213-214; Scott-Macnab **Mediation Arbitration** 45-48. See also Effron "Alternatives to litigation" 483-484.

private concern of the disputants. Hence, confidential information disclosed during the arbitration process is protected from public scrutiny.²⁶

The technicality and formality of conventional arbitration has tended to blur the underlying consensual structure of arbitration. This has created the perception that the process of arbitration is a privatised replica of the judicial model. This is misleading. The consensual elements of arbitration, as actualised through the principle of disputant autonomy, make its process analytically distinct and independent of the judicial model. Unlike the judicial model, the process of arbitration has a bipartite structure consisting of the unlikely mix of adjudicative and consensual elements. Although the quasi-judicial element has been exaggerated in the form of conventional arbitration, the consensual base has been preserved. Precisely because of its consensual characteristics, it is possible to integrate the process of arbitration into the system of ADR as one of its primary processes.

Within the framework of ADR, the conventional attributes of the process of arbitration are moderated.²⁷ On account of its consensual elements, the inherent flexibility of the process of arbitration has been adapted to suit contemporary needs. The results have been extremely creative. Derivatives of the process of arbitration have been developed.²⁸ Moreover, the process of arbitration has been extended into context-based applications other than in the commercial sector.²⁹ In addition, because it ranks as a primary process, the elements of arbitration have been combined with other public or private processes to form hybrid processes.³⁰ This could never have been achieved if the process of arbitration was merely an offshoot of the judicial model.

²⁶ Although privacy and the confidentiality of arbitration proceedings should be upheld as a primary principle for private arbitration, there is doubt whether it is advisable to maintain this principle in the case of public arbitrations where the disclosure of information could be vital to the public interest: Scott-Macnab **Mediation Arbitration** 45-46.

²⁷ Bevan **ADR** 8.

²⁸ See, further, 7.4 below.

²⁹ See, further, 7.3 below.

³⁰ See, further, 8.3.1 and 8.3.3 below.

Even though arbitration may be recognised as an independent process, the norms and values of the process of arbitration need to be examined in order to confirm its processual compatibility with those of the system of ADR. To do so, it is necessary to explore the norms and values of the process of arbitration in the setting of the principles of third-party intervention³¹ as well as its various context-based applications³² and derivative extensions.³³

7.2 Arbitration and third-party intervention

7.2.1 Introduction

Within the broader context of ADR, it is extremely simplistic to regard arbitration as a hybrid of judicial proceedings merely because the adjudicative process is common to both. If this reasoning is to be taken to its ultimate conclusion, then it is equally true that arbitration is a hybrid of the processes of negotiation and mediation because of the consensual elements inherent in all three processes. Although there are continuities between the adjudicative structures of arbitration and judicial proceedings on the one hand, and between the consensual natures of arbitration and negotiation and mediation on the other hand, arbitration essentially remains an independent and primary process within the system of ADR. The unique processual qualities of arbitration are brought to the fore when assessed within the theoretical context of the principles of third-party intervention.

7.2.2 Structure of power

All forms of third-party intervention are derived from the exercise of power. The intrusiveness of the intervention is in proportion to the extent to which the disputants divest themselves of the control of the dispute and vest it in a neutral party or forum.³⁴

³¹ See, further, 7.2 below.

³² See, further, 7.3 below.

³³ See, further, 7.4 below.

³⁴ Effron "Alternatives to litigation" 482. See also 6.1.1 above.

Although in practice disputes are not necessarily resolved according to the strict adherence to a continuum, in theory a continuum of third-party intervention based on the structure of power explains the degree of intrusiveness.

By comparison to arbitration and judicial proceedings, the power in mediation is unobtrusive.³⁵ The foundation of mediatory power is solely contractual.³⁶ The mediation agreement between the disputants and the mediator justifies the intrusion and limits the intervention to the facilitation of a negotiated agreement. Within the ambit of the mediation agreement, the mediator may assume a directive or passive role but only as an intermediary for a negotiated settlement.³⁷ Essentially, power and process are derived from the terms of the mediation agreement while processually, both are intermeshed within the internal mediational structure. In the final analysis, the exercise of power in mediation is subjective since there are no external rules or sanctions that either confirm or bolster the personal power of the mediator or ensure the fairness of the process.³⁸

As an extension of the judiciary, courts exercise the judicial functions of government.³⁹ Hence, courts are vested with the jurisdiction, both statutory⁴⁰ and at common law,⁴¹ to

³⁵ The situation is explained as follows by Efron "Alternatives to litigation" 482: "Courts, for example, are the most intrusive form of dispute resolution: the parties must accept both the decision that the judge makes and the process by which the judge will reach the decision. Arbitrators are less intrusive than courts: the parties may provide by agreement the process which the arbitrator uses to reach a decision but the arbitrator provides the parties with a decision. The least intrusive processes are those often called "*mediation*" or "*conciliation*": while the third-party neutral may take control of the process ..., the ultimate decision on how to resolve the dispute is normally left to the parties themselves." See also Mowatt "Thoughts on mediation" 733 and 6.4 above.

³⁶ See Trollip ADR appendix A for an example of an mediation agreement.

³⁷ See, further, 6.1.2 above.

³⁸ See, further, 6.2.1 above.

³⁹ See Carpenter **SA Constitutional Law** 156-157.

⁴⁰ See, for instance, the Supreme Court Act 59 of 1959 s 19(1) and the Magistrates' Courts Act 32 of 1944 ss 28-29 and 46.

⁴¹ For a summary of civil jurisdiction at common law, see Forsyth **Private International Law** 140-233.

adjudicate or deliberate on all causes arising within their prescribed territorial boundaries. The power and process of the courts as expressed through judicial proceedings, is therefore institutionalised and accordingly regulated by external rules that are sanctioned by the State. Ultimately, the power that sustains judicial proceedings is not only objective but also derived from the sovereign power of the State.

The temptation is to ascribe the power exercised in arbitration only to the contractual agreement between the parties. This is partially correct. Other than in the case of mediation, the contractual basis of arbitration is antecedent to the dispute.⁴² Arbitral power was originally derived from the extension of the contract by means of the stipulation that future disputes arising from the interpretation or performance of the contract would be resolved by arbitration.⁴³ However, consensus to extend the contract explains the historical origins of arbitral power but does not fully account for its contemporary application. The modern notion of arbitration is that it is an independent dispute resolution process and an integral part of the administration of civil justice.⁴⁴ Indeed, the residual element of its origins is still found in the fundamental legal assumption, basically expressed through the standard arbitration clause, that the disputants may anticipate the resolution of disputes through a permissible extension of the contract. But arbitral power has developed beyond its contractual foundations for in our time it is possible to distinguish between agreement and process.⁴⁵ The process of arbitration is recognised as an independent method of dispute resolution that is no

⁴² Although contract is the basis of both mediation and arbitration, the distinctions, however slight, are fundamental. In the case of mediation, the normal practice is to enter into an *ad hoc* mediation agreement only after the dispute has arisen whereas in the case of arbitration, the contract itself presupposes the potential for dispute, hence accounting for the standard arbitration clause which extends the existing contract to accommodate the regulation of a dispute by means of arbitration, should the dispute in fact arise. An *ad hoc* arbitration agreement is possible after the dispute has arisen, but this is not the rule.

⁴³ See Carlston "Theory of the arbitration process" 631. See also Butler and Finsen **Arbitration in SA** 3. Hence, arbitral power may be undermined by contesting the validity of the arbitration agreement: Butler and Finsen *ibid* 56-60; Jacobs **Law of Arbitration in SA** 29-38.

⁴⁴ Fischer-Zemin and Junker "Arbitration and mediation" 24.

⁴⁵ Carlston "Theory of the arbitration process" 632.

longer reliant on contractual incorporation since arbitral power, and even the scope of that power, may respectively be conferred and determined by statutory provision.⁴⁶ Arbitral power therefore vests in a complex amalgam of disputant consensus and autonomy of process. The opposite side of the coin is that both internal and external rules determine the exercise of arbitral power, regulate its processual equivalence and ensure objective decisional standards for a full and final adjustment of the dispute.

7.2.3 Decisional methodology

All three forms of third-party intervention have the common purpose of resolving disputes yet in each instance the decisional methodology differs. The mediational model relies on the co-operative negotiations between the disputants, acting through an intermediary, to effect a realignment of relationships through joint decision making that culminates in a consensual agreement.⁴⁷ Because its nature is intrinsically consensual, decision making by a intervenor is totally alien to the mediation process - the disputants retain and exercise their original decision-making powers.⁴⁸ This is the antithesis of arbitration and judicial proceedings. Both depend on adjudicative methods of decision making. However, the comparison goes no further since in each instance the adjudicative technique differs.⁴⁹

⁴⁶ Although the provisions of the Arbitration Act 42 of 1965 are merely regulatory, there are numerous statutes that prescribe compulsory forms of arbitration eg the Labour Relations Act 28 of 1956 s 46. The Arbitration Act of 1965 s 40 expressly provides that its provisions apply to all compulsory statutory arbitrations except in so far as its provisions are inconsistent with that of the other statute, the regulations thereunder or the procedure so authorised. See, further, Butler and Finsen **Arbitration in SA** 67-68; Jacobs **Law of Arbitration in SA** 4-5. What is clearly evident is that compulsory statutory arbitration has extended the process of arbitration beyond its contractual origins and given it the standing of an independent process.

⁴⁷ See, further, 6.2.2 above; see also Fischer-Zemin and Junker "Arbitration and mediation" 23.

⁴⁸ See, further, 6.1.3 above; see also Fischer-Zemin and Junker "Arbitration and mediation" 26.

⁴⁹ See Menschikoff "The significance of arbitration" 700.

Court-based adjudication is concerned with the creation of rights while arbitral adjudication is involved with the interpretation of rights.⁵⁰ The difference is fundamental and distinct. The public ordering of society according to legal precepts is the subject of court-based adjudication. As a social process, adjudication has the broader purpose of regulating and maintaining public policy; of giving meaning to public values by providing guidance for future behaviour.⁵¹ The decisional structure is therefore primarily directed at creating rights that are binding on third parties through the creation of precedent and in so doing resolving the particular dispute at hand.⁵² Court-based adjudication is therefore instrumental in determining a specific dispute and yet in so doing, effecting systemic or structural social change. Arbitral adjudication is far more limited. It is bound to the determination of the specific issues stated in the arbitration agreement.⁵³ Accordingly, the scope of its decisional competence is restricted to the immediate dispute between the disputants, without having any precedential implications for third parties.⁵⁴ This

⁵⁰ Carlston "Theory of the arbitration process" 631.

⁵¹ See Fiss "The forms of justice" 2.

⁵² See Landes and Posner "Adjudication as a private good" 236 who succinctly express this view as follows: "A court system ... produces two types of service. One is dispute resolution - determining whether a rule has been violated. The other is rule formation - creating rules of law as a by-product of the dispute-settlement process. When a court resolves a dispute, its resolution ... provides information regarding the likely outcome of similar disputes in the future. This is the system of precedent, which is so important in the Anglo-American legal system."

⁵³ For the distinction between arbitral and court-based adjudication, see Fiss "The forms of justice" 30-31 where he states: "Arbitrators are paid for by the parties; chosen by the parties; and enjoined by a set of practices ... that localizes or privatizes the decision. The function of the arbitrator is to resolve the dispute. The function of the judge, on the other hand, must be understood in wholly different terms: he is a public officer; paid by public funds; chosen not by the parties but by the public or its representatives; and empowered by the political agencies to enforce and create society-wide norms ... as a way of giving meaning to our public values."

⁵⁴ This proposition does not imply that arbitration is merely an isolated *ad hoc* event. Arbitrators are probably influenced by earlier awards on similar facts: Harris "Precedent in labour arbitration" 26 et seq. However, there is no definite information that confirms the precedential value of arbitral awards: Mentschikoff "Commercial arbitration" 866, "The significance of arbitration" 702. See also Scott-Macnab **Mediation Arbitration** 29-31. What is emphasised in the text is

decisional technique therefore differs vastly from court-based adjudication since what is being applied is in reality a method of adjudicative problem solving.⁵⁵ In this particular respect, although their decisional methodologies might differ, there is more in common between mediation and arbitral adjudication than between arbitral and court-based adjudication because in the case of mediation and arbitral adjudication, problem solving is foundational for both.

7.2.4 Role and function of the third-party neutral

The mediator, arbitrator and judge - all three fulfil the role of resolving disputes yet each has disparate functions. Although the association of these functionaries is strained from the vantage of practice, in theory, each is linked to the other within the framework of the principles of third-party intervention. In terms of these principles, common attributes may be identified. Accordingly, within the specific context of third-party intervention, what is true of all these three types of dispute resolvers is that each -

- (a) participates as an intervenor in a process of dispute resolution;
- (b) controls the related process; and
- (c) enters the process as a neutral "stranger".⁵⁶

that arbitral awards do not acquire a binding authority that by analogy is applicable in similar instances as decisional criteria which in the future would accordingly affect the rights of third parties.

⁵⁵ The essence of this notion is captured by Shilston "Modern commercial arbitration" 46: "Commercial arbitration is a problem-solving process. ... The resolution of disputatious contractual problems through arbitration rather than court litigation should follow procedural paths broadly similar to those adopted by professional managers in the normal course of business. The art of arbitration is geared to designing the appropriate procedure for solving the instant problem in view." See also Note "The California rent-a-judge experiment" 1611-1612.

⁵⁶ The word "stranger" is used to denote the same meaning given to it by Eisenberg "Private ordering through negotiation" 655-660 in regard to the selection and application of norms, the determination of facts, the choice of remedy as well as the emotional effect of participation.

In each instance the *roles* of the mediator, arbitrator and judge are identical. However, each may be distinguished from the other according to the differing *functions* that each performs in the process of dispute resolution.

Although it is an unsettled issue whether a mediator's control of the mediation process should be passive or directive,⁵⁷ there is little doubt regarding a mediator's intermediary function as the facilitator of a negotiated settlement between the disputants.⁵⁸ In the case of the arbitrator and judge, the matter is a little more complex.

The function of both the arbitrator and judge can be described as being adjudicative. As a first description, this is satisfactory. What is conveyed is that, as adjudicators, both the arbitrator and judge must conduct the proceedings according to the rules of natural justice in order to ensure fairness of process.⁵⁹ Because a judge and an arbitrator must apply the rules of natural justice, both are bound to act in a judicial manner. However, allowing the matter to rest there, without further qualification, has led to certain false assumptions.

One such fallacy is founded on the assumption that an arbitrator is a private judge.⁶⁰ The mere fact that an arbitrator performs an adjudicative function does not necessarily justify this assumption. The respective appointment and qualifications of an arbitrator and a judge rest on different grounds. A judge is appointed by the President,⁶¹ on the advice of the Judicial Services Commission,⁶² as a fit and proper person, to hold permanent and

⁵⁷ See, further, 6.1.2 above.

⁵⁸ See, further, 6.1.3 above.

⁵⁹ See, further, Butler and Finsen **Arbitration in SA** 98-99 165-167 190-191.

⁶⁰ See also Butler and Finsen **Arbitration in SA** 95; Scott-Macnab **Mediation Arbitration** 56-58; Solove "Alternative means to resolve corporate disputes" 138.

⁶¹ See the Constitution of the Republic of South Africa Act 200 of 1993 ss 99(1) and 104(1).

⁶² See the Constitution of the Republic of South Africa Act 200 of 1993 ss 99(5) and 104(1) read with s 105 and the Judicial Services Commission Act 9 of 1994.

independent judicial office⁶³ which may not compete with any other office of profit⁶⁴ and hence, the payment of all judges' salaries and allowances⁶⁵ are guaranteed out of a separate fund.⁶⁶ In contrast, an arbitrator is appointed by the disputants in a personal capacity or as a member of an institution, on the grounds of professional or technical expertise (whether it be non-legal or legal),⁶⁷ and is paid by the disputants for the adjudicative services rendered in an open and competitive market.⁶⁸ Although there is a functional continuum between an arbitrator and a judge,⁶⁹ the diverse nature of their appointment and qualifications indicates that each has distinctive qualities that are suited to different forms of adjudication.⁷⁰ Consequently, an absolutisation of the adjudicative analogy between the arbitrator and a judge leads to the erroneous conclusion that an arbitrator is a judge in a private or lay capacity. Uncritical acceptance of this proposition misrepresents the actual functions of an arbitrator. The correct approach is to differentiate between the functions of a private and a public adjudicator respectively for in so doing variations in the form and function of adjudication are acknowledged.

An arbitrator is irrefutably a private adjudicator. The reason is clear: the arbitrator acquires adjudicative power over a private forum from the consensual authority of the

⁶³ The Constitution of the Republic of South Africa Act 200 of 1993 s 104(4) provides that a judge may only be removed from office by the President on the grounds of misbehaviour, incapacity or incompetence which must be established by the Judicial Services Commission and upon receipt of an address of the National Assembly and the Senate requesting such removal.

⁶⁴ See the Supreme Court Act 59 of 1959 s 11.

⁶⁵ See the provisions of the Judges' Remuneration and Conditions of Employment Act 88 of 1989.

⁶⁶ See, further, 8.3.1 below where similar considerations are also discussed in relation to the rent-a-judge process.

⁶⁷ See, further, Butler and Finsen **Arbitration in SA** 79-86. So too, the disputants may terminate the appointment of an arbitrator. Butler and Finsen *ibid* 103-106.

⁶⁸ See, further, Butler and Finsen **Arbitration in SA** 86-88.

⁶⁹ Bayles "Principles for legal procedure" 39.

⁷⁰ For a detailed comparison between an arbitrator and a judge, see Butler and Finsen **Arbitration in SA** 95-97.

disputants. However, the basic reason for vesting this power in an arbitrator rests mainly on the disputants' selection of a person who is a specialist and therefore competent to adjudicate the specialised nature of the dispute on the basis of expert knowledge. On the other hand, a judge is a public adjudicator who presides over a public forum to apply substantive legal norms and maintain public values. As a public adjudicator, a judge thus fulfils a societal function that accords with the obligation of government, acting through the judiciary in this instance, to maintain social harmony between citizens. In these terms, the adjudicative function of an arbitrator is more specific since it is limited to the resolution of technical and specialised disputes while that of the judge fulfils the broader governmental obligation of the public ordering of society.

The style of adjudication also differentiates the respective functions of an arbitrator and a judge. In the Anglo-American system of procedure, the judge is cast as an umpire who, in an adversarial setting, passively and impartially controls the court process as well as the hearing at a trial. As such, a judge performs a supervisory rather than a managerial function in regard to the conduct of the litigation and the trial.⁷¹ By comparison, the procedural functions of an arbitrator are not so stereotyped. The consensual foundations of the process of arbitration⁷² make it possible for the arbitrator to break the mould of a passive "umpireal" adjudicator and to enter the arena as an active manager of the dispute.⁷³ In fact, the managerial function of an arbitrator is implicit and the failure of an arbitrator to manage the arbitration process is at the root of many of the criticisms of conventional arbitration.⁷⁴ Arbitration should be managed differently from court

⁷¹ In the United States this is a moot point since in various jurisdictions judges are permitted to exercise managerial functions in regard to complex litigation. See, further, Resnik "Managerial judges" 376 et seq.

⁷² See, further, 7.1 above.

⁷³ For example, an arbitrator to an expedited arbitration may actively manage the process through increased participation and interrogatory competence. Quality arbitration is yet another example of an arbitrator being given total investigative and procedural control. See, further, 7.4 below.

⁷⁴ See Shilston "Modern commercial arbitration" 60-61 in which he expresses this view as follows at 60: "[B]usinessmen who might otherwise regard, and use, the private arbitration service as a useful adjunct to the conduct of their commercial activity view arbitration with disdain, because it is seen to be as unattractive as 'going to law' with all the formality, attendant delay, cost and disruption to

proceedings for ultimately, as a private adjudicator, the arbitrator's responsibility is to the consumer of his services and not the public at large.⁷⁵

In these terms it is insupportable to contend that an arbitrator is a private judge. The functions of an arbitrator and a judge are distinctive. The one functions as a private adjudicator, the other as a public adjudicator. To reason otherwise legitimises the notion that the process of arbitration is no more than a parody of judicial proceedings. In the final instance, if an arbitrator is regarded as being a private judge, it takes but a very short jump in logic, as fallacious as it might be, to conclude that arbitration is a privatised form of judicial proceedings.

7.3 Contextualised applications

An analysis of arbitration in the context of the principles of third-party intervention emphasises its structural qualities. The analysis is also indicative of the instrumental considerations that relate to the selection of arbitration as the appropriate dispute resolution mechanism in contrast to the attributes of the other forms of third-party intervention. However, the assumption created is that the process of arbitration remains structurally constant. In theory it is possible to deal with arbitration as a structural concept but in practice the position is quite different. Pragmatic objectives and expediency force the process of arbitration to shift and change according to the differing contexts in which it is applied.⁷⁶

Stated differently: in theory it is possible to deal with arbitration as a stable processual model yet, in a practical setting, its processual objectives are dictated by the social context in which it is applied. Essentially, the basic structure of the process of arbitration is capable of being adapted and moulded to suit the context of a particular dispute. Litigation may be adjectivally described as, for instance, "divorce" or "commercial"

business life. That need not be the position if arbitrators manage the arbitral process from inception to conclusion".

⁷⁵ See, further, Shilston "Commercial arbitration" 58-59.

⁷⁶ See also Carlston "Theory of the arbitration process" 636.

litigation and so on, but the description remains adjectival since what is being explained is the nature of the cause of action and not the substance of the process itself. The situation is quite different in the case of arbitration. An adjective preceding the word "arbitration" conveys the substantive quality of the process within a particular social context. This in turn influences the processual norms and values of the process of arbitration in its differing settings.

Consequently, there is a variance between the process of arbitration as a static and unitary concept within the theoretical framework of third-party intervention and the distinctive forms of arbitration that are identified by the various context-based applications that emerge in practice. The form of the arbitration is determined by the substantive nature of the dispute. As a result, the description of the arbitration is definitive of its form, as in the case of labour arbitration,⁷⁷ commercial arbitration⁷⁸ and international arbitration.⁷⁹ Further sub-classification is sometimes possible: commercial arbitration has specialist applications in the field of insurance⁸⁰ and the construction industry.⁸¹ Even within the internal form of a particular type of arbitration distinctive elements arise, the most notable example being that of labour arbitration where rights-based and interest-based disputes are differentiated.⁸²

⁷⁷ See, for instance, Butler and Finsen **Arbitration in SA** 30-36; Lotter and Mosime **Arbitration at Work**. See also Getman "Labor arbitration and dispute resolution" 916 et seq.

⁷⁸ See Fulton **Commercial ADR** 55-69 for a description that concentrates on commercial arbitration and also Shilston "Modern commercial arbitration" for an overview of current perspectives on commercial arbitration.

⁷⁹ See Butler and Finsen **Arbitration in SA** 296-316; Christie "Arbitration: party autonomy or curial intervention II: international commercial transactions" 360 et seq; Aaron "International arbitration I: arbitration clauses" 633 et seq; "International arbitration II: the main centres" 93 et seq; "International arbitration III: choosing an arbitration institution" 306 et seq; International arbitration IV: choosing a set of rules" 503 et seq.

⁸⁰ See, for instance, Butler and Finsen **Arbitration in SA** 55-56.

⁸¹ See Finsen "Arbitration and mediation in the construction industry" 176-206; Hyman **Engineering Construction Contracts** 167-169; McKenzie **Law of Building and Construction Contracts** 161-203.

⁸² For the distinction between a right-based dispute and interest-based dispute, see Butler and Finsen **Arbitration in SA** 30-32.

However, because of its pervasive quality, restrictions have been placed on the substantive scope of arbitration. Under the provisions of the Arbitration Act of 1965,⁸³ the process of arbitration may not be applied in regard to any dispute that relates to a matrimonial cause⁸⁴ or that affects the status of a person.⁸⁵ One of the important implications of this exclusion is that divorce and family disputes cannot be resolved by means of arbitration in South Africa.⁸⁶ At common law, it is not permissible to submit criminal matters to arbitration.⁸⁷

Apart from context-based applications of arbitration that are determined by the substance of a dispute, it is also possible to identify the practice of arbitration in specific institutional settings. For instance, Mentschikoff⁸⁸ identifies the following instances that relate mainly to commercial arbitration -

- (a) individual arbitration where all the necessary arrangements for the arbitration are made entirely by the disputants themselves;
- (b) arbitration that arises within the context of a particular trade or commercial association that creates its own arbitration structure for the settlement of disputes among its members on either a voluntary or compulsory basis; and lastly

⁸³ 42 of 1965.

⁸⁴ s 2(a). See, further, Butler and Finsen **Arbitration in SA** 52-53; Jacobs **Law of Arbitration in SA** 17-18.

⁸⁵ s 2(b). See, further, Butler and Finsen **Arbitration in SA** 53-54; Jacobs **Law of Arbitration in SA** 18.

⁸⁶ It should be recognised that in the United States the process of arbitration is used as a method for resolving the issues arising out of a divorce and family disputes. See, for example, Coulson "Family arbitration" 22 et seq; Herman, McKenry and Weber "Mediation and arbitration applied to family conflict resolution" 17 et seq; Spenser and Zammit "Mediation-arbitration" 911 et seq, "Arbitration under the family dispute services" 111 et seq. For a South African perspective on the matter, see Scott-Macnab **Mediation Arbitration** 192-209.

⁸⁷ Butler and Finsen **Arbitration in SA** 53.

⁸⁸ "Commercial Arbitration" 848-849. See also Mustill "Arbitration: history and background" 44-45 49-51 for a historical perspective on the development of institutional arbitration.

- (c) arbitration provided by administrative groups⁸⁹ that supply the rules, personnel and facilities to enable certain disputants to conduct the process of arbitration as a method of settlement.

What is clearly evident is that arbitration is an extremely versatile process, notwithstanding its adjudicative structure. For this reason, arbitration has been described as being a "chameleon word, assuming varying significance as the social setting in which it takes place varies".⁹⁰ Perhaps, the best explanation is that, because the process of arbitration has consensual foundations,⁹¹ it is capable of absorbing the substantive qualities of a dispute and in so doing, takes on unique and distinctive forms.

7.4 Derivative extensions

Apart from the ability of the process of arbitration to accommodate the substance of a dispute in a variety of contexts,⁹² it is also able to adapt its process without compromising the normative integrity of its adjudicative structure. This occurs precisely because the consensual elements of the process of arbitration give effect to the principle of disputant autonomy⁹³ which permits the disputants, working through the arbitrator, to control the process. Accordingly, on the basis of their mutual consent, it is possible and permissible for the disputants to alter the processual form of the arbitration process.⁹⁴

The fact that arbitration is traditionally applied in its conventional form does not necessarily establish this particular form of arbitration as a fixed processual model. The

⁸⁹ In the South African context these institutions would be identified as the Association of Arbitrators, the Alternative Dispute Resolution Association of South Africa (ADRASA) and Independent Mediation Services of South Africa (IMSSA).

⁹⁰ Carlston "Theory of the arbitration process" 638.

⁹¹ See, further, 7.1 above.

⁹² See 7.3 above.

⁹³ See, further, 7.1 above.

⁹⁴ See also Rowland *Arbitration* 63.

conventional form of arbitration⁹⁵ is used more frequently because the disputants themselves have agreed that the authoritarian norms of the judicial system should be applied to the arbitration process. Similarly, the disputants are at liberty to deviate from the conventional form of arbitration and tailor the arbitration to fit their particular needs. Although arbitration in its conventional form might have been rejected by the disputants in favour of an alternative arbitral form, in theory it is retained as a notional standard for determining the extent of the deviation of that alternative arbitral form. For this reason, all alternative arbitral forms may in principle be regarded as derivative extensions of the conventional model. The derivative forms of arbitration that have crystallised in practice are identified as expedited arbitration, last-offer arbitration, documents-only arbitration and quality arbitration.

No matter how far removed an alternative arbitral form might be from the conventional model,⁹⁶ it qualifies as a derivative form of arbitration because it still retains its essential arbitral characteristics. Consequently, all the derivative forms of arbitration have the following in common with each other -

- (a) the disputants submit their dispute to a neutral and impartial third party who is named and recognised as an arbitrator;
- (b) the arbitrator applies the rules of natural justice as a minimum processual requirement;
- (c) the outcome is in the form of a definitive decision that in most instances is binding; and
- (d) the decision itself is based on a finding of fact in regard to quality or on the interpretation of rules and standards of conduct.

⁹⁵ For "conventional arbitration", see 7.1 note 3 above.

⁹⁶ As in the case of quality arbitration which would border on expert appraisal were it not for the fact that a binding and final decision is made. See, further, text to note 106 for details regarding quality arbitration. For the differences between expert appraisal and arbitration, see Astor and Chinkin *Dispute Resolution* 129-139.

These characteristics are common not only to derivative forms of arbitration but are also those of arbitration in its conventional form. These processual qualities characterise the related processes as forming part of a primary arbitral model.

Alternative arbitral forms, both in theory and in practice, hence conform to the norms and values of a primary arbitral model and cannot be classified as hybrid processes merely because they deviate from arbitration in its conventional form. Derivative extensions from the conventional form of arbitration and hybrid processes⁹⁷ that contain strong arbitral elements should therefore be regarded as being analytically distinct. Admittedly, there is a very thin dividing line between pure arbitral processes and those processes that rely heavily on arbitral elements in combination with the elements of other dispute resolution processes, as in the case of the rent-a-judge process⁹⁸ and mediation/arbitration.⁹⁹ The unfortunate part is that arbitral derivatives and hybrid processes are sometimes mistakenly interchanged.¹⁰⁰ The crucial test is to determine whether or not the mix produces a process that is substantially different from the model of pure arbitration. The description of the alternative arbitral processes that follows, indicates that all these processes are arbitral in their nature and do not contain any alien elements derived from other dispute resolution processes.

The need to streamline conventional arbitration by reducing delays that in turn decreases the potential for cost, is the primary reason for the development of expedited arbitration.¹⁰¹ In order to achieve this purpose, the rules that regulate the process of

⁹⁷ For a detailed analysis of the hybrid processes, see chapter 8 below.

⁹⁸ For the rent-a-judge process, see 8.3.1 below.

⁹⁹ For mediation/arbitration, see 8.3.3 below.

¹⁰⁰ See, for instance, Henry and Lieberman **The Manager's Guide to Resolving Legal Disputes** 75-77 who deal with the rent-a-judge process in their chapter relating to arbitration. See also Trollip **ADR** 36 who mentions the rent-a-judge process as a variation of conventional arbitration. On the other hand, for example, Butler and Finsen **Arbitration in SA** 201 describe quality (sniff-look) arbitration as "a hybrid type of arbitration".

¹⁰¹ In Australia, expedited arbitration is also referred to as "fast track arbitration": Astor and Chinkin **Dispute Resolution** 123.

arbitration are attenuated. Some or all of the following steps are taken to abbreviate the proceedings: the preliminary meeting is either curtailed or abolished; the exchange of pleading is restricted or disallowed; discovery is limited or dispensed with; the rules of evidence are modified and simplified; the number of witnesses or expert witnesses may be reduced; opening and final statements are restricted in their length. Apart from these procedural considerations, the arbitrator is permitted a greater participatory role which allows for a more active involvement, with wider powers of intervention coupled with interrogatory competence.¹⁰²

A variant of expedited arbitration is known as final-offer arbitration.¹⁰³ In this instance the decisional methodology is altered. In order to discourage excessive demands, the arbitrator is competent to find only in favour of the one disputant's claim or the other disputant's last offer but may not award anything in between this range. The effect is to reduce unnecessary delays caused by inflated demands that are inevitably followed by counter-rejections.¹⁰⁴

An ingenious method of obviating the need for a hearing has been devised in an arbitral form known as documents-only arbitration. The disputants waive their right to an arbitral hearing and instead agree that an arbitrator may render a decision only on the basis of documents that contain all the necessary evidence that pertains to the issues in dispute. Obviously this form of arbitration should not be applied when complex issues are

¹⁰² See, further, Mulligan "Alternative dispute resolution" 99-100; Trolip **ADR** 36-38. See also Butler and Finsen **Arbitration in SA** 201-202 for a brief description of summary procedure arbitrations conducted according to the rules of the Arbitration Association.

¹⁰³ In the South African literature, final-offer arbitration is interchangeable with the term "pendulum arbitration" while in the United Kingdom, the equivalent terms are either "pendulum" or "flip-flop" arbitration. In the United States of America the usage is "final-offer" arbitration or "baseball" arbitration. The term "final-offer" arbitration is used in Australia.

¹⁰⁴ See, further, Butler and Finsen **Arbitration in SA** 202; Mulligan "Alternative dispute resolution" 100; Trolip **ADR** 37. See also Fulton **commercial ADR** 70-73; Henry and Lieberman **The Manager's Guide to Resolving Legal Disputes** 74-75; Goldberg, Sander and Rogers **Dispute Resolution** 223-225; Rowland **Arbitration** 68.

involved. However, it is suited to disputes that do not justify the time and expense involved in hearing and testing oral evidence.¹⁰⁵

Quality arbitration¹⁰⁶ goes one step further than documents-only arbitration - it not only dispenses with an arbitral hearing but also with the need to adduce and test any evidence. This form of arbitration vest solely in the technical skill and expertise of the arbitrator. Most quality arbitrations are conducted under the auspices of a trade association and according to the usages that have developed in a particular trade regarding a specific commodity. Arbitrators are entitled to definitively decide the issue on the basis of their own personal skill, experience or method of testing as, for instance, whether natural cassia oil has been adulterated, wine is of the stated vintage or that the quality of coffee beans or Ceylon tea meets stipulated standards. This form of arbitration is best known in the United Kingdom and is little used in South Africa.¹⁰⁷

All the alternative arbitral forms described above deviate considerably from the conventional model of arbitration yet remain derivative extensions of that same model since their essential arbitral qualities have been retained. What distinguishes each alternative arbitral form from the other as well as from the general model, is the manner and the extent to which the disputants have by their mutual consent adapted the arbitral process to suit the needs of the circumstances of a particular type of dispute or have streamlined the process so as to save time and expense. In order to achieve these objectives, one or more of the following processual adjustments need to be effected, namely -

- (a) either curtailing or dispensing with the pre-hearing stage;
- (b) abbreviating the hearing or abolishing it altogether;

¹⁰⁵ See Butler and Finsen **Arbitration in SA** 197-201 for a detailed description of documents-only arbitration. See also Rowland **Arbitration** 66-67.

¹⁰⁶ Quality arbitration is the term used by Parris **Arbitration** 94 which is commonly referred to as "look-sniff" arbitration or sometimes "taste-look" arbitration, as the case may be.

¹⁰⁷ See, further, Butler and Finsen **Arbitration in SA** 201; Parris **Arbitration** 94-105; Rowland **Arbitration** 67-68.

- (c) modifying or totally disregarding the rules of evidence;
- (d) increasing the degree of the arbitrator's control of and participation in the arbitral process; and
- (e) altering the decisional style of the award.

Once again, what is illustrated, is the inherent flexibility of the process of arbitration not only to adapt itself to the substance of a dispute but, in the present instance, to modify its process to accommodate the particular demands of specific types of disputes. However, although the arbitration process might be versatile, it is not malleable since an alternative arbitral form adheres in every instance to the core principles that give expression to the norms and values of the primary arbitral model.

7.5 Arbitral norms and values

Of all three primary processes, arbitration is the most complex because it is based on the principle of adjudicative decision making in contrast to the consensual decisional structure of negotiation and mediation. Consensual decision making by its very nature reserves the competence to determine the outcome of a dispute to the disputants themselves whereas adjudicative decision making relies on the imposition of an outcome by a third-party neutral. The move is one from a simplex to a complex decisional structure.

The complexity of adjudicative decision making lies in the various forms, functions and limits of adjudication which in turn are influenced by the extent of the power vested in the adjudicator, the social purpose and context of the adjudication itself, the processual methods of conducting the adjudication and lastly, the quality of an adjudicated outcome. In the case of court-based adjudication, these variables are basically settled - its institutionalised norms and values inhibit flexibility which can only be introduced through procedural reform. Although arbitration has a co-ordinate relationship in regard to the courts, the consensual norms that underlie the process of arbitration instil it with a remarkable flexibility that permits pragmatic adaptations of its adjudicative structure,

enabling it to assimilate these variables in a variety of arbitral forms¹⁰⁸ and to modify its functions in relation to different social contexts.¹⁰⁹

Precisely because arbitral authority is derived from a private and not a public source, it is governed by norms and values that promote expertise, processual flexibility, expedited decision making and collaboration engendered by economic self-interest. Historically, these values originate in the consensual foundations of the law of contract in combination with the need of the interdependent business community to resolve disputes among its members by means of expedient and binding adjustments, which otherwise would threaten cohesiveness and jeopardise dealings in good faith on account of litigious wrangling. Although the forms, functions and contexts of arbitration have since changed, the contemporary notion of arbitration still advances it as an alternative adjudicatory process that has the potential for achieving procedural pragmatism as well as expedient and lasting solutions while simultaneously fostering responsibility for the self-determination of disputes.

This leads back to the initial question which so far has only been partially answered: is the process of arbitration a misfit in the general context of the system of ADR?¹¹⁰ By comparison to the other primary processes, the functional role of arbitration within the system of ADR provides processual solutions that the other primary processes cannot offer. In contradistinction with the other primary processes, arbitration facilitates the establishment of a neutral, private and specialised forum, satisfies the need for stability and predictability of the related outcome and provides a fair process that culminates in a definitive and final adjustment of a dispute that is judicially enforceable.¹¹¹ Over and above these instrumentalist considerations, there is the overriding principle of disputant autonomy which gives the process of arbitration a quality of flexibility¹¹² and endows it

¹⁰⁸ See, further, 7.4 above.

¹⁰⁹ See, further, 7.3 above.

¹¹⁰ See, further, 7.1 above.

¹¹¹ Carbonneau *Alternative Dispute Resolution* 137.

¹¹² Butler and Finsen *Arbitration in SA 22*; Finsen "The case for arbitration" 636.

with a reservoir of norms and values that are intrinsically consensual in nature. As in the case of other ADR processes, these primary characteristics empower disputants to manage their own dispute outside the constraints of the court system.

However, in the final analysis, because arbitration has been integrated within the system of ADR, a shift of emphasis has occurred. The prominence of arbitration in its conventional form is being undermined as alternative arbitral forms have developed and are applied in a variety of contexts. This does not imply that conventional arbitration is being relegated to the background. Certainly conventional arbitration still serves a useful purpose in regard to certain types of disputes. But, more important than this, its norms and values that have proved to be so resilient in the past, establish the basis for the modern development of other arbitral forms and their application in substantive areas of dispute that extend beyond the traditional ambit of conventional arbitration. Stripped of its conventional trappings, arbitral dispute resolution is now being recognised as a meaningful method of problem solving¹¹³ which is a feature common to all ADR processes, with this exception, that in this instance, the method of problem solving is based on an alternative adjudicatory ethic. Given these considerations, it is inconceivable that the process of arbitration should be excluded as a primary ADR process.

¹¹³

See, further, 7.2.3 above.

CHAPTER 8

THE HYBRID PROCESSES

8.1 Hybridisation of the primary processes

8.2 Classification of the hybrid processes

8.3 Descriptive analysis

8.3.1 The litigation/arbitration combination

8.3.2 The litigation/negotiation combination

8.3.3 The mediation/arbitration combination

8.4 The processual quality of the hybrid processes

8.1 Hybridisation of the primary processes

Adherence to convention and procedural formality emanating from its institutionalised nature, account for the inflexibility of court-based adjudication as it is expressed through the process of litigation. Rigidity is so ingrained that it is only by means of procedural reform that any meaningful change can be effected. By comparison, the primary processes of negotiation, mediation and arbitration are characterised by an inherent flexibility. These processes have never been nor ever will be in need of reform because, unlike legal process, they have not been devised to conform to institutionalised requirements aimed at the public ordering of society. As informal dispute resolution mechanisms, the primary processes are woven into the fabric of society and as social patterns change in every age, so too, have these processes adapted to meet the demands of that change.

There is no need to turn to history to prove this point. The contemporary modification and extension of the scope of the primary processes through the direct influence of the

system of ADR,¹ illustrates their adaptability. Over the past two decades there have been a spate of textbooks and journal articles in all fields of the social sciences on the subject of negotiation; the process of mediation is being applied in contexts that were never traditionally envisaged and, as an informal yet legally recognised dispute resolution mechanism, the scope of the process of arbitration has been extended through the creation of its derivatives.² No conscious reform was needed. The informal nature of the primary processes makes them naturally susceptible to change. Apart from these developments, flexibility is so intrinsic to the primary processes that the present generation has seen how the structural elements of one primary process have been compounded with those of another private or public process to form hybrid processes that were unknown to previous generations.

The primary processes were borrowed by the system of ADR but the hybrid processes are original to that system. The development of the hybrid processes confirm not only the flexibility of the primary processes but especially the creativity stimulated by the system of ADR to match a dispute with an appropriate dispute resolution process. However, although basically flexible, each primary process is restricted by the form and limits of its processual functions. For instance, as a form of third-party intervention, mediation provides intermediary assistance to facilitate a settlement by negotiation but cannot guarantee a settlement or, if a settlement is reached, that the outcome will be binding. By the same token, although the outcome of an arbitral award is binding, that outcome is achieved by means of an adjudicative and not a consensual method of dispute processing. In order to accommodate disputants who need the certainty of a binding decision within the context of a consensual method of dispute processing, the fundamental assumptions and methodology of the process of mediation have been combined with the finality of an arbitral award by means of the development of a hybrid process known as mediation/arbitration.³ Mediation/arbitration is but one example of the manner in which various elements of the primary processes have been hybridised. Many other mixed processes have been and are being developed by similar methods.

¹ See, further, 3.1 above.

² See, further, 7.4 above.

³ For mediation/arbitration, see 8.3.3 below.

The system of ADR has given impetus to the creation of hybrid processes. It has provided a framework within which pragmatic extra-curial settlements can be achieved by creating new dispute resolution processes, that are tailored both to meet the needs of the disputants and to realistically match the nature of the dispute. The various processual components of the primary processes provide a rich source of material for experimentation. The elements of private processes may be combined with public processes; investigatory aspects of fact determination that is a distinctive feature of adjudicative processes may be linked to the methodologies of consensual processes; the non-binding outcome of consensual processes may be grafted onto adjudicative processes that render a binding decision and vice versa; the opportunity to present proof on evidence so characteristic of adjudicatory processes may be integrated with consensual processes and lastly, the role of the third-party neutral may be adapted to be less or more interventionist than would normally be the case. The amalgamation of the elements of two or more primary processes has led to the creation of a variety of hybrid process, to name only those that have gained general recognition: rent-a-judge, the mini-trial, the summary jury trial, early neutral evaluation and mediation-arbitration. Not all these processes are familiar within the South African context, but they are nevertheless treated in the hope that they will be received into our system.

A notable feature of the hybrid processes is that they have been structured to facilitate dispute processing mainly within the corporate and commercial sectors. A variety of reasons have converged to make the hybrid processes popular within these sectors. Commercial contracts, especially in the construction industry, contain complicated technical detail relating to performance, the subject matter of these contracts often relates to complex matters of science and technology, the risk variables are very high as is the value of the contracts, very often the duration extends over a period of years and lastly, the performance of the contract is often dependent upon the co-operation of a number of interested parties whose functions and duties must be interfaced for the proper management of the contract. A prime example would be that of an Eskom contract for the construction of a power station which requires the management of up to 700 sub-contractors, not to mention the functions of professionals such as architects,

quantity surveyors, engineers and project managers.⁴ Because of the risks involved, disputes and disputing are inevitable. Disputes that are not controlled by efficient management could seriously diminish profits. For this reason, effective and speedy dispute resolution processes are required. The emergence of the system of ADR has stimulated inventiveness in this regard and in many respects explains the creation of the hybrid processes. A new management style is in the making. The traditional approach regards disputes as being an irritating intrusion that should be managed by in-house lawyers or legal professionals. This approach is fast changing as literature on dispute management recommends that disputes and their settlement are the direct concern of management and are just as important as the other components of project management.⁵

A characteristic of all the hybrid processes is that their creation has been prompted by expediency. The source material is accordingly either anecdotal or based on instrumentalist descriptions and pragmatic considerations, with little consideration being given to analysis based on processual theory. Yet, this in itself does not justify the outright rejection of the hybrid processes as lacking in processual authenticity. Although tenuous at this stage of their development, the hybrid processes have the latent potential to become mature informal processes precisely because they are composed of recognised processual elements of the primary processes. Even though the hybrid processes are the product of *ad hoc* experiments, their development does not occur in isolation. The future development of the hybrid processes must inevitably occur within the broader processual framework of the primary processes. For this reason alone, the hybrid processes should be nurtured as the fledglings of the system of ADR.

Another feature common to the hybrid processes is that the nature and scope of the dispute that they address is far more specified and narrowed by comparison to those resolved by means of the primary processes. For instance, the mini-trial has been developed to resolve disputes between major corporations and which involve claims of

⁴ See Baird "NEC: a new approach" 26.

⁵ See Green "Corporate ADR" 228-229; Henry and Lieberman *The Manager's Guide to Resolving Legal Disputes* 2 95-96.

an extraordinary high amount. Likewise, mediation-arbitration is specifically associated with labour disputes. This particular attribute of the hybrid processes possibly represents a trend in the development of the system of ADR. Within the system of ADR, the scope of the primary processes has already been expanded into different fields of application. These processes have also been extended in their ambit by means of the creation of derivative forms. The development of the hybrid processes probably indicates a shift towards streamlining informal dispute resolution mechanisms by devising custom-made processes to deal with specific types of disputes. If this is the case, then the movement towards devising hybrid processes should be encouraged since their development would give vitality, impetus and authenticity to the system of ADR.

The concept of a hybrid process is not particularly novel. The ombudsman is historically the forerunner of the ADR hybrids. In its original form, the ombudsman had very little to do with ADR since it was developed in the Scandinavian countries. In the classic Scandinavian model, the ombudsman⁶ is a respected public official who functions independently and outside the judicial system with the express purpose of investigating citizen complaints regarding maladministration by public bodies, but does not include the competence to give a binding decision.⁷ As process, the ombudsman combines the functions of mediation and fact determination inherent in the process of adjudication. The notion of a hybrid process is therefore not unique to the system of ADR. However, the existence of a precedent of a hybrid process lends credibility to the creation of hybrid processes under the auspices of the system of ADR. The ombudsman sets a conceptual model against which newly created hybrid processes may be appraised and evaluated in regard to their functional attributes, efficiency and durability, both in regard to the form of

⁶ In gender-neutral terms, the ombudsman is referred to as the ombuds or ombudsperson: Singer **Settling Disputes** 25.

⁷ Singer **Settling Disputes** 25. The Ombudsman Act 118 of 1979 was modelled on these conventional principles. See also Dlamini "An ombudsman for SA" 71; Mireku "The relationship between the courts and the ombudsman" 529. It should be noted that the Constitution of the Republic of South Africa Act 200 of 1993 ss 110-113 provides for the appointment, powers and functions of a national public protector and s 114 authorises the appointment of provincial public protectors. The role of the public protector is based conceptually on the model of the ombudsman. See also text to notes 9 and 10 below for adapted models of the ombudsman.

process and its outcome. Moreover, as a conceptual model, the ombudsman also teaches that hybrid processes are highly flexible and easily adapted to a variety of situations. For instance, in the United States the ombudsman is a company official who holds a neutral position in the corporate structure and whose only function is to conduct grievance procedures in respect of disputes among employees by means of informal counselling, mediation and sometimes, investigation and recommendations to management.⁸ Similarly, in the United Kingdom, the role and function of the ombudsman has been adapted to deal with consumer complaints within the banking industry.⁹ Conceivably, once they have become established, the ADR hybrids will be adapted or modified to meet situations other than those for which they were originally devised.

Although the ADR hybrids have not as yet established themselves as generally recognised informal processes, they should be assessed as processes in the making that supplement the primary ADR processes. In so doing, they extend the ambit of the system of ADR itself. Against this background, the description and analysis of the hybrid processes that follow, should be evaluated. Every attempt has been made to ensure accuracy. Understandably, this might not always be achieved because the hybrid processes are presently processually unstable. The source material is at times contradictory both in respect of terminology and the substance of these processes.

8.2 Classification of the hybrid processes

Precisely because the hybrid processes are as yet immature forms of process and hence processually inconsistent, any classification of these processes is fraught with problems. In the first place, any such classification is premature considering the development that still needs to occur for the hybrid processes to acquire the processual regularity and uniformity that is characteristic of established forms of process. Perhaps, because of their inherent adaptability, the hybrid processes might never stabilise. It is also possible that some of these processes might eventually be discarded as having

⁸ Green "Corporate ADR" 228; Henry and Lieberman *Manager's Guide to Resolving Legal Disputes* 109-112; Singer *Settling Disputes* 103-105.

⁹ Birds and Graham "ADR: financial services" 123-130.

been merely *ad hoc* experiments that do not merit universal application. But these are issues that will be clarified only in the future. Be that as it may, on the basis of present knowledge there is sufficient published literature, albeit tentative, to justify the compilation of a classification on the understanding that at this stage it is preliminary and possibly even incomplete.

A second problem is methodological in its nature. A classification of the primary processes is a relatively simple matter by comparison to that of the hybrid processes. Although the primary processes are informal, they are also established and universally recognised processes. On the other hand, the hybrid processes are not only informal but novel in regard to the combinations of the various elements of the primary processes out of which they have been created. Consequently, it is possible to relate the primary processes to the general body of procedural principles for the purposes of classification whereas, in respect of the hybrid processes, classification must necessarily relate to the principles governing the primary processes since it is from an amalgam of these principles, that the hybrid processes were devised in the first place. A classification of the *FORM* of the hybrid processes is therefore subsidiary to a classification of the form of the primary processes.

The issue of form leads on to the next which relates to the method of classifying the substantive elements of the hybrid processes. The substance of a process may be classified either according to its function, characteristics, or by means of comparison. These considerations have already been treated in some detail in a previous chapter that deals with the classification of the primary processes.¹⁰ However, because of the novelty of the hybrid processes, considerations that relate to the classification of the substantive elements of the primary processes do not apply equally to those for the classification of the hybrid processes. Classification according to function is premature at this stage and a classification by means of a comparison would be quite futile because the hybrid processes have been tailor-made to suit the circumstance of a particular type of dispute and to meet the specific needs of disputants. Contrary to the method of

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See 4.2 above.

TABLE 2 - SYSTEMATIC CLASSIFICATION OF HYBRID PROCESSES

	FORM						
	COMBINATION	LITIGATION / ARBITRATION	LITIGATION /NEGOTIATION			MEDIATION/ARBITRATION	
	HYBRID PROCESS	RENT-A-JUDGE	MINI-TRIAL	SUMMARY JURY TRIAL	NEUTRAL EVALUATION	MED-ARB	ARB-MED
CHARACTERISTICS	VOLUNTARY/ COERCIVE	Voluntary	Voluntary	Coercive	Coercive	Voluntary	Voluntary
	PRIVATE / PUBLIC	Private - except when enforcement sought	Private	Public	Public	Private	Private
	NATURE OF PROCEEDINGS	Presentation of proofs and arguments	Presentation of "best case"	Presentation of summary proofs and arguments	Determination of pre-trial issues	Consensual/ adjudicative	Adjudicative/ consensual
	THIRD-PARTY INTERVENTION	Party-selected private adjudicator with legal/retired acumen, normally judge or lawyer	Party-selected neutral advisor	Mock jury empaneled by court	Senior lawyer as a private evaluator	Mediator/ adjudicator, party selected	Adjudicator/ mediator, party selected
	PROCEDURE	Statutory procedure but very flexible regarding time, venue and procedures	Informal and procedural rules set by parties	Procedural rules fixed but less formal than adjudication	Pocedural rules fixed but less formal than trial process	Informal and non-adversarial/ formal but not necessarily technical or adversarial	Formal but not necessarily technical or adversarial/ informal and non-adversarial
	REPRESENTATION	Legal representation	Legal representation or self-representation;	Legal representation/ litigants must be present	Legal representation/ litigants must be present	Self-representation /legal presentation	Legal representation or self-representation
	OUTCOME	Principled decision, sometimes supported by finding of fact and conclusions of law	Agreement	Advisory verdict	Advisory opinion	Consensual agreement or arbitral award	
	BINDING/NON - BINDING	Binding subject to appeal	Contractually binding	Non-binding		Non-binding or binding	

classification of the primary processes, at this stage the best method for classifying the substantive elements of the hybrid processes would be on the grounds of their basic characteristics. The added advantage of adopting this approach is that it builds onto an existing classification of the characteristics of the hybrid processes.¹¹

In the light of the above, the classification contained in table 2 below is based on the form and characteristics of the selected hybrid processes. The horizontal gradient classifies the hybrid processes according to their **FORM** and the vertical gradient contains a classification according their individual **CHARACTERISTICS**.¹²

8.3 Descriptive analysis

8.3.1 The litigation/arbitration combination

Alternative processes apply outside the system of public dispute resolution. However, there is one notable exception. Functioning within the system of public dispute resolution, the rent-a-judge process offers an intra-curial alternative to the process of litigation.

The term "rent-a-judge" succinctly explains an essential quality of this process. By mutual agreement, the disputants may avoid litigation through the appointment of a private judge who essentially conducts a process of private litigation. Yet the term "rent-a-judge" is not altogether satisfactory. It is actually a journalistic expression that was first coined by the **Wall Street Journal**¹³ to replace the term "trial by reference". The latter

¹¹ See Goldberg, Sander and Rogers **Dispute Resolution** 5. Their table is for the sake of convenience included at the end of this chapter and marked annexure A for the purpose of identification. The original version of this table first appeared in Green "Theory and practice of dispute resolution" 257. See also Green "Private resolution of civil disputes" 14.

¹² The information contained in the vertical gradient has been adapted from the table contained in Goldberg, Sander and Rogers **Dispute Resolution** 5. See, further, note 11 above and annexure A included at the end of this chapter.

¹³ See Henry and Lieberman **The Manager's Guide to Resolving Legal Disputes** 75; Singer **Settling Disputes** 59.

term is historically and technically more correct because it refers to the general reference procedure contained in the civil procedural codes of all American states, with the exception of Illinois and Louisiana.¹⁴ However, the rent-a-judge experiment was based directly on the provisions of the California Code of Civil Procedure of 1872 that provides that a court may upon the agreement of both parties order a general reference for a trial of all matters of fact and law.¹⁵ In 1976, the forgotten statute was discovered and re-interpreted in the context of the system of ADR as a means of providing an alternative method of solving the burgeoning case load in the state of California, which at the time was reaching drastic proportions.¹⁶

The other term used to describe the rent-a-judge process is that of "private judging". Although this term aptly indicates that the process rests on the appointment of a private judge, "private judging" raises semantic problems if the process of arbitration is brought into consideration. More so than the "rent-a-judge process, arbitration is an established and legally recognised form of private adjudication. Because the divide between what is called "private judging" and arbitration is so tenuous, it is advisable to keep the terms analytically distinct so as to avoid confusion. Technically it would be far better to retain the term "trial by reference" but unfortunately journalese has popularised the phrase "rent-a-judge". No matter how crass the term "rent-a-judge" might seem, it ought to be retained to prevent any confusion that might ensue from the use of the word "private judging". The term "rent-a-judge" is therefore used in this work and should be construed to include any reference to "private judging" or "trial by reference".

¹⁴ For a summary of the various types of reference procedures in the United States, see Note "The California rent-a-judge experiment" 1594-1597.

¹⁵ See Coulson "Private settlement for the public good" 7; Green "Corporate ADR" 256; Herron "Rent-a-judge" 52; Note "The California rent-a-judge experiment" 1597.

¹⁶ Coulson "Private settlement for the public good" 7; Gnaizda "Secret justice for a privileged few" 6; Green "Corporate ADR" 260; Green "Private resolution of civil disputes" 17; Henry and Lieberman **The Manager's Guide to Resolving Legal Disputes** 75.

On account of the fact that the rent-a-judge process was originally based on the rather liberal provisions of the California general reference procedure,¹⁷ these provisions will be used to establish a basic processual model.¹⁸ Upon the application of both parties, the court (known as the presiding court) may appoint a referee to either try all of the issues in the action, whether of fact or of law, and accordingly enter a judgment or appoint a special referee to a special reference limited to ascertaining a particular fact or set of facts.¹⁹ The referee is not required to have any special qualifications.²⁰ Upon being appointed, the referee has all the powers of a judge, except the contempt power and the competence to appoint a referee.²¹ A reference can be obtained at any time, even prior to the filing of a complaint or just before the trial by a court of law.²² The trial can be heard at any convenient venue, the trial date may be set by the mutual agreement of the parties and the general public may be excluded from the proceedings.²³ The procedure at the trial may be based on conventional court proceedings or the more informal procedures of arbitration.²⁴ Witnesses may be called and sworn, but if the parties so

¹⁷ See the California Code of Civil Procedure ss 638-645.

¹⁸ Although the Californian code is used as a basic model, it should be emphasised that the reference procedure is a common procedural mechanism in other Anglo-American systems of civil procedure. For instance, in the United Kingdom, RSC Ord 36 regulates a limited form of the general reference procedure; in Australia, for example, the NSW Supreme Court Rules rule 72 and the Victoria Supreme Court Rules order 50 provide for a general form of the reference procedure. The South African model is contained in the Supreme Court Act 59 of 1959 s 19bis which provides for a special reference procedure. What is evident is that in theory there is scope for such reference procedures to be manipulated by astute lawyers so as to convert them into a rent-a-judge process.

¹⁹ California Code of Civil Procedure s 638(1)-(2). See also Green "Corporate ADR" 258; Note "The California rent-a-judge experiment" 1597 n 19.

²⁰ s 640. See also Green "Corporate ADR" 258; Note "The California rent-a-judge experiment" 1597.

²¹ Green "Corporate ADR" 258.

²² Green "Corporate ADR" 257; Note "The California rent-a-judge experiment" 1597.

²³ Green "Corporate ADR" 257; Note "The California rent-a-judge experiment" 1598.

²⁴ Green "Corporate ADR" 257.

agree, the evidence need not be reported or recorded.²⁵ The referee's subsequent report must consist of findings of fact and conclusions of law that must be stated separately.²⁶ The findings of the referee are treated as being the equivalent of the findings of the presiding court and are just as conclusive as any other final judgment of a court of law.²⁷ Accordingly, the right to appeal is preserved.²⁸ As at 1985, there were ten states using the trial by reference procedure, of which California and New York have particularly liberal rules.²⁹

As an alternative dispute resolution mechanism functioning within the ambit of the court system, the rent-a-judge process is an attractive adjudicative option. It eliminates the disadvantages attached to both litigation and arbitration yet synthesises the positive aspects of both these processes. An important advantage is that the judge is privately appointed rather than randomly imposed.³⁰ As in the case of arbitration, the principle of party selection permits the appointment of an adjudicator on the basis of known expertise in a specialist field so as to match the complexity of the dispute. This in itself saves the time normally spent during a conventional trial in explaining highly technical detail with which the court is unfamiliar³¹ and generally, enhances the credibility of the process.

²⁵ *Idem.*

²⁶ s 644. See also Green "Corporate ADR" 257; Note "The California rent-a-judge experiment" 1598.

²⁷ s 644. See also Green "Corporate ADR" 257; Note "the California rent-a-judge experiment" 1598.

²⁸ Green "Corporate ADR" 257; Note "The California rent-a-judge experiment" 1598-1599.

²⁹ Henry and Lieberman *The Manager's Guide to Resolving Legal Disputes* 75.

³⁰ Banks "ADR: a return to basics" 574; Green "Corporate ADR" 258; Herron "Rent-a-judge" 53; Note "The California rent-a-judge experiment" 1599.

³¹ Fulton *Commercial ADR* 121; Henry and Lieberman *The Manager's Guide to Resolving Legal Disputes* 76; Note "The California rent-a-judge experiment" 1599.

Flexibility of procedure is another important advantage.³² In California, where a permissive approach has been adopted, the disputants may design the rules of procedure and evidence to meet their specific needs, that is if they wish to waive the general rules of procedure that are applicable.³³ This is not particularly innovative since the same applies in regard to arbitration. However, other than in the case of arbitration, undue leniency is counter-balanced by the fact that the referee is obliged to apply substantive law and the judgment is subject to appeal. On the other hand, in certain other states, the referee is bound to follow the prescribed rules of procedure and evidence.³⁴

Another favourable aspect of the rent-a-judge process is the confidentiality that it affords. The only information that is made public is the referee's findings of facts or conclusions of law that are submitted in a report to the presiding court or details that are contained in the record if the referee's decision is taken on appeal. For the rest, the disputants are spared the publicity of conventional litigation: public attendance at the rent-a-judge proceedings may be restricted and testimony or exhibits that are normally of public record, remain private. The element of confidentiality alone is in certain cases a primary reason for the selection of the rent-a-judge process. The privacy in which the process is conducted is an effective means of avoiding negative media coverage, preserving the secrecy of evidence relating to intimate personal disclosures or trade secrets as well as safeguarding the exclusiveness of certain business methods.³⁵

Irrespective of any these advantages, there is one that overshadows all: the rent-a-judge process retains the conventional stability of institutionalised proceedings but discards the related technicalities and formalities that retard the progress of customary litigation and accordingly increase the transactional costs involved. In functional terms, the rent-a-judge process is characterised by its speed, convenience, predictability of proceedings

³² Banks "ADR: a return to basics" 574.

³³ Green "Corporate ADR" 259.

³⁴ Henry and Lieberman *The Manager's Guide to Resolving Legal Disputes* 75; Leeson and Johnston *Dispute Resolution in America* 22.

³⁵ See also Green "Corporate ADR" 259.

and certainty of a timeous outcome.³⁶ Unlike the disputants committed to conventional litigation who have little control over the scheduling of a trial date or the rendering of a judgment, the rent-a-judge participants may exercise uninhibited party-control over these aspects. The date of the trial is set by the mutual agreement of the parties, the venue and its privacy may be arranged, convenient times for the hearings may be determined and in certain instances, even the period within which the referee must submit the report of his findings,³⁷ is prescribed.³⁸ In many respects these features of the rent-a-judge process resemble the process of arbitration. This may be so, but the rent-a-judge process has the added advantage that the disputants are also assured of a legally binding decision that is subject to appeal within the traditional court structure. In contrast, the process of arbitration only provides a contractually binding decision (if it is not made an order of court) in the form of an award that need not be reasoned and which is final since it may only be set aside on the narrow grounds for review.³⁹

Ostensibly, the reference procedure contained in the Californian code and for that matter, even other versions of the reference procedure,⁴⁰ are normal civil procedural mechanisms that are integrated within the procedural structure of the court systems involved. As purely a procedural mechanism, the reference procedure is far removed from the systematics of ADR. Yet, the interpretation of the Californian model of the reference procedure within the context of ADR has altered its procedural purpose to such an extent that its contemporary application as the rent-a-judge process, is quite different from its original intent.⁴¹ Although being highly localised, the re-interpretation of

³⁶ See Banks "ADR: a return to basics" 574; Green "Corporate ADR" 258-259.

³⁷ In California, the referee must submit a report of his findings within 20 days after the close of the rent-a-judge proceedings: Green "Corporate ADR" 259.

³⁸ See Fulton **Commercial ADR** 120; Green "Corporate ADR" 258; Henry and Lieberman **The Manager's Guide to Resolving Legal Disputes** 75-76; Note "The California rent-a-judge experiment" 1599.

³⁹ See in this respect, Note "The California rent-a-judge experiment" 1600; Herron "Rent-a-judge" 53.

⁴⁰ See, further note 18 above.

⁴¹ Coulson "Private settlement for the public good" 7 explains the probable origin of the Californian reference procedure as follows: "This process was authorized by state law in 1872, probably to facilitate the resolution of property line disputes,

the Californian reference procedure has become the most renowned example of the rent-a-judge process that sets a precedent for the conversion of reference procedures in other jurisdictions. The upshot is that the rather innocuous and often neglected reference procedure now poses serious institutional considerations when re-interpreted as the rent-a-judge process within the ambit of ADR.⁴² By comparison to other ADR processes that are essentially extra-curial alternatives, the rent-a-judge process represents a pragmatic intra-curial alternative to litigation that in fact makes the ADR/litigation dichotomy extremely actual.

The rationale underlying the conversion of the a reference procedure into the rent-a-judge process is the grafting of the private elements of arbitration onto the public attributes of judicial proceedings. The combination of the elements of arbitration and litigation is not particularly topical because arbitration and litigation have survived for centuries as co-ordinate dispute resolution processes. At the heart of the problem is the hybridisation of the role and function of the arbitrator and the judge. Until the invention of the rent-a-judge process, the conventional categorisation of formal adjudicators consisted of the judge and the arbitrator. The rent-a-judge process has introduced the private judge as a third category.⁴³

The designation of a private judge in itself severely contradicts the sacrosanct principles originally enunciated in the Act of Settlement of 1700⁴⁴ that have permeated Anglo-American systems through their unwavering commitment to the independence of the judiciary.⁴⁵ Central to the concept of judicial independence is the public responsibility of

but little use was made of it until the late 1970's, when lawyers in Los Angeles, facing a lengthy court backlog, began submitting cases to retired judges."

⁴² In the United States, constitutional considerations also form part of the debate. In particular, are the issues of due process and equal protection under the Fourteenth Amendment as well as under the First Amendment in respect of the public right to attend a civil trial. See, further, Note "The California rent-a-judge experiment" 1601-1610; Gnaizda "Secret justice for the privileged few" 11; Herron "Rent-a-judge" 53-55.

⁴³ See Note "The California rent-a-judge experiment" 1611.

⁴⁴ 12 & 13 Will 3 c 2.

⁴⁵ See Holdsworth 2 **History** 208-209 215-216; Wade and Bradley **Constitutional and Administrative Law** 13-15. In South Africa, the Constitution of the Republic

the judge whose role is to interpret and apply the law, impartially and without fear or favour, in order to uphold, maintain and extend public norms and standards for the good of society as a whole.⁴⁶ One of the implications of judicial independence is that, as public functionaries,⁴⁷ judges should not hold any other office of profit.⁴⁸ With specific reference to civil proceedings, litigants are therefore assured that their respective claim or defence will be adjudicated independently and impartially by a publicly appointed judge who will decide the matter in accordance with public principles of substantive law and procedure.

The crucial question is whether a retired judge is exonerated from the public responsibility entailed under the principle of judicial independence. To assert that a private judge need not honour the principle of judicial independence would cross the role of an arbitrator with that of a judge.⁴⁹ An arbitrator's sole mandate is to resolve an immediate dispute as it is concisely stated in the arbitration agreement. Apart from the

of South Africa Act 200 of 1993 ss 96 and 104, the Supreme Court Act 59 of 1959 ss 10-11 and the Judges' Remuneration and Conditions of Employment Act 88 of 1989, confirm the independence of the judiciary.

⁴⁶ These principles are expressly upheld by the Constitution of the Republic of South Africa Act 200 of 1993 s 96(2)-(3) in the following terms -

- "(2) The judiciary shall be independent, impartial and subject only to this Constitution and the law.
- (3) No person and no organ of state shall interfere with judicial officers in the performance of their functions."

⁴⁷ See, for example, the Constitution of the Republic of South Africa Act 200 of 1993 s 104(1) that states that judges must be fit and proper persons appointed by the President on the advice of the Judicial Services Commission.

⁴⁸ For instance, this principle is clearly stated in the Supreme Court Act 59 of 1959 s 11: "No judge of the Supreme Court shall without the consent of the Minister accept, hold or perform any other office of profit or receive in respect of any service any fees, emoluments or other remuneration apart from his salary and other allowances which may be payable to him in his capacity as such a judge." The Constitution of the Republic of South Africa Act 200 of 1993 s 104(2) read with the Judges' Remuneration and Conditions of Employment Act 88 of 1989 guarantees the salary of a judge and that it will not be reduced during continuation of office.

⁴⁹ See, for instance, Coulson "Private settlement for the public good" 9-10 in which the confusion between the role of an arbitrator and a judge is evident: the author argues that a private judge should be subject to rules of conduct but then proposes that the rules of ethics of the Association of American Arbitrators should bind private judges.

duty to adhere to the rules of natural justice, an arbitrator's only responsibility is to the disputants with whom he enters into a commercial transaction for the rendering of his adjudicative services.

On the other hand, judicial integrity is maintained by prohibiting judges from holding any office of profit. Yet this does not hold true for a private judge whose appointment in the first place is based on a commercial relationship with the disputants.⁵⁰ Proponents of the rent-a-judge process ironically argue that judicial integrity of a private judge is maintained because of the constraints of "market forces" to which traditional judges are not subjected.⁵¹ An arbitrator might be sensitive to "market forces" but this should certainly not be applicable to a referee, in the guise of a private judge, who functions within the structure of the court system. To argue otherwise, would enhance the possibility of procedural abuse which the principles of judicial independence were designed to prevent.⁵²

Another institutional problem raised by the practice of the rent-a-judge process is that it confuses the private duties of an arbitrator with the public functions of a judge. Judges function within a public and institutionalised structure and their task is, as Fiss puts it

... not to maximise the ends of private parties, nor simply to secure the peace, but to explicate and give force to values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.⁵³

Settlement is therefore not an end in itself. Ultimately, the effect of a judgment does not only finalise the dispute between the litigants but also binds third parties by the authority of precedent in regard to the likely outcome of similar disputes in the future.⁵⁴ By contrast, an arbitrator operates in a free market system that places an economic value

⁵⁰ See Herron "Rent-a-judge" 53.

⁵¹ See Herron "Rent-a-judge" 55.

⁵² See Note "The California rent-a-judge experiment" 1613-1614. See also Astor and Chinkin **Dispute Resolution** 172; Fulton **Commercial ADR** 121-122.

⁵³ "Against Settlement" 1085.

⁵⁴ Landes and Posner "Adjudication as a private good" 236.

on adjudicative services. Arbitrators resolve current disputes in a purely commercial setting, without any accountability to the public at large; the rules they create bind only the disputants and not third parties and hence have no precedential value.⁵⁵ The private judge acts within a mixture of these functions. In a judicial capacity, the private judge gives effect to public norms and legal values and yet the arbitral function tends to predominate, because being bound to the disputants in a commercial relationship, her task is to settle the immediate dispute without taking cognisance of the rights of third parties or in any manner advancing legal doctrine in the form of precedent.⁵⁶

The rent-a-judge process is a viable alternative to litigation, for those who can afford it. As a process, it is highly private and confidential, conforms with standards of procedural formality, permits party selection of an adjudicator and blends the problem-solving facet of arbitration with the procedural guarantees of judicial proceedings. Irrespective of all these advantages, as an intra-curial alternative, it competes directly with judicial proceedings. The potential danger is that if the rent-a-judge process is allowed unrestricted application, it might in retrospect be regarded by history as the first step in establishing a dual system of litigation, similar to the co-existence between common-law procedure and Chancery procedure in the classical English system of civil procedure.

8.3.2 The litigation/negotiation combination

The grafting of the elements of litigation onto those of negotiation at first glance seems rather contradictory because each of these processes is situated on opposite ends of the dispute resolution continuum. Yet, in practice, this is precisely what has been achieved. In the past such a blend would have been unthinkable primarily because dispute resolution processes were compartmentalised. As a result, the discontinuities between various processes were emphasised. However, under the auspices of the system of ADR, the opportunity was created to treat dispute resolution processes integratively. Continuities between various processes were accentuated hence making it possible to hybridise elements of processes that have conventionally remained isolated from one

⁵⁵ Note "The Californian rent-a-judge experiment" 1611.

⁵⁶ Ibid 1612.

another. Within this setting, the mini-trial, the summary jury trial and early neutral evaluation have been devised. Of the three, the mini-trial is the best recognised since the other two are confined to the practice of the United States. The mini-trial will accordingly be analysed in detail. Although the summary jury trial and early neutral evaluation will be treated in a cursory manner, there is some functional value in doing so because both these processes illustrate further extensions of the litigation/negotiation combination and might be classified as intra-curial derivatives of the mini-trial.

The use of the term "mini-trial" is a misnomer because the process it describes has very little in common with judicial proceedings.⁵⁷ However, the use of the term "mini-trial" may be justified in one respect, notably because this process imitates the trial procedure as a means of communicating information that eventually forms the basis for a negotiated settlement. With this in mind, the phrases "information exchange"⁵⁸ and "structured negotiation"⁵⁹ have been used to describe the mini-trial. Yet, these phrases have made no impact probably because the descriptions they contain are far too general.

The phrase "information exchange" is a salient description of the mini-trial but is not sufficiently precise because this is a characteristic of many other alternative processes. So too, the phrase "structured negotiation" is a suitable description but unsatisfactory on technical grounds because mediation is *par excellence* a process of structured negotiation. This raises the interesting question of whether the mini-trial is an independent process or a derivative of the process of mediation. From the description of the mini-trial below, similarities with mediation will become evident and indeed, at times, mediation proper is one of the methods of maintaining the negotiations should the mini-trial reach an impasse. However, the matter is academic since the literature shows that

⁵⁷ See Edelman and Carr "The mini-trial: an ADR procedure" 9; Henry "Mini-trial: an alternative to litigation" 13; Henry and Lieberman **The Manager's Guide to Resolving Legal Disputes** 25; Mowatt "ADR: some points to ponder" 48; Rogers "Mini-trials - diverting the adversarial instinct" 28.

⁵⁸ Cheney "The mini-trial option" 161; Henry and Lieberman **The Manager's Guide to Resolving Legal Disputes** 25; Rogers "Mini-trials - diverting the adversarial instinct" 28.

⁵⁹ See Henry "Mini-trials: an alternative to litigation" 13; Rieker "ADR: quo vadis?" 33.

the mini-trial has been consciously devised as an amalgam of the elements of the process of litigation and negotiation. Moreover, the term "mini-trial" has become entrenched and in fact does figuratively explain the fundamental features of this process.

A first description of the mini-trial is that it is a business technique used as a managerial tool for the efficient determination of inter-corporate disputes.⁶⁰ By means of the mini-trial a legal problem is translated into a business problem mainly because pro-active control of the dispute is returned to the executive management of a corporation. The theory and principles underlying the mini-trial as well as its processual structure might best be explained by means of an example based on the first-ever mini-trial arising out of a prolonged dispute between Telecredit Inc and TWR.

The dispute between Telecredit and TWR arose out of a complex set of legal and technical facts. Telecredit was the owner of several patents that enabled retail stores to control the creditworthiness of its customers who presented credit cards for purchases. The company had licensed its patents to several manufacturers and its annual sales were in the vicinity of \$ 8 million. However, its patents had never been tested in litigation with the probable risk that if they were, its patents might be upset. Based on a number of indications that TWR had been infringing its patents, Telecredit commenced proceedings against TWR claiming damages in the sum of \$ 6 million and praying for an interdict to prohibit further infringement. TWR defended the action, alleging that Telecredit's patents were invalid. Both companies had a great deal at stake: if Telecredit succeeded in its claim, TWR would lose one of its major products and by the same token, if TWR's defence was upheld, Telecredit would lose one of its major assets. In any event, TWR contested the amount of the damages claimed by Telecredit, contending that this amount was disproportionate to the damages allegedly suffered.

Proceedings were commenced during the latter part of 1974 and, 30 months later, by 1977, some 100 000 documents had been exchanged, numerous interrogatories had been sent by Telecredit's lawyers to TWR and many of its employees had been deposed. TWR had also begun an inordinately active discovery programme aimed at

⁶⁰ See Fulton Commercial ADR 111.

proving that Telecredit's patents were invalid. In addition, emotions in both camps began to run high and each party's ability to trade normally was being severely hampered because of the uncertainty of the eventual outcome of the dispute. Telecredit proposed that the dispute be put to arbitration. TWR was not convinced that this would be the correct method of resolving the dispute because there was some uncertainty as to whether a patent dispute was legally arbitrable and was also concerned that an award would "split the difference" which would still result in an exceptionally high amount of damages being awarded against it. Under these circumstances, TWR's lawyers began to negotiate with Telecredit's patent licensing administrator in order to determine a procedure that would lead to settlement. After many months of preparation, a procedure which at the time was known as an "information exchange" was finally conducted within a space of two days, based on eight pages of agreed rules.

A vigorous discovery programme was conducted over a limited period of six weeks. Thereafter, the hearing commenced at a private venue. The tribunal consisted of a neutral advisor as well as the executive officer of the respective companies who both had an unrestricted mandate to settle. The parties were represented by their attorneys. Each party was permitted four hours to make presentations followed by a 90-minute reply by the opposite party and a period of 30 minutes for rebuttal. After each stage of the process, the neutral advisor gave a summary of where the case stood. Because the presentations were restricted to a total of 12 hours, each side was forced to present its "best case".⁶¹ With a clear understanding of the factual and legal difficulties faced on both sides, the company executive officers met privately and within 30 minutes had reached a working agreement that materialised as a formal agreement several months later.⁶²

⁶¹ The phrase "best case" is developing into a technical term that expresses the incisiveness and economy of the simulated trial presentations. See, further, Cheney "The mini-trial option" 165; Henry and Lieberman **The Manager's Guide to Resolving Legal Disputes** 30-32; Nolan-Haley ADR 192.

⁶² For a detailed description of the **Telecredit v TWR** case, see Henry and Lieberman **The Manager's Guide to Resolving Legal Disputes** 19-25. See also Cheney "The mini-trial option" 160; Green "Private resolution of civil disputes" 15. For descriptions of other mini-trial cases, see Cheney *ibid* 167-171; Henry "Mini-trials: an alternative to litigation" 14-15; Marks "Overview of ADR techniques" 287-291.

Although the account of the mini-trial between Telecredit and TWR is purely anecdotal, it does portray important elements of the process. In the first place, it illustrates that the mini-trial has a definite internal processual structure. Two general stages are identified: an information exchange and settlement negotiations.⁶³ The information exchange seems to predominate. The accent tends to be on the litigation component. Yet, in the final analysis, it is of subsidiary importance. The only purpose of the abbreviated trial process is to facilitate settlement negotiations on the basis of an information exchange of each disputant's interpretation of the facts in dispute and their arguments on legal issues. The settlement negotiations between the company executive officers are the climax of the mini-trial. Because of the information exchange, the company executive officers are fully informed, possibly for the first time, of the factual and legal issues, the strengths and weaknesses of each party's case, the moral legitimacy of an opponent's claims and ultimately, the basis for a potential settlement and its implications.⁶⁴

None of this occurs in a haphazard fashion. Underlying both stages is a structure that consists of definitive processual steps.⁶⁵ The process commences when the disputants mutually agree to resolve their dispute by means of a mini-trial. This underpins the voluntary nature of the process. In addition, rules of conduct are jointly devised by the disputants.⁶⁶ The disputants must also by mutual agreement appoint a neutral advisor and ensure the presence of the senior executives on both sides who must have the

⁶³ See clause 3 of the American Arbitration Association Mini-Trial Procedures contained in (1987) *The Arbitration Journal* 15-16, hereinafter referred to as the "AAA Mini-trial Procedures". See also Cheney "The mini-trial option" 161.

⁶⁴ See Fulton *Commercial ADR* 113; Green "Corporate ADR" 238; Henry "Mini-trials: an alternative to litigation" 14; Rogers "Mini-trials - diverting the adversarial instinct" 28.

⁶⁵ In order to maintain consistency in the description of the mini-trial process, the description that follows is based on the rules contained in the AAA Mini-Trial Procedures. For commentaries on the mini-trial process, see Antrobus and Sutherland "ADR in commercial disputes" 174-175; Astor and Chinkin *Dispute Resolution* 141-143; Cheney "The mini-trial option" 163-167; Fulton *Commercial ADR* 111-113; Green "Commercial ADR" 238-241; Henry and Lieberman *The Manager's Guide to Resolving Legal Disputes* 26-35; Nolan-Haley *ADR* 192-195.

⁶⁶ See AAA Mini-Trial Procedures cl 2. For a summary of the basic content of a mini-trial agreement, see Cheney "The mini-trial option" 162-163. See also Henry and Lieberman *The Manager's Guide to Resolving Legal Disputes* 130-134.

authority to settle.⁶⁷ The neutral advisor and the senior executives form the panel for the purposes of the mini-trial. The senior executives must be in attendance during both the information exchange and settlement negotiation stages.⁶⁸ During the information exchange, the neutral advisor must be in attendance to decide on questions of procedure and to advise the party representatives when requested to do so.⁶⁹ Prior to the information exchange, the disputants must deliver to each other written summaries of the issues relating to their respective cases along with copies of all documents that will be presented during the information exchange.⁷⁰ Discovery must also take place in the manner agreed upon by the disputants.⁷¹ Rules of evidence may be waived but the disputants may prior to the information exchange agree to a limited application of these rules that will be enforced by the neutral advisor.⁷² Legal counsel represents each disputant during the information exchange; the function of counsel is to prepare and present each disputant's "best case".⁷³ Once the information exchange has been concluded, the senior executive officers meet privately and in good faith, to voluntarily settle the dispute.⁷⁴ Should a settlement not be reached, the neutral advisor must then render an advisory opinion regarding the likely outcome of the dispute in a court of law; this opinion ought to identify issues of law and fact that would expeditiously dispose of the dispute and reasons for the opinion must be offered.⁷⁵ On the basis of the neutral advisor's opinion, the senior executive officers must meet for a second time in an attempt to settle the matter. If a settlement cannot be reached, the proceedings may be abandoned or written offers of settlement may be submitted to the neutral advisor who in

⁶⁷ See AAA Mini-Trial Procedures clis 5 and 7.

⁶⁸ See AAA Mini-Trial Procedures cl 7.

⁶⁹ See AAA Mini-Trial Procedures cl 6.

⁷⁰ See AAA Mini-Trial Procedures cl 9.

⁷¹ See AAA Mini-Trial Procedures cl 8.

⁷² See AAA Mini-Trial Procedures cl 10.

⁷³ See AAA Mini-Trial Procedures cl 4. See also note 61 above for the term "best case".

⁷⁴ See AAA Mini-Trial Procedures cl 11.

⁷⁵ See AAA Mini-Trial Procedures cl 12.

turn will make recommendations for settlement in terms of these offers.⁷⁶ In this latter respect, the neutral advisor will be cast into a mediational role. The mini-trial will be terminated should the neutral advisor's recommendations be rejected.⁷⁷ The mini-trial proceedings are confidential and no written document or oral statement used during any part of the process may be used in evidence at any subsequent proceedings.⁷⁸ The neutral advisor's fee and expenses must be paid by both disputants and each disputant will bear his own costs, including legal fees, incurred in connection with the mini-trial.⁷⁹

The description of the process for the mini-trial confirms what has been already stated: the mini-trial reduces the complexity of legal issues into a managerial problem. During the information exchange, trial skills are employed as a business technique to determine with clinical precision the issues in dispute. This is not an end in itself. In the final instance, during the settlement negotiation stage, the senior executive officers interpret the information so exchanged in the light of the related legal implications, but more importantly, according to managerial objectives as defined by corporate policy. Although inextricably interconnected, the point of focus is not so much on the simulation of the litigation process but rather on the negotiation of a settlement. The object of the mini-trial is therefore problem solving through negotiation and not, as in the case of the trial process, competitive persuasion to ensure a winning position out of a binary adjudicative outcome.

From the perspective of the business sector, the mini-trial has a number of advantages. As an extra-curial alternative, the mini-trial has sufficient flexibility to be adapted to the particular circumstances of a dispute. As process, it is also cost effective because it overcomes the tardiness of the trial process yet is capable of attaining a pragmatic decision in a private and confidential setting.⁸⁰ These advantages are subject to one

⁷⁶ See AAA Mini-Trial Procedures cl 13.

⁷⁷ *Idem.*

⁷⁸ See AAA Mini-Trial Procedures cl 14.

⁷⁹ See AAA Mini-Trial Procedures cl 15.

⁸⁰ For commentaries dealing with the advantages of the mini-trial, see for instance Cheney "The mini-trial option". 171-174; Fulton **Commercial ADR** 115-116;

major disadvantage which is that the disclosure of a disputant's "best case" could give the other disputant a tactical advantage in subsequent proceedings, should the mini-trial fail. This problem is not particular to the mini-trial, but is a weakness of all alternative extra-curial processes.⁸¹

The mini-trial is certainly a unique hybrid process. It is comparable to arbitration, especially in its expedited form, in regard to its expediency and processual swiftness.⁸² But the comparison goes no further. Unlike arbitration, the mini-trial is not bound by the same procedural formalities nor is there the prospect of a binding adjudicative decision. Neither is it subject to any legislative regulation. On the other hand, the mini-trial also has the attributes of the process of mediation.⁸³ Both are consensual processes. The functions of the neutral advisor can be associated with those of a mediator. Moreover, like mediation, the mini-trial is essentially another form of structured negotiation. However, on technical grounds, the mini-trial is quite different to the process of mediation. The processual structure of the mini-trial distinguishes it from the process of mediation. The outcome of the mini-trial is the product of independent decision making that is achieved without the intermediary intervention of a neutral third party, unless this is expressly requested in extreme cases where the parties reach a deadlock. Moreover, the capacity of the neutral advisor to intervene is restricted. In brief, the neutral advisor controls the conduct of the process of the mini-trial but not the process itself as it is devised and prescribed in advance by the mutual agreement of the parties. By comparison to mediation, the mini-trial is a highly structured form of negotiation that functions on the basis of pre-prepared rules of conduct that are external to the process itself.

Henry and Lieberman *The Manager's Guide to Resolving Legal Disputes* 36-47.

⁸¹ Antrobus and Sutherland "ADR in commercial disputes" 175; Fulton *Commercial ADR* 116; Henry "Mini-trials: an alternative to litigation" 17.

⁸² See Fulton *Commercial ADR* 117.

⁸³ Cf Astor and Chinkin *Dispute Resolution* 79.

The mini-trial is therefore not a derivative of the processes of either arbitration or mediation. It has the standing of an independent process: it contains an internal structure which, though externally flexible, is processually consistent; its conduct is dependent on predetermined rules and it is capable of achieving a non-binding outcome that is pragmatic and expedient. The independence of the mini-trial is also confirmed by the fact that it is the model for other litigation/negotiation hybrids, namely, the summary jury trial and early neutral evaluation.

The summary jury trial and early neutral evaluation also follow the broad processual structure of the mini-trial in that both consist of an information exchange stage and a settlement negotiation stage. Apart from structural similarities, the summary jury trial and early neutral evaluation are applied in a context that is totally different to that of the mini-trial. The summary jury trial and early neutral evaluation are both intra-curial alternatives that have been designed to settle pending litigation under the auspices of the courts and within the ambit of court administration. The distinction between each of these methods of settlement relates to the timing of their application at the various stages of the process of litigation. Early neutral evaluation is introduced during the initial stages of the process of litigation, even as soon as the pleading stage;⁸⁴ as its name indicates, the summary jury trial relates to the stage when a case is ready for trial and for its presentation to a jury.⁸⁵ The summary jury trial and early neutral evaluation are therefore litigation techniques whereas the mini-trial is essentially a business technique that addresses a managerial problem.

The object of the summary jury trial is to encourage a settlement of pending litigation by forecasting the verdict of a civil jury.⁸⁶ The decision to adopt the summary jury trial is normally taken at the final pre-trial conference.⁸⁷ The empanelment of advisory jurors

⁸⁴ Brazil et al "Early neutral evaluation" 279.

⁸⁵ Lambros "The summary jury trial - an alternative method" 287.

⁸⁶ Lambros "The summary jury trial - an alternative method" 290; Lambros and Shunk "The summary jury trial" 45.

⁸⁷ Lambros "The summary jury trial - an alternative method" 287.

signifies the commencement of the summary jury trial.⁸⁸ The format of a summary jury trial is minutely detailed by Judge Lambros,⁸⁹ who is credited as being the person who originally invented this process.⁹⁰ The process proper commences when the parties on both sides who have the authority to settle, meet in the appointed court presided over by a judge in the presence of a jury. Normally the judge who will try the case conducts the summary jury trial and, if not able to do so, may delegate this function to a magistrate. The presiding judge briefly explains the process and then introduces the jury. It is recommended that at this stage the parties should present a brief two to three minute overview of their cases in order to give the jury a clearer understanding of the presentations that follow. Thereafter, counsel for each party is allowed one hour to make formal presentations which normally consists of a 45-minute period for the adduction of evidence in chief and 15 minutes for cross-examination and re-examination. The jury is then excused to deliberate the matter. During its absence, the court engages the parties in settlement negotiations. Once the jury returns, it gives either a unanimous verdict or individual verdicts which in both instances are advisory. The judge and counsel then engage in a dialogue with the jurors regarding their perspectives on the merits of the case and the quality of the presentations, thereby affording the lawyers involved an insight into the strengths and weaknesses of their respective client's cases.⁹¹ The summary jury trial therefore facilitates an appraisal by counsel of the approach a jury would take in the actual trial and on this basis normally instigates a settlement, if not at the time of the summary jury trial, then normally within a few weeks thereafter.⁹²

⁸⁸ Lambros "The summary jury trial - an alternative method" 288; Lambros and Shunk "The summary jury trial" 47-48.

⁸⁹ "The summary jury trial - an alternative method" 288-290.

⁹⁰ Lambros and Shunk "The summary jury trial" 43.

⁹¹ For other descriptions of the conduct of the summary jury trial, see Lambros and Shunk "The summary jury trial" 46-53; Astor and Chinkin **Dispute Resolution** 171-172; Banks "ADR: a return to basics" 574-575; Singer **Settling Disputes** 67; Solove "Alternative means to resolve corporate disputes" 138.

⁹² See Lambros "The summary jury trial - an alternative method" 290. See also Lambros and Shunk "The summary jury trial" 53-54 for a critical evaluation of the summary jury trial.

The summary jury trial is a non-binding court-mandated procedure that applies specifically within the United States because of its adherence to the jury system.⁹³ This settlement process is therefore of little practical value within other Anglo-American jurisdictions that do not any longer rely on a jury in civil cases. However, in theoretical terms, the summary jury trial illustrates the manner in which an intra-curial hybrid has been devised through a combination of the elements of litigation and negotiation. What is surprising is that a summary jury bench has not been devised as a genus of the summary jury trial in those Anglo-American countries which do not provide for a civil jury trial.

Early neutral evaluation is a further refinement of the summary jury trial. It is the most recently developed intra-curial process and therefore does not have wide-spread application. Originally, early neutral evaluation was developed as a pilot project of the district court for the Northern District of California and was eventually adopted as an intra-curial process.⁹⁴ Once more, it is based on the negotiation/litigation combination.

However, the purpose of early neutral evaluation differs significantly from that of the summary jury trial. As an intra-curial process, its purpose is to settle pending litigation during its early stages. Early neutral evaluation is therefore not directed at the trial stage but at producing a settlement during the formative stage of litigation when proper communication between the parties would be most beneficial in order to prevent a hardening of positions which normally takes place during this early stage of the process of litigation.⁹⁵

Like the summary jury trial, early neutral evaluation is court-imposed process and both share the same processual structure. Under its inherent discretion to appoint a master, the court appoints a highly respected and experienced lawyer as a neutral person to

⁹³ For Australian perspectives on the summary jury trial, see Astor and Chinkin **Dispute Resolution** 171-172; De Garis "Judicial alternative dispute resolution" 51-66.

⁹⁴ See Levine "Northern district of California adopts ENE" 235-238. See also Levine "Early neutral evaluation" 236-240; Brazil et al "Early neutral evaluation" 279.

⁹⁵ Brazil et al "Early neutral evaluation" 279.

conduct the process. The process itself consists of a confidential two hour case evaluation which, beforehand, is preceded by written exchanges of information statements that state the parties' positions. The parties are represented by counsel and must themselves attend. Counsel for each party gives a presentation of the evidence on the facts and related legal arguments, without interruption. Thereafter, the evaluator gives a non-binding opinion that provides the basis for further negotiation. In so doing the evaluator may seek further information, explore the weaknesses of each party's case and assist the parties in reducing the issues in dispute. As a result, the parties obtain a clear idea of their settlement options. If a settlement is not reached, the evaluator gives a non-binding opinion regarding her assessment of the liability of the parties as well as the range of liability for damages, thus providing the groundwork for a negotiated settlement in the future.⁹⁶

Early neutral evaluation has a number of advantages as a pre-trial settlement process. Firstly, it forces the lawyers involved into a realistic analysis of the case during the early stages of litigation.⁹⁷ The process also opens communication between the parties and enables the one party to hear the other party's versions of the case.⁹⁸ Through the intervention of the evaluator, the essential and non-essential elements of the dispute are determined with some precision.⁹⁹ The process also provides a reality check for both parties that opens the way for a negotiated settlement.¹⁰⁰ The chances for a settlement are enhanced by the fact that, because of their compulsory attendance, the parties are educated about the merits of their respective cases, the options at their disposal which considered cumulatively, especially in the case of an obstinate client, may dissuade them from taking a fixed and uncompromising position.¹⁰¹

⁹⁶ For a detailed description of the structure and process of early neutral evaluation, see Brazil et al "Early neutral evaluation" 280-282 283-285.

⁹⁷ Ibid 274 283.

⁹⁸ Ibid 283.

⁹⁹ Ibid 283.

¹⁰⁰ Ibid 280 282 283.

¹⁰¹ Ibid 283.

Far too little is known about early neutral evaluation at this stage in order to make any critical assessment. However, what is encouraging is that it emphasises the flexibility of the negotiation/litigation combination as a means of effecting extra-curial and intra-curial methods of settling litigation.

8.3.3 The mediation/arbitration combination

In theory, the combination of the processes of mediation and arbitration amounts to a contradiction in terms. Although they share the same basic principles of third-party intervention, each is diametrically different in its structure: mediation is a consensual process¹⁰² whereas arbitration is an adjudicative process.¹⁰³ The distinction lies in the method of dispute resolution. Mediation relies on inter-party negotiations facilitated by a neutral third party to produce an outcome based on the mutual agreement of the disputants. Being an adjudicative process, arbitration applies a totally different method of dispute resolution. Essentially the process of arbitration uses interpretative methods to determine the issues in dispute that are resolved by means of a binding decision. Although both processes in theory occupy distinct positions on the dispute continuum, the demands of practice have resulted in the unlikely mix of mediation and arbitration to produce a process known by its abbreviated name as med/arb.

In terms of its process, med/arb consists of two distinct stages. As its name suggests, med/arb commences with mediation and, if agreement is not reached, the mediation stage is converted into an arbitration stage.¹⁰⁴ On the face of it, the distinction between these processual stages seems artificial for in any event, if the mediation fails, the next logical step on the dispute continuum would be to resort to arbitration. With this in mind, the only explanation of the processual integrity of med/arb is the expressed intention of the disputants that mediation and arbitration should follow as sequential and inseparable

¹⁰² See further 6.2.2 above.

¹⁰³ See further 7.2.3 above.

¹⁰⁴ See Albertyn "Specialized arbitration and mediation" 120; Astor and Chinkin **Dispute Resolution** 145; Bevan ADR 9.

stages as part of a single and independent process. This intention alone characterises med/arb as being a process distinct from standard mediation and arbitration.

The combination of mediation and arbitration into a single process inevitably affects the quality of both processes. When the disputants enter into the mediation stage of the process of med/arb, they do so on the unconditional understanding that should the mediation fail, control of the dispute will be vested in the hands of a third party who is authorised to give a final and binding decision in favour of only one of the disputants. The disputants therefore commence the mediation stage of med/arb under threat that they will lose consensual control of the dispute if the mediation should reach deadlock. In this context, the disputants pressurise each other to reach mutual agreement as an alternative to an adjudicative decision that will definitely follow if their differences are not settled.¹⁰⁵ Moreover, the possibility that the mediation stage might be followed by the arbitration stage, forces the disputants to thoroughly prepare for the mediation. In addition, the mediation stage leads both disputants to a better understanding of the strengths and weaknesses of their respective cases for the purposes of the arbitration that might follow.¹⁰⁶ This in itself is an incentive to settle the dispute during the mediation phase.

Med/arb also influences the quality of the process of arbitration. Usually the same person fulfils the dual function of mediator-arbitrator.¹⁰⁷ Apart from the fact that this requires special skills, the disclosure of confidential information made during the mediation stage (especially during a private caucus) could influence the mediator-arbitrator's decision when acting in an arbitral capacity.¹⁰⁸ Although the arbitral award might be notionally fair, there is no guarantee that the confidential information acquired

¹⁰⁵ See Albertyn "Specialized arbitration and mediation" 121.

¹⁰⁶ Ibid 121.

¹⁰⁷ See Astor and Chinkin **Dispute Resolution** 145; Nolan-Haley ADR 200.

¹⁰⁸ Albertyn "Specialized arbitration and mediation" 121; Astor and Chinkin **Dispute Resolution** 145; Bevan ADR 9.

during the mediation stage has not influenced that decision.¹⁰⁹ This is a particularly important criticism of the arbitration component of the med/arb process.

An arbitrator is required to act in a judicial capacity. This entails a positive obligation to apply the natural rules of justice which could be compromised because of the arbitrator's direct participation during the mediation stage.¹¹⁰ In order to overcome this problem, it is possible to limit the mediational role or to exclude the arbitral function by appointing a different person as the arbitrator. This is not an entirely satisfactory arrangement because the limited mediational function could seriously affect the outcome of the mediation. Similarly, the arbitration stage could be influenced by the fact that a different arbitrator would have to be apprised anew of the relevant issues of the dispute by comparison to the mediator-arbitrator who would already be well informed in this respect.¹¹¹ Other methods of dealing with the judicial integrity of the arbitration stage are possible. One option is that an advisory opinion be given by the arbitrator if the mediation fails.¹¹² Another possibility is that of tripartite arbitration whereby a neutral arbitrator acts in conjunction with an arbitrator appointed by each of the disputants.¹¹³ Once again, these options are not immune from criticism. An advisory opinion is a very weak substitute for an arbitral award¹¹⁴ and tripartite arbitration is a distortion of both the processes of mediation and arbitration.¹¹⁵

¹⁰⁹ Albertyn "Specialized arbitration and mediation" 121; Astor and Chinkin **Dispute Resolution** 146; Nolan-Haley ADR 201.

¹¹⁰ Albertyn "Specialized arbitration and mediation" 121; Astor and Chinkin **Dispute Resolution** 146-145.

¹¹¹ See Astor and Chinkin **Dispute Resolution** 146 who raise this important point and deal with it in some detail.

¹¹² Bevan ADR 9-10; Goldberg "Mediation: alternative to arbitration" 281; Nolan-Haley ADR 201.

¹¹³ Bevan ADR 9; Fuller "Collective bargaining and the arbitrator" Fifteenth Annual Meeting, National Academy of Arbitrators (1962) cited in Goldberg Green and Sander **Dispute Resolution** 252.

¹¹⁴ See Bevan ADR 9-10.

¹¹⁵ See Bevan ADR 9; Fuller "Collective bargaining and the arbitrator" Fifteenth Annual Meeting, National Academy of Arbitrators cited in Goldberg, Green and Sander **Dispute Resolution** 253-254.

One other solution is to apply the process of arb/med which is only noted in the South African literature dealing with ADR.¹¹⁶ As its name implies, arb/med is the counterpart to med/arb. The ostensible difference between the two is that the processual stages are reversed. Arb/med commences with the arbitration stage which is directly followed by the mediation stage and only if the mediation fails, is the arbitral award given. A major disadvantage of arb/med is that the disputants must first enter into technical and often protracted arbitration proceedings before the mediation stage commences. Be that as it may, the advantage of arb/med is that it ensures the judicial integrity of the arbitration phase since the opportunity for the arbitrator-mediator being a party to the disclosure of confidential information is totally excluded. Although arb/med gives prominence to the rules of natural justice during the arbitration stage, the obversion of the processual stages changes the nature of the process. Arb/med therefore does not directly address the problem of the judicial integrity of the arbitration stage of med/arb because a totally new process is introduced to deal with the problem.

The objections relating to the judicial integrity of the arbitration stage of the med/arb process, are somewhat strained. These objections reflect the stringent processual morality of Western systems of procedure that are preoccupied with standards for neutrality and impartiality which in other cultures would be regarded as being rather artificial.¹¹⁷ Certainly, traditional African processes move from mediational to arbitral processes, and vice versa, with alacrity. In any event, the disputants enter into the process of med/arb with knowledge of the risks and disadvantages involved.¹¹⁸ The possibility that the rules of natural justice might be compromised is one of the risks that ought to be calculated. By the same token, one of the factors in favour of med/arb that might outweigh the related risks is that the mediator-arbitrator could gain the confidence of both disputants and this could lead to a satisfactory outcome in either the mediation or even the arbitration stages.¹¹⁹

¹¹⁶ For a detailed description of arb/med, see Albertyn "Specialized arbitration and mediation" 118-120.

¹¹⁷ See Astor and Chinkin **Dispute Resolution** 146.

¹¹⁸ See Albertyn "Specialized arbitration and mediation" 121.

¹¹⁹ See Astor and Chinkin **Dispute Resolution** 146.

There is the temptation to describe med/arb as a hybrid process consisting of a mix between mediational negotiation and interpretative adjudication. However, this description would not be accurate. In the final analysis, med/arb does not consist of an inextricable commingling of the primary elements of mediation and negotiation. Essentially, each process retains its own independent method of dispute resolution. Yet, this does not discount the fact that med/arb can still be classified as a hybrid process. What differentiates med/arb from the other hybrid processes described above is that it does not consist of a mixture of the elements of its constituent processes. Instead, med/arb consists of a unique blend of the functional roles of the mediator and arbitrator. The result alters the dynamic of both standard mediation and arbitration to form a totally new process with its own substantive norms and processual goals. Essentially, med/arb is a hybrid process based on the interplay between the functions of the neutral third parties involved in the primary processes of mediation and arbitration.

8.4 The processual quality of the hybrid processes

Conspicuous by its absence is any reference to neutral fact finding and expert appraisal. This omission contradicts other classifications that include these ADR mechanisms as hybrid processes.¹²⁰ However, in this work, neutral fact finding and expert appraisal have been disregarded as hybrid processes on the grounds that neither of the two meet the required standards in this respect.

Reduced to the most basic terms, neutral fact finding consists of the appointment of a neutral fact finder who is given the mandate to investigate and render an objective report in regard to a specific situation which relates in whole or in part to a particular dispute.¹²¹ Expert appraisal is similar to neutral fact finding in all respects save one which is that the

¹²⁰ For instance, see the table contained in Goldberg, Sander and Rogers **Dispute Resolution** 5 attached to the end of this chapter and marked annexure A for the purposes of identification.

¹²¹ See Bevan **ADR 17**; **BNA Report 17**; Goldberg, Sander and Rogers **Dispute Resolution** 283.

appointed expert renders an advisory opinion in regard to the subject matter of the investigation.¹²²

In the first place, it is difficult to detect which elements of the primary processes have been combined to construct these two ADR mechanisms. A likely mix is between the elements of arbitration and negotiation. The reasoning is that the fact finder's report or the expert appraiser's opinion act as a catalyst for a negotiated settlement. This construction is rejected. Although both neutral fact finding and expert appraisal seem closely related to the arbitration, neither of these two mechanisms reflect the binding and binary decisional qualities of the process of arbitration. It is therefore extremely artificial to presume the presence of the elements of arbitration. Moreover, the fact that the disputants inevitably attempt a negotiated settlement of the dispute once a fact finder's report or an appraiser's opinion has been received, does not establish that the related ADR mechanisms contain elements of the process of negotiation. Quite simply, neutral fact finding and expert appraisal are not hybrid process but rather independent ADR mechanisms, and no more than that.

To take the matter further, neutral fact finding and expert appraisal even fall short of the standards required to be established as forms of process. In brief, these mechanisms have no independent processual structure that ultimately produces an outcome that definitively resolves a dispute. If any process is involved at all it is minimal and only of an elementary nature. The only processual requirements for both processes is that both disputants should voluntarily agree to either neutral fact finding or expert appraisal as methods of determining the factual issues in dispute and that the conduct of the neutrals so appointed should meet with the requirements of impartiality. Furthermore, the fact-finder's report or the expert appraiser's opinion is inconclusive in the sense that it in no manner resolves a dispute but rather pre-empts it. A further step is necessary to effect the resolution of the dispute. Normally resort is made to the process of negotiation or if not, then to any other independent dispute resolution process. In this context, neutral

¹²²

See Astor and Chinkin *Dispute Resolution* 113-115; Singer *Settling Disputes* 68-72. It is possible that the disputants might agree that the expert appraiser's opinion will be binding rather than non-binding. In such an instance, expert appraisal may be regarded as a derivative of the process of arbitration.

fact finding and expert appraisal are adjuncts to other independent dispute resolution processes. Neutral fact finding and expert appraisal must therefore be classified as subsidiary ADR mechanisms that do not have any of the qualities of a hybrid process.

This critical evaluation of neutral fact finding and expert appraisal is functional in that it indicates the standards that should be applied to determine the processual authenticity of a hybrid process. The processual requirements for a hybrid process may accordingly be enumerated as follows, namely, that a hybrid process -

- (a) must consist of a combination either of the elements or functional roles of the neutral third parties of two or more independent informal or formal processes;
- (b) must have an identifiable and autonomous processual structure; and
- (c) should be capable of independently resolving a dispute.

The absence of any one of these requirements disqualifies a purported process as being classified as a genuine hybrid process and relegates it to the status of an ADR mechanism.

Although the hybrid processes cannot be equated with the primary processes in regard to their processual consistency, evaluated as a whole, they do share certain common characteristics. These characteristics simultaneously describe the intrinsic nature of the hybrid processes. In summary, the hybrid processes -

- (a) privatise the settlement of a dispute, notwithstanding the fact that certain processes are mandatory under the rules of court;
- (b) convert adversarial dispute processing into co-operative terms that rely on the goodwill of the parties to effectively resolve the dispute;
- (c) transform the legal technical terms of a dispute into a problem-solving process that in certain instances may even be dealt with at the managerial level;
- (d) directly involve the disputants in the management and resolution of the dispute, thereby divesting legal representatives of absolute control;

- (e) operate on the basis of third-party intervention, often even permitting the disputants control over the selection of the neutral third party
- (f) are expressly designed to produce a cost-effective and efficient resolution of dispute with the minimum delay.¹²³

What is evident is that these characteristics display a highly instrumentalist approach to disputing and dispute resolution. This in itself epitomises the rationale underlying the creation of hybrid processes.

Apart from these common characteristics, the hybrid processes range from being extra-curial to intra-curial processes, from being purely private to public processes and from producing non-binding to binding outcomes. Yet, in this diversity, the hybrid processes pose efficient and authentic alternatives to the conventional processes of the courts and in so doing seriously threaten their jurisdiction to be seized of all causes. As the existing hybrid process develop in their processual consistency and as other hybrid processes are designed in the interim, it is possible to speculate that these processes have the potential of becoming so firmly established in the future that, in conjunction with the primary processes, it is highly likely that a dual system of dispute resolution could be established.

¹²³

See also Green "Corporate ADR" 233.

“Hybrid” Dispute Resolution Processes

<i>Characteristics</i>	<i>Private Judging</i>	<i>Neutral Expert Fact-Finding</i>	<i>MiniTrial</i>	<i>Ombudsman</i>	<i>Summary Jury Trial</i>
Voluntary/ Involuntary	Voluntary	Voluntary or involuntary under FRE 706	Voluntary	Voluntary	Voluntary or involuntary; see p. 271
Binding/ Nonbinding	Binding, subject to appeal	Nonbinding but results may be admissible	If agreement, enforceable as contract	Nonbinding	Nonbinding
Third party	Party-selected third-party decisionmaker, may have to be former judge or lawyer	Third-party neutral with specialized subject matter expertise; may be selected by the parties or the court	Party-selected neutral advisor, sometimes with specialized subject expertise	Third-party selected by institution	Mock jury impaneled by court
Degree of formality	Statutory procedure but highly flexible as to timing, place and procedures	Informal	Less formal than adjudication; procedural rules may be set by parties	Informal	Procedural rules fixed; less formal than adjudication
Nature of proceeding	Opportunity for each party to present proofs and arguments	Investigatory	Opportunity and responsibility to present summary proofs and arguments	Investigatory	Opportunity for each side to present summary proofs and arguments
Outcome	Principled decision, sometimes supported by findings of fact and conclusions of law	Report or testimony	Mutually acceptable agreement sought	Report	Advisory verdict
Private/ Public	Private, unless judicial enforcement sought	Private, unless disclosed in court	Private	Private	Usually public; but see p. 285

CHAPTER 9

PROCESSUAL PLURALISM

9.1 The quest for processual humanism

9.2 Propositions and principles

9.3 ADR theory: prognosis

9.1 The quest for processual humanism

This thesis has been a learning experience. Many of my preconceived ideas about process and procedure have been set aside. Having taught Civil Procedure for the better part of my working life, it was quite normal for me blindly to accept the technicality and formality of procedure as being essential for upholding the fundamental procedural guarantees of litigants. Tactics, strategy and adversarial posturing were part of a "power game" to advance the partisan interests of a client. The object of the game was to win and that meant obtaining a favourable judgment. Of course, human beings were involved - judges, registrars, advocates, attorneys, articled clerks and even the litigants. They were all part of the system - part of the theory of procedure.

The rules of court comprised the script and the actors, practitioners and litigants alike, had to conform to it - an austere drama, based on conflict and controversy, yet devoid of any sensitivity to the needs and emotions of the protagonists. Indeed, a dull drama, for the script always predicted the outcome of a procedural battle in which one of the litigants lost and both were normally bankrupted by the costs. There is always a catharsis but a traumatic one for the litigants. As they leave the stage, each knows that his or her personal needs and interests have not been conciliated. This began to prick my conscience a little for it became evident that "the play" is *not* "the thing". Process and procedure ought not to be regarded as being ultimate at the expense of the needs,

wants and interests of litigants for to do so brands the system as being basically anti-social. Of course this could be rationalised - civil procedure is a unitary system of procedure that has multiple functions within the institutionalised and authoritarian structure of the court system. Courts are therefore the first and only arbiters of disputes and civil procedure the only system for conducting a claim through its various stages.

The anti-social nature of civil procedure began to disturb me. Surely the interests of litigants should supersede institutional objectives? I began to investigate this. One avenue was the history of Civil Procedure. There was some hope because the history of procedure shows a definite trend away from procedural rigidity and formality to greater procedural flexibility. However, history only explains but does not resolve contemporary problems. The next stage of enquiry began with a study of procedural reform. One enticing notion was that reform can be brought about by increasing judicial resources. Again, there was a stumbling block - the state of the fiscus does not permit such idealism. Procedural change can also be effected by the internal reform of the system. This is in accord with the historical imperative for greater procedural flexibility but this alone does not introduce a more humanistic ethos. There is also the possibility of reforming the system of procedure by manipulating jurisdictional limits or by the statutory exclusion of specified claims from the court system, as in the case of labour disputes that are regulated under the provisions of the Labour Relations Act of 1956 or the Compensation for Occupational Injuries and Diseases Act of 1993 that regulates compensation to workmen. Ironically, while examining the notion of diverting disputes from the court system, by chance I came across an obscure and rather insignificant work on ADR.

It took some time to digest the information. Slowly the realisation dawned on me that litigation is essentially a method of dispute resolution and that it is not the only method but one of many methods of dispute resolution. This insight was seminal. ADR cut across formal and institutional lines. It presented an obvious challenge to civil procedure and an unorthodox option for its reform. My first impulse was to reject ADR outright. Conventional legal training is suspicious of deformed and decentralised methods of dispute resolution that deviate from the authoritarian norms and values of civil procedural law. Eventually, my curiosity as well as a nascent understanding that ADR

processes offer a humanistic alternative to public processes, prevailed. I decided to study ADR sceptically, with the single purpose of determining whether it is an authentic system of dispute resolution that is based on cogent principles with a structure of theory. The present thesis is the product of that decision.

The conclusions reached in this thesis have cured my scepticism. ADR is an authentic system of dispute resolution that relies on a body of principles which are linked to a theoretical frame of reference. However, this should not be taken to mean that ADR is to be regarded as an independent or mature science and that it is a panacea for all the ills of civil procedure. As a system of dispute resolution, ADR can presently offer some solutions that could mitigate the rigours of adversarial litigation. What is important though is that ADR does have the potential for effecting systemic change to the system of civil procedure in the future provided that its theory and principles, which are presently rudimentary, are developed systematically into an independent science.

However, if ADR is to develop into an independent science at all, an attitudinal change is necessary; ADR will only be understood as an independent system of dispute resolution if a drastic change of the legal mindset occurs. Essentially, the shift is one from a notion of a unitary system of procedure to a concept of a pluralistic system of process. Conventional assumptions concerning processual cohesiveness, unity of function and the certainty of a sanctioned outcome do not exist in regard to ADR. The theory and principles of ADR point to contrary premises.

In its conclusions, this thesis rejects the premises of a unitary system of procedure as a basis for explaining the theory and principles of ADR. Instead, the notion is advanced that the system of ADR is founded on a theory of processual pluralism. The system of ADR comprises multiple informal processes. Traditional processes such as negotiation, mediation and arbitration are the primary ADR processes that have generated the more exotic and modern processes of expedited arbitration, documentary arbitration, final-offer arbitration, mediation/arbitration, rent-a-judge, the mini-trial and many other processes that are either developing or in the making. Each process is distinct and separate, having its own unique form, function and method of transforming a dispute. Outwardly, this represents a diverse collection of disjunctive processes. Yet an introspective

analysis shows that there is an innate centrality that originates in core principles that bind individual processes to each other and to a unified body of theory. These foundational principles of ADR are replicated in each of its processes. The basic concept is therefore that of autonomous and individual systems of process that conform to a central body of theory and principle.

9.2 Propositions and principles

There is an unfortunate trend that is evident in much of the ADR literature. Many commentators tend to reduce the primary principles of ADR into instrumentalist considerations. In other words, ADR principles are used as rational guideposts for comparing the efficacy of various processes or for weighing up the advantages of using an ADR process instead of the process of litigation. The literature is replete with descriptions of the attributes of various ADR process. Some keywords or phrases are: consensual, mutual agreement, flexibility, privacy and confidentiality, disputant participation, control of the outcome, fairness of the outcome. Very rarely is the understanding shown that these purported attributes in reality constitute fundamental ADR principles.

This situation arises because the same instrumentalist approach that is applied in regard to the process of litigation is transposed onto the system of ADR. At the root of the problem is the failure to recognise that the process of litigation and ADR processes are derived from two distinctly different systems of process. Although in practice ADR processes can and do compliment the process of litigation, in theory ADR is a true alternative to the public system of dispute resolution: ADR is a pluralistic processual system whereas the public system of dispute resolution is based on a unitary system of procedure. An inevitable dialectic is involved and until it is perceived, an instrumentalist approach to ADR will predominate. Throughout this thesis there are moves and shifts in meaning that accentuate this dialectic. Out of this dialectic certain propositions arise from which the primary ADR principles are extracted.

Proposition 1: ADR places emphasis on process, not on rules.

Public process is authoritarian and institutionalised and is therefore rule directed. Rules external to the process itself prescribe in the minutest detail the manner in which procedures are to be conducted and furthermore sanction participation in the process. Public processes therefore have no independent existence apart from the rules that sustain them.

No externally sanctioned rules are imposed on ADR processes. These processes are subject to their own rules - rules that are generated internally within the nature of a process itself.¹ Because ADR processes are not bound by externally imposed rules, they are therefore consensual in their nature and flexible in their application.

The consensual nature of ADR processes is expressed through the principles of disputant consensus, disputant autonomy and processual flexibility. ADR processes therefore operate on the basis of the mutual consent of the disputants, permit the disputants to participate in the management and control of both the conduct of a process and its outcome. Furthermore, the absence of externally imposed rules enables the disputants functionally to select or craft a process that suits their needs in relation to the nature of the dispute involved. Within this consensual context, ADR processes promote humanistic norms and values in contrast to public processes that serve a body of abstract rules.

¹

For example, the process of negotiation progresses through a number of definitive stages that create a processual framework within which the disputants bilaterally conduct the process on the basis of selected strategies. In the case of mediation, negotiations are conducted through the intermediary intervention of a mediator who, with the agreement of the disputants, sets and applies processual standards, while leaving the content and outcome of the dispute in the disputant's control. Rules are applied to the process of arbitration but these rules are not imposed externally for they can be traced to the consensual basis of the law of contract or to regulatory statutory provisions.

Proposition 2: **ADR concentrates on a dispute and not on a claim.**

Intrinsic to its very nature, litigation cannot process a dispute. Every dispute must be formulated as a claim before it becomes eligible for public dispute processing. Moreover, the process of litigation is incapable of determining the validity of claim unless it has been reduced by means of a system of pleading into single issues in controversy which are then tested at a trial.

Unfettered by formality and rules, ADR processes are able to absorb a dispute in its original form and process it according to the norms and values of the context within which it arose. ADR processes are capable of adapting themselves to the context of a dispute whereas public legal processes transform a dispute within the context of the legal system according to which the dispute must conform.

ADR processes are therefore based on principles of dispute transformation and dispute processing that respect the integrity of a dispute as well as its context and culture. The context of the dispute and the culture of the disputants remain paramount and not the process itself. In the final analysis, ADR applies the principles of dispute transformation and dispute processing in such a manner that the dispute is not converted into a processual abstraction; instead, it deals with a dispute on the basis of humanistic values.

Proposition 3: **ADR relies on privatised decision making rather than on public adjudicative settlement.**

Courts do not solve problems. Should this happen, then problem solving is incidental to the judgment of a court that by precedent binds third parties. An ADR outcome has no such public effect. Instead, it is a private arrangement enforceable under the consensual principles of the law of contract.

ADR privatises decision making in order to give effect to the mutual agreement of the disputants even if, as in the case of arbitration, it is by their consent that they agree to be bound by a third party's decision. An outcome based on the mutual agreement of the

disputants is advanced as being more durable than a court's decision because, paradoxically, it lacks the element of coercion of a settlement dictated by a court. Mutual agreement is the foundation for reconciliation and the basis for a humane outcome that is devoid of direct sanction or the threat of executory procedures. The principle of privatised decision making, as idealistic as it might seem, personalises process since by means of joint problem solving, the disputants share responsibility for the substance of their dispute and the outcome of their mutual decisions.

Proposition 4: **ADR promotes functional processual goals and not institutional objectives.**

Courts are primarily concerned with the enforcement of substantive legal rights that are interpreted in the light of public policy, *boni mores*, and for the good of society as a whole. The adjudicative and deliberative functions of the courts, as instruments of the judicial arm of government, therefore give effect to institutionalised objectives in accordance with the governmental obligation to ensure the public ordering of society. In this setting, the process of litigation is the medium through which these institutional objectives are realised; its processes and procedures are therefore public in their nature and authoritarian in their premises.

The domain of ADR is that of private dispute processing and therefore necessarily gives effect to personal, group or community norms and values. Consequently, the individualised nature of dispute processing is addressed at problem solving and not the maintenance of public values. Unhindered by institutional constraints, it is possible to differentiate functionally between the type of dispute involved, the needs of the disputants as well as the most appropriate process for the resolution of the dispute, even if this might entail the process of litigation. The concept is best represented by a continuum comprising multiple processes that each have a single processual function.

ADR therefore adheres to principles that distinguish between the form and function of specific processes. Many of these principles apply within the internal dynamic of specific

process² while others apply generally to all ADR processes.³ As a result, because of the principles that relate the form of a specific process to its functional purpose, ADR consists of individual systems of process that operate within a general processual system.

9.3 ADR theory: prognosis

The theory and principles of civil procedural law have been inextricably interwoven into the themes of this thesis. Yet, in its conclusions, the theory of ADR is distinct and separate from that of civil procedural law. Although borrowing does occur, the major conclusion reached is that private informal processes and public formal processes are derived from two systems of process that are antithetical to each other. Although civil procedural theory has been used paradigmatically as a means of understanding and extracting the principles of ADR, other than serving this specific purpose, it in no manner contributes to the theory of ADR. A definite conclusion is that a theory for ADR cannot be subsumed into civil procedural theory. In the final analysis, ADR is an independent system of dispute resolution based on its own structure of theory and principle.

Processual pluralism is the only theory that explains the consensual principles of ADR as well as the cohesion between these principles and the diverse and individually distinct ADR processes. Without a theory structured on processual pluralism, ADR processes are seemingly no more than a loose collection of informal processes that are rationally selected on the basis of purely instrumentalist considerations of the functions and efficiency of each, as convenient techniques for resolving disputes privately outside the formal justice system. However, interpreted on the basis of the theory of processual pluralism, each ADR process is distinct in its form and according to its form, every process fulfils a specific function in regard to a particular type of dispute as it arises within its own context. Centralised under the unifying theory of processual pluralism,

² For instance, the principles of intermediary intervention apply only to the process of mediation; the bilateral adjustment of relationships is characteristic of negotiation and adjudicative problem solving is an attribute of arbitration.

³ In this instance the consensual principles of ADR are brought into play eg disputant consensus, disputant autonomy, processual flexibility and the like.

ADR processes are not merely dispute resolution techniques or mechanisms applied in an *ad hoc* manner to various types of disputes but rather acquire a processual status based on the application of functional consensual principles. Each process is autonomous in its form and function yet capable of being explained and developed meaningfully within an independent system of theory and principle.

Explained on the basis of the theory of processual pluralism, a distinct and definitive contrast is created between ADR and civil procedure as systems of dispute resolution. The authoritarian and unitary principles of civil procedural law support the theory that a one-dimensional system of procedure can fulfil multiple functions. A theory for ADR posits that singular functions are performed in a system of multiple processes. Despite the apparent dialectic, there is an intuitive understanding about the future development of both systems: that ADR and civil procedure share a common destiny and that the emergence of ADR is providential for the reform of civil procedure.

The individualist principles and unitary procedural structure of civil procedure may be traced historically to their original agrarian foundations and their application in a homogeneous society, respectively. This accounts for many of the current problems with civil procedure. Irrespective of the increasing flexibility introduced by procedural reform, the essential unitary structure of civil procedure remains intact. Hence, reform that promotes access to justice in effect still means access to a one-dimensional procedural structure. This conflicts with the contemporary tendency towards social pluralism. The emergence of ADR may therefore be interpreted as a confluence between processual pluralism and the phenomenon of social pluralism.

It is believed that future civil procedural reform will inevitably have to accommodate the needs of a pluralistic society. The likely interaction between ADR and civil procedure therefore seems unavoidable. A foreseeable trend in the development of ADR is a move from an experimental phase during which its processes remain private and informal, to an institutional phase that absorbs ADR processes into the court system. The institutionalisation of ADR is tantamount to civil procedural reform but the mainstreaming of ADR into the public system of dispute resolution likewise alters the character of ADR. ADR processes are forced into the rigid mould of formal public processes and so too, the

introduction of the principles of processual pluralism drastically changes the unitary nature of civil procedure.

The institutionalisation of ADR is already occurring to a greater or lesser degree in Anglo-American jurisdictions. The concern is for the quality of the reform that affects both systems of dispute resolution. Often, it is sensed that change is effected only on the basis of instrumentalist considerations with little understanding that two theoretically distinct systems of process are being interfaced. In order to understand fully the dimensions of the system of ADR and to enhance the quality of civil procedural reform, it is of extreme importance that ADR should be regarded as an independent system of dispute resolution, based on a theory of processual pluralism which is supported by its own functional processual principles.

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