The role of court-annexed mediation in providing access to justice in the resolution of commercial disputes

M Olivier

orcid.org/0000-0001-6808-5619

Mini-dissertation submitted in partial fulfilment of the requirements for the degree *Masters of Law* in *Import and Export Law* at the North-West University

Supervisor: Prof SPLR De La Harpe

Co-Supervisor: Mrs MB Schoeman

Graduation ceremony: May 2018

Student number: 22739653

DECLARATION

I, Monica Olivier, identity number 9108250097088 and student number 22739653, hereby declare that this thesis titled "The role of court-annexed mediation in providing access to justice in the resolution of commercial disputes" is my own original work. The dissertation is hereby humbly submitted to the North-West University (NWU), in partial fulfilment of the requirements for the LLM in Import and Export Law degree. This dissertation has not been submitted anywhere before.

MONICA OLIVIER

.....
MONICA OLIVIER

Date: 2017/12/03

ACKNOWLEDGEMENTS

Deuteronomy 31:6 "Be strong and courageous. Do not be afraid or terrified because of them, for the LORD your God goes with you; He will never leave you nor forsake you." I should like to thank my Lord and Saviour for blessing me with the opportunity to obtain a Master's degree, for the knowledge and determination He provided throughout this journey. All is done in honour and glory of His name.

Throughout the completion of our Master's programme there were many memorable moments but also many obstacles along the way. I should like to thank the following people in my life for helping me with these:

My handsome husband, Jacques Olivier. You define the phrase support system. You were my chair when I couldn't stand, my light in the darkest moments when none of this made sense anymore. Thank you for giving me perspective every day and making me smile by creating hope and excitement until the end. We started, struggled, prayed, laughed, cried and even pulled all-nighters together to finally submit our Masters'. It's a Kodak moment to graduate with you!

My study leader, Prof Stephen de la Harpe. Thank you for your effort, guidance and support throughout this journey. My co-study leader Mrs Michelle Schoeman, thank you for your selfless support, early mornings, late nights, patience and support, you are an absolute inspiration and life saver. A special thank you to Alan and tannie Doepie for all the long hours and understanding throughout the editing process.

My lovely parents. In remembrance of my late dad, Willem Kasselman for planting the seed that "Jy leer nooit verniet nie". Today I understand and I wanted to say I finally made it. My beautiful mom, Elsie Kasselman for every sacrifice, prayer, phone call and motivation session.

My amazing Mother and Father in law, Willie and Christelle Olivier. Paps thank you for your wisdom and teaching us that you must at all times

"smokkel met jou kop". Moeder, thank you for your endless love and motivation throughout our journey. Always lighting up a situation, creating hope and blessing us with positive energy.

Uncle Danie and Tannie Ella. Words can never describe our gratitude. Thank you for always checking up to make sure we are well rested, healthy and still in a great mindset. Thank you for you constant support and always asking "Is julle nog oraait." Thank you for every breath of fresh air when we came to visit and helping us to renew our thoughts.

Uncle Eugene and Auntie Eria. You were the friends who became family. Thank you for always uplifting us, praying for us, voting for us and supporting us throughout this journey. Thank you that any time is always a good time when we needed support or just wanted to share our progress. We love and appreciate you.

Thank you to all our friends, family and in-laws for your endless support and understanding. We are truly blessed to have friends and family all over the country who always believed in us, prayed for us and who always understood that weekends and holidays are non-existent for a while. A special thank you to our Gonzales friends for being our backbones and endless support system. Your impact, prayers and involvement throughout this journey was highly appreciated.

A special thank you to my amazing colleagues. I am so blessed to work with a bunch of women who are always ready to pray with and for you, and who make the best coffee for those days when sleep was no option and to celebrate in the moment when I could finally submit. Thank you to our amazing management team who kept me focussed and positive when it felt as if everything had come crashing down. Thank you for your understanding and leniency when I needed a day or two off, but also when I just needed a hug or a prayer. It's an honour to complete my masters whilst working with and under these incredible leaders and mighty women of God.

ABSTRACT

Title: The role of court-annexed mediation in providing access to justice in the resolution of commercial disputes

Key words: Section 34**,** Commercial disputes, access to justice, juristic persons, small ammerging enterprises, Constitution, alternative dispute resolution, evaluative, mediation, court-based mediation, court-annexed mediation, mandatory, consent.

Nowadays, parties in commercial disputes face various challenges as well as financial constraints. Due to limited financial resources as well as the abovementioned constraints, especially in small emerging enterprises/medium upcoming and growing companies, dispute resolution processes, specifically litigation, are not equally accessible to all. Companies are in dire need of an alternative, more cost-efficient and effective way of resolving disputes. The need for a cost-efficient and effective dispute resolution mechanism speaks to a company's right to proper access to justice. Therefore, the main issue is what must be done to assist a company that requires a more cost-efficient and effective way of resolving a commercial dispute. This paper focuses on court-based/annexed mediation and how it provides access to justice between jursitic persons in commercial disputes. This project is taken forward by studying the position as it pertains to access to justice as well as court-annexed mediation in the State of Victoria, Australia. Victoria is globally acknowledged to be an exemplary jurisdiction in this respect. The study describes various ways in which court-based/annexed mediation could assist South African companies to resolve commercial disputes and concludes that it would be more efficient to introduce the state of Victoria's application of court-annexed mediation into South African legislation, as it grants proper access to justice to companies engaged in commercial disputes.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ADR	Alternative dispute resolution
AHRLJ	African Human Rights Law Journal
Australian ADR Bulletin	Australian Alternative Dispute Resolution Bulletin
Comp Int'l LJ SA	Comparative and International Law Journal of Southern Africa
Constitution	Constitution of the Republic of South Africa
DSCV	Dispute Settlement Centre of Victoria
ICC	International Chamber of Commerce
ICSID	International Centre for the Settlement of International Disputes
IMSSA	Independent Mediation Service of South Africa
NADRAC	National Alternative Dispute Resolution Advisory Council
SAJHR	South African Journal on Human Rights
SA Merc LJ	South African Mercantile Law Journal
UNCITRAL	United Nations Commission on International Trade Law

1 Introduction

Chief Justice Sandile Ngcobo in his opening remarks at the Access to Justice Conference, held 7-10 July 2011, stated that access to justice refers to the right to an affordable, impartial, fair and equally accessible way of dispute resolution for all.[1] This statement may find its origin in section 34 of the *Constitution of the Republic of South Africa*, 1996[2] (hereafter referred to as the *Constitution*) which provides that:

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

This implies that everyone has the right to access to justice and to equality before the law.[3] Section 34 also allows for the utilisation of alternative methods of resolving disputes, which have collectively become known as Alternative Dispute Resolution methods (hereafter referred to as ADR). These methods have gained momentum in most industries, as may be seen in the introduction of legislation that makes provision therefore. There are more than 50 pieces of legislation that make reference to the resolution of disputes by means of mediation alone.[4] The commercial sector is no exception.

In this context the commercial sector can be described as "the part of a country's economy that includes all businesses except those involved in manufacturing and transport".[5] Examples of aspects regulated by commercial law within the commercial sector include:

---

1 Ngcobo "Enhancing access to Justice: The search for better Justice" 5, 7.

2 *Constitution of the Republic of South Africa*, 108 of 1996.

3 Preamble of the Constitution. The issue as to whether the right as contained in s 34 is applicable to natural as well as juristic persona and other pertinent issues pertaining to s 34 will be elaborated upon in chapter 3 hereafter.

4 *New Companies Act* 71 of 2008, *Consumer Protection Act* 68 of 2008; *Magistrates Court Act* 90 of 1993 and the Amended Magistrates Court rules 2014.

5 Cambridge Dictionary https://dictionary.cambridge.org/dictionary/english/commercial-sector.

> all aspects of business, including advertising and marketing, collections and bankruptcy, banking, contracts, negotiable instruments, secured transactions, and trade in general.[6]

The commercial sector faces challenges in trying to keep up to date with the latest business initiatives and trends, while at the other end of the spectrum having to keep up to date with the latest statutory demands imposed upon it.[7] The challenges include, amongst others, the difficulty of accessing credit for small businesses,[8] political uncertainties and the risk of doing business abroad, dispute resolution and the impact of the B-BBEE compliance requirements on how the business is managed.[9]

These challenges mostly affect small, medium, upcoming and growing companies which are still trying to generate profits despite the limitations of the financial resources at their disposal, in comparison with the financial stability of their well-established competitors, which are therefore seen as "power houses" with stronger bargaining powers. [10] The one area in particular that needs to be addressed is the appropriate resolution of disputes which arise within the commercial sector.The starting point in doing so is firstly to determine what constitutes a commercial dispute.

In this instance commercial disputes arise mostly from verbal and written agreements as well as delictual claims.[11] Disputes arising from the delictual claims, commercial slander, patent issues, trade disputes, profit sharing between projects, unfair competition, "disputes between shareholders, interpretation of agreement and breach of contract" are all deemed examples of commercial disputes.[12] It is important to note that commercial

---

6 Legal Dictionary 2007 http://legal-dictionary.thefreedictionary.com/constant.

7 Anon 2017 https://www.export.gov/article?id=South-Africa-market-challenges.

8 United States Congress House Committee on Small Business *Financial and economic challenges* 3.

9 Gordon-Davis and Cumberlege *Legal Requirements* 366.

10 Guillemin "Reasons for choosing ADR" 24.

11 Chern *The commercial mediator's handbook* 1.

12 Chern *The commercial mediator's handbook* 1; Lew, Mistelis and Kröll *Comparative international commercial arbitration* 50-53; Lowe and Leiringer *Commercial Management of Projects* 3.

disputes can also arise between two individuals. For purposes of this research paper the focus shall be placed only on commercial disputes between juristic persons.

Due to the vital role that the commercial sector plays in regard to expanding businesses to create shared wealth and business opportunities as well as creating competition in the market to improve the quality of goods and services,[13] if it had access to a proper dispute resolution mechanism this could contribute to more efficient corporate governance, which would ultimately assist in resolving one of the difficult challenges faced in particular by small, emerging companies. Should the chosen dispute resolution mechanism be inappropriate, this might result in exorbitant costs being incurred, but more importantly it might be seen as preventing the disputing parties from attaining access to justice.[14] Litigation has always been companies' first recourse as a medium of dispute resolution, as there is a misconception that this is the only suitable form of dispute resolution.[15] Litigation over the past century has been the most preferred method of solving a dispute between two or more parties, but it is not free of obstacles,[16] which include, for example, the fact that the process is expensive, slow, complex, unpredictable and time consuming.[17]

Where a method of dispute resolution is as flawed as this, it negates proper access to justice. The reason may be attributed to the fact that the company with limited resources cannot afford to continue with the dispute and is therefore denied the opportunity to resolve the dispute in a fair and cost-efficient manner. The civil justice system must facilitate and not

---

13 Pretorius *Dispute Resolution* 164.

14 European Union Agency for Fundamental Rights "Access to justice in Europe " 40.

15 Brand, Steadman and Todd *Commercial mediation* 13; Atlas, Huber and Trachte-Huber *Alternative dispute resolution* 2.

16 Brand, Steadman and Todd *Commercial mediation* 13; Atlas, Huber and Trachte-Huber *Alternative dispute resolution* 2.

17 Radebe 2011 http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html; South African Law Commission Issue Paper 8 (Project 94) Alternative Dispute Resolution 3; Brand, Steadman and Todd *Commercial mediation* 13-14.

obstruct the right to access to justice for all.[18] Therefore, and as most current and potential litigants experience financial constraints, in the last few years alternative dispute resolution has found increased support in resolving disputes.

It is therefore pertinent to ensure that the disputes are resolved swiftly, with as little damage as possible to the relationships between the parties, in the most cost-effective manner possible, namely by means of ADR.[19] One of the predominant ADR methods used in the commercial sector is mediation.[20] Mediation can be defined as: [21]

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

Mediation is also one of the ADR methods that are gradually becoming regulated by statute – more specifically by Rules of Court.[22] This form of mediation is known as court-based, alternatively court-annexed mediation.[23] Court-based mediation is seen as a relatively formal form of mediation, as it is usually directly administered by a court.[24] It could grant the upcoming company a pracitical way of solving its problems. Instead of being forced into an unfavourable settlement due to the financial constraints it faces, the upcoming company can still obtain a favourable or more favourable outcome than that resulting from litigation. Court-based

---

18 Radebe 2011 http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html.

19 Radebe 2011 http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html; South African Law Commission Issue Paper 8 (Project 94) Alternative Dispute Resolution 3; Brand, Steadman and Todd Commercial mediation 13-14.

20 Barker 1996 *Loy LA Int'l & Comp LJ* 10.

21 Brand, Steadman and Todd *Commercial mediation* 19; CEDR 2017 https://www.cedr.com/about_us/library/glossary.php; Blake, Browne and Sime *A practical approach* 234; Frenkel *International law* 95.

22 In the South African context it is regulated by the "Voluntary Court-based Mediation Rules" of 2013, published as the "Amended Magistrates Court rules" GN 183 in GG 37448 of 18 March 2014; Rule 50.07(1) of the Supreme Court Rules of Victoria SR NO 103 of 2015 and Amended High Court Rules 71 of 1997 of Zambia as another external example.

23 This method of mediation will form the focus of this study.

24 Munroe 1996 *Prob LJ* 110.

mediation therefore needs to be investigated to ascertain to what extent it could provide access to justice for companies engaged in commercial disputes.

In a further attempt to shed light on the above issues, reference will be made to Australia - more specifically, to the State of Victoria. This is due to the fact that South Africa and the State of Victoria in Australia face similar hurdles with respect to their civil justice systems pertaining to access to justice. Court-annexed mediation has been well regulated in Australia by the National Alternative Dispute Resolution Advisory Council[25] since 1995. Specifically in the State of Victoria it is also regulated by various statutory provisions, such as section 108 of the *Magistrate's Court Act* 51 of 1989 and Rule 50.07(1) of the Supreme Court Rules of Victoria of 2015[26] and Rule 34A.21 of the Country Court Civil Procedure Rules of 2008.[27]

With reference to court-annexed mediation, Warren[28] states that:

> In the Supreme Court of Victoria, no civil case except for Magistrates' Court & VCAT appeals and judicial review matters, goes to trial without at least one round of mediation. The technique has resulted in the court's contested matters sitting at about five per cent of its filed civil cases.

It is clear that court-annexed mediation has been successfully applied in the civil justice system of the State of Victoria, with the goal of improving access to justice. Victoria has a world-wide reputation in this respect. Therefore, in the light of the fact that South Africa's court-based mediation system is still at its infancy and Victoria's court-annexed mediation system is more developed, it will be worthwhile to investigate their current practices in respect of access to justice and the use of court-based

---

25 Victorian Law Reform Commission Civil Justice Review Report 14 of 2008 212.

26 SR NO 103 of 2015 - Reg 50.7 http://www.austlii.edu.au/au/legis/vic/num_reg/sccpr 2015n103o2015514/s50.07.html.

27 Victoria Consolidated Regulations 2008 http://www.austlii.edu.au/au/legis/vic/consol_ reg/cccpr2008380/.

28 Warren 2009 http://assets.justice.vic.gov.au//supreme/resources/fffc72f7-2add-455c-890 1-b5a442 ebd4f4/adr+and+a+different+approach+to+litigation_cj.pdf.

mediation in the resolution of commercial disputes and compare them with the current practices in South Africa.

The research question posed is therefore "What role will court-based mediation play in providing access to justice in the resolution of commercial disputes between juristic persons in South Africa?"

A literature study comprising of an analysis of relevant books, case law, legislation, and academic writings will be performed, and a comparison will be drawn between the two legal jurisdictions, South Africa and the State of Victoria, to obtain an answer to the research question posed above.

The content of the following chapters of this dissertation could be described as follows. Chapter two will briefly discuss the aspect of access to justice in general, which discussion will be followed by a general discussion of mediation, more specifically court-annexed mediation, in chapter 3. Thereafter chapters 4 and 5 will provide expositions of the issues of access to justice and court-annexed mediation in South Africa and Victoria respectively. A comparison between the two will be furnished in chapter 5 so as to assist in providing a conclusion to the mini dissertation, which may be found in chapter 6, where the research question will be answered.

2 Access to justice: A brief exposition

2.1 Introduction

Access to justice is a well-known term, both nationally and internationally. The United Nations defines access to justice as a basic human right as well as a vital tool used not just in fighting poverty but also in preventing and resolving disputes.[29] In the light hereof it has been freely debated by governments, regulators, presiding officers to only name a few.[30] Despite this, there is no one specific definition of access to justice, which lack opens the door to different interpretations and understandings of the term. For example, the word justice is taken to refer to a "basic social good" which must be accessible to every man, woman or child, irrespective of their financial or social status.[31] In order to try to determine what access to justice entails two common approaches are adopted, namely the Narrow and the Broad approaches, which will be elaborated on hereunder.[32]

This chapter will set out a brief exposition as to what access to justice is by referring to the Narrow and Broad approaches, so as to obtain a definition of the term. Furthermore, the challenges associated with access to justice will be discussed.

2.2 Defining access to justice

2.2.1 Narrow approach

Access to justice is equal access to legal and other state services.[33] Sackville[34] is of the opinion that access to justice refers to the fact that every individual should be treated equally before the law. This is seen as a narrow approach to justice, which is usually taken to mean "access to

---

29 UNDP "Access to justice" 3.
30 Farrow 2015 *Revista Forumul Judecatorilor* 72.
31 Farrow 2015 *Revista Forumul Judecatorilor* 85.
32 Sackville "Some thoughts on access to justice" np.
33 Nyenti 2013 *De Jure* 902.
34 Sackville "Some thoughts on access to justice" np.

formally constructed, political impartial courts and administrative agencies".[35] Lord Woolf elaborated thereon. He defined access to justice by referring to the three main characteristics which the civil justice system should display, namely equality of access to legal services, national equality and equality before the law.[36] These three principles are supposed to give effect to individual rights by ensuring that all individuals have an equal right to access legal services,[37] to have their disputes resolved, and to ensure that each individual's interests and rights remain protected.[38] Although access to justice focuses on the right to have a dispute or claim adjudicated before a court, it also includes the right that the dispute should be adjudicated fairly.[39]

Consequently, processes and procedures must be implemented to ensure just, fair, effective, efficient and affordable access to the legal system for all.[40] The latter principles require the civil justice system to treat litigants fairly and resolve cases in a cost and time-efficient manner.[41]

The narrow approach clearly focuses on giving access to justice "based on a legal ideology which excludes other means of resolving disputes or addressing social problems".[42]

But although the main focus of access to justice in the civil litigation system is placed upon courts, it is not limited thereto, as it is also possible to adopt a broader approach to the right.

---

35 Ojelabi "Improving access to justice" 11.
36 Nyenti 2013 *De Jure* 903.
37 Regardless of the individual's social and economic ability.
38 Nyenti 2013 *De Jure* 904.
39 Francioni "The rights of access to justice" xi.
40 Nyenti 2013 *De Jure* 902-903.
41 Sackville "Some thoughts on access to justice" np.
42 Ojelabi "Improving access to justice" 11.

2.2.2 Broader approach

It is clear that the narrow approach of access to justice provides equal opportunity to individuals to access courts and make use of legal representation. The latter approach emphasizes an approach which improves access to justice by making the "legal system more efficient, user-friendly and overall accessible".[43] Access to justice can involve far more than just a fair process of adjudication, as is suggested in the above depiction of the narrow approach.[44]

The concept of access to justice has developed over the years to include access to social, economic and environmental justice.[45] The idea is that access to justice is a vital component of the rule of law and of the process of giving effect to basic human rights, and that it can therefore be seen as a fundamental element of any democracy.[46] In this instance the state is required to recognize each individual's right to human and political equality.[47]

Sackville[48] argues that it is necessary to safeguard individuals' rights by means of effective legal mechanisms, one of which is by entrenching access to justice, which includes access to information for consumers[49] as well as improving access to "alternatives to the judicial process for the resolution of complaints or disputes".[50]

Access to justice also means creating and providing alternative and appropriate forums for various and everyday disputes to be facilitated and resolved.[51]

---

43 Farrow 2015 *Revista Forumul Judecatorilor* 81.
44 Farrow 2015 *Revista Forumul Judecatorilor* 81; Vettori 2015 *AHRLJ* 359.
45 Nyenti 2013 *De Jure* 902.
46 Ojelabi "Improving access to justice" 10.
47 Sackville "Some thoughts on access to justice" np.
48 Sackville "Some thoughts on access to justice" np.
49 Sackville "Some thoughts on access to justice" np.
50 Sackville "Some thoughts on access to justice" np.
51 Ojelabi "Improving access to justice" 12.

Consequently, Ojelabi[52] states that:

> claims of justice are dealt with as quickly and simply as possible – whether that is personally (everyday justice) informally (such as ADR, internal review) or formally (through courts, industry dispute resolution or tribunals).

After analysing the definitions it is apparent that the narrow approach mainly requires the civil justice system to resolve disputes in a just, fair, speedy and cost-efficient manner. It is further concluded that although the narrow approach focuses mainly on making the litigation process efficient and accessible to all, access to justice is not limited thereto. The broader approach to access to justice also includes the recognition of an individual's human rights as well as access to alternative dispute resolution processes. Therefore, the submission is made that access to justice refers to the resolution of a dispute by means of litigation or some form of alternative dispute resolution in a just, fair, speedy and cost-efficient manner.

2.3 Challenges in respect of access to justice

To give effect to access to justice as set out above, the civil justice system has to be user friendly, available and accessible to all.[53] To give effect to the latter requirements, a dispute must be resolveable in a simple, speedy, affordable and effective manner.[54] However, legal systems are usually "plagued by high costs, delays, complexity and uncertainty" amongst other thing[55] Ngcobo[56] identifies additional challenges as:

> [the legal system] is complex, it is fragmented and overly adversarial. These weaknesses combine to produce a system that is gradually becoming inaccessible to the average person.

As such, the civil justice system is not accessible to all.[57]

---

52 Ojelabi "Improving access to justice" 12.
53 Ngcobo "Enhancing access to Justice: The search for better Justice" 11-12.
54 Heywood and Hassim 2008 *SAJHR* 263; Maclons *Mandatory Court Based Mediation* 13.
55 Vettori 2015 *AHRLJ* 356.
56 Radebe 2011 http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html.
57 Radebe 2011 http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html.

2.3.1 Legal costs and proceedings

If a dispute is resolved in a timely manner by way of litigation it may be argued that the process has enabled the individual to gain proper access to justice.[58] However, in practice, due to the usual prolonged delay in the finalisation of legal proceedings, a vulnerable party is often deprived of its right to proper access to justice.[59] This delay in legal proceedings is caused by various factors and role players in the legal system, such as:

> an excessive workload and insufficient number of judges; inefficient organization of court work; excessive delays between the handing down of a judgment and its notification to the parties as well as delays between individual hearings; lack of communication between judges and parties to the proceedings; and the rigidity of procedural rules, including rules of evidence.[60]

The European Union Agency for Fundamental Rights argues further that in a situation where an individual is in a protracted state of doubt regarding a dispute's outcome, this is "similar to a denial of justice".[61] Unfortunately, the delay in court proceedings itself gives rise to a major challenge in accessing justice, namely high legal costs.[62] In this regard various factors are taken into account when legal costs are determined.[63]

Due to the financial status of most vulnerable litigants, the high legal costs alone make accessing justice almost impossible.[64] This is based on the fact

---

58 EUAFR "Access to justice in Europe" 40.
59 EUAFR "Access to justice in Europe" 40.
60 EUAFR "Access to justice in Europe" 40-42.
61 EUAFR "Access to justice in Europe" 40.
62 EUAFR "Access to justice in Europe" 42; United Nations and the Rule of Law date unknown https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/.
63 EUAFR "Access to justice in Europe" 42; United Nations and the Rule of Law date unknown https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/.
64 Farrow 2015 *Revista Forumul Judecatorilor* 76; Genn 2012 *Yale JL & Human* 401. In this regard various factors are taken into account when legal costs are determined. These factors include "the complexity, difficulty or novelty of the case, the specialized knowledge and responsibility required as well as the time consumed by the lawyer, the volume of the documents drafted, the urgency and importance of the matter to the client and the value of the money or property at stake." See EUAFR "Access to justice in Europe" 43.

that legal costs occur during legal proceedings, but continue when a court ruling or decision still needs to be enforced.[65] Rhode[66] stated that formal rights can be "prohibitively expensive to enforce, successful plaintiffs can be informally blacklisted and legislatures may overturn legal rulings that lack political support". In light of these economic implications, a lack of affordable legal representation and civil legal aid structures, individuals chose to rather avoid formal legal procedures.[67]

2.4 Conclusion

The duty of the civil justice system is to facilitate and improve access to justice. The right to proper access to justice is not one that should or can be narrowed in its interpretation. Such a narrow approach negates the reason for access to justice in any country as this approach deprives a vulnerable party of proper, sufficient and adequate access to justice.

A broader approach is required to give effect to the needs of a party such as an upcoming company, which may be faced with various challenges as mentioned in chapter 1. Therefore, the above guidelines for access to justice must apply not just to formal but also to informal means of dispute resolution.[68]

It is clear that the right to access to justice is not confined to access to courts but includes access to independent forums or tribunals as part of a broader approach to the interpretation of access to justice.[69] Therefore, the right contemplates other methods of obtaining justice in a fair, effective, cost-efficient, impartial and legal manner.[70]

---

65 Rhode *Access to Justice* 18.
66 Rhode *Access to Justice* 18.
67 UNDP "Access to justice" 4.
68 UNDP "Access to justice" 4.
69 Hurter 2011 *Comp Int'l LJ SA* 408.
70 Ngcobo "Enhancing access to Justice: The search for better Justice" 18-19; Maclons *Mandatory Court Based Mediation* 13.

From the above investigation it is apparent that access to justice within its broad approach allows for other methods of dispute resolution. This leads to an investigation as to what form of ADR can contribute to proper access to justice. As mentioned in chapter 1 there are various forms of ADR and an investigation into all of these forms would be impractical. As a result mediation, specifically court-based mediation as a form of ADR, is selected for consideration in the chapters that follow.

3 Mediation: A form of alternative dispute resolution

For the past century litigation has been the most preferred method used in solving a dispute between two or more parties. However, this method has shown on various occasions that it has many limitations.[71] As discussed above, litigation has often led to time consuming, expensive, unpredictable and antiquated ways of settling a dispute.[72] It is for this reason that society and the judiciary have sought alternative methods by which to resolve disputes, known as alternative dispute resolution methods (ADR).[73] In short, ADR includes various techniques or methods, other than litigation or adjudication through the courts, which is designed to specifically resolve different types of disputes between parties.[74] It is important to understand that while one of the goals of ADR is to reduce the congested court system, the main purpose is to broaden the range of mechanisms and processes used to assist in dispute resolution.[75] Mediation is one of these ADR methods.[76]

Mediation specifically forms part of the private decision-making process where the parties themselves are actively involved in the dispute resolution process.[77]

---

71 Brand, Steadman and Todd *Commercial mediation* 13; Atlas, Huber and Trachte-Huber *Alternative dispute resolution* 2.

72 South African Law Commission Issue Paper 8 (Project 94) Alternative Dispute Resolution 3; Brand, Steadman and Todd *Commercial mediation* 13-14.

73 Abdul Wahab *Court-annexed and judge-led mediation* 18; Pretorius *Dispute Resolution* 2; South African Law Commission Issue Paper 8 (Project 94) Alternative Dispute Resolution 17.

74 Pretorius *Dispute Resolution* 1; South African Law Commission Issue Paper 8 (Project 94) Alternative Dispute Resolution 13 "Most simply put, ADR denotes all forms of dispute resolution other than litigation or adjudication through the courts."

75 Pretorius *Dispute Resolution* 2; Maclons *Mandatory Court Based Mediation* 11. When one has a look at the purpose and goals thereof, it can be described as follow: "to relieve court congestion, as well as prevent undue cost and delay; to enhance community involvement in the dispute resolution process; to facilitate access to justice; and to provide more effective dispute resolution."

76 Brand, Steadman and Todd *Commercial mediation* vii.

77 Berger *Private dispute resolution* 23; Pretorius *Dispute Resolution* 3; Jones-Pauly and Elbern *Access to justice* 140.

In chapter 2 it was stated that ADR can contribute to providing proper access to justice for companies in commercial disputes. It was also stated that there are various methods of ADR and that mediation, more specifically court-based mediation, would be dealt with. However, there are various kinds of mediation which need to be considered. In light hereof it t is necessary, therefore to analyse the models of mediation, the key characteristics of mediation, the process of mediation, and the advantages and disadvantages as well as the different forms of mediation, focusing only on court-based and commercial mediation due to the nature of the study. To determine the contribution that court-based mediation will make to the attainment of proper access to justice one needs to investigate commercial mediation as it finds applicability to commercial disputes. One needs to determine why court-based mediation was chosen as the focus point of this research as opposed to commercial mediation which, as already stated, is also applicable to commercial disputes. The analysis will begin by looking at the different models of mediation.

3.1 Models of mediation

There are four primary models of mediation, namely the settlement, facilitative, transformative and evaluative models.[78] These different models of mediation do not amount to different forms of mediation but are rather four different approaches to mediation practices. They differ predominantly in respect of the role the mediator plays and the objectives of the mediation session. The most applicable to commercial disputes is the evaluative model. This mediation model is also known as advisory or managerial mediation.[79] Legal rights and entitlements are taken into account during the mediation process to ensure that a settlement is reached which is in the scope of court decisions.[80] Due to the fact that the mediator also provides additional professional advice and information, the

78 Spencer and Brogan *Mediation Law and Practice* 100.
79 Spencer and Brogan *Mediation Law and Practice* 101.
80 Spencer and Brogan *Mediation Law and Practice* 101.

mediator is required to be an expert in the topic of the dispute but is not required to be an expert in the formal proceedings.[81] The evaluative model is best applied in commercial, anti-discrimination, property and personal injury disputes.[82]

The submission is made, therefore, that to ensure access to justice, a company must be able to resolve a dispute by applying law, but needs also to resolve the dispute in a fair and cost-efficient manner. It is clear, that court-based mediation will be best suited to give affect to the latter. This will be dealt with in more detail later in this chapter.

3.2 Key characteristics of mediation

Mediation takes place only if both parties agree to and freely initiate this form of dispute resolution.[83] In this regard the parties are able to decide the place of mediation, the issues which will be dealt with, and when the mediation will take place. Mediation can be seen as both a confidential and a private process.[84] The goal thereof is to enhance honesty between the parties and to respect the feelings, desires and hopes of the parties individually. [85] Furthermore, the content thereof may not be used as evidence outside the mediation process, regardless of whether it is for a legal, formal or individual assessment procedure.[86]

The mediator must ascertain both parties' needs in the dispute, to enable himself to impartially facilitate the process, so that a mutually favourable

---

81 Spencer and Brogan *Mediation Law and Practice* 101.

82 Spencer and Brogan *Mediation Law and Practice* 101.

83 Brand, Steadman and Todd *Commercial mediation* 24; Law Reform Commission Report 98-2010 Alternative Dispute Resolution: Mediation and Conciliation 21; Pel *Referral to mediation* 102.

84 Arthur 2015 *Australian ADR Bulletin* 91; Vettori 2015 *AHRLJ* 358; Brand, Steadman and Todd *Commercial mediation* 24; Rovine *Contemporary issues* 273.

85 Doherty and Guyler *The essential guide to workplace mediation* 15; Boulle and Rycroft *Mediation* 39; Rovine *Contemporary issues* 273.

86 Law Reform Commission Report 98-2010 Alternative Dispute Resolution: Mediation and Conciliation 20; Brand, Steadman and Todd *Commercial mediation* 24.

outcome is reached between the parties.[87] Whilst doing so the mediator must act neutrally, and therefore not express her/his views regarding the underlying issues.[88] Although it may be advantageous to the parties if the mediator has expert knowledge of the topic of the dispute at hand, it is not a requirement that the mediator be an expert in this regard.[89]

3.3 Advantages and disadvantages of mediation

3.3.1 Advantages of mediation

The outcome of mediation is never definitive, therefore, as mentioned above, if mediation is not successful the parties still have the opportunity to enter into litigation. However, due to the high success rate of mediation, most disputes reach a durable settlement.[90] In the overwhelming majority of cases there is no need to enter the litigation process. Consequently parties save a lot in personal and litigation costs as well as in attorney fees.[91]

The process of mediation is also a more suitable method of dispute resolution in cases where there is unequal financial power between the parties.[92] In such a case a financially stronger party may not be able to dictate the outcome of mediation as easily as in litigation, where the stronger party may hold the weaker party to ransome by prolonging the process.

Due to the informality of the process, mediation takes the parties' underlying issues into account, making sure the outcome of the dispute is

---

87 Doherty and Guyler *The essential guide to workplace mediation* 15; Weinstein *Mediation in the workplace* 69-70.

88 Brand, Steadman and Todd *Commercial mediation* 25; Carbonneau *Handbook on Mediation* 286.

89 Carbonneau *Handbook on Mediation* 286; Pretorius *Dispute Resolution* 41.

90 Munroe 1996 *Prob LJ* 112.

91 Genn 2012 *Yale JL & Human* 405; Munroe 1996 *Prob LJ* 112.

92 Boulle and Rycroft *Mediation* 73. This is to ensure that both parties' "rights and interests" are taken into account.

focused on the parties' personal interests.[93] This is based on the fact that parties are more relaxed, willing to negotiate, willing to compromise and flexible during the negotiations.[94] Boulle and Rycroft[95] refer to the "principle of self-determination". This principle means that the "mediating parties are required to make their own informed decisions on settlement options".[96] Even in situations where a settlement is not reached and litigation is instituted, the communication between the parties has already improved, and this has a positive effect on the pre-trial proceedings.[97]

Pretorius[98] states that mediation is used in disputes where the parties want to maintain an on-going positive relationship, whilst maintaining hands-on control over the outcome to secure their future interests. In most cases the latter refers to disputes between parties with either a "business, professional, or personal relationship".[99] Therefore, mediation will help maintain a future business relationship by taking both parties' concerns and prospects into account.

3.3.2 Disadvantages of mediation

Although mediation is suitable for most disputes, this might not always be the case. Where there is an intense and complex dispute between hostile parties, mediation may in some cases lack the control needed to guide the parties into constructive decision-making.[100] One of the purposes of mediation is to reach a quicker settlement than litigation would, but in some instances a party may not be willing to compromise in the beginning stages of the mediation process.[101]

---

93 Munroe 1996 *Prob LJ* 107.
94 Barker 1996 *Loy LA Int'l & Comp LJ* 11; Munroe 1996 *Prob LJ* 112.
95 Boulle and Rycroft *Mediation* 73.
96 Boulle and Rycroft *Mediation* 73.
97 Munroe 1996 *Prob LJ* 113.
98 Pretorius *Dispute Resolution* 40, 41.
99 Mwenda *Paradigms of ADR* 40.
100 Boulle and Rycroft *Mediation* 73.
101 Genn 2012 *Yale JL & Human* 404.

Mediation will also not be appropriate in disputes where there is a clear legal principle governing a specific dispute,[102] as such mediation does not fill the gap in a dispute when legal precedents and community standards are absent. Consequently, mediation should not be used where there is a clear legal question at hand, when it is used with hidden motives and when the parties are not in a healthy "emotional or psychological state".[103]

Mediation will be suitable in disputes where both parties willingly agree to it and are committed to solving their dispute(s) by way of a negotiated settlement.[104] In this regard Mwenda[105] states that, if a party should strongly feel that they have a clear-cut case or want to create a binding precedent with the outcome, mediation is less suitable. This would disadvantage the other party who is willing, able or prefers to mediate instead of entering into litigation.

3.4 Different forms of mediation

3.4.1 The nature of commercial mediation

Firstly, although mediation as a form of dispute resolution between parties is governed by way of contract, there are various institutional rules which govern the practice in domestic as well as international disputes.[106] To narrow the scope of this research, the institutional rules regarding domestic commercial disputes specifically in South Africa will be discussed in chapter 4. With reference to international disputes, there are three primary institutions which are normally regulate international commercial mediation. These are the United Nations Commission on International Trade Law (UNCITRAL),[107] the International Centre for the Settlement of

---

102 Boulle and Rycroft *Mediation* 74.
103 Boulle and Rycroft *Mediation* 74-75.
104 Boulle and Rycroft *Mediation* 73.
105 Mwenda *Paradigms of ADR* 41.
106 Barker 1996 *Loy LA Int'l & Comp LJ* 15.
107 UNCITRAL date unknown http://www.uncitral.org/uncitral/en/about_us.html. Barker 1996 *Loy LA Int'l & Comp LJ* 15. These rules will apply if adopted by the parties. They are applied in *ad hoc* proceedings, where the disputes are not administered by a

International Disputes (ICSID),[108] and the International Chamber of Commerce (ICC).[109]

Secondly, the type of mediator used in commercial mediation would also be different from the type of mediator used in non-commercial disputes.[110] In this regard Slusarciuc[111] states that commercial mediators have no coercive power, unlike mediators in the political sphere.[112] Their power in disputes arises from their expertise in the matter at hand.

Commercial mediation envisages various advantages to parties in commercial disputes. The parties to a dispute get the opportunity to develop a more creative outcome to their disputes due to the informality of the negotiation process.[113] Secondly, due to the fact that commercial mediation focuses on a win-win outcome for both parties, it helps to improve the future business relationship between the parties, as the mediator focuses on the needs and desires of both parties.[114] Therefore, commercial mediation makes provision for parties who prefer to maintain their commercial and contractual ties, regardless of the disputes which may arise.[115] Thirdly, the issues in dispute are narrowed, thereby making provision for disputes to be settled more effectively.[116]

---

specific organisation. Their application can also be specifically excluded by the parties. The application of the UNICITRAL rules is also not limited to international disputes.

108 ICSID date unknown https://icsid.worldbank.org/en/. Barker 1996 *Loy LA Int'l & Comp LJ* 15. This set of rules is applicable to members of the ICSID convention and is used to settle "investment disputes between states and nationals of other states".

109 ICC date unknown https://iccwbo.org/about-us/who-we-are/dispute-resolution/; Barker 1996 *Loy LA Int'l & Comp LJ* 15. In this regard, the International Centre for ADR provides a set of mediation rules which can be incorporated into commercial contracts worldwide, amongst others.

110 Slusarciuc "Mediation in commercial conflicts" 271.

111 Slusarciuc "Mediation in commercial conflicts" 271.

112 Slusarciuc "Mediation in commercial conflicts" 271.

113 Barker 1996 *Loy LA Int'l & Comp LJ* 9.

114 Barker 1996 *Loy LA Int'l & Comp LJ* 10-11.

115 Barker 1996 *Loy LA Int'l & Comp LJ* 10.

116 Barker 1996 *Loy LA Int'l & Comp LJ* 10.

3.4.2 Court-based mediation

Court-based mediation is seen as a more formal form of mediation due to the fact that it is mostly directly administered by a court.[117] In some disputes mediation is a mandatory process which parties must follow prior to court proceedings.[118] In some jurisdictions parties in a litigation process can either be mandated by a court or strongly advised to make use of mediation before "utilizing the adjudicatory process".[119] Therefore, court-based mediation can be seen as either an optional or a mandatory process, but it is still administered by a court. The process which follows after the initiation of the mediation is almost identical to that described in paragraph 3.2 above.

Due to the fact that court-based mediation is not identical from one jurisdiction to the next, a consideration of a few general characteristics of court-based mediation will follow. For the purposes of this study, court-based mediation as it is applied in South Africa and in Victoria will be discussed in greater detail in chapters 4 and 5 respectively.

3.4.2.1 The nature of court-based mediation

Firstly, with regards to optional mediation, the court may recommend that a dispute be referred to be settled by way of mediation with the consent of both the parties.[120] Therefore, the parties may choose either to resolve their dispute by way of mediation or to continue with the adjudication process. In most jurisdictions, just as in voluntary mediation, the process is confidential.[121] However, in some jurisdictions such as California, the mediator may be required to make recommendations to the court in cases

---

117 Munroe 1996 *Prob LJ* 110.
118 Munroe 1996 *Prob LJ* 110.
119 Munroe 1996 *Prob LJ* 110.
120 Munroe 1996 *Prob LJ* 116.
121 Munroe 1996 *Prob LJ* 116.

where the parties were not willing to mediate a settlement. This is mostly in child custody disputes.[122]

Secondly, in some jurisdictions such as Saskatchewan parties in certain disputes are obliged to enter into mediation after the close of pleadings.[123] In this instance they must first receive the leave of the court before they can proceed further with litigation.[124] Furthermore, in most jurisdictions if a settlement is reached and one party does not comply with the agreement, the other party is entitled to apply for judgment as provided for in the contract.[125] In Canada, when a mediator has filed a certificate of non-compliance by a party, a court may:

> strike out a written pleading or affidavit filed by the defaulting party, dismiss the action or strike out the defence, order the defaulting party to pay costs, or make any other order that is just.[126]

Alternatively, if an agreement/settlement is not reached, litigation is still the final resort, and parties can still utilize the adjudicatory process.[127] Therefore, litigation is seen as a last resort and mediation should be attempted "before and after the issue of court proceedings".[128] The purpose of these mandatory court-based mediation rules is not to force parties to settle a dispute by way of mediation but to prevent future financial loss caused by a party who "might be deemed to have unreasonably refused an offer of mediation".[129]

Due to the financial implications surrounding dispute resolution Lord Woolf, like the presiding officers in other English courts, provided "mediation schemes offering no- or low-cost, time-limited mediation, held on court

---

122 Munroe 1996 *Prob LJ* 116.
123 Richler 2011 *Judges Journal* 16.
124 Richler 2011 *Judges Journal* 16.
125 Richler 2011 *Judges Journal* 16.
126 Richler 2011 *Judges Journal* 16.
127 Richler 2011 *Judges Journal* 16; Munroe 1996 *Prob LJ* 111.
128 Genn 2012 *Yale JL & Human* 406.
129 Genn 2012 *Yale JL & Human* 402.

premises for litigants who had already commenced court proceedings".[130] In most jurisdictions the court offers a list of qualified mediators[131] from among whom the parties themselves may appoint the appropriate mediator.[132] However, as discussed in 3.4.1 above, in complex cases external mediators "known for their particular areas of expertise or their experiences as senior counsel or, in many cases, as former court justices" may be appointed.[133] Although court-based mediation is organised by a court, the mediator in this regard does not act as a judge.[134] The "mediator does not have any authority to decide an issue, resolve a dispute, or force the parties to reach an agreement".[135]

3.5 Conclusion

In the beginning of this chapter the question was posed as to why court-based mediation was the chosen method of mediation to discuss, as well as how it contributes to the attainment of proper access to justice. It was established in paragraph 3.1 with reference to the different models of mediation that the preferred model for commercial disputes is the evaluative model. The form of mediation that can be practised most coherently in this model is court-based mediation. This is firstly based on the fact that the mediator is usually an expert in the applicable commercial field of dispute. Secondly, due to the process being administered by the court, there is a sense of direction in the dispute, as opposed to party's delaying the resolution of the dispute for their own purposes. Lastly, because the characteristics of the evaluative model are concurrently applied in court-based mediation. It seems clear that the evaluative model leads one in the direction of court-based mediation for these reasons, and

130 Genn 2012 *Yale JL & Human* 403.
131 In this instance, in most jurisdictions any "neutral, impartial person who possesses mediation skills and some expertise" regarding the dispute at hand can be a mediator.
132 Munroe 1996 *Prob LJ* 111.
133 Richler 2011 *Judges Journal* 15.
134 Munroe 1996 *Prob LJ* 112.
135 Munroe 1996 *Prob LJ* 112.

it is therefore the preferred method to obtain proper access to justice in this context.

In chapter 2 it was determined that the resolution of commercial disputes by way of ADR falls within the scope of access to justice as part of the broad approach in the interpretation of this right. There are, however, other questions that arise pertaining to access to justice, such as the applicability of this right to companies, as well as its specific content in different jurisdictions. The South African position relating to access to justice will be discussed in chapter 4.

In chapter 3 it has been determined that court-based mediation is an effective tool to use in resolving commercial disputes. The question remains to what extent it can contribute to the attainment of access to justice.

The application of court-based mediation differs from jurisdiction to jurisdiction, with each applying it from the point of reference of domestic law. To give a proper exposition of court-based mediation one needs to investigate the particular domestic law. Consequently, an investigation must be launched into court-based mediation in South Africa to properly understand how this form of ADR can assist in the attainment of access to justice. This analysis follows hereafter, in chapter 4.

4 Access to justice and court-based mediation from a South African perspective

4.1 Introduction

Every individual in South Africa is provided with the right to equal access to justice, in section 34 of the Constitution. Section 34 provides for the opportunity to have disputes resolved in a fair and public hearing.[136] It provides further that a dispute may be resolved either by a court or by an impartial tribunal or forum.[137] Section 34 therefore plays a vital role in enabling access to justice to all individuals in South Africa. If one makes reference to the narrow application, access to justice refers to "access to legal advice and legal services" as well as other methods of dispute resolution, before independent and impartial courts, tribunals or forums, or through consensual mechanisms such as negotiation or mediation.[138] This right to access to justice is, therefore, of paramount importance, as it grants every individual in South Africa equal access to justice in order to resolve his or her legal disputes.[139] As section 34 refers directly to individuals, the question arises as to whether this section would apply to juristic persons in commercial disputes.

Commercial disputes in South Africa have statutory as well as regulatory recognition, in as much as the *Companies Act* applies, as well the King Report, for instance.[140] One of the most common methods of resolving such disputes is mediation.

---

136 Section 34 of the *Constitution.*

137 Section 34 of the *Constitution.*

138 Section 34 of the Constitution; McQuoid-Mason 2013 *Oñati Socio-Legal Series* 565.

139 Davis "Access to courts" 28-1.

140 Section 156(a) of the *New Companies Act* 71 of 2008 makes provision for disputes to be resolved through alternative dispute resolution. S 166(1) states that a dispute can be resolved by either "mediation, conciliation or arbitration." Provision for mediation in disputes can further be found in s 70(1)(c) of the *Consumer Protection Act* 68 of 2008; s 54 of the *Magistrates Court Act* 90 of 1993 which makes provision for pre-trial procedures where the application of mediation needs to be considered. Rule 75

This chapter will firstly focus on the question of whether or not access to justice as a constitutional right applies to companies, in as much as they are a juristic persons.

In the general discussion of access to justice in chapter 2 it was determined that the broad approach makes provision for ADR. It must, however, be determined as to whether access to justice as a South African constitutional right makes provision for ADR, and more specifically for court-based mediation. The intricacies of the right to access to justice will be investigated in this chapter. This will be done in order to illustrate the application of the constitutional right in a South African commercial context as well as how mediation and/or court-based mediation facilitates access to justice.

After the above investigation has been concluded it will be necessary to investigate court-based mediation in South Africa. In chapter 3 mediation and more specifically court-based mediation was discussed in general, and it was determined that the evaluative model is the most effective mediation model to resolve commercial disputes.[141] It was further determined that court-based mediation would be most suitable version to invoke, as it focuses largely on legal principles, and because the mediators make decisions that are aligned with those which a court would make. As this was a discussion on the general principles of court-based mediation there is a necessity for an investigation into the principles of court-based mediation within South Africa to determine if it is still the preferred method of resolving commercial disputes. It is important to note that the writer's goal is to prove why court-based mediation would be the preferred method of resolving disputes. For this, one needs to determine how commercial mediation takes place in South Africa. This will be done by investigating the relevant South African legislation. Once this is determined, the focus will be

---

of the Amended Magistrates Court rules 2014 also provides for a court to refer disputes for mediation.

141 Spencer and Brogan *Mediation Law and Practice* 100.

redirected to how court-based mediation could contribute to the attainment of proper access to justice.

4.2 Access to justice in South Africa

4.2.1 Application of access to justice

As previously indicated, access to justice applies to all individuals in South Africa. What needs to be determined is whether or not this right, as provided for in section 34 of the Constitution, is applicable to juristic persons? The answer hereto lies in section 8(4) of the Constitution, which makes provision for two factors that need to be taken into consideration, namely "the nature of the fundamental right" and the "nature of the juristic person".[142] With respect to the "nature of the fundamental right", rights which specifically require human existence, such as "the right to life", cannot be applicable to a juristic person such as a company.[143] However, juristic persons can rely on rights that don't require human existence, such as the "right to access courts" in terms of section 34 of the *Constitution.*[144] With respect to the "nature of the juristic person", the Bill of Rights will apply to private juristic persons, in other words not to public juristic persons such as state organs.[145] The point here is that private juristic persons are run by individuals who collectively exercise their fundamental rights, in comparison with state organs, which collectively exercise state power.[146] In this regard Currie and de Waal[147] state that "juristic persons are not in and of themselves worthy of protection, but they become so when they are used by natural persons for the collective exercise of their fundamental rights".

---

142 Currie and De Waal *The Bill of Rights Handbook* 36; s 8(4) of the *Constitution.*
143 Currie and De Waal *The Bill of Rights Handbook* 36.
144 Currie and De Waal *The Bill of Rights Handbook* 36.
145 Currie and De Waal *The Bill of Rights Handbook* 36.
146 Currie and De Waal *The Bill of Rights Handbook* 37.
147 Currie and De Waal *The Bill of Rights Handbook* 37. Therefore, one needs to look at the "relationship between the activities of the juristic person and the fundamental rights of the natural persons who stand behind the juristic person".

As discussed in chapter 2, for many years the enforceability of this right especially by way of litigation was limited not just for individuals but also for companies, due to financial resources amongst other reasons. In the South African context, access to justice refers to far more than just the adjudication of a dispute by a court or an alternative tribunal. In this instance Nyenti[148] states that:

> [j]ustice is not the exclusive preserve of the courts. The Constitution … is designed to achieve justice in the broader sense including social justice and various functionaries including government, independent institutions, the private sector and indeed civil society take on a special responsibility for the achievement of justice and thus access to justice is more, much more tha[n] simply access to courts.

In conjunction with the latter, "access to justice" refers amongst other things to the fundamental principle as set out in section 9(1) of the Constitution that "everyone is equal before the law and has the right to equal protection and benefit of the law". To give effect to this fundamental right in conjunction with the right to access to justice, Nyenti[149] proposes that "each person should have effective means of protecting his or her rights or entitlements under the substantive law".

Therefore, it is clear and it is also the writer's submission that section 34 of the Constitution is applicable not just to natural persons but also to private juristic persons.

4.3 Content of the right

As stated above, the right to access to justice is a right derived from section 34 of the Constitution, namely the right to access to courts.[150] In this regard, section 34 states the following:[151]

---

148 Nyenti 2013 *De Jure* 902.
149 Nyenti 2013 *De Jure* 902-903.
150 Section 34 of the *Constitution*; Hurter 2011 *Comp Int'l LJ SA* 408.
151 Section 34 of the *Constitution*, 1996.

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

Two important principles may be discerned in the above: firstly, that each person has the right to having his or her dispute "decided before a court" or by "another tribunal or forum"; secondly, that the dispute must be resolved in a "fair public hearing".[152] These two principles will be analysed separately.

4.3.1 Equality of arms

Although the state has a positive obligation to fund legal representation in only certain civil cases, the principle of "equality of arms" still plays a leading role when it comes to legal representation in civil matters.[153]

This principle of "equality of arms" was dealt with in the *Shilubana v Nwamitwa* case.[154] In this instance, the respondent brought an application to postpone the matter.[155] The application was brought on the grounds that the respondent's legal representation in comparison with the applicant's was an "an imbalance of counsel" and that proper legal representation for the respondent must be funded by the State.[156] The respondent stated that "his lack of resources ha[d] left him ill-equipped to prepare properly for the hearing".[157] The Court stated that the main issue in such a matter is determining what the principle of "in the interest of justice" would dictate in this matter. The question at hand was "whether the parties are effectively represented, given the nature of the issues to be

---

152 Brickhill and Friedman "Access to courts" 59.
153 Brickhill and Friedman "Access to courts" 73.
154 (CCT03/07) [2007] ZACC 14; 2007 9 BCLR 919 (CC) (17 May 2007) para 6.
155 *Shilubana v Nwamitwa* (CCT03/07) [2007] ZACC 14; 2007 9 BCLR 919 (CC) (17 May 2007) para 6.
156 *Shilubana v Nwamitwa* (CCT03/07) [2007] ZACC 14; 2007 9 BCLR 919 (CC) (17 May 2007) para 6.
157 *Shilubana v Nwamitwa* (CCT03/07) [2007] ZACC 14; 2007 9 BCLR 919 (CC) (17 May 2007) para 6.

decided?"[158] In this instance, when determining what would be in the interest of justice, the Court took factors such as the seniorority of councel and the amount of representation affroded to a party into account.[159] The Court concluded, after taking these aspects into account, that it would be in the interest of justice to postpone the hearing.[160] The Court made it clear that although it is not common to apply for postponement on the grounds of "an imbalance of counsel", known as "the principle of "equality of arms", such an application may succeed in exceptional cases.[161] The position is explained by Brickhill and Friedman[162] as follow:

> The principle of the equality of arms must flow from the right to legal representation in at least some civil matters. For the right to legal representation to be meaningful, it must not result in an extreme imbalance in representation. If a right to legal representation in some civil matters exists, it must be a right to effective representation that is generally commensurate with the representation of the opposing parties.

Therefore, the issue of "equality of arms" is in exceptional circumstances a relevant factor taken into account when a court makes a decision regarding legal representation giving rise to access to justice.[163] It is clear that in certain complex civil cases, legal proceedings are seen as "fair" when they take place with a near equality of legal representation.

4.3.2 Another independent and impartial tribunal or forum

The right to access to justice implies the right that a dispute be heard before a court, or before an independent and impartial tribunal or forum. It is important first of all to distinguish between the meaning of

---

158 *Shilubana v Nwamitwa* (CCT03/07) [2007] ZACC 14; 2007 9 BCLR 919 (CC) (17 May 2007) para 21.
159 *Shilubana v Nwamitwa* (CCT03/07) [2007] ZACC 14; 2007 9 BCLR 919 (CC) (17 May 2007) para 22.
160 *Shilubana v Nwamitwa* (CCT03/07) [2007] ZACC 14; 2007 9 BCLR 919 (CC) (17 May 2007) para 23.
161 *Shilubana v Nwamitwa* (CCT03/07) [2007] ZACC 14; 2007 9 BCLR 919 (CC) (17 May 2007) para 23.
162 Brickhill and Friedman "Access to courts" 75.
163 Brickhill and Friedman "Access to courts" 75.

"independent" and "impartial" in this context. Brickhill[164] explains the difference as follow:

> Independence is a structural or institutional requirement, as opposed to impartiality, which is concerned with actual or perceived bias in respect of specific judicial officers.

These definitions seem also to apply in section 165(2) of the Constitution. Section 165(2) states that "the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice". Therefore, to adhere to the requirements as set out in section 34 of the Constitution, courts, tribunals and forums must act independently and without bias when adjudicating a dispute. Consequently, it is clear that independence and impartiality in the civil justice system is important to giving effect to the right to access to justice.

Secondly, after the independence and impartiality of the tribunal or forum has been determined, the next question is whether it will conduct a fair public hearing and whether the hearing could be seen as appropriate in that specific case.[165] In this regard Davis[166] states that "the concept of fairness, as employed in section 34, will require expansion by the courts in order to ensure that the applicable tribunal or forum conduct itself fairly..." Therefore, as the principles set out in section 34 form part of the "rule of law", it is clear that a failure by "another tribunal or forum" to conform to the standards of justice set out above would render the procedure unconstitutional.[167]

---

164 Brickhill and Friedman "Access to courts" 76.
165 Brickhill and Friedman "Access to courts" 86.
166 Davis "Access to courts" 28-3.
167 Davis "Access to courts" 28-8(1).

4.3.3 Waiver of the right to access courts

The question, however, is whether a party can waive its constitutional right to access courts when a dispute is settled by way of an alternative forum or tribunal.

The court in *Lufuno Mphaphuli & Associates v Andrew* raised the issue regarding the waiver of a party's right to access a court in private arbitration.[168] In this case the court concluded that section 34 of the Constitution does not have a direct application to private arbitrations.[169] An indirect application is envisaged in common and statutory law.[170] The court concluded that if parties choose to resolve their dispute by way of arbitration, they have not waived their rights in section 34 but have rather chosen not the exercise them.[171] Furthermore, although arbitration doesn't exclude the court's jurisdiction (grounds for appeal), when agreeing to make use of arbitration the parties by way of agreement may forfeit their right to access the courts.

4.3.4 Alternative to access to courts

Although each person has the right to access to justice, putting this into practice is not always easy. In this regard Davis,[172] a judge of the High Court, emphasised the need to improve South Africa's civil justice system by stating that:

> What is surprising is that so much has been said about transformation, but there has never really been an interrogation of what a changing legal culture for a society of 45 million diverse people would be. Right from the top, from the Constitutional Court down, it's not good enough to simply change the robes.

---

168 *Lufuno Mphaphuli & Associates Ltd v Andrews* 2009 4 SA 529 (CC).
169 *Lufuno Mphaphuli & Associates Ltd v Andrews* 2009 4 SA 529 (CC) para 216.
170 *Lufuno Mphaphuli & Associates Ltd v Andrews* 2009 4 SA 529 (CC) para 215.
171 *Lufuno Mphaphuli & Associates Ltd v Andrews* 2009 4 SA 529 (CC) para 216.
172 Davis "Two observations and five remarks" 26.

As explained by Davis, it is clear that in some instances the courts are failing to function efficiently and effectively when resolving disputes.[173] The failure has an enormous impact on the justice system, especially affecting the average person, the poor and the vulnerable.[174] In this regard Cassim[175] states that if litigaion becomes inaccesible to South Africans a situation arises wherby repect is lost for the law and structers upholding law and order.

It is clear that in certain circumstances formal methods of dispute resolution such as litigation have led to challenging issues in the civil justice system. Due to these issues, financially vulnerable parties may find themselves denied the opportunity to exercise their right to access to the justice system.

The process of mediation or consolidation may fail and no agreement between the parties may be reached. The wording of Section 166(1) of the Companies Act 71 of 2008 (hereafter referred to as the *Companies Act*) provides that "ADR may be done as an alternative to applying for relief to a court, or filing a complaint with the commission".[176]

4.4 Role of mediation in resolving commercial disputes

4.4.1 Recognition of mediation in commercial disputes

4.4.1.1 Role of mediation in commercial disputes

The support for increasing the practice of alternative dispute resolution such as mediation instead of adjudication is growing tremendously in the commercial sphere of South Africa. This is based on the fact that mediation plays an important role in resolving disputes in various areas of civil law in South Africa, but in some areas such as commercial law it plays a leading

173 Davis "Two observations and five remarks" 26.
174 Patelia "Implementing mediation in the formal legal system" 9.
175 Cassim "Promoting Liberal Constitutional Democracy" 23.
176 Wiese 2014 *SA Merc LJ* 672.

role.[177] In this context, mediation is often referred to in the Code on Corporate Governance, which refers to the various King Reports on Good Governance.[178] The King Reports are seen as "the most effective summary of the best international practices in corporate governance".[179] Due to the tremendous developments in corporate governance as well as the regulatory developments since the publication of King III (2009), it was necessary to publish the King IV report in 2016. However, companies can still follow the fundamental concepts set out in the King III Report,[180] as the "fundamental philosophy and concepts" have not changed. In the King IV[181] report ADR is seen as an established element of good governance stating that ADR mechanisms should be adopted and implemented as set out in the King III resport.[182] The formulation has merely been simplified to ease the interpretation of the King Reports for "all types of entities across all sectors". Therefore it is the application of mediation as set out by the King III report, followed by the *Companies Act* that will be discussed below.

4.4.1.2 King Report on Governance for South Africa, 2009

The King Report on Governance for South Africa 2009 (hereafter, the King III Report) can be seen as a milestone in the development of dispute resultion practices in South Africa, due to the emphasis it places upon the use of mediation as against litigation or arbitration when resolving commercial disputes.[183] The Report is divided into 9 chapters.[184]

---

177 Maclons *Mandatory Court Based Mediation* 83.

178 Four Reports have been issued, firstly King I (1994), King II, 2002, King III (2009) and King IV (2016).

179 Banhegyi *Management* 317.

180 Institute of Directors in South Africa date unknown http://c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/16F4503D-86F9-43D5-AEB4-C067B06EB59C/Guide_to_questions_and_answers_on_King_IV.pdf.

181 Institute of Directors 2016 www.iodsa.co.za/resource/resmgr/king_IV_Report/IoDSA_King_IV_Report_-_WebVe.pdf.

182 Institute of Directors 2016 http://www.pcb.org.za/wp-content/uploads/2015/04/King_IV_Report_draft.pdf.

183 Herbert (ed) 2011 *Int'l Law* 119.

184 *King III Report,* 2009.

Recommendations are made in these chapters as they deal with the various issues set forth in the code.[185] The King III Report must therefore be read in conjunction with the code to enhance corporate governance in South Africa.[186] Compliance with the recommendations made in the King III Report is compulsory for all "companies listed on the Johannesburg Stock Exchange, but voluntary [for] all other entities".[187]

Although the King III report fails to specify which ADR method must be used in certain commercial disputes,[188] the report still recommends the use of mediation as being appropriate when resolving commercial disputes where the interests of both parties must be considered, to enhance and maintain business relationships as well as stakeholder relations.[189] In this regard, the King III report states that directors as well as executive officers have the duty to resolve disputes "effectively, expeditiously and efficiently".[190] The above principles are based on the observation that disputes in a company must be resolved in a manner which is cost-efficient and does not disrupt the normal cause of business.[191] In this regard, mediation is most appropriate to commercial disputes, due to the fact that such disputes are then resolved in a fast and efficient manner.[192]

---

185 *King III Report,* 2009;Maclons *Mandatory Court Based Mediation* 65.

186 Maclons *Mandatory Court Based Mediation* 65.

187 Wiese 2014 *SA Merc LJ* 669.

188 The King III Report defines mediation as "a process where parties in dispute involve the services of an acceptable, impartial and neutral third party to assist them in negotiating a resolution to their dispute, by way of a settlement agreement." Principle 8.9 of the King III report.

189 Principle 8.8 of the King III report; Wiese 2014 *SA Merc LJ* 670; Maclons *Mandatory Court Based Mediation* 65-66. When deciding which ADR method is most suitable, six factors are taken into account: "the time available to resolve a dispute, whether principle and precedent is necessary, the business relationship involved in the dispute, whether expert recommendation is required, the confidentiality of the dispute and the rights and interests of the parties in the dispute." Maclons *Mandatory Court Based Mediation* 66-67.

190 Herbert (ed) 2011 *Int'l Law* 119; Wiese 2014 *SA Merc LJ* 669; Principle 8.8 of the King III report.

191 Herbert (ed) 2011 *Int'l Law* 119.

192 Maclons *Mandatory Court Based Mediation* 68.

Furthermore, as mediation takes place privately, Maclons[193] states that "the goodwill and private affairs of the disputing companies would be protected and safe-guarded". Therefore, it is clear that companies would have the freedom to express their needs and opinions by knowing that what they say cannot be used against them in a civil litigation matter. Mediation is also preferred due to the complexity of commercial disputes and because it enables original solutions which give effect to the parties' needs rather than to their rights.[194] On the other hand, in certain situations where a legal precedent needs to be followed or a binding solution needs to be established, civil litigation is still preferable to mediation.[195] In this regard, where disputes are solved through the process of civil litigation, the legal rights and obligations of the parties need to be enforced.[196]

Thus, mediation is still preferred in most cases. It is possible that a failure to prefer mediation may even be grounds for damage claims against the company, more specifically its directors.[197] Section 77(2)(a) of the *Companies act* envisages the personal liability of a director(s) in the event that the director(s) fails to execute his or her fiduciary duty. The submission is made that it is the director(s) fiduciary duty to make adequate financial decisions as to the generating of income and the minimising of costs. The attempted use of mediation instead of litigation minimises costs. Furthermore, a legal counsel acting on behalf of a company may be held liable for professional negligence when failing to either incorporate an ADR clause into a contract or failing to advise the company on mediation as an option to resolve the dispute.[198]

193 Maclons *Mandatory Court Based Mediation* 68.
194 Paragraph 8 of the King III Report; Maclons *Mandatory Court Based Mediation* 69.
195 Maclons *Mandatory Court Based Mediation* 68.
196 Maclons *Mandatory Court Based Mediation* 69.
197 Herbert (ed) 2011 *Int'l Law* 119.
198 Herbert (ed) 2011 *Int'l Law* 119.

4.4.1.3 *Companies Act* 71 of 2008

With reference to commercial disputes, although they may also be referred to an independent facilitator, cognisance should be taken of the fact that the Companies Tribunal, as envisaged in the *Companies Act* 71 of 2008 (hereafter referred to as the *Companies act*), was established as an independent tribunal available to settle such disputes.[199] The legislator specifically made provision for the incorporation of ADR in commercial disputes throughout the act, specifically in Part C of chapter 7.[200] In this regard, ADR refers to "mediation, conciliation or arbitration".[201] Firstly, section 156(a) of the *Companies Act* states that:

> A person...may seek to address an alleged contravention of this Act, or to enforce any provision of, or right in terms of this Act ... or a transaction or agreement contemplated in this Act ... by-
>
> (a) attempting to resolve any dispute with or within a company through alternative dispute resolution...

If a dispute falls within the jurisdiction of the Companies Tribunal the dispute may be heard by either mediation, conciliation or arbitration before the tribunal's panel.[202] The fees regarding the process are also state-funded, making it more affordable than litigation for both parties.[203]

Section 166(1) of the *Companies act* makes provision for "voluntary dispute resolution" as an alternative to litigation or to filing a complaint with the commission.[204] In this regard section 166(1) of the *Companies act* states that a person may refer a dispute to be resolved by either "mediation, conciliation or arbitration" by "the Companies Tribunal, an accredited entity

---

199 Carr and Veldhuizen date unknown http://www.companiestribunal.org.za/alternative-dispute-resolution-at-the-companies-tribunal/. The *New Companies Act* came into effect on the 1st of May 2011. Wiese 2014 *SA Merc LJ* 670.

200 Wiese 2014 *SA Merc LJ* 670.

201 Maclons *Mandatory Court Based Mediation* 70.

202 Carr and Veldhuizen date unknown http://www.companiestribunal.org.za/alternative-dispute-resolution-at-the-companies-tribunal/.

203 Carr and Veldhuizen date unknown http://www.companiestribunal.org.za/alternative-dispute-resolution-at-the-companies-tribunal/.

204 Maclons *Mandatory Court Based Mediation* 70.

or any other person". Furthermore, section 166(2) of the *Companies act* provides that if the Companies Tribunal itself or any accredited entity would conclude that one or both of the parties did not enter into the ADR with good faith or that there was no "reasonable probability" of resolving the dispute(s), a certificate that the process of ADR had failed must be issued.[205]

With reference to the latter discussion of mediation in the broader sense, it is clear that the parties voluntarily choose to enter into a mediation process.[206] However, although this voluntarism is of the nature of mediation, this is not true of court-based mediation, which will be discussed hereunder.

4.4.2 Court-based mediation in South-Africa

Section 7 of the Constitution places a duty on the state to promote the democratic values of "human dignity, equality and freedom". With reference to the latter and the aim of reforming South Africa's civil justice system to promote access to justice for all, the former Department of justice introduced court-based mediation.[207] Court-based mediation differs from private mediation in that it forms part of the judicial system.[208] In this regard, court-based mediation could be used to manage and reduce the burden of the case-flow in South African courts, consequently promoting alternative dispute resolution and, therefore, promoting access to justice for parties.[209] The principles of mandatory court-based mediation were regulated by a draft set of mediation rules approved by the South African

---

205 Maclons *Mandatory Court Based Mediation* 71.
206 Brand, Steadman and Todd *Commercial mediation* 44.
207 Maclons *Mandatory Court Based Mediation* 120.
208 Brand, Steadman and Todd *Commercial mediation* 44.
209 Jordaan 2012 http://capechamber.co.za/wp-content/uploads/2012/10/How-to-prepare-for-a-media tion.pdf.

Rules Board on 19 November 2011.[210] The draft rules would regulate court-based mediation in both the High and the Low Courts of South Africa.[211].

Rule 3(1) of the 2011 draft rules[212] stated that a dispute may be reffered to mediation by a party to the dispute or by a judicial officer. The judicial officer will only refer a dispute to mediation if there is good reason for such a referal.[213]

It is clear that before certain disputes can be resolved by way of litigation, they may first be referred to mediation in an attempt to resolve them.[214] Secondly, with reference Rule 9 of the 2011 draft rules,[215] if a settlement is reached between the parties an application can be brought to court for the settlement to be made an order of the court. When only a partial settlement has been reached, the unsettled matters may be referred back to litigation to be resolved.[216] In this instance the aim would be to protect the relationship between the parties by way of mediation and to revert to litigation only as a last resort.[217]

Although the focus of the 2011 draft rules was to promote access to justice, the "absence of an act of Parliament sanctioning such rules" put the constitutionality thereof in question.[218] This opinion is based on the fact that mandatory mediation may be seen as an infringement upon the constitutional right of a party to approach the court.[219] Consequently, the 2011 draft rules for mandatory mediation were modified by the "Voluntary

---

210 Brand, Steadman and Todd *Commercial mediation* 45.
211 Maclons *Mandatory Court Based Mediation* 120.
212 Rule 3(1) of the Draft set of rules 2011 http://www.golegal.co.za/wp-content/uploads/2016/12/Court-Annexed-Mediation-Rules-of-the-Magistrates-Courts.pdf.
213 Rule 3(1)(c) of the Draft set of rules 2011 http://www.golegal.co.za/wp-content/uploads/2016/12/Court-Annexed-Mediation-Rules-of-the-Magistrates-Courts.pdf.
214 Jordaan 2012 http://capechamber.co.za/wp-content/uploads/2012/10/How-to-prepare-for-a-media tion.pdf.
215 Rule 9 of the Draft set of rules 2011 http://www.golegal.co.za/wp-content/uploads/2016/12/Court-Annexed-Mediation-Rules-of-the-Magistrates-Courts.pdf.
216 Maclons *Mandatory Court Based Mediation* 119.
217 Rule 1(iv) of the Draft set of rules 2011 http://www.golegal.co.za/wp-content/uploads/2016/12/Court-Annexed-Mediation-Rules-of-the-Magistrates-Courts.pdf.
218 Maclons *Mandatory Court Based Mediation* 122.
219 Patelia "Implementing mediation in the formal legal system" 17.

Court-based Mediation Rules" of 2013, published as the "Amended Magistrates Court rules".[220] These voluntary court-based mediation rules formed part of the "pilot project" which was enforced by particular Magistrates Courts on 1 December 2014.[221] The objectives of this set of rules are set out in Rule 75 of the Amended Magistrates Court rules as follow:

> (1) Parties may refer a dispute to mediation
> (a) prior to the commencement of litigation; or
> (b) after commencement of litigation but prior to judgment; Provided that where the trial has commenced the parties must obtain the authorization of the court.
> (2) A judicial officer may at any time after the commencement of litigation, but before judgment, enquire into the possibility of the mediation of a dispute and accord the parties an opportunity to refer the dispute to mediation.[222]

With reference to the latter, it is clear that the voluntary court-based mediation rules are being incorporated into South Africa's civil justice system. In this instance, the voluntary mediation rules are similar to the court-based mediation rules in the sense that both sets of rules aim to provide "solutions to the dispute, which are beyond the scope and powers of the judicial officers".[223] A dispute between parties will be referred to mediation by way of an agreement between the parties themselves, except in the instance where a court imposes the mediation process.[224] Although the process of mediation is still voluntary, the Magistrates Court may still indirectly pressure both the parties together with their attorneys to consider whether mediation might not be a better solution to a particular dispute than litigation.[225] Where the parties and/or their legal representatives fail to give "proper consideration" to the mediation process,

---

220 GN 183 GG 37448 of 18 March 2014 http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf.
221 Maclons *Mandatory Court Based Mediation* 124.
222 Rule 75 of the Amended Magistrates Court rules 2014 http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf.
223 Rule 71(f) of the Amended Magistrates Court rules.
224 Patelia "Implementing mediation in the formal legal system" 18.
225 Patelia "Implementing mediation in the formal legal system" 18.

an adverse costs order against the party and/or its legal representative may be the consequence thereof.[226]

It is clear that court-based mediation remains voluntary in nature. Although a court could refer a dispute to be settled by way of mediation, it cannot force the parties to make use thereof. The submission is made that on the the one hand this gives effect to the Constitutional right to access to the courts, but on the other hand it opens loopholes in commercial disputes for the process to be more costly and time consuming if both parties are not in full agreement that they should try to settle their dispute by way of mediation. Where there are power imbalances one party may have the upper hand, in which case the dispute will most likely be resolved by way of litigation. Therefore, the submission is made that where parties enter the litigation process because one of the parties has not agreed to mediation, they should face obstacles to accessing justice so that their dispute is not resolved in a simple, speedy, affordable and effective manner.

4.5 Conclusion

It has been established that access to justice in the South African context applies to juristic persons, as well as that there are independent tribunals and forums to rely on in commercial disputes. When mediation and more specifically court-based mediation were being investigated it became apparent that these ADR methods contribute to the attainment of access to justice. It also became apparent that commercial mediation as a form of mediation could provide a solution to facilitating access to justice in commercial disputes. However, the issue with commercial mediation remains clouded by the voluntary nature thereof. If the parties agree to commercial mediation, a company that has strong financial backing is not as fully motivated to attempt to resolve the dispute by this means as a

[226] Patelia "Implementing mediation in the formal legal system" 18.

company that cannot afford litigation. If the commercial mediation proves to be difficult the company with the financial means could just revert to litigation, as commercial litigation is in no way mandatory. Therefore, the parties to the mediation are not negotiating a settlement on an equal basis. The submission is made that court-based mediation could enhance realising access to justice. As already said, the problem with commercial mediation is that it is not mandatory.

An investigation will be launched into the jurisdiction of Victoria to ascertain how access to justice functions there, as well as how court-based mediation is used to effectively realise such a right. The aim of the investigation woud be to identify principles in court-based mediation in Victoria which could possibly be applied to South Africa's court-based mediation process, to enable and improve access to justice in this jurisdiction.

5 Court-annexed mediation: The state of Victoria, Australia

5.1 Introduction

Unlike the South African Constitution, which makes specific provision for access to justice, the Australian Constitution makes no specific or expressed constitutional guarantee of access to the courts.[227] It would seem that the right to access to justice is implied in the Australian Constitution.[228] In the State of Victoria, the right to access to justice is entrenched and implied within section 24(1) of the *Charter of Human Rights and Responsibilities Act* 43 of 2006, the common law, and the rule of law, and is reflected in the ambient democratic values.[229]

Due to the complexity of the Australia's system of government, an investigation into Australia's government and court system will be the point of departure for this chapter. This investigation will aim to explain how the State of Victoria's legal sector functions within Australia's system of government to determine how Victoria gives effect to the right to access to justice. Thereafter, an analysis of access to justice as well as the obstacles to access to justice will follow.

The state of Victoria has been actively applying court-annexed mediation for a long period of time and therefore successfully advancing ADR in Australia.[230] Just as in South Africa, there are various characteristics of voluntary mediation which are used in Victoria to maintain a good relationship between disputing parties. These characteristics include the mediation's being "voluntary, private, confidential, flexible, informal, speedy and less costly".[231] However, court-annexed mediation in the state of Victoria is rather different from that in South Africa.

---

227 Commonwealth of *Australia Constitution Act*, 1900.
228 Barak *Human dignity* 141.
229 Kellam "International trends in civil justice" 2, 8.
230 Maclons *Mandatory Court Based Mediation* 109.
231 Fox *Justice in the 21st Century* 176.

Based on statutory power (which will be discussed below) the "Supreme, Country and Magistrates' Court" of Victoria may order a dispute or part of the proceedings to be resolved via mediation, with or "without the consent of the parties".[232] In this chapter the content and various statutory provisions regulating court-annexed mediation in Victoria will be discussed to determine to what extent court-annexed mediation gives effect to access to justice in commercial disputes.

5.2 The system of government in Australia

Before access to justice in Victoria can be discussed, it is important to understand how Australia's legal system functions.

5.2.1 Australia's court system

The Australian Court system is separated into "state, territorial and federal jurisdictions, with the High Court of Australia as the final court of appeal".[233] The "federal courts"[234] have jurisdiction over the whole of Australia, whereas the "state courts" have jurisdictions only in the states in which they are established.[235] Each state has three types of courts, namely "lower courts such as the Magistrate's Court or local court, intermediate courts like the District Court or Country Court, and a Supreme Court".[236] Australia is a federation of six states, namely New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania.[237] For the purposes of this chapter and paper, the State of Victoria will be the focal point.

---

232 Kellam "International trends in civil justice" 15. "In each case referral to mediation should depend on the nature of the case and be at the discretion of the Court"; Victorian Law Reform Commission Civil Justice Review Report 14 of 2008 213.

233 Ficks 2008 *Journal of Japanese Law* 137.

234 "These courts operate under federal law and are the same in all states." The term refers to "The High Court of Australia, the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court of Australia." Law Institute Victoria 2014 https:// www.liv.asn.au/for-the-community/victorian-legal-system.

235 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-system.

236 Ficks 2008 *Journal of Japanese Law* 137.

237 Ficks 2008 *Journal of Japanese Law* 137.

5.2.2 Australia's legal sector

The legal system in Australia is known as an "adversarial system".[238] Various features of the adversarial system in civil disputes are explained by the Law Institute of Victoria as follows:

> Cases in court are presided over by a judge or magistrate who acts as an impartial and independent "umpire"; individuals are responsible for the conduct of their own matters and are represented by legal practitioners; rules of evidence and procedure are set down and both parties have equal footing; the role of the judge is to direct the jury, give rulings on points of law, summarise the facts of the case and answer queries from the jury.[239]

In civil disputes each case is determined on its own merits and in some cases the judge together with a jury and in other cases the judge alone decides the outcome as well as the remedy for each case.[240] In commercial disputes specifically, a case is normally adjudicated by a single judge or a panel of judges without a jury.[241]

Australia's legal framework also consists of three different types of law, namely "the Australian Constitution, statute law and common law".[242]

Firstly, the Australian Constitution was drafted in the 1890's, provides "a framework for the development of all other laws in Australia" and is also seen as Australia's "supreme law".[243] The Australian constitution was enacted in the year 1900 by the British Parliament and came into force in

---

238 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-sys tem.

239 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-sys tem.

240 "Juries are required for serious criminal trials and some civil trials in the County and Supreme Courts. For civil trials (private disputes between parties) there are six jury members. In these cases, the jury must decide which party is at fault." Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-system.

241 Ficks 2008 *Journal of Japanese Law* 137.

242 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-system.

243 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-system.

1901 with the creation of the federation. [244] The total Australian constitutional sector also includes the various state Constitutions, which originated in the 1950's.[245]

Secondly, statute law or legislation is also promulgated by a specific state as well as by the Commonwealth parliament.[246] As a practical example, the Victorian government would promulgate certain laws which would be applicable to the citizens of Victoria only, whereas laws made by the federal parliament will apply to all Australians.[247]

Lastly, common law, which is also known as "case law", is handed down as decisions made in various court cases and applies to future cases as it forms part of the "doctrine of precedent".[248]

5.3 Access to justice

5.3.1 Access to justice: Implied in legislation

As mentioned above, each state promulgates statute law or legislation which applies to that particuar state only. In the state of Victoria the right to access to justice is implied within section 24(1) of the *Charter of Human Rights and Responsibilities Act* 43 of 2006. Section 24(1) refers to the right to a fair hearing in both criminal and civil matters by stating that:

> A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

---

244 Bennet 2004 https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/online/Milestones.

245 Bennet 2004 https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/online/Milestones.

246 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-system.

247 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-system.

248 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-system.

Although there are no specific or express constitutional guarantees which afford a right to access to justice, the state and federal constitutions assume the existence of the common law, the rule of law, and general subscription to democratic values. Affirming the latter, Judge Kellam,[249] formerly a judge in the Victoria Country Court, the Supreme Court and the Court of Appeal of Australia, states that:

> The Rule of Law requires fair and just resolution of disputes. However, it also requires that the process, particularly in relation to civil disputes be cost effective. The primary goal of a civil justice system is the just resolution of disputes through a fair, but timely, process at a reasonable expense.

It is clear that the right to access to courts is implied through Victorian legislation as well as the rule of law, and is implicit in the democratic values of Australia. Although the right to access to the courts is not a direct constitutional right, disputes are still to be settled in a fair and timely manner as required by the rule of law.[250] This, however, is not realised without difficulty.

5.3.2 Challenges regarding access to justice

Wayne Martin, Chief Justice of Western Australia, states that there are three main obstacles to access to justice in Australia, namely cost, delay and the complexity of the civil justice system.[251]

Firstly, with reference to "delay", Judge Kellam[252] refers to a statement by Cleeson CJ in *State Pollution Control Commission v Australian Iron & Steel Pty Ltd* of 1992 that:

> The courts of this State are overloaded with business, and their workload has, over a number of years, increased at a greater rate than any increase of the resources made available to them. The inevitable consequence has been delay.

---

249 Kellam "International trends in civil justice" 2, 8.
250 Kellam "International trends in civil justice" 2, 8.
251 Wayne 2014 *Australian Law Review* 2.
252 Kellam "International trends in civil justice" 9.

The delay in the civil justice system is not just time consuming, but it also increases litigation costs, which are seen as the second challenge, and arise from the prolonged litigation period.[253] In a community survey in 2006 the following was concluded:

> In the previous year, 35% of Victorians were involved in at least one dispute, with the total number of disputes in Victoria estimated at 3.3 million. The cost to Victorians of attempts to resolve these disputes was $2.7 billion in expenses such as legal and expert advice and personal time.[254]

The systemic delay and high costs attendant on the litigation process render the civil justice system inaccessible to many.[255]

Lastly, due to the volume and complexity of the statutes within substantive law as well as procedural law it is difficult for ordinary people to access the courts without legal representation.[256] Kellam J refers to the *AON Risk Services Australia Ltd v Australian National University* case,[257] where the High Court of Australia stated that:

> In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone... It is recognized by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.

The complexity of some disputes makes litigation difficult for middle-class individuals who do not financially qualify for legal aid but are also not wealthy enough to afford the private legal representation necessary to analyse complex issues. They are therefore unable to access the civil justice system.[258]

---

253 Wayne 2014 *Australian Law Review* 6.
254 Victorian Law Reform Commission Civil Justice Review Report 14 of 2008 216.
255 Kellam "International trends in civil justice" 2, 8.
256 Wayne 2014 *Australian Law Review* 12-13. In this regard Wayne states that the vast amount of legislation promulgated by parliament could have been circumvented by legislating principles as opposed to practical details.
257 Kellam "International trends in civil justice" 10.
258 Wayne 2014 *Australian Law Review* 3.

It is clear that the three main obstacles, namely delay, costs and complexity, are connected with one another. In this context, case management strategies must be implemented to reduce the delay in the civil justice system. Amongst other things, case management strategies include the "early resolution of disputes".[259] Therefore, ADR methods such as mediation and court-based mediation have been implemented to reduce the delay in the civil justice system.

The approach to the investigation into the research question asked in this dissertation has been twofold, with the first part focusing on access to justice/the courts. As that has been dealt with above, it is now time to investigate the intricacies of court-based/court-annexed mediation, which investigation will take place below.

5.4 Content of mediation and court-annexed mediation in Victoria

5.4.1 Introduction

Alternative dispute resolution in the Australian context is defined by the National Alternative Dispute Resolution Advisory Council as an "umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them".[260] ADR methods are implemented to improve access to justice due to the profound problems occurring in the civil justice system, hampering access to justice in Australia.[261] In 1993 the "Dispute Settlement Centre of Victoria", known as the DSCV became effective, creating a centralized system to administer ADR methods, specifically in the state of Victoria.[262] The goal of DSCV was not just to provide "informal, impartial, accessible,

259 Kellam "International trends in civil justice" 9.
260 Victorian Law Reform Commission Civil Justice Review Report 14 of 2008 212.
261 Wayne 2014 *Australian Law Review* 2.
262 Ojelabi "Improving access to justice" 19.

low cost" ADR methods to all communities in Victoria, but also to educate the public regarding these methods.[263]

These methods include mediation and court-annexed meditation, which will be discussed separately.

5.4.2 Mediation as a form of ADR

Mediation as a form of ADR is seen as an "integral part of the court's adjudicative processes" and is used to promote alternative dispute resolution.[264] The importance of implementing mediation in Victoria's legal framework was explained by John Phillips,[265] the Chief Justice of the Supreme Court of Victoria, as follows:

> All studies of dispute resolution show that people greatly value the quick resolution of disputes and the opportunity to put their case in the presence of a neutral person. Mediation satisfies both these requirements.

After the implementation of mediation in the state of Victoria, Maclons[266] stated that, expect for appeals and judicial reviews, a case wil not be heard unless it has atleast been sent for one round of mediation. It is clear that mediation in the state of Victoria has been used successfully to resolve disputes.

5.4.2.1 Characteristics of mediation

Although the characteristics of court-annexed mediation (which will be discussed hereunder) often differ from jurisdiction to jurisdiction, the characteristics of voluntary mediation in general are mostly identical.

---

263 Ojelabi "Improving access to justice" 19.

264 Kellam "International trends in civil justice"15.

265 Abdul Wahab *Court-annexed and judge-led mediation* 35.

266 Maclons *Mandatory Court Based Mediation* 109, 110. Maclons described the success ot the system of "court-based" mediation in the state of Victoria as follows: "In the Supreme Court in 2006, more than 70% of mediated cases were able to achieve settlement ... in the Country court, approximately 60% of civil cases were successfully settled at mediation ... in the Magistrates Court, approximately 64.42% of civil cases were successfully mediated according to a 2007 year end annual report..."

Mediation in the State of Victoria is also seen as a "voluntary, private, confidential, flexible, informal, speedy and less costly" method of resolving disputes.[267]

Given the desired outcome of mediation, which is finding an appropriate solution agreed to by both parties, mediation commences with agreement between the parties that the process should take place,[268] thus making the process voluntary.

The process itself is structured and is guided by an impartial and independent third party known as the mediator.[269] The mediator does not have any "advisory or determinative role in regard to the content of the dispute or the outcome of its resolution".[270] This makes the process informal.

As the process is informal, the mediators are not required to be court officials. The mediation is not a consideration of the rights but of the interests and needs of the parties.[271] Private mediation can therefore in general be conducted by "former judicial officers, lawyers and other professionals".[272] The process is seen as informal, flexible and less costly. Although the mediation process is not based on legal rights, it is still the "footing on which discussion proceeds".[273]

Due to the confidentiality of the mediation process, parties are prohibited from "adducing evidence of a communication made, or a document prepared, in connection with an attempt to negotiate a settlement".[274] This is also known as the "without prejudice" principle.[275] This principle is

---

267 Fox *Justice in the 21st Century* 176.
268 Fox *Justice in the 21st Century* 176.
269 Bergin 2012 http://www.austlii.edu.au/au/journals/NSWJSchol/2012/24.pdf.
270 Ficks 2008 *Journal of Japanese Law* 133.
271 Fox *Justice in the 21st Century* 179.
272 Bergin 2012 http://www.austlii.edu.au/au/journals/NSWJSchol/2012/24.pdf.
273 Fox *Justice in the 21st Century* 179.
274 Bergin 2012 http://www.austlii.edu.au/au/journals/NSWJSchol/2012/24.pdf.
275 Arthur 2015 *Australian ADR Bulletin* 91. Parties "contents cannot be put in evidence without the consent of all relevant parties."

codified in the State of Victoria in section 131(1) of the *Uniform Evidence Act* of 1995.[276]

The purpose of the confidentiality or "without prejudice" principle is to make sure that disclosures which were made during the mediation process cannot be published outside the mediation or used to manipulate another party to be forced into a specific settlement during mediation.[277] The principle of "confidentiality" can also be incorporated in the mediation contract itself, by adding a "confidentiality clause" which will still be effective regardless of whether a settlement between the parties has been reached or not.[278]

Lastly, the confidentiality or without prejudice principle gives effect to the principle of "unqualified mediator immunity",[279] which grants a mediator full immunity from civil proceedings.[280]

These characteristics of mediation in general help to improve the dispute resolution process, making it more time efficient to resolve disputes by taking into account both parties' concerns and interests.[281]

Although mediation in general is seen as a voluntary means of dispute resolution, the Law Council of Australia[282] suggested that:

> there be a formal requirement for parties and their advisers to consider alternative dispute resolution before taking a civil case to court. We have

---

276 *Uniform Evidence Act* of 1995; Arthur 2015 *Australian ADR Bulletin* 91. S 131(1) states that "Evidence is not to be adduced of: (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute."

277 Bergin 2012 http://www.austlii.edu.au/au/journals/NSWJSchol/2012/24.pdf.

278 Arthur 2015 *Australian ADR Bulletin* 92 "in Australia an agreement to negotiate may be legally enforceable if it is clearly or unequivocally expressed".

279 Bergin 2012 http://www.austlii.edu.au/au/journals/NSWJSchol/2012/24.pdf.

280 Bergin 2012 http://www.austlii.edu.au/au/journals/NSWJSchol/2012/24.pdf.

281 Fox *Justice in the 21st Century* 176.

282 Fox *Justice in the 21st Century* 176.

> also recommended the adoption of further professional rules requiring legal practitioners to advise a client on alternatives to litigation.

Therefore, the application of voluntary mediation in some instances, such as in the State of Victoria, leads to court-annexed mediation, which is not always seen as a voluntary application.[283]

The characteristics, development and application in various courts of court-annexed mediation in the State of Victoria will be discussed below.

5.4.3 Court-annexed mediation

5.4.3.1 Characteristics of court-annexed mediation

With reference to court-annexed mediation in Victoria, there are a few characteristics which differ from mediation in general.

In court-annexed mediation a judge or any officer of that court may refer a case to be resolved via mediation at any time during the litigation process.[284]

As discussed above, when parties voluntarily choose to mediate, they choose the mediator themselves and are then liable for the costs thereof. However, in court-annexed mediation if "an order is sought" for mediation, the court itself will approve the mediator.[285] In this instance, it is usually "court staff" (registrars or commissioners) who conduct the court-annexed mediations.[286] This is because the mediators used by the court must be "suitably qualified and experienced" with "a high level of skill".[287]

The principle of immunity as discussed above regarding mediation in general also applies to court-annexed mediation. This form of immunity is

---

283 Bergin 2012 http://www.austlii.edu.au/au/journals/NSWJSchol/2012/24.pdf.
284 North "Court Annexed Mediation in Australia" 2.
285 Kellam "International trends in civil justice" 15.
286 Bergin 2012 http://www.austlii.edu.au/au/journals/NSWJSchol/2012/24.pdf.
287 Kellam "International trends in civil justice" 15.

applicable to mediations which are connected to the highest court of Victoria.[288]

The biggest difference between the state of Victoria and most other jurisdictions is the principle of "consent to mediate" by the parties. Based on statutory power (which will be discussed below), the "Supreme, Country and Magistrates' Court" in the State of Victoria may order a dispute or part of the proceedings to be resolved via mediation, with or "without the consent of the parties".[289]

Just as in South Africa, the fact that a court can refer parties to mediate "without the consent of the parties" was strongly opposed by the legal profession in the State of Victoria. The argument made was that it is an infringement of the rule of law.[290] Judge Kellam[291] opposed this argument by making the following statement:

> However, my experience (and that of other judges) is that there has proved to be no foundation to the concerns. Practitioners now routinely advise their clients that the judge will in all likelihood require the matter to be mediated and it is now rare for there to be any resistance to such an order.

The Chief Justice[292] of Australia's superior court in 1999 supported this observation by stating that court-annexed mediation:

> enables the parties to discuss their differences in a co-operative environment where they are encouraged but not pressured to settle so that cases that are likely to be resolved early in the process can be removed from that process as soon as possible.

It must also be understood that although the requirement to make use of mediation is mandatory, both parties still determine the outcome of the

---

288 Bergin 2012 http://www.austlii.edu.au/au/journals/NSWJSchol/2012/24.pdf.

289 Kellam "International trends in civil justice" 15. "In each case referral to mediation should depend on the nature of the case and be at the discretion of the Court"; Victorian Law Reform Commission Civil Justice Review Report 14 of 2008 213.

290 Kellam "International trends in civil justice" 16.

291 Kellam "International trends in civil justice" 16.

292 Kellam "International trends in civil justice" 15.

mediation session as well as whether or not to settle the dispute.[293] Therefore, the outcome of court-annexed mediation is still voluntary.

Both the State and the Federal courts around Australia have already adopted court-annexed mediation.[294] With specific reference to the State of Victoria, court-annexed mediation as well as the success thereof has grown tremendously. To determine the reason behind its success it is important to understand the developments which took place through the years to produce court-annexed mediation as it is today.

5.4.3.2 Development of court-annexed mediation in Victoria, Australia

Court-annexed mediation was first initiated in the *Victorian Country Court Building* case in 1983, where mediation was used to resolve a dispute in the construction industry.[295] This case led to the implementation of a mediation programme by the Federal Court of Australia in 1987.[296] It was only in the 1990's that the implementation of court-annexed mediation started to grow rapidly.

In 1991 the *Federal Court of Australia Act,* 1976 was amended to allow courts, with the consent of both parties, to refer a case or part thereof to mediation.[297] The effect of this move was explained in 1991 by Justice Phillips, the Chief Justice of the Supreme Court of Victoria, when he said that when mediation is used effectively, it can be used as a great tool to resolve the backlog in cases of the Supreme Court.[298]

---

293 Bergin 2012 http://www.austlii.edu.au/au/journals/NSWJSchol/2012/24.pdf.

294 Fox *Justice in the 21st Century* 179.

295 North "Court Annexed Mediation in Australia" 2; Maclons *Mandatory Court Based Mediation* 104.

296 North "Court Annexed Mediation in Australia" 3.

297 North "Court Annexed Mediation in Australia" 3.

298 North "Court Annexed Mediation in Australia" 3. Also see Maclons *Mandatory Court Based Mediation* 104. Mediation sessions were offered "on a *pro bono* basis", which resulted in the backlog of cases being dispatched.

As a result thereof, in 1992 the Victoria Supreme Court referred 280 out of its 762 cases for mediation. This was known as the "Spring offensive".[299] The "Spring offensive" was highly successful. 104 Cases out of the 280 were successfully settled by way of court-annexed mediation, which was a 54% success rate.[300]

This led to the "Autumn Offensive" in 1994, when 150 cases were referred to mediation by the Supreme Court with a success rate of 80%.[301] Due to the high success rate of mediation in general, the Federal Attorney-General announced the implementation of the "National Alternative Dispute Resolution Advisory Council", known as NADRAC, in 1995.[302] The purpose of NADRAC is to advise the Federal Attorney general as to the various alternative ways to resolve disputes in a effecient and cost effective manner.[303]

Together with announcing the establishment of NADRAC, the Federal Attorney-General stated that "the Government was encouraging the expansion of Alternative Dispute Resolution as part of its strategy to lower legal costs and improve access to justice".[304] In 1995 the former Chief Justice of the Supreme Court, Phillips CJ,[305] stated that "the time has come for the organized involvement of mediation in all Victorian courts". In 1997 NADRAC announced that in order for disputes to be resolved more

---

299 North "Court Annexed Mediation in Australia" 3; Agapiou and Ilter *Court-connected construction mediation practice* np.

300 North "Court Annexed Mediation in Australia" 3; Agapiou and Ilter *Court-connected construction mediation practice* np. Also see Abdul Wahab *Court-annexed and judge-led mediation* 77.

301 Agapiou and Ilter *Court-connected construction mediation practice* np.

302 McFarlane 2012 http://whoswholegal.com/news/features/article/29919/mediation-comes-age-victoria/.

303 McFarlane 2012 http://whoswholegal.com/news/features/article/29919/mediation-comes-age-victoria/.

304 North "Court Annexed Mediation in Australia" 3.

305 Maclons *Mandatory Court Based Mediation* 105.

effectively, the State must also provide the means to enable the process. The "means" would officially include court-annexed mediation.[306]

Later on, in 2008, the Victorian Law Reform Commission proposed that ADR must be used even earlier in the civil justice system, specifically in the Victorian courts.[307] With reference to the latter, the emphasis was placed upon the issue of cost and access to courts, which could be reduced by taking recourse to ADR. In this instance the Victorian Government Attorney-General stated that:

> such costs may be less than the costs incurred if the matter proceeds to trial. Therefore, cases which are settled or resolved through ADR processes may incur less cost, but where the matter still proceeds to trial there may be an increase in the overall costs borne by the parties. However, if there is a narrowing of the issues, or if certain matters are resolved during the ADR process that might otherwise have led to significant interlocutory costs, then the ADR process may result in a net decrease in costs in cases which still proceed to trial.

Thereafter, in 2009, the Department of Justice launched a report after considering the effectiveness of mediation in both the Supreme and Country Courts of Victoria.[308] The report confirmed that mediation meets all the necessary requirements for ADR. The "Dispute Settlement Centre of Victoria" also stated that "85% of disputes are resolved at mediation and 86% of DSCV clients are satisfied with mediation sessions in particular preserving existing relationships and enabling future business".[309]

The application of mediation as an alternative to civil court proceedings started to expand tremendously. This was a fulfilment of the prophecy made by the former Chief Justice of the Supreme Court, Phillips CJ,[310] (already quoted above), that "the time has come for the organized involvement of mediation in all Victorian courts". Based on these developments and in reaction to the startling success rate, various statutes

306 North "Court Annexed Mediation in Australia" 4.
307 Ojelabi "Improving access to justice" 20.
308 Agapiou and Ilter *Court-connected construction mediation practice* np.
309 Agapiou and Ilter *Court-connected construction mediation practice* np.
310 Maclons *Mandatory Court Based Mediation* 105.

started to make an appearance, providing for the application of court-annexed mediation.

5.4.3.3 Victorian courts and court-annexed mediation

As mentioned above, the state of Victoria has three different levels of courts. The application of court-annexed mediation in civil cases is governed and enforced by various statutes applicable to the different levels of courts. These statutes are discussed below.

5.4.3.4 Supreme Court of Victoria

The Supreme Court of Victoria, also known as the "highest court" in the state of Victoria, is divided into two divisions, the "Trial Division" and the "Court of Appeal".[311] The "Trial Division" deals with more serious and complex cases, such as cases involving a high monetary value.[312] The "Court of Appeal" on the other hand deals with all appeals "from the Trial Division of the Supreme Court and other Victorian courts and tribunals".[313]

With reference to court-annexed mediation, Rule 50.07(1) of the Supreme Court Rules of Victoria[314] (known as the general civil procedure rules) states that "at any stage of a proceeding the court may, with or without the consent of any party, order that the proceeding or any part of the proceeding be referred to a mediator". Court-annexed mediation forms part of Victoria's civil justice system and achieved great success.

This success was described in the Supreme Court's annual report for 2005/2006, which stated that 70% mediationed cases reached

311 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-system.

312 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-system.

313 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-system.

314 SR NO 103 of 2015 - Reg 50.7 http://www.austlii.edu.au/au/legis/vic/num_reg/sccpr2015n 103o2015514/s50.07.html.

settlement.[315] It is clear that court-based mediation in the Supreme Court of Victoria has been a great success.

5.4.3.5 Country Court of Victoria

The Country Court of Victoria is seen as the second highest court in the state, being situated hierarchically just under the Supreme Court of Victoria. With reference to civil matters, the Country Court deals with cases which are seen to be more serious than those dealt with by the Magistrates Court.[316] The court is regulated by the *Country Court Civil Procedure Act*, 2010[317] as well as the Country Court Civil Procedure Rules of 2008.[318] Court-annexed mediation is regulated by Rule 34A.21 stating that a dispute can be reffered to mediation by the court in accordance with Rule 50.07 with or without the concent of the party.

Rule 50.07 sets out the procedure for court-annexed mediation. It states that:

> (2) An order for reference to mediation may be made at any stage of a proceeding. (3) Except so far as the Court otherwise orders, an order for reference to mediation shall not operate as a stay of the proceeding. (4) Where a reference is made under paragraph. (2) The mediator shall endeavour to assist the parties to reach a settlement of the proceeding or settlement of that part of the proceeding referred to the mediator. (5) The mediator may and shall if so ordered report to the Court whether the mediation is finished.
>
> (6) The mediator shall not make any report to the Court other than a report under paragraph (5). (7) Except as all the parties who attend the mediation in writing agree, no evidence shall be admitted of anything said or done by any person at the mediation. (8) The agreement may be made at the mediation or later. (9) The Court may determine the remuneration of the mediator, and by what party or parties and in what proportion the remuneration is to be paid either in the first instance or finally. (10) The Court may order any party to give security for the remuneration of the mediator.

---

315 Victorian Law Reform Commission Civil Justice Review Report 14 of 2008 213.

316 Law institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-system.

317 *Civil Procedure Act* 47 of 2010 http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/51dea49770555ea6ca256da4001b90cd/B45E5C73DC677EEECA257789001D2998/$FILE/10-047a.pdf.

318 Available at http://www.austlii.edu.au/au/legis/vic/consol_reg/cccpr2008380/.

5.4.3.6 Magistrates Court of Victoria

The Magistrates Court is the "lowest court in the Victorian hierarchy". It deals with both civil and criminal cases and hears about 90% of all Victorian cases. Cases are heard and determinations are made by magistrates and the jury system is not applicable.[319] Court-annexed mediation in the Magistrates Court is regulated by section 108 of the *Magistrate's Court Act* 51 of 1989.[320] It states that:

> (1) Subject to and in accordance with the Rules,[321] the Court may, with or without the consent of the parties, refer the whole or any part of a civil proceeding to mediation. (2) Unless all the parties who attend the mediation otherwise agree in writing, no evidence shall be admitted at the hearing of the proceeding of anything said or done by any person at the mediation.

The Magistrate's Court annual report of 2005/2006 stated that 39% of the 9360 defended civil claims were finalised by way of mediation and that 70% of the cases referred to mediation were finalised during the mediation phase.[322] Therefore, court-annexed mediation has been met with great success in the Magistrates Court of Victoria. The submission is made that if the Magistrates court hears almost 90% of all Victorian cases, court-annexed mediation must have a big impact on resolving disputes among the citizens of Victoria.

---

319 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-system.

320 *Magistrate's Court Act* 51 of 1989 http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTObject_Store/LTObjSt3.nsf/d1a8d8a9bed958efca25761600042ef5/c3999db032f30669ca2577610028 2b74/$FILE/89-51a154.pdf.

321 The latter rules as stated above refers to the Magistrates Court General Civil Procedure rules 2010 http://www.austlii.edu.au/au/legis/vic/consol_reg/mcgcpr2010464/.

322 Victorian Law Reform Commission Civil Justice Review Report 14 of 2008 213.

5.4.3.7 Legislation pertaining to court-annexed mediation

5.4.3.7.1 *Civil Procedure Act* 47 of 2010[323]

The *Civil Procedure Act* is applicable to all civil disputes arising in the State of Victoria.[324] The purpose of the act as set out in section 7(1) is to "facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute".[325] To give effect to the purpose of the act, parties are required to "take reasonable steps to resolve their disputes before litigation commences".[326] Methods of facilitating the requirements of the parties can be found in various sections of the act.

Section 7(2)(c) of the act states that disputes can be resolved by means of "any appropriate dispute resolution process (i) agreed to by the parties; or (ii) ordered by the court". An appropriate dispute resolution process in this context is defined in section 3 of the act, which refers amongst other things to "mediation, whether or not referred to a mediator in accordance with rules of court".

Section 66(1) of the act makes provision for courts to refer any civil proceeding or any part thereof to appropriate dispute resolution, such as mediation. Section 66(2) of the act states that a referral may be made with or without the consent of the parties. Section 66(3) of the act further states that a referral can be made at any stage in the proceedings.

A further obligation on parties regarding the resolution of a civil dispute is set out in section 16 of the act, which places a duty on certain parties

---

323 *Civil Procedure Act* 47 of 2010 http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/51dea49770555ea6ca256da4001b90cd/B45E5C73DC677EEECA257789001D2998/$FILE/10-047a.pdf. The civil procedure act commenced on the 1st of January 2011.

324 Maclons *Mandatory Court Based Mediation* 107; Bergin 2012 http://www.austlii.edu.au/au/journals/NSWJSchol/2012/24.pdf.

325 Section 7(1) of the *Civil Procedure Act* 47 of 2010.

326 Abdul Wahab *Court-annexed and judge-led mediation* 37.

involved in a civil dispute[327] to "further the administration of justice" *inter alia* in:

(a) any interlocutory application or interlocutory proceeding;
(b) any appeal from an order or a judgment in a civil proceeding;
(c) any appropriate dispute resolution undertaken in relation to a civil proceeding.

Section 41(1) places an obligation on each party to certify that it has read through and understands the obligations and duty placed upon it. If a party is represented in the matter, the representative may also make the "obligation certificate" by ensuring that his/her client understands the intricacies of the civil claim.[328] Section 41(2) states that an "obligation certification" must be filed by the applicable party/representative together with the substantive documents.[329]

This obligation is not taken lightly by the courts. Section 28 of the act states that "a court may take into account any contravention of the overarching obligations". Section 29 of the act provides that the court may also "make any order it considers appropriate in the interest of justice", such as various cost orders or "sanctioning such contravention", amongst other things, where a party fails to comply with the its obligation.

5.4.3.7.2 *Civil Dispute Resolution Act* of 2011

The abovementioned duties are also set out in the *Civil Dispute Resolution Act* of 2011. The object of this act is "to ensure, as far as possible, that people take genuine steps to resolve disputes before proceedings are

---

327 As set out in s 10 "The overarching obligations apply to— (a) any person who is a party; (b) any legal practitioner or other representative acting for or on behalf of a party; (c) any law practice acting for or on behalf of a party; (d) any person who provides financial assistance."

328 Section 41(3); Maclons *Mandatory Court Based Mediation* 108.

329 In this regard Maclons explains that it refers to the "document which initiates the civil dispute. Thus, for instance, such document could be a complaint, a summons or application which commenced a civil proceeding, a notice if defence or a counterclaim." S 41(3); Maclons *Mandatory Court Based Mediation* 108.

instigated".[330] This said, the act places a duty upon legal representatives to inform their clients regarding the provisions and requirements of the act by recommending the use of ADR.[331]

As mentioned in the above discussion of the *Civil Procedure Act*, the court will take into account whether "genuine steps" were taken by the parties to resolve the dispute by way of ADR, and if their legal representatives failed in their obligation to inform the parties about this duty, personal cost orders against them may be granted.[332]

5.5 Conclusion

It is concluded that in the State of Victoria, access to justice is implied and entrenched within section 24(1) of the *Charter of Human Rights and Responsibilities Act* 43 of 2006 and the Rule of Law which requires disputes to be resolved in a fair and just manner. It is concluded that the main obstacles regarding access to justice in the civil justice system were cost, delay, and the complexity of the civil justice system.[333]

Just as in most other jurisdictions, the characteristics of the mediation process in the State of Victoria are that it is a "voluntary, private, confidential, flexible, informal, speedy and less costly" method of resolving disputes.[334] However, the application of court-annexed mediation differs from that in most other jurisdictions.

The biggest difference in the State of Victoria is to be found in the principle of "consent to mediate" by the parties. Based on their statutory powers, the Supreme, Country and Magistrates' Courts in the State of Victoria may

---

330 McFarlane 2012 http://whoswholegal.com/news/features/article/29919/mediation-comes-age-victoria/.
331 McFarlane 2012 http://whoswholegal.com/news/features/article/29919/mediation-comes-age-victoria/.
332 McFarlane 2012 http://whoswholegal.com/news/features/article/29919/mediation-comes-age-victoria/.
333 Wayne 2014 *Australian Law Review* 2.
334 Fox *Justice in the 21st Century* 176.

order a dispute or part of the proceedings to be resolved via mediation, with or "without the consent of the parties",[335] thereby placing an obligation on both parties, regardless of their financial position, to enter into mediation before entering litigation.

The quality of court-annexed mediation in Victoria is also due to the fact that if "an order is sought" by the court to mediate, the court itself will approve the mediator.[336] In this situation the mediators used by the court must be "suitably qualified and experienced" with "a high level of skill".[337] The submission is made that as in the evaluative model of mediation, the mediator will generally be an expert in the subject matter of the underlying dispute and thus able to guide the parties towards a fair settlement.

The reason for Victoria's success with the diversion of litigation towards mediation is the importance the courts place on the application of the mediation process. In this instance the courts may grant sanctioning or costs orders in the interest of justice where parties failed to comply with the obligation to consider mediation.

It is clear that various statutes not only make provision for mandatory court-annexed mediation in civil disputes, but also provide for sanctions or cost orders, which are the consequence for parties not complying with the abovementioned sections of the various acts, the purpose of which is to resolve disputes in an "efficient, timely and cost-effective" manner. It is clear that Victoria contributes to proper access to justice in its application of its court-based mediation system. It is also clear that there are similarities as well as differences between the manner in which South Africa and Victoria use court-based mediation to facilitate access to justice. These similarities and differences are be discussed in chapter 6.

---

335 Kellam "International trends in civil justice" 15. "In each case referral to mediation should depend on the nature of the case and be at the discretion of the Court"; Victorian Law Reform Commission Civil Justice Review Report 14 of 2008 213.

336 Kellam "International trends in civil justice" 15.

337 Kellam "International trends in civil justice" 15.

6 Comparison between South African and Victoria, Australia

6.1 Introduction

The purpose of this chapter is to investigate the similarities and differences, between the position in SA and Victoria and to ascertain the manner in which an analysis of the situation in Victoria can assist in answering the research question.

6.2 Comparison

6.2.1 Applicable legal system

South Africa's legal system is seen as a "hybrid" or an "adversarial" legal system.[338] Various procedural rules which govern the judicial system can be found in the "Constitution, other enabling legislation, procedural rules" and the common law.[339] The 1996 Constitution is seen as the "Supreme law" of the entire country.[340] Legislation must be amended if it should be found not to be consistent with the Constitution or with the values of the Constitution.[341]

Although the justice systems in both the State of Victoria as well as in Australia as a whole are seen as adversarial, they actually differ from each other.[342] The Australian Constitution is seen as the supreme law of the country and provides a framework for all other laws throughout Australia,[343] but each state, including the State of Victoria, may promulgate

338 Wolter *et al* "South Africa" 578.
339 Wolter *et al* "South Africa" 581.
340 Wolter *et al* "South Africa" 578.
341 Wolter *et al* "South Africa" 578.
342 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-sys tem.
343 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-sys tem.

statutory laws or legislation which are applicable only to the citizens of that specific state.[344]

6.2.2 Applicable court system

In contrast, the South African court structure is explained by Wolter[345] as consisting of the following:

> The superior courts, being the Constitutional Court, Supreme Court of Appeal and the various divisions of the High Court, and the lower courts, comprising the regional and district Magistrates' Courts.

Although the South Africa court system houses various courts mandated to deal with various classes of disputes, it still consists of only one legal system which is applicable to the entire country.

In South Africa, as stated above, the Constitution, various statutes, legislation and the principles of common law apply to the entire country. This is not the case in Australia. The entire Australian court system is further separated into "state, territorial and federal jurisdictions".[346] Federal courts have jurisdiction over the whole of Australia, whereas State courts have jurisdiction only in the states in which they are established - in the State of Victoria in this instance.[347]

It is clear that Australia does not possess only one legal system which is applicable to the entire country, although it does have a Constitution which is the supreme law of the entire country. Furthermore, both South Africa and Australia have various courts mandated to hear various disputes. However, some courts in Australia may hear only certain disputes in particular states, such as in the state of Victoria.

---

344 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-sys tem.

345 Wolter *et al* "South Africa" 578.

346 Ficks 2008 *Journal of Japanese Law* 137.

347 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-sys tem.

6.2.3 Content of access to justice

In South Africa the right to access to justice is envisaged in section 34 of the 1996 Constitution, and the rule of law as well as the Bill of Rights.[348] This right enables every individual to have equal access to justice.[349] All persons have the right to have their disputes decided before a court or another tribunal or forum, and the disputes must be resolved in fair and public hearings.[350] These principles as set out in section 34 of the Constitution form part of the "rule of law", and failure to comply with them can render the procedure unconstitutional.[351]

Contrary to the South African Constitution, which make specific provision for access to justice, there is no specific or expressed constitutional guarantee of access to courts within the Australian constitution.[352] It would seem that the right to access to justice is implied by the Australian Constitution.[353] It is entrenched and implied within section 24(1) of the *Charter of Human Rights and Responsibilities Act* 43 of 2006 as it pertains to the state of Victoria. With regard to the rule of law, the resolution of disputes must be fair, timely, just and cost-effective.[354] The principle of access to justice in the State of Victoria seems to be generally consistent with the principle as it is set out in the South African Constitution, as stated above. The difference lies in how the courts apply these principles.

6.2.4 Application of the right to access to justice

Section 165(2) of the South African Constitution states that "the courts are independent and subject only to the Constitution and law, which they must apply impartially and without fear, favour or prejudice".[355] Alternative

---

348 Radebe 2011 http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html.
349 Davis "Access to courts" 28-1.
350 McQuoid-Mason 2013 *Oñati Socio-Legal Series* 565; S 34 of the *Constitution.*
351 Davis "Access to courts" 28-8(1).
352 *Commonwealth of Australia Constitution Act* 1900.
353 Barak *Human dignity* 141.
354 Section 24(1) of the *Charter of Human Rghts and Responsibility Act* 43 of 2006.
355 Section 165(2) of the *Constitution*.

tribunals or forums must also comply with these principles to give effect to the right to access to justice.[356]

Certain aspects of the Victorian system are consistent with the South African system. These include the right to have civil proceedings "decided by a competent, independent and impartial court or tribunal after a fair and public hearing".[357] However, in Victoria certain cases are determined by a judge alone, and other cases by a judge and jury.[358] It is possible that the application of the law "impartially and without fear" may be tempered by the fact that such cases are adjudicated together with a jury. The opinion is held that a jury consists of laymen whose objectivity in a case is more likely to be influenced than that of a judge alone. However, more complex cases, such as commercial disputes are mostly adjudicated by a single or either a panel of judges without a jury.[359] Therefore, the application of the constitutional requirement that cases be judged "impartially and without fear", thus ensuring access to justice for all, seems to be more complex in the State of Victoria than in South Africa due to the complexity of their legal system.

6.2.5 Challenges in respect of access to justice

As stated above, to enable access to justice in both South Africa and the State of Victoria, dispute resolution must be simple, speedy, accessible, affordable and effective, but for many years in both jurisdictions individuals and companies with minimal resources have been denied access to justice through the civil justice system.

---

356 Davis "Access to courts" 28-3.

357 Section 24(1) of the *Charter of Human Rights and Responsibility Act* 43 of 2006.

358 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-sys tem.

359 Ficks 2008 *Journal of Japanese Law* 137.

Minister of Justice and Constitutional development, Jeff Radebe has identified challenges in South Africa's civil justice system. He[360] states that it is "expensive, slow, complex, fragmented and overly adversarial". A further obstacle to access to justice is the lack of expertise on the judge's panel in particularly complex commercial disputes.[361] The failure by South African courts to function efficiently and effectively has a deletrious effect on access to justice.[362] These challenges in litigation are inclined to impact more frequently on the financially vulnerable parties to a dispute.[363]

Although it might seem that these challenges are unique to South Africa, this is not the case. In the State of Victoria the Chief Justice, Wayne Martin,[364] stated that the three main obstacles to access to justice are "cost, delay and complexity" in the civil justice system. Due to the increasingly heavy case load of civil cases, the Victorian courts are overloaded.[365] Due to the delay in cases being concluded, the costs involved in litigation have been increasing, making the process costlier than expected.[366] Furthermore, due to the complexity of the statutes, ordinary people find it difficult to access the courts without proper legal representation.[367] These obstacles, just as in South Africa, make it more difficult for those who do not qualify for free legal representation but do not themselves have the resources to pay for representation and thus to access the civil justice system.[368]

Given these obstacles to access to the court system, other methods of dispute resolution have had to be found, such as mediation and court-

---

360 Radebe 2011 http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html; South African Law Commission Issue Paper 8 (Project 94) Alternative Dispute Resolution 3; Brand, Steadman and Todd *Commercial mediation* 13-14.
361 Davis "Two observations and five remarks" 27.
362 EUAFR "Access to justice in Europe" 40.
363 Farrow 2015 *Revista Forumul Judecatorilor* 76; Genn 2012 *Yale JL & Human* 401.
364 Wayne 2014 *Australian Law Review* 2.
365 Kellam "International trends in civil justice" 9.
366 Wayne 2014 *Australian Law Review* 6.
367 Wayne 2014 *Australian Law Review* 12-13.
368 Wayne 2014 *Australian Law Review* 3.

based/annexed mediation, which are methods of obtaining justice in a fair, impartial and legal manner in both South Africa and the State of Victoria.[369]

6.2.6 Content of mediation and mandatory court-based mediation

6.2.6.1 Characteristics of mediation

In both South Africa and the State of Victoria, mediation in general is a voluntary, private, confidential, flexible, informal, speedy and less costly process initiated by two or more parties.[370] In both jurisdictions mediation is facilitated by an impartial and independent third party known as the mediator.[371] In both jurisdictions the mediator only facilitates the process whilst ensuring that there is a cooperative relationship between the parties. The mediator does not play an advisory or determinative role.[372] Although the process is controlled by the mediator, the mediator does not influence the decision of the parties. The parties still determine the outcome themselves.[373] In both jurisdictions, due to the fact that the mediator only facilitates the process, it is not required that the mediator in private mediation has expert knowledge about the issue at hand.[374] Furthermore, in both South Africa and Victoria, based on the confidentiality of the

---

369 Victorian Law Reform Commission Civil Justice Review Report 14 of 2008 212; Radebe 2011 http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html; South African Law Commission Issue Paper 8 (Project 94) Alternative Dispute Resolution 3; Brand, Steadman and Todd *Commercial mediation* 13-14.

370 Brand, Steadman and Todd *Commercial mediation* 19; CEDR 2017 https://www.cedr.com/about_us/library/glossary.php; Blake, Browne and Sime *A practical approach* 234; Frenkel *International law* 95; Fox *Justice in the 21st Century* 176.

371 Brand, Steadman and Todd *Commercial mediation* 2; Law Reform Commission Report 98-2010 Alternative Dispute Resolution: Mediation and Conciliation 21; Bergin 2012 http://www.austlii.edu.au/au/journals/NSWJSchol/2012/24.pdf.

372 Doherty and Guyler *The essential guide to workplace mediation* 12; Mwenda *Paradigms of ADR* 40; Ficks 2008 *Journal of Japanese Law* 133.

373 Ficks 2008 *Journal of Japanese Law* 133; Doherty and Guyler *The essential guide to workplace mediation* 12; Mwenda *Paradigms of ADR* 40.

374 Carbonneau *Handbook on Mediation* 286; Pretorius *Dispute Resolution* 41; Fox *Justice in the 21st Century* 179.

process, the content of the information shared during mediation cannot be used as evidence outside the mediation process.[375]

One difference between the situation in these two jurisdictions is that in South Africa there are various pieces of legislation making provision for the voluntarily referral of disputes to ADR, such as mediation. In the South African context, commercial mediation is governed in the first instance by the Code of Good Governance with specific reference to the various King Reports on Good Governance.[376] The King III report places an indirect duty on directors and executive officers to resolve disputes "effectively, expeditiously and efficiently".[377] As in Victoria, a failure to advise a company on mediation or a failure to comply with this obligation may lead to damage claims against the company or its directors, and in regard to legal counsel, a charge of professional negligence.[378] Secondly, section 156 of the *Companies act* 71 of 2008 provides that a person may (also voluntarily) attempt to resolve a dispute through ADR, which includes mediation, conciliation or arbitration. Furthermore, section 167 of the *Companies act* states that if the ADR process was effective, with the consent of both parties it could be made an order of the court. On the other hand, various pieces of legislation provide for mandatory court-annexed mediation in Australia.

6.2.6.2 Characteristics of court-based/annexed mediation

In both jurisdictions mediation in general is seen as a voluntary process, but there are some instances where mediation could be an optional obligation (in South Africa) or a mandatory obligation (in the State of Victoria). In South Africa court-based mediation differs from private

---

375 Bergin 2012 http://www.austlii.edu.au/au/journals/NSWJSchol/2012/24.pdf; Doherty and Guyler *The essential guide to workplace mediation* 15.

376 Four Reports have been issued, firstly King I (1994), King II, 2002, King III (2009) and King IV (2016.); Banhegyi *Management* 317.

377 Herbert (ed) 2011 *Int'l Law* 119; Wiese 2014 *SA Merc LJ* 669; Principle 8.8 of the King III report.

378 Herbert (ed) 2011 *Int'l Law* 119.

mediation in the sense that it forms part of the judicial system of South Africa.[379] The principles of court-based mediation were originally regulated by a draft set of mediation rules approved by the South African Rules Board in 2011, as well as by Rule 37 of the High Court rules.[380] They provided that before certain disputes became the subject of litigation there had to be an attempt to resolve them by way of mediation.[381] The outcome of the mediation process was still to be determined by the parties, and they did not waive their right to enter into litigation when no or just a partial settlement by way of mediation was reached.[382] However, the constitutionality of these "mandatory" court-based mediation rules was questioned.[383] It was concluded that their "mandatory" nature infringed upon the constitutional right to approach a court.[384]

With reference to the latter, the "mandatory" court-based mediation rules were modified and gave effect to the "voluntary court-based mediation rules" of 2013, known as the "amended Magistrates' Court rules".[385] These rules would provide for voluntary court-based mediation in "civil proceedings in the Magistrates' Courts" with the purpose of improving access to justice by reducing the overload of civil disputes in the courts.[386] In this instance, a dispute can still voluntarily be referred to mediation by way of agreement between the parties, but a court can also provide the parties with the opportunity to refer it to mediation.[387] The process of mediation remains voluntary, but a failure by the parties/legal

379 Brand, Steadman and Todd *Commercial mediation* 44.
380 Brand, Steadman and Todd *Commercial mediation* 45; Draft set of rules 2011 http://www.golegal.co.za/wp-content/uploads/2016/12/Court-Annexed-Mediation-Rules-of-the-Magistrates-Courts.pdf.
381 Rule 3(1) of the Draft set of rules 2011.
382 Maclons *Mandatory Court Based Mediation* 119.
383 Maclons *Mandatory Court Based Mediation* 122.
384 Patelia "Implementing mediation in the formal legal system" 17.
385 GN 183 GG 37448 of 18 March 2014 http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf.
386 Rule 71(f) of the Amended Magistrates Court rules.
387 Patelia "Implementing mediation in the formal legal system" 18.

representative to consider mediation as an option may lead to an adverse cost order against the party/legal representative concerned.[388]

The difference between the position in the State of Victoria and that in South Africa is that, based on its statutory power, a court in Victoria may refer a case to mediation with or without the consent of the parties. This is known as mandatory court-annexed mediation.[389] Just as in South Africa, this "mandatory" court-annexed mediation was opposed on the grounds that it infringes upon the rule of law.[390] However, as the parties still determine the outcome of the mediation, various Australian judges concluded that there was "no foundation to the concerns".[391] Therefore, the mandatory court-annexed mediation rules were not modified into voluntary rules as in South Africa. In this instance, where a Victorian court refers a case to mediation, the court itself approves the mediator, providing mediators who are highly skilled and suitably qualified.[392] The provision of mandatory court-based mediation is reiterated in the following pieces of legislation. It is stated in Rule 50.07(1) of the Court Rules of Victoria 2015[393] (general civil procedure), Rule 34A.21 of the Country Court Civil Procedure Rules of 2008,[394] section 108 of the *Magistrate's Court Act* 51 of 1989, and section 66 of the *Civil Procedure Act* 47 of 2010. Furthermore, Victoria does not only grant the courts the power to refer cases to mediation, but also places a duty on the parties involved in a civil dispute to "further the administration of justice". This is set out in section 16 of the *Civil Procedure Act* 47 of 2010.

---

388 Patelia "Implementing mediation in the formal legal system" 18.

389 Kellam "International trends in civil justice" 15. "In each case referral to mediation should depend on the nature of the case and be at the discretion of the Court"; Victorian Law Reform Commission Civil Justice Review Report 14 of 2008 213.

390 Kellam "International trends in civil justice" 16.

391 Kellam "International trends in civil justice" 16.

392 Kellam "International trends in civil justice" 15.

393 Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-sys tem.

394 Available at http://www.austlii.edu.au/au/legis/vic/consol_reg/cccpr2008380/.

This is therefore different from the South African position, where mediators are not required to possess particular skills. In both jurisdictions, mediation ensures that cases are resolved earlier in the process, advancing access to justice. The difference between the two jurisdictions is not just that court-based mediation in Victoria is mandatory, but also that it is regulated by various pieces of legislation and not just the mediation rules set out in South Africa.

As mentioned above, in South Africa if the parties or their legal representatives fail to consider the possibility of mediation a cost order can be granted against them accordingly. The State of Victoria goes a step further. Firstly, as provided in section 41 of the *Civil Procedure Act* 47 of 2010 a duty is placed upon the parties to certify that they have read through and understand the duty placed upon them in section 16 of the same act. In these instances, the parties must file an obligation certificate together with the substantive documents in the proceedings.[395]

Secondly, section 28 of the *Civil Procedure Act* 47 of 2010 states that "a court may take into account any contravention of the overarching obligations". Lastly, a court may then make ANY order it considers appropriate if it should be in the interest of justice, such as a cost order, or it may even "sanction such contravention".[396] This is further set out in the *Civil Dispute Resolution Act* of 2011.

Therefore, it is clear that the State of Victoria does not take such an obligation lightly, and failure to act accordingly can lead to much more than a cost order. This will ensure that the parties will take genuine steps to resolve their disputes by way of ADR, such as mediation and court-annexed mediation, before civil litigation proceedings are even instigated. This a clear indication of the requirement that the parties to a dispute need

---

395 Section 41(3) of the *Civil Procedure Act* 47 of 2010 and Maclons *Mandatory Court Based Mediation* 108.

396 Section 29 of the *Civil Procedure Act* 47 of 2010.

actively to take steps to resolve disputes in an "efficient, timely and cost-effective" manner, which is in line with the purpose of the abovementioned act and promotes the realisation of the right to access to justice.

6.3 Conclusion

From the above investigation it is apparent that there are many similarities between the two jusrisdictions with regard to the provision of access to justice, mediation and court-based/annexed mediation. The main difference between the two jurisdictions is the fact that court-based mediation in Victoria is mandatory. It is also apparent that the application of court-based mediation is different in Victoria, where it makes a more effective contribution to access to justice as a whole. It is clear that South Africa should apply these principles, as it cannot be disputed that Victoria has had a resounding success with its application of the system of court-based mediation.

The purpose of the next chapter is to conclude the entire study and eventually answer the research question. The goal is also to make certain recommendations regarding the South African application of court-based mediation, in the hope that they will eventually lead to proper access to justice.

7 Conclusion

Access to justice is a well-known "basic right", both nationally and internationally.[397] Although there is no specific definition for access to justice, there are various approaches. The narrow approach to access to justice mainly requires the civil justice system to resolve individuals' disputes in a just, fair, effective, efficient and affordable manner.[398] The broader approach to access to justice includes the consideration of an individual's right to social, economic and environmental justice.[399] To enable the broader approach, the right to access to justice includes the recognition of an individual's human rights, and provides alternative methods of dispute resolution to promote the realisation of these rights.[400] Therefore, the conclusion is drawn that the provision of access to justice refers to the provision of an affordable, impartial, fair and accessible means of dispute resolution for all.[401]

In the South African context this right may find its origin in section 34 of the *Constitution of the Republic of South Africa*,[402] the rule of law and the enforceability of the Bill of Rights.[403] The question was asked whether this right applies only to private persons or, for the purposes of this research, to juristic persons in the commercial sector as well. The conclusion was reached that although a juristic person in itself is not worthy of protection, the fact that natural persons form part of a juristic person by collectively exercising fundamental rights within a juristic person makes a juristic person worthy of protection.[404]

---

397 UNDP "Access to justice" 3.
398 Nyenti 2013 *De Jure* 902-903, 904.
399 Nyenti 2013 *De Jure* 902.
400 Ojelabi "Improving access to justice" 12.
401 Ngcobo "Enhancing access to Justice: The search for better Justice" 5, 7.
402 *Constitution of the Republic of South Africa*, 1996.
403 Radebe 2011 http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html.
404 Currie and De Waal *The Bill of Rights Handbook* 37.

In the context of Australia it was concluded that the right to access to justice is implied in the Australian Constitution.[405] More specifically, in Victoria the right is entrenched and implied within section 24(1) of the *Charter of Human Rights and Responsibilities Act* 43 of 2006, the common law and the rule of law, and is reflected in the ambient democratic values of the citizens of the state.[406] In conclusion, taking the aforementioned into account, the right to access to justice in civil matters in Victoria includes the right that a dispute should be heard by "a competent, independent and impartial court or tribunal after a fair and public hearing".[407] It also includes that a dispute should be settled fairly and in a timely manner, as required by the rule of law.[408]

Although the application of this right differs in the two jurisdictions, the obstacles against enforcing this right are almost identical in both jurisdictions.

In the commercial sector, these obstacles mostly affect upcoming, growing companies with scarce financial resources.[409] Due to their financial limitations upcoming companies often face bigger, established companies with greater financial resources, which are in a far better position regarding litigation and contract negotiations.[410] Litigation in the civil justice system is therefore not always equally affordable and accessible to all juristic persons in commercial disputes.[411]

---

405 Barak *Human dignity* 141.
406 Kellam "International trends in civil justice" 2, 8.
407 Section 24(1) of the *Charter of Human Rights and Responsibilities Act* 43 of 2006.
408 Kellam "International trends in civil justice" 2, 8.
409 Guillemin "Reasons for choosing ADR" 24.
410 Guillemin "Reasons for choosing ADR" 24; Radebe 2011 http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html; South African Law Commission Issue Paper 8 (Project 94) Alternative Dispute Resolution 3; Brand, Steadman and Todd *Commercial mediation* 13-14.
411 Radebe 2011 http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html.

To overcome these hurdles and to ensure effective and affordable dispute resolution between parties, ADR methods are being implemented in both South Africa and Victoria.[412]

As explained in chapter 4, in South Africa court-based mediation is currently regulated by the "Voluntary Court-based Mediation Rules" of 2013, published as the "Amended Magistrates' Court Rules".[413] In this instance although parties can still voluntarily enter into mediation by way of agreement, the Magistrate's Court has the discretion to insist that the parties must aim to first resolve their dispute by way of mediation before entering litigation.[414] However, although court-based mediation remains voluntary, the failure by the parties or their legal representatives to consider mediation as an option may lead to cost orders against the parties or their legal representatives.[415]

The question needs to be asked to what extent court-based mediation improves access to justice for all parties to a commercial dispute if it is seen as a voluntary process in South Africa. The submission is made that if the parties to a commercial dispute are not obliged to attempt mediation before entering litigation, the more powerful of the two parties is unlikely to agree to it, thus leaving the other party with no choice other than to litigate, whether litigation is in the best interest of the party or not. The high legal costs alone would make accessing justice almost impossible for most financially vulnerable potential litigants, such as upcoming, growing companies.[416]

---

412 Radebe 2011 http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html; South African Law Commission Issue Paper 8 (Project 94) Alternative Dispute Resolution 3; Brand, Steadman and Todd *Commercial mediation* 13-14; Ojelabi "Improving access to justice" 20.

413 GN 183 GG 37448 of 18 March 2014 http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf.

414 Patelia "Implementing mediation in the formal legal system" 18.

415 Patelia "Implementing mediation in the formal legal system" 18.

416 Farrow 2015 *Revista Forumul Judecatorilor* 76; Genn 2012 *Yale JL & Human* 401. In this regard various factors are taken into account when legal costs are determined. These factors include "the complexity, difficulty or novelty of the case, the specialized

The position is different in the state of Victoria, Australia, which is known to have been actively applying court-annexed mediation for a long period of time and thereby successfully improving access to justice.

In terms of the various statutory powers discussed above,[417] the Supreme, Country and Magistrates' Courts may order a dispute or part of the proceedings to be resolved via mediation, with or "without the consent of the parties".[418]

The question, however, is whether the principles applied in Victoria could be fruitfully applied in the South African context to improve access to justice. In this regard the following submission is made on the basis of the investigation performed in this research and the literature review initially conducted.

Mandatory court-annexed mediation in Victoria provides that an attempt must be made for a dispute to be resolved by way of mediation before the parties enter into litigation. The process only limits the parties' right to litigation, it doesn't entirely take it away. A party may revert to litigation after an attempt at mediation has been made and a settlement has not been reached, or the dispute has only partially been settled, as discussed above. In this regard, if it should be the case that a party is not satisfied with the settlement or proposed settlement, there is nothing stopping him/her from entering into litigation.

Furthermore, the mediators are not laymen, as in the case of voluntary mediation. Mediators who are highly skilled and suitably qualified are

---

knowledge and responsibility required as well as time consumed by the lawyer, the volume of documents drafted, the urgency and importance of the matter to the client and the value of the money or property at stake." See EUAFR "Access to justice in Europe" 43.

417 Rule 50.07(1) of the Supreme Court Rules of Victoria; Ss 47, 66(1), 66(3) and 7(2)(c) of the Country Court *Civil Procedure Act 47* of 2010, Rule 34A.21 and Rule 50.07 of the Country Court Civil Procedure Rules of 2008; S 108 of the *Magistrates Court Act* 51 of 1989 and the *Civil Dispute Resolution Act* of 2011.

418 Kellam "International trends in civil justice" 15 and Victorian Law Reform Commission Civil Justice Review Report 14 of 2008 213.

appointed by the court. Therefore, although the dispute isn't heard by the "court" itself, by a presiding officer with legal knowledge, it is still facilitated by a mediator with legal knowledge. In this instance, as explained above, many complex civil disputes are heard by South African courts where the presiding officer(s) is not a specialist in that particular field. Therefore, just as the option for appeal exists in litigation, the option to go to litigation still exists if the parties should not be satisfied with the agreement reached during mediation. Regardless of the pros and cons regarding mediation, the argument can still be made that mandatory court-annexed mediation does not infringe upon a party's right as contained in section 34 of the Constitution. It merely requires parties to take active steps to attempt to solve a dispute prior to litigation in order to minimise the case load in courts and thus to improve access to justice. Where the parties are not satisfied with the outcome thereof, they are still entitled to make use of their right to access the courts. In fact, this system contributes to a party's right to access to justice as it resolves disputes in a more effective and cost-efficient manner.

The conclusion is drawn that currently, whilst court-based mediation in South Africa is seen as a voluntary process, this voluntarism gives effect to the right to access to justice in commercial disputes only when both parties agree to mediation throughout the entire process. However, in most cases involving financial imbalances between the parties, one of the parties can easily opt out of mediation, forcing the resolution of the dispute to take place by way of litigation. The obstacles to the smooth functioning of the the civil justice system seem to be almost identical in South Africa and Victoria, but the court-annexed mediation system used in commercial disputes in Victoria has a better success rate than that in South Africa. This may be accounted for partly by the fact that the Victoria government has over the years invested in court-annexed mediation. The judiciary and the legislature have together developed the mediation process to enhance access to justice. In South Africa, as in Victoria, the judiciary has a vital

role to play in encouraging the general public to buy into the system of mandatory court-based mediation by sanctioning non-compliance by the parties.

The enactment of the *Civil Procedure Act* would in all probability influence not just the parties but also the lawyers representing the parties to cooperate in the mandatory court-annexed procedure. Therefore it is concluded that if the general public is informed regarding the procedure and gives its cooperation in good faith this would promote the resolution of disputes in a "just, efficient, timely and cost-effective" manner.[419] The successes achieved through Victoria's mandatory court-annexed mediation are a clear indication that the various role players in that state have already bought into the system.

South Africa can learn much from the State of Victoria's mandatory court-annexed mediation process. A mandatory system of that nature can force the parties at least to attempt one round of mediation before entering litigation. When that occurs, a well-qualified mediator may guide the parties to a resolution of their disputes in a more cost-efficient and quicker way, improving access to justice for both parties. The effect on future business relationships will be positive, and if a dispute cannot be resolved the parties can still revert to litigation, thereby not limiting a party's right to access to courts but promoting the realisation of the party's right to access to justice.

[419] Wolter *et al* "South Africa" 112.

BIBLIOGRAPHY

Literature

Abdul Wahab *Court-annexed and judge-led mediation*

Abdul Wahab A *Court-annexed and judge-led mediation in civil cases: the Malaysian experience* (PhD-dissertation Victoria University Australia 2013)

Agapiou and Ilter (eds) *Court-connected construction mediation practice*

Agapiou A and Ilter DA (eds) *Court-connected construction mediation practice: A comparative international review* (Routledge London 2016) also available at https://books.google.co.za/books?id=yhR6DQAAQBAJ&pg=PT72&dq=mediation+in+the+state+of+Victoria+Australia&hl=en&sa=X&ved=0ahUKEwjj9a6V0tHVAhVsAcAKHUxcDBYQ6AEIJjAA#v=onepage&q=mediation%20in%20the%20state%20of%20Victoria%20Australia&f=false

Arthur 2015 *Australian ADR Bulletin*

Arthur JK "Confidentiality and privilege in mediation" 2015 *Australian Alternative Dispute Resolution Bulletin* 91-94

Atlas, Huber and Trachte-Huber *Alternative dispute resolution*

Atlas NF, Huber SK and Trachte-Huber EW *Alternative dispute resolution: the litigator's handbook* (American Bar Association Chicago 2000)

Banhegyi *Management*

Banhegyi S *Management: fresh perspectives* (Prentice Hall Cape Town 2007)

Barak *Human dignity*

Barak A *Human dignity: The constitutional value and the constitutional right* (Cambridge University Press Cambridge 2015)

Barker 1996 *Loy LA Int'l & Comp LJ*

Barker J "Alternative for the Resolution of Commercial Disputes: Guidelines for a US Negotiator Involved in an International Commercial Mediation with Mexicans" 1996 *Loyola of Los Angeles International and Comparative Law Journal* 1-1027

Berger *Private dispute resolution in international business*

Berger KP *Private dispute resolution in international business: negotiation, mediation, arbitration* (Kluwer Law International 2009)

Blake, Browne and Sime *A practical approach*

Blake S, Browne J and Sime S *A practical approach to alternative dispute resolution* (Oxford University Press Oxford 2016)

Boulle and Rycroft *Mediation*

Boulle L and Rycroft A *Mediation: principles, process, practice* (Butterworths Durban 1997)

Brand, Steadman and Todd *Commercial mediation*

Brand J, Steadman F and Todd C *Commercial mediation: A user's guide to court-referred and voluntary mediation in South Africa* (Juta Cape Town 2016)

Brickhill and Friedman "Access to courts"

Brickhill J and Friedman A "Access to courts" in Brickhill J, Friedman A, Woolman S and Roux T *Constitutional law of South Africa* 2nd ed (Juta Cape Town 2006) Ch 59

Carbonneau *Handbook on Mediation*

Carbonneau TE (ed) *American Arbitration Association: Handbook on Mediation* (American Arbitration Association New York 2016)

Cassim "Promoting Liberal Constitutional Democracy"

Cassim N "Promoting Liberal Constitutional Democracy" address at the Helen Suzman Foundation symposium series Part one *The changing role of the Courts in Civil Litigation* (Johannesburg 10 May 2010) 22-23

Chern *The commercial mediator's handbook*

Chern C *The commercial mediator's handbook* (Routledge Abingdon 2015)

Currie and De Waal *The Bill of Rights Handbook*

Currie I and De Waal J *The Bill of Rights Handbook* 6th ed (Juta Cape Town 2013)

Davis "Two observations and five remarks"

Davis D "Two observations and five remarks" address at Helen Suzman Foundation symposium series Part one *The changing role of the Courts in Civil Litigation* (Johannesburg 10 May 2010) 26-28

Davis "Access to courts"

Davis D "Access to courts" in Cheadle MH, Davis DM and Haysom NRL *South African Constitutional Law: Bill of rights* 2nd ed (LexisNexis Durban 2005) 28-1 also available at http://www.worldcat.org/title/south-african-constitutional-law-the-bill-of-rights/oclc/51329278/editions?referer=di&editionsView=true

Doherty and Guyler *The essential guide to workplace mediation*

Doherty N and Guyler M *The essential guide to workplace mediation & conflict resolution: Rebuilding working relationships* (Kogan Page London 2008)

EUAFR "Access to justice in Europe"

European Union Agency for Fundamental Rights "Access to justice in Europe: an overview of challenges and opportunities"

Farrow 2015 *Revista Forumul Judecatorilor*

Farrow TCW "What is access to justice" 2015 *Revista Forumul Judecatorilor* 72-92

Ficks 2008 *Journal of Japanese Law*

Ficks E "Models of general court-connected conciliation and mediation for commercial disputes in Sweden, Australia and Japan" 2008 *Journal of Japanese Law* 131-152

Fox *Justice in the 21st Century*

Fox R *Justice in the 21st Century* (Cavendish Australia 1999)

Francioni "The rights of access to justice"

Francioni F "The rights of access to justice under customary international law" in Francioni F (ed) *Access to justice as a human right* (Oxford University Press Oxford 2007) 1-55 https://books.google.co.za/books?id=dmxCAgAAQBAJ&printsec=frontcover&dq=access+to+justice&hl=en&sa=X&ved=0ahUKEwijxsufia3XAhVnKcAKHZDzD4QQ6AEIOzAE#v=onepage&q=access%20to%20justice&f=false

Frenkel *International law*

Frenkel DA *International law, conventions and justice* (Athens Institute for Education and Research Greece 2011)

Genn 2012 *Yale JL & Human*

Genn H "What is civil justice for - Reform, ADR, and access to justice" 2012 *Yale Journal of Law and the Humananities* 397-417

Guillemin "Reasons for choosing ADR"

Guillemin JF "Reasons for choosing alternative dispute resolution" in Ingen-Housz A *ADR in business: Practice and issues across countries and cultures* Vol II (Kluwer Law Alphen aan den Rijn 2011) Chapter 2

Gordon-Davis and Cumberlege *Legal requirements*

Gordon-Davis L and Cumberlege P *Legal requirements for hospitality businesses* (Juta Lansdowne 2008)

Herbert (ed) 2011 *Int'l Law*

Herbert WA (ed) "International Commercial Mediation" 2011 *International Lawyer* 111-124 also available at http://eds.b.ebscohost.com.nwulib.nwu.ac.za/eds/detail/detail?vid=1&sid=63f4fa6c-c068-4927-

9f4d-b4cc2f54e4fb%40sessionmgr104&bdata=JnNpdGU9ZWRzLWdmU%3d#AN=hein.journals.intlyr45.11&db=edshol

Heywood and Hassim 2008 *SAJHR*

Heywood M and Hassim A "Remedying the maladies of 'lesser men or women': the personal, political and constitutional imperatives for improved access to justice" 2008 *South African Journal on Human Rights* 263-280

Hurter 2011 *Comp Int'l LJ SA*

Hurter E "Access to justice: to dream the impossible dream?" 2011 *Comparative and International Law Journal of Southern Africa* 408-427

Jones-Pauly and Elbern *Access to justice*

Jones-Pauly C and Elbern S *Access to justice: the role of court administrators and lay adjudicators in the African and Islamic contexts* (Kluwer Law International New York 2002)

Kellam "International trends in civil justice"

Kellam M "International trends in civil justice" address at Helen Suzman Foundation symposium series Part One *The changing role of the Courts in Civil Litigation* (Johannesburg 10 May 2010) 8-18

King III Report 2009

King III Report on Corporate Governance for South Africa 2009

Lew, Mistelis and Kröll *Comparative international commercial arbitration*

Lew JD, Mistelis LA and Kröll S *Comparative international commercial arbitration* (Kluwer Law The Hague 2003)

Lowe and Leiringer *Commercial management of projects*

Lowe DJ and Leiringer R *Commercial management of projects: Defining the discipline* (Blackwell Malden 2006)

Maclons *Mandatory Court Based Mediation*

Maclons W *Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System* (LLM-dissertation University of Western Cape 2014)

McQuoid-Mason 2013 *Oñati Socio-Legal Series*

McQuoid-Mason D "Access to justice in South Africa: Are There Enough Lawyers?" 2013 *Oñati Socio-Legal Series* 561-579

Munroe 1995 *Prob LJ*

Munroe CE "Court-Based Mediation in Family Law Disputes: An Effectiveness Rating and Recommendations for Change" 1996 *Probate Law Journal* 107-132

Mwenda *Paradigms of ADR*

Mwenda WS *Paradigms of alternative dispute resolution and justice delivery in Zambia* (PhD-thesis University of South Africa Pretoria 2009)

Ngcobo "Enhancing access to Justice: The search for better Justice"

Ngcobo JS "Enhancing access to Justice: The search for better Justice" Speech delivered at the *Access to justice conference: Towards delivering access to quality justice for all* (6 July 2011) 1-23

North "Court Annexed Mediation in Australia"

North J "Court Annexed Mediation in Australia - an overview" Speech delivered at the *Malaysian Law Conference* (17 November 2005) 1-2

Nyenti 2013 *De Jure*

Nyenti M "Access to justice in the South African social security system: Towards a conceptual approach" 2013 *De Jure* 901-916

Ojelabi "Improving access to justice"

Ojelabi LA "Improving access to justice through alternative dispute resolution: the role of community legal centres in Victoria, Australia" (Research Report, Faculty of Law and Management, La Trobe University, September 2010) 1-68

Patelia "Implementing mediation in the formal legal system"

Patelia E "Implementing mediation in the formal legal system - A South African perspective" at the *International Mediation Symposium* (29 April 2016 Istanbul, Turkey)

Pel *Referral to mediation*

Pel M *Referral to mediation: A practical guide for an effective mediation proposal* (Sdu Uitgevers The Hague 2008)

Pretorius *Dispute Resolution*

Pretorius P *Dispute Resolution* (Juta Cape Town 1993)

Rhode *Access to Justice*

Rhode DL *Access to Justice* (Oxford University Press Oxford 2004) https://ebookcentral-proquest-com.nwulib.nwu.ac.za/lib/northwu-ebooks/reader.action?docID=279586

Richler 2011 *Judges Journal*

Richler J "Court-Based Mediation in Canada" 2011 *Judges Journal* 14-17

Rovine *Contemporary issues*

Rovine AW *Contemporary issues in international arbitration and mediation: The Fordham Papers* (Martinus Nijhoff Leiden 2007)

Sackville "Some thoughts on access to justice"

Sackville R "Some thoughts on access to justice" at the First Annual Conference on *Primary Functions of Government* (28-29 November 2003 Victoria University of Wellington New Zealand)

Slusarciuc "Mediation in commercial conflicts"

Slusarciuc M "Mediation in commercial conflicts. The annals of the 'Stefan cel Mare' University of Suceava" 2010 *Fascicle of the Faculty of Economics and Public Administration* 277-284

Spencer and Brogan *Mediation Law and Practice*

Spencer D and Brogan M *Mediation Law and Practice* (Cambridge University Press New York 2006)

UNDP "Access to justice"

UNDP "Access to justice: Practice note" 9 March 2004 1-31

United States Congress House Committee on Small Business "Financial and economic challenges"

United States Congress House Committee on Small Business "Financial and economic challenges facing small businesses" One Hundred Tenth Congress of the *Committee on Small Business, United*

States House of Representatives (20 November 2008 Washington) 1-58

Vettori 2015 *AHRLJ*

Vettori S "Mandatory mediation: An obstacle to access to justice" 2015 *African Human Rights Law Journal* 355-377

Wayne 2014 *Australian Law Review*

Wayne M "Access to justice" 2014 *Australian Law Review* 1-21 also available at http://eds.b.ebscohost.com.nwulib.nwu.ac.za/eds/detail/detail?vid=7&sid=b5ff0fb6-ea72-4f10-a6c9-7b63cef92df4%40sessionmgr4010&bdata=JnNpdGU9ZWRzLWxpdmU%3d#AN=hein.journals.undauslr16. 5&db=edshol

Weinstein *Mediation in the workplace*

Weinstein RJ *Mediation in the workplace: a guide for training, practice, and administration* (Greenwood New York 2001)

Wiese 2014 *SA Merc LJ*

Wiese T "The use of alternative dispute resolution methods in corporate disputes: the provisions of the Companies Act of 2008: analyses" 2014 *South African Mercantile Law Journal* 668-677

Wolter *et al* "South Africa"

Wolter G *et al* "South Africa" in Cotton J *The dispute resolution review* 8th ed (Law Business Research London 2016) 578-596

Case law

AON Risk Services Australia Ltd v Australian National University [2009] HCA 27 239 CLR 175, 83 ALJR 951, 258 ALR 14

Lufuno Mphaphuli & Associates Ltd v Andrews 2009 4 SA 529 (CC)

Shilubana v Nwamitwa (CCT03/07) [2007] ZACC 14, 2007 9 BCLR 919 (CC) (17 May 2007)

State Pollution Control Commission v Australian Iron & Steel Pty Ltd (1992) 29 NSWLR 487

Legislation

Australia Constitution Act, 1900

Charter of Human Rights and Responsibilities Act 43 of 2006

Civil Dispute Resolution Act of 2011

Civil Procedure Act 47 of 2010

Commonwealth of Australia Constitution Act 1900

Companies Act 71 of 2008

Constitution of the Republic of South Africa, 1996

Consumer Protection Act 68 of 2008

Country Court Civil Procedure Act, 2010

Federal Court of Australia Act, 1976

Magistrate's Court Act 51 of 1989

Magistrates Court Act 90 of 1993

Uniform Evidence Act of 1995

Government publications

Country Court Civil Procedure Rules of 2008

Law Reform Commission Report 98-2010 Alternative Dispute Resolution: Mediation and Conciliation

South African Law Commission (Project 94) Report on Democratic Arbitration

South African Law Commission Issue Paper 8 (Project 94) Alternative Dispute Resolution

GN 183 GG 37448 of 18 March 2014

International instruments

Victorian Law Reform Commission Civil Justice Review Report 14 of 2008

Internet sources

Victoria Consolidated Regulations 2008 http://www.austlii.edu.au/au/legis/vic/consol_reg/cccpr2008380/

Victoria Consolidated Regulations 2007 *County Court Civil Procedure Rules 2008* http://www.austlii.edu.au/au/legis/vic/consol_reg/cccpr2008380/ accessed 24 October 2017

Anon 2017 https://www.export.gov/article?id=South-Africa-market-challenges

Anon 2017 *South Africa – Market Challenges* https://www.export.gov/article?id=South-Africa-market-challenges 24 October 2017

Bennet 2004 https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/online/Milestones

Bennet S 2004 *Australia's Constitutional Milestones* https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/online/Milestones accessed 15 October 2017

Bergin 2012 http://www.austlii.edu.au/au/journals/NSWJSchol/2012/24.pdf

Bergin PA 2012 *The objectives scope and focus of mediation legislation in Australia* at the "Mediate First" Conference held at Hong Kong Convention and Exhibition Centre 11 May 2012 3 http://www.austlii.edu.au/au/journals/NSWJSchol/2012/24.pdf accessed 25 September 2017

Cambridge Dictionary https://dictionary.cambridge.org/dictionary/english/commercial-sector

Cambridge Dictionary https://dictionary.cambridge.org/dictionary/english/commercial-sector accessed 3 November 2017

Carr and Veldhuizen date unknown http://www.companiestribunal.org.za/alternative-dispute-resolution-at-the-companies-tribunal/

Carr G and Veldhuizen PJ date unknown "Alternative dispute resolution at the companies tribunal" *Corporate Report* available http://www.com paniestribunal.org.za/alternative-dispute-resolution-at-the-companies-tribunal/ accessed 30 October 2017

CEDR 2017 https://www.cedr.com/about_us/library/glossary.php

CEDR 2017 *Glossary of terms* https://www.cedr.com/about_us/library/glossary.php accessed 25 September 2017

Civil Procedure Act 47 of 2010 http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/51dea49770555ea6ca256da4001b90cd/B45E5C73DC677EEECA257789001D2998/$FILE/10-047a.pdf

Civil Procedure Act 47 of 2010 http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/51dea49770555ea6ca256da4001b90cd/B45E5C73DC677EEECA257789001D2998/$FILE/10-047a.pdf accessed 6 June 2017

Country Court Civil Procedure Rules of 2008 http://www.austlii.edu.au/au/legis/ vic/consol_reg/cccpr2008380/

Country Court Civil Procedure Rules of 2008 http://www.austlii.edu.au/au/legis/vic/consol_reg/cccpr2008380/ accessed 6 June 2017

Draft set of rules 2011 http://www.golegal.co.za/wp-content/uploads/2016/12/Court-Annexed-Mediation-Rules-of-the-Magistrates-Courts.pdf

Draft set of rules 2011 http://www.golegal.co.za/wp-content/uploads/2016/12/Court-Annexed-Mediation-Rules-of-the-Magistrates-Courts.pdf accessed 6 June 2017

GN 183 GG 37448 of 18 March 2014 http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf

GN 183 GG 37448 of 18 March 2014 http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf accessed 7 June 2017

Institute of Directors 2016 http://www.pcb.org.za/wp-content/uploads/2015/04/King_IV_Report_draft.pdf

Institute of Directors 2016 *Draft King IV Report on Corporate Governance for South Africa* http://www.pcb.org.za/wp-content/uploads/2015/04/ King_IV_Report_draft.pdf accessed 21 July 2017

Institute of Directors in South Africa date unknown http://c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/16F4503D-86F9-43D5-AEB4-C067B06EB59C/Guide_to_questions_and_answers_on_King_IV.pdf

Institute of Directors in South Africa date unknown *Guide to questions and answers on King IV* http://c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/16F4503D-86F9-43D5-AEB4-C067B06EB59C/Guide_to_questions_and_answers_on_King_IV.pdf accessed 21 July 2017

Institute of Directors 2016 www.iodsa.co.za/resource/resmgr/king_IV_Report/IoDSA_King_IV_Report_-_WebVe.pdf

Institute of Directors 2016 *King IV Report on corporate governance for South Africa 2016* www.iodsa.co.za/resource/resmgr/king_IV_Report/IoDSA_King_IV_Report_-_WebVe.pdf accessed 1 December 2017

ICSID date unknown https://icsid.worldbank.org/en/

International Centre for the Settlement of International Disputes (ICSID) date unknown https://icsid.worldbank.org/en/ accessed 12 November 2017

ICC date unknown https://iccwbo.org/about-us/who-we-are/dispute-resolution/

International Chamber of Commerce (ICC) date unknown https://iccwbo.org/about-us/who-we-are/dispute-resolution/ accessed 12 November 2017

Jordaan 2012 http://capechamber.co.za/wp-content/uploads/2012/10/How-to-prepare-for-a-mediation.pdf

Jordaan B 2012 *Court-based mediation becoming a reality in SA civil justice system* http://capechamber.co.za/wp-content/uploads/2012/10/How-to-pre pare- for-a-mediation.pdf accessed 5 June 2017

Law Institute Victoria 2014 https://www.liv.asn.au/for-the-community/victorian-legal-system

Law Institute Victoria 2014 *Victorian Legal System* https://www.liv.asn.au/for-the-community/victorian-legal-system accessed 9 August 2017

Legal Dictionary 2007 http://legal-dictionary.thefreedictionary.com/constant

Legal Dictionary 2007 http://legal-dictionary.thefreedictionary.com/constant accessed 13 August 2017

Magistrate's Court Act 51 of 1989 http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTObject_Store/LTObjSt3.nsf/d1a8d8a9bed958efca25761600042ef5/c3999db032f30669ca25776100282b74/$FILE/89-51a154.pdf

Magistrate's Court Act 51 of 1989 http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTObject_Store/LTObjSt3.nsf/d1a8d8a9bed958efca25761600042ef5/c3999db032f30669ca25776100282b74/$FILE/89-51 a154.pdf accessed 7 June 2017

Magistrates Court General Civil Procedure Rules 2010 http://www.austlii.edu.au/au/legis/vic/consol_reg/mcgcpr2010464/

Magistrates Court General Civil Procedure Rules 2010 http://www.austlii.edu.au/au/legis/vic/consol_reg/mcgcpr2010464/ accessed 10 June 2017

McFarlane 2012 http://whoswholegal.com/news/features/article/29919/mediation-comes-age-victoria/

McFarlane T 2012 *Mediation comes of age in Victoria* http://whoswholegal.com/news/features/article/29919/mediation-comes-age-victoria/ accessed 5 August 2017

Radebe 2011 http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html

Radebe J 2011 *Address by the Minister of Justice and Constitutional Development* Mr Jeff Radebe on the occasion of *Access to Justice Conference* (Friday 08 July 2011 Hillton Hotel, Sandton) http://www.justice.gov.za/m_speeches/2011/20110708_min_ajc.html accessed 25 September 2017

Rule 1(iv) of the Draft set of rules 2011 http://www.golegal.co.za/wp-content/uploads/2016/12/Court-Annexed-Mediation-Rules-of-the-Magistrates-Courts.pdf

Rule 1(iv) of the Draft set of rules 2011 http://www.golegal.co.za/wp-content/uploads/2016/12/Court-Annexed-Mediation-Rules-of-the-Magistrates-Courts.pd accessed 6 June 2017

Rule 3(1) of the Draft set of rules 2011 http://www.golegal.co.za/wp-content/uploads/2016/12/Court-Annexed-Mediation-Rules-of-the-Magistrates-Courts.pdf

Rule 3(1) of the Draft set of rules 2011 http://www.golegal.co.za/wp-content/uploads/2016/12/Court-Annexed-Mediation-Rules-of-the-Magistrates-Courts.pdf accessed 6 June 2017

Rule 75 of the Amended Magistrates Court rules http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf

Rule 75 of the Amended Magistrates Court rules http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf accessed 17 July 2017

Rule 9 of the Draft set of rules 2011 http://www.golegal.co.za/wp-content/uploads/2016/12/Court-Annexed-Mediation-Rules-of-the-Magistra tes-Courts.pdf

Rule 9 of the Draft set of rules 2011 http://www.golegal.co.za/wp-content/uploads/2016/12/Court-Annexed-Mediation-Rules-of-the-Magistra tes-Courts.pdf accessed 6 June 2017

SR NO 103 of 2015 - Reg 50.7 http://www.austlii.edu.au/au/legis/vic/num_reg/sccpr 2015n103o2015514/s50.07.html

SR NO 103 of 2015 - Reg 50.7 http://www.austlii.edu.au/au/legis/vic/numreg/sccpr2015n103o2015514/s50.07.html accessed 9 August 2017

UNCITRAL date unknown http://www.uncitral.org/uncitral/en/about_us.html

United Nations Commission on International Trade Law (UNCITRAL) date unknown http://www.uncitral.org/uncitral/en/about_us.html accessed 12 November 2017 10 November 2017

United Nations and the Rule of Law date unknown https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-jus tice/

United Nations and the Rule of Law date unknown *Access to justice* https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/ accessed 10 November 2017

Warren 2009 http://assets.justice.vic.gov.au//supreme/resources/fffc72f7-2ad d-455c-8901-b5a442ebd4f4/adr+and+a+different+approach+to+litigation_cj.pdf

Warren M 2009 "ADR and a different approach to litigation" speech at the Law Institute of Victoria *Serving up insights series* held on 18 March 2009 2 http://assets.justice.vic.gov.au//supreme/resources/fffc72f7-2add-455c-8901-b5a442ebd4f4/adr+and+a+different+approach+to+litigation_cj.pdf accessed 8 August 2017