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**COMPARATIVE STUDY ON DISPUTE RESOLUTION BETWEEN
SOUTH AFRICA AND GERMANY**

BY

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DECLARATION

I BERNARD RAKHUDU MASOBELA declare that the dissertation for the degree of Masters in Labour Law at the North West University, Mafikeng Campus hereby submitted, has not previously been submitted by me for a degree at this or any other university, that it is my own work in design and execution and that all material contained herein has been duly acknowledged.

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God Bless

MASOBELA BR

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COMPARATIVE STUDY ON DISPUTE RESOLUTION BETWEEN SOUTH AFRICA AND GERMANY

1. INTRODUCTION

This paper is based on the comparative study of dispute resolution between the South African and the German labour systems within the private sector.

In order to deal with this subject, I need to examine what a dispute entails, the distinction between right dispute and interest dispute. There is a need that I examine different models of dispute resolution and analyse the different dispute resolution institutions, their functions and role between the two labour law systems. Most importantly is to determine whether there is anything in particular which one system can learn from the other.

Our labour law system is still developing. Therefore we need to have more and more comparative studies with international legal systems with the aim of learning and improving our system.

The dawn of the new era in South Africa has largely contributed to the present developing labour law system. Statutory structures for African workers were largely ignored while plant-level bargaining by the new, unregistered unions was not regulated by statute. The government appointed the Wiehann Commission of Inquiry in 1979. This Commission recommended a number of reforms that would fundamentally change the industrial relations system. There were a lot of problems that were encountered with the old labour legislation.¹ The primary dispute resolution mechanisms were not effective enough to cope with the demand of the time. In 1994 the government appointed a Task Team to draft a new Labour Relations Bill. At this time the Interim Constitution was still in place. Therefore by appointing this Task Team the government was complying with the provisions of the Interim Constitution, which provided for labour relations rights.²

¹ Labour Relations Act 1956.

² Section 27 of the Interim Constitution, 200 of 1993.

This brought about a completely new era in labour relation issues. As a result the Labour Relations Act,³ hereinafter referred to as LRA, was finally adopted. This is the most important piece of legislation regulating dispute resolution in labour relations matters. There were several amendments the most important of which is the Labour Relations Amendment Act of 2002.⁴

The LRA regulates ways and means of dealing with labour dispute resolutions as well as different dispute resolutions institutions in the workplace and sector level.⁵ It provides for the framework of dispute resolution in such a way that conflict, which is inherent in employment relationship, is resolved. I have gone through German labour legislation and I haven't found any legislation that is comparable to the LRA, consolidated and almost all-embracing as this legislation is. I think, with respect, that this is one area where the Germans could learn from us.

When one looks at the intention of the legislature in passing the LRA it becomes very clear that it was to create specialist tribunals for the hearing of labour disputes. The long title of the LRA provides amongst others, to change the law governing labour relations and for that purpose to give effect to the provisions of the Constitution,⁶ to promote and facilitate collective bargaining at the workplace and at sectoral level, to regulate the right to strike and the recourse to lockout in conformity with the Constitution, to promote employee participation in decision making through the establishment of workplace forums, to provide simple procedure for the resolution of labour disputes through statutory conciliation, mediation and arbitration, for which purpose the Commission for Conciliation, Mediation and Arbitration, hereinafter referred to as CCMA is established, and through independent alternative dispute resolution services accredited for that purpose and most importantly the establishment of the Labour Court and Labour Appeal Court, with exclusive jurisdiction to decide matters arising out of the Act.

³ 66 of 1995.

⁴ 12 of 2002.

⁵ Section 1 LRA.

⁶ Section 23.

The intention of the legislature alluded to above, was also extended to dispute resolution services such as the bargaining council through the amendment of 2002.⁷

The notable innovations were the establishment of the Commission for Conciliation, Mediation and Arbitration, which took over much of the dispute resolution work of the Department of Labour and the abolishment of industrial court, and the introduction of statutory worker participation in the form of workplace forums, with powers of consultation and joint decision-making. All these institutions are discussed below.⁸ In short the purpose of the LRA, namely the effective resolution of labour disputes, is the theme of this paper.

2. WHAT IS A DISPUTE?

The employment relationship, employer-employee, is all about constant friction and conflict. The parties to employment relationship should understand their rights and duties. The employment relationship should clearly be distinguished from other legal forms of relationships. It is therefore clear that conflict and friction are inherent in employment relationship and in any workplace. This is the reason why there should be mechanisms dealing with such conflicts and frictions in the form of dispute resolution. The employment relationship needs to balance the social justice and economic prosperity. Consequently, conflict must be regulated by rules relating to conduct of parties and the rules regulating the mechanisms for resolving disputes.⁹

2.1. Disputes of Rights distinguished from Disputes of Interest

In labour relations issues, there are two most important distinguished types of rights, namely disputes of rights and disputes of interest. A dispute of right concerns the interpretation and application or alleged infringement of an existing right. It may be

⁷ Labour Relations Amendment Act No 12 of 2002.

⁸ Chapter 5 and 6 respectively.

embodied in common law rules, in a statute, in a contract of employment or in a collective agreement. Disputes of rights are often disposed of by means of grievance procedure, negotiation, mediation or arbitration.

Disputes of interest otherwise referred to as economic disputes, concern the creation of new rights. Such disputes are often disposed of by means of economic power (industrial action) or arbitration.

The LRA does not define disputes, except what is provided for in terms of section 213 that dispute 'includes alleged dispute.' Despite this, there are two general categories identified, namely those disputes referred to the Commission for Conciliation, Mediation and Arbitration, in terms of the LRA¹⁰ they are otherwise referred to as 'rights disputes' and those disputes about matters of mutual interest, 'interest disputes.'¹¹

Labour law requires that the labour law disputes institutions should interpret the rights based disputes. The intended reason is to protect the rights of the parties.

3. MODELS FOR SETTLING DISPUTES

In both jurisdictions, models such as conciliation, arbitration and adjudication are used by different institutions to deal with dispute resolution. Conciliation and arbitration are the most common forms of non-judicial or third party intervention mechanisms.

The LRA recognises these models of dispute resolution in such a way that conflict will be efficiently resolved within the workplace. There is nothing in the LRA that prohibits parties from formulating their own ways and means of settling their labour disputes. This can be achieved through collective agreements. Normally it is expected that in the event parties enter into a collective bargaining, they should also agree as to their labour

⁹ Brooks BT, Volume 17 2002: *The International Journal of Comparative Labour Law and Industrial Relations*, Some Recent International Developments in Employment Dispute Settlement, Kluwer Law International, 200.

¹⁰ Section 133 (1) (b).

disputes resolution mechanisms. The parties have the freedom of developing their own resolution procedures. As a matter of fact parties are encouraged to regulate their mutual conduct as well as method of resolving disputes between them. If their agreement is in writing then the Arbitration Act¹² will apply. If parties do not agree to use arbitration, one party may refer the dispute to arbitration.¹³

In the event that parties fail to regulate the mechanisms for resolving disputes between them, then one of the parties may unilaterally elect the statutory or agreed mechanism for resolving disputes. In such a case the party may refer the dispute to statutory arbitration in terms of the LRA or refer the dispute to a court of law for adjudication, or embark on industrial action. The parties may at times elect the forum, for example, the Labour Court or the High Court. However there are various factors that need to be taken into account when deciding on the appropriate process and the appropriate forum for resolving disputes.¹⁴

The most important factors that will determine the choice of mechanism and forum are the nature of the particular dispute, the parties involved and their relationship, whether the parties are willing and able to agree on a process, the costs of the process, the effects on the process and consequences that are likely to flow from utilising a particular process, the relative power of the parties, the level of trust that exists between the parties, the need for finality in resolving the disputes and the need for privacy or publicity. The idea is to select, or design a process that is best suited to effectively resolve a particular category of dispute.¹⁵

In Germany the closed shop and agency shop are forbidden. There is a distinction between individual and collective labour disputes of interests. Individual labour disputes cannot for example be resolved through collective agreement since this method is exclusively available to parties to collective agreements. The law provides that parties to

¹¹ Section 133 (1) (a) read with section 134 of the LRA.

¹² 42 of 1965.

¹³ Van Kerken E.T. *Private & Statutory Arbitration* (RAU 5/6/2002) 4.

¹⁴ Van Kerken E.T. 2.

collective agreements are, trade unions only on the side of employees and either a single employer or association of employers on the side of the employer.¹⁶ There is no room for individual employees. Even a group of employees, cannot conclude a collective agreement unless backed by a trade union, the same as the initiation of strike, cannot be initiated by a group of employees if not backed by trade union. In simple terms a group of workers cannot conclude a collective agreement with an employer or employers' association if they are not backed by a trade union. The Federal Constitutional Court took the matter further:

*"...it cannot be the purpose of Article 9 par 3 of the Constitution that every association of employees or employers should be admitted to participate in collective bargaining. The starting point for any further consideration should be that it is the purpose of the system of collective bargaining to produce a reasonable structure of working conditions...This purpose requires that the ability to participate in collective bargaining must be based on certain prerequisites."*¹⁷

The basis of this position is that only members of a particular trade union, that is a party to collective agreement can be bound thereby. The exception to this rule is that there is what is referred to as Declaration of general binding, according to which parties thereto, may approach the authorities for a declaration of this nature.

The above scenario differs with the South African Labour Relations position, according to which collective agreement can under certain circumstances¹⁸ also bind employees who are non-members of the trade unions or trade union party to the collective agreement irrespective of the subject of regulation. Therefore the main dispute resolution mechanism in as far as collective bargaining is concerned is the collective agreement. In as far as the individual dispute resolution is concerned the main mechanism is the Labour Courts as compared to the position in South Africa where the relevant mechanism is the CCMA. However, there is a role played by Labour Courts with regards to collective bargaining. Therefore the German labour relations system recognises both judicial and

¹⁵ Van Kerken 2-3.

¹⁶ Section 2 Act on Collective Agreements.

¹⁷ FCC; decision of 6 May 1964, *BverfGE* (pp 18- 34 (28).

¹⁸ Section 23(1) (d) LRA.

non-judicial mechanisms for preventing and resolving labour disputes. Preventative measures are the most important means of disputes resolution.

I need to discuss these models briefly before embarking on the different dispute resolution mechanisms, since they, in one way or another, determine the procedure in different mechanisms.

3.1. Adjudication

Adjudication is the process through courts of law. It is normally regarded as the appropriate mechanism to resolve rights disputes. This is also the position in Germany. Unlike in Germany, with three level labour court system our system has two levels, namely the Labour Court (LC) and the Labour Appeal Court (LAC). The functions are almost the same. The notable difference in the German's system is that their labour courts are functioning as the CCMA in the initial stages of their adjudication, in that every case brought before a labour court begins with conciliation procedure called *Güteverfahren*.

3.2. Conciliation

Conciliation is a process whereby a third party encourages the parties to reach their own agreement.¹⁹ Conciliation may be by way of mediation. Conciliation procedures for pay bargaining are provided for in collective agreements, on the basis of a model agreement between the German Employers Association (BDA) and the German Confederation of Trade Unions (DGB). There is no compulsory state conciliation or arbitration. In order to set conciliation process activated, either party must declare the negotiations to have formally broken down. The consent of the parties is needed for conciliation to go ahead. In South Africa conciliation is not defined in the LRA, however it functions the same way as in Germany even though the procedure may be different. There is no specific procedure described in terms of the LRA. The conciliating presiding officer determines the procedure to attempt to resolve the dispute that may include mediation.

¹⁹ Barnard, Catherine, *E C Employment Law* Second Edition 2000, Oxford University press 578.

4. THE ROLE OF COLLECTIVE BARGAINING

4.1. General

Collective Bargaining and industrial action are typical means of resolving disputes of interest. In South Africa collective bargaining is on the rise, strongly encouraged and supported by labour relations statutes. There is a strong trend towards centralisation, as compared to individualisation. The South African labour system is fast moving in the direction of global market forces.

In Germany, there is a need to distinguish two kinds of collective bargaining namely

- Collective Bargaining between a trade union and employer's association on branch level for the whole region or between a trade union and a single employer on company level, and
- Collective bargaining between works council and employer on plant level.

For the sake of convenience my discussion will follow the following structure: In this part I will deal with collective bargaining between trade union and an employer's association on branch or company level. In the next chapter,²⁰ I will follow up with collective bargaining between works council and employer at plant. In this chapter I will compare the roles of both works council and workplace forums level and lastly industrial action.²¹

4.2. Collective Bargaining between a trade union and employer

Collective bargaining can take place on the shop floor or enterprise level with the individual employer, or otherwise, at industry level with a group of employers. The industry level bargaining takes place at the bargaining council level, if such council has jurisdiction in respect of the particular employer(s) and employees. In Germany dispute

²⁰ Chapter 5.

²¹ Chapter 6.

resolution mechanisms are dispute resolution boards and joint dispute resolution, whereas in South Africa there are bargaining councils and statutory councils.

Collective bargaining fulfils economic, social and political functions. Economical, in the sense that it serves as a device for the regulation of individual and collective workplace relations and the institutionalisation of industrial conflict. It fulfils a social function in the sense that it establishes a system of industrial justice which protects employees from arbitrary action by management and which recognises their right to human dignity. From a political perspective, it brings a measure of democracy to the industrial life in that it gives employees a say in matters that affect their working lives.²²

Collective bargaining and industrial action as a last resort are regarded as most appropriate avenues for the settlement of disputes of interest. Adjudication, on the other hand, is normally regarded as the appropriate method to resolve disputes of right. Even in respect of disputes of right, the legislature requires parties to use the appropriate statutory collective bargaining mechanisms before the final adjudication process takes place. The position is the same as in Germany where the Labour Courts have the sole jurisdiction over all disputes between parties to a collective agreement concerning rights as well as individual contracts. Broadly speaking, disputes over the alleged breach of a collective agreement are adjudicated upon by the Labour Courts or arbitrator if the parties agree.²³

Collective bargaining is intended to establish and maintain a balance of interests between the parties or to transform conflicting interests into limited co-operation. Collective bargaining requires parties to enter into collective agreements. Therefore, collective bargaining forms the cornerstone of our collective labour relations system.

Collective bargaining in terms of the LRA is voluntary. Although the LRA does not create a system in which bargaining is compelled by law, it promotes collective bargaining. Self-regulation or self-governance is the primary mechanism for regulating

²² Roycroft A & Jordan B, *A guide to South African Labour Law* (Juta 1992) 116-117.

²³ Barnard, Catherine 578.

conflicts in collective bargaining relationships. This means if parties can solve their problems so be it.

Registered unions and employer organisations must ensure that all collective agreements contain procedures to resolve interpretation and application disputes. Parties are obliged to arrange their own procedures in certain circumstances. Such procedure must first require parties to attempt to resolve the dispute through conciliation and if the dispute remains unresolved, through arbitration.²⁴

If there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the matter to the Commission if the collective agreement does not provide for a procedure or if the procedure provided for in the collective agreement is not operative or any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.²⁵

In pursuit of the object of promoting orderly collective bargaining, the LRA sanctions agreements not to strike or lock-out, thus no person may participate in a strike or lock-out if that person is bound by a collective agreement, prohibiting a strike or lock-out in respect of the issue in question.²⁶

4.2.1. Principles underlying Collective Bargaining

Collective bargaining is voluntary in nature. There is no duty to bargain anymore unlike the position under the old LRA. During that period court interference was the order of the day. The courts accepted that there was a duty to bargain on matters of mutual interest, in particular on distributive issues. Parties were expected to bargain in good faith.²⁷ The

²⁴ Section 24(1) LRA.

²⁵ Section 24 (2) LRA.

²⁶ Sections 65 (1) (a) & 28(1) (i) LRA.

²⁷ *NUM v ERGO* 1991 ILJ 1221 (A).

new LRA does not provide for such arrangement. In *ECCAWUSA & Others v Southern Sun Hotels (Pty) Ltd*, the Labour Court remarked:²⁸

“Although the concept of the duty to bargain in good faith was recognised in relation to the unfair labour practice jurisdiction of the 1956 Labour Relations Act, this is not the approach adopted in the current Act. Accordingly, the duty which existed under the 1956 Act, under the unfair labour practice jurisdiction, has not been incorporated into the current Act. There is no legal duty, implied by the Act, or an other law, to the effect that there is a duty to bargain in good faith.”

When one looks at the provisions of the Constitution it provides for the right to engage in collective bargaining to every employer, employers’ organization and trade union.²⁹ This formulation has given rise to a debate as to whether this provision creates a right to bargain, coupled with a corresponding duty on the other party in the collective bargaining process to engage in collective bargaining. Authors argue that what is actually protected is a freedom to bargain without undue state interference or regulation as opposed to a right.³⁰ This view implies that there is no corollary legally enforceable duty on the counterpart to bargain collectively. This view is endorsed in a decision *South African National Defence Union v The Minister of Defence & Others*.³¹ The Court based its decision on the different wording of the interim Constitution,³² Which guaranteed the right to bargain collectively.

On the other hand, other authors³³ do not support this view. In a recent judgment, *South African National Defence Union and another v The Minister of Defence & others*³⁴ the Court rejected the view that a mere freedom is provided for by the wording of section 23(5) of the Constitution. According to the Court the use of the phrase “to engage in” is

²⁸ (2002) 21 ILJ (LC) at par 37.

²⁹ Section 23(5).

³⁰ H Cheadle in D Davis, N Cheadle (eds) *Fundamental rights in the Constitution-Commentary and Cases* (Juta, 1997) 231-232.

³¹ 2003(3) SA 239(T).

³² Section 27(3) Interim Constitution 200 of 1993.

³³ M Brassey *Employment and Labour Law (Vol 1: Employment Law)* (1998) C3:8-9).

³⁴ [2003] 9 BLLR 932 (T).

entirely neutral as regards the question whether section 23(5) confers a right or a freedom. The Court interpreted the provision as conferring a right on the union concerned to engage in collective bargaining, and that the section imposes an obligation on the Minister to engage in collective bargaining.

4.2.2. Collective agreements

In the South African context the notion of collective agreement means 'a written agreement concerning terms and conditions of employment or any other matter of mutual interest.'³⁵ In Germany the notion is somehow stricter in that it regulates the rights and duties of the parties to it, so called obligatory part, and contains legal norms mandatory for the employment relationship covered by the collective agreement, normative part.³⁶

4.2.3. Normative Part and Obligatory Part

Roger Blanpain³⁷ compares collective agreement to a '*double-yolked egg: it has a double content.*' By double content he meant the Normative Part and Obligatory Part. He describes the Normative Part as a collective agreement containing stipulations about wages and working conditions, which regulate the labour relations between the employer/s and the employees. These wages and working conditions have a normative nature. They are the norms, which regulate the working conditions of those, which fall within the territorial and occupational scope of the collective agreement.³⁸

On the other hand the Obligatory part consists of the rights and duties of the parties to a collective agreement. These obligations can be explicit or implicit. The implicit obligations are the peace obligations (abstention from industrial action as long as the agreement is in force) that can be relative or absolute. These duties are deemed to be inherent in the very existence of the collective agreement. This is the case, even if parties

³⁵ Section 213 LRA.

³⁶ Section 1 para 1 Act on Collective Agreements.

³⁷ Blanpain, Roger, *European Labour Law*, Seventh revised edition 2000, Kluwer Law International, The Hague-London-Boston, par 765 at 427.

to a collective agreement explicitly contracted out those duties, in which case they would nevertheless apply. Abrogation would be null and void.³⁹ In contrast the binding effect of German collective agreements differ from that subject to South African labour law, according to which collective agreements can, under certain circumstances, also bind employees who are non-members of the unions parties to the agreement irrespective of the subject of regulation.⁴⁰

The peace obligation places parties to a collective agreement under an obligation to maintain peace at the work place for the duration of the agreement in question. As in Germany, in South Africa this notion of peace obligation is well known.⁴¹ It does not however prohibit industrial action aimed at achieving a collective agreement on terms and conditions not already laid down in the content of the agreement in question. On the other hand the duty of the parties to a collective agreement to exert their influence implies that they must use the means available to them under the law of associations to ensure that their respective members duly abide by the provisions of the agreement.⁴²

Collective agreements are important since they form the basics and the framework of the settlement of disputes. They regulate relations between the collective parties. They are preventative in nature. Every collective agreement except union security agreements⁴³ must provide for a dispute resolution procedure to resolve disputes about its interpretation and application. The procedure must first require the parties to resolve the disputes through conciliation and, if the dispute remains unresolved to resort to arbitration.⁴⁴

³⁸ Blanpain par 766 at 427.

³⁹ Blanpain par 768 at 427.

⁴⁰ Close shop and agency agreements.

⁴¹ Section 65 LRA, under certain conditions, prohibits the participation in industrial action or any conduct in contemplation or furtherance of a strike or a lockout.

⁴² Weiss, Manfred, and Dr Marlene Schmidt, 2000 updated to 1/3/2000, *Federal Republic of Germany*, Kluwer Law International, The Hague Boston, par 360 at 154.

⁴³ Sections 25 and 26 or a settlement agreement contemplated in either section 142A or 158 (1) (c) - the latter is introduced by the amendment of 2002.

⁴⁴ Section 24 (1) LRA.

4.2.4. Parties to a collective agreement

A collective agreement may be concluded by a trade union only i.e. on the employee's side and by a single employer or by an employers' association on the employer's side. In order to be accepted as a party to collective bargaining, any association, whether a trade union or employers' association, has to meet certain requirements developed by the courts.

The association has to be established for an indefinite period. The organisation must have a corporate structure; in other words it must be in such a way that continuity is guaranteed. It must be independent from the opposing side. It should not be the employers' instrument undermining the labour movements. The association must consist of members from one side only, either employees side or employers side. The association may not be confined to one establishment but must exceed this scope. Associations must be independent from the State and political parties. However this requirement does not prohibit an association aimed at similar political goals as a political party. The association has to be autonomous. The association has to be structured in such a way that there should be a guarantee that members are able to influence the activities of their associations. Although these restrictions have been abolished the unions retained them.

In terms of South African law⁴⁵ registration is not as strict. A collective agreement binds even employees who are not members of the registered trade union party to the agreement as long as they are identified in the agreement or such agreement binds the employees in the case where the trade unions which is a party represents the majority of the employees employed by the employer at the workplace.⁴⁶

A collective agreement binds every person who was a member at the time of collective agreement became binding and every person who becomes a member after it became binding, whether or not such a person continues to be a member of either party to the

⁴⁵ Sections 95-106 LRA.

⁴⁶ Section 23 (1) (d).

agreement during the subsistence of the collective agreement. Consequently a non-party may be bound as if it is a party by collective bargaining.

The LRA makes provision for the procedure to resolve disputes about the interpretation and application of collective agreements.⁴⁷ Strange enough there is no procedural provisions concerning disputes about the interpretation and application of sections 23, 24, 25 and 26.

4.2.5. Functions of Collective Agreements

Collective agreements fulfill three main functions; namely:

- Protective

A collective agreement gives employees protection against employers' taking the law into their own hands' in order to impose working conditions. This is important, because employees' contract of employment cannot breach the minimum working conditions set by the collective agreement.

- Organisational

A collective agreement fleshes out the content of all employment relationships it covers while in force.

- Preserving industrial peace

While a collective agreement remains in force, employees are prohibited from going on a strike to enforce new demands relating to the pay and conditions the agreement cover.⁴⁸

In South Africa the position is that no employee may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if that employee is bound by a collective agreement that prohibits a strike or a lock-out in respect of the issue in dispute.⁴⁹

⁴⁷ Sections 24 (1) as amended.

⁴⁸ Publication of August 2000 by the Minister of Labour 19-20.

4.3. Dispute resolution mechanisms between trade unions and employer/s association

In Germany there is provision for dispute resolution forums in collective bargaining namely the dispute resolution boards and joint dispute resolution boards. These boards are the most important dispute resolution mechanisms. They are comparable to the South African systems of bargaining councils and statutory councils.

4.3.1. Dispute Resolution Board

The Allied Control Council Act on Dispute Resolution in Labour Conflicts⁵⁰ obliges the state (*Länder*) to establish dispute resolution boards. These boards are established by the state Minister of Labour and Social Affairs. These forums are established in order to avoid labour conflict. The importance of this process is the exclusion of industrial action in regard to disputes of interest. The parties may agree to exclude resort to the adjudication process. This is the reason why in some of the industries, such as chemical, the parties agree not to undertake industrial action, or hold a strike ballot, until conciliation has been tried and failed.⁵¹

If negotiations between the parties to a collective agreement have broken down, in many cases arbitration proceedings take over. The purpose is to reconcile the parties to a labour dispute and to prevent the outbreak of industrial action. Even when the industrial action has already started, an attempt can still be made through arbitration to reach a settlement, the success of which will bring the industrial action to an end. Arbitration is in most cases aimed at contributing to the conclusion of a new collective agreement and thus to the maintenance or restoration of industrial peace. There is a need to distinguish between agreed or voluntary and state arbitration. Voluntary arbitration is the sample arbitration

⁴⁹ Section 65(1)(a) LRA.

⁵⁰ Passed in 1946.

⁵¹ Burgess, Pete, 1996, *European Management Guides, Industrial Relations and Collective Bargaining*: Income Data Services Institute of Personnel and Development 134.

agreement that the trade union federation (DGB) and the employers' federation (BDA) have recommended their respective members to adopt.⁵²

State arbitration regulations were provided for after the war on the settlement and arbitration of labour disputes.⁵³ This Act was a step further away from the dispute resolution by the state authority. It provided for voluntary dispute resolution agreements by trade unions and employers' associations. In terms of this Act, it was absolutely up to the parties to decide whether or not such a procedure should be established and if so, how it should be structured. The *Länder* had to establish dispute resolution boards that are standing committees.⁵⁴

Some *Länder* such as the former *Land* of Baden did formulate an arbitration law into its own *Land* law: It has been established that some *Länder* also issued executive regulations that have only subsidiary significance in the face of arbitration procedures agreed on voluntarily between the parties. They can only be applied if:

- No arbitration panel has been provided for in a collective agreement, and one or both parties have approached the state arbitration body, or
- The agreed arbitration panel has failed to produce an agreement, and the parties have agreed to go to state arbitration.⁵⁵

There is no compulsion to form arbitration or a possibility of declaring the arbitration award to be binding against the will of the parties.⁵⁶ Antoine Jacobs⁵⁷ writes;

"The German system of compulsory arbitration was regarded by the trade unions as an in-road on their trade union rights. Although the definition of arbitration (Schlichtung) in the Decree [referring to Collective Agreements Decree of 1918] was the provision of assistance in the making of "overall agreement"-that is, the promotion of agreement

⁵² Halbach *et al*, 1/7/1994 5th revised and extended Edition, *Labour Law in Germany: An Overview*, Published by the Federal Ministry for Labour and Social Affairs at 327 par 103.

⁵³ Control Commission Act no 35 20 August 1946.

⁵⁴ Weiss 378 at par 160-161

⁵⁵ Halbach *et al* at 328 par 104.

⁵⁶ Halbach *et al* at 328 par 105.

⁵⁷ *The Making of Labour Law in Europe: Comparative Study of nine Countries up to 1945*: Mansell publishing Limited 1986 Chapter 5 183-240 Edited by Bob Hepple at 230.

when voluntary joint regulation failed -the 'order imposing compulsory effect allowed the arbitration authorities to impose a binding award where this was 'deemed to be equitable on a fair balancing of interests and (if its) implementation (is) necessary for economic and social reasons.'"

4.3.1.1. Composition of Dispute Resolution Boards

Dispute resolution boards are composed of an equal number of representatives of both the parties. They are chaired by the neutral president, nominated by the *Land* Minister of Labour and Social Affairs in agreement with the trade unions and employers' associations from a list compiled by the Labour Department in co-operation with those organisations. Such a board can only intervene upon the request of both parties. The decisions of the board are binding upon parties to a dispute only if they have agreed in advance that this be so.

The Act⁵⁸ gives absolute priority to voluntary dispute resolution agreements by both parties. Though the Act provides for the framework and specifications, the details may be ignored in order to give the parties priority to voluntary dispute resolution agreements. Only in the event where the voluntary procedure, either does not exist or turns out to be unsuccessful, can the Act be of assistance to reach an agreement. In practice, however, it does not play any role, hence the establishment of the joint dispute resolution by agreement between the parties.

4.3.2. Joint Dispute Resolution Boards

Joint Dispute resolution boards are particularly established by collective bargaining parties, in order to avoid labour conflict. Parties may refer interest disputes to these boards. They are given precedence over the statutory conciliation or arbitration procedure. Arrangement for joint dispute resolution may be included as clauses in collective agreement or form a separate agreement.⁵⁹

⁵⁸ Allied Control Council Act on Dispute Resolution in Labour Conflicts.

These types of boards are established in collective agreements between parties. Agreements on the establishment of joint dispute resolution cover all areas of the private sector. This procedure is not very successful, because there is a huge amount of free collective bargaining without involvement of dispute resolution.⁶⁰

In an agreement between the German Confederation of Trade Unions (DGB) and the German Employers' Association (BDA) of 1954, the following basic terms were fixed:

"Thereby the DGB and the BDA as well as their members are obliged to take serious efforts to primarily conclude collective agreements by way of free negotiations. If those negotiations do not lead to result, it is the common conviction of DGB and BDA that state boards should not be involved in dispute resolution in collective bargaining, but only joint dispute resolution boards based on voluntary agreements. This however requires that the necessary preconditions for such a voluntary system be established by the contracting parties."

4.3.2.1. Composition of Joint Dispute Resolution

There is no homogeneous pattern in as far as composition is concerned. It differs from industry to industry and from sector to sector. In general, a joint dispute resolution board is composed of an equal number of members representing the parties involved. These boards are headed by the president. In the case of the food industry, there are two presidents. The other common feature is that there is always a distinction between regional agreements and national boards for industrial agreements.

4.3.2.2. Procedure at joint dispute resolution boards

The initiation of these procedures may be made on the application of either or both parties to the collective agreements. In the event of breakdown of negotiations it should commence automatically. This procedure places the collective parties under an obligation to make efforts to resolve their disputes before embarking upon industrial action. If the

⁵⁹ [www.eurofound.ie/emire/ Germany](http://www.eurofound.ie/emire/Germany). (Joint Dispute Resolution).

⁶⁰ Weiss par 379 at 161.

joint dispute resolution board fails to arrive at a compromise proposal, the procedure is deemed to have been exhausted unsuccessfully. Thereby the peace obligation ceases to exist and industrial action may commence. On the other hand, if the parties reach a compromise, such compromise is regarded as constituting a new collective agreement.⁶¹

There is one common feature in all industries, namely; that none of the boards meets in public. The boards have to hear evidence by the parties and evaluate the documents presented by the parties. The procedure is not prescribed. It is the prerogative of the boards to formulate the procedure. Minutes have to be recorded in writing and be kept secret.⁶²

On the whole, the system of voluntary joint dispute resolution has turned out to be an instrument that helps a great deal to promote suitable compromises without infringing the autonomy in collective bargaining of the parties.

If a collective agreement cannot be reached easily, industrial action has to be taken in order to show each side's constituency that every attempt to improve the results of bargaining is taking place. However once strikes and lockouts have started, joint dispute resolution is used to terminate the conflict. Therefore joint dispute resolution is normally used to prevent a strike. In the event all other mechanisms fail to settle the dispute or to reach an agreement then the remaining tool to put pressure on the parties is industrial action.

4.4. Bargaining Council

A bargaining council is defined in the LRA⁶³ as: *'A bargaining council referred to in s27 and includes, in relation to the public service that bargaining councils referred to in s35.'*

In turn section 27 provides:

⁶¹ (www.eurofound.ie/emire/Germany/ Joint Dispute Resolution).

⁶² Weiss par 386 at 164.

*“One or more registered trade unions and one or more registered employers’ organisations may establish a bargaining council for a sector and area by
(a) Adopting a constitution that meets the requirements of section 30 and
(b) Obtaining registration of the bargaining council in terms of section 29.”*

The State may also be a party to a bargaining council.⁶⁴ A bargaining council may be established for more than one sector. The LRA provides for the registration of bargaining councils as well as incidental issues and procedures for such registration.⁶⁵

4.4.1. Powers and functions of Bargaining Council

The powers and functions of bargaining councils among others are;

- To conclude collective agreements,⁶⁶
- To enforce them,⁶⁷
- To prevent and to resolve labour disputes,⁶⁸
- To perform the dispute resolution functions referred to in terms of section 51,⁶⁹
- To establish a fund to be used for resolving disputes,⁷⁰
- To determine the matters which may not be an issue in dispute for the purposes of a strike and a lock-out at the workplace,⁷¹
- To confer on workplace forum additional matters for consultation⁷² and
- To establish, by collective agreement, procedures to resolve any dispute contemplated in section 51.⁷³

Basically it regulates the dispute resolution. This is evident from the objectives thereof. The objectives provide for classification of dispute resolution, powers of the bargaining

⁶³ Section 213 LRA.

⁶⁴ Section 27(2) LRA.

⁶⁵ Sections 27(4) and 29 LRA.

⁶⁶ Section 28 (1) (a) LRA.

⁶⁷ Section 28 (1) (b) LRA.

⁶⁸ Section 28 (1) (c) LRA.

⁶⁹ Section 28(1)(d) LRA.

⁷⁰ Section 28(1) (e) LRA.

⁷¹ Section 28(1) (i) LRA.

⁷² Section 28(1) (j) LRA.

⁷³ Section 51(9) introduced by Labour Relations Amendment Act No 12 of 2002.

councils as well as rationalisation of the registration and the amalgamation of bargaining councils in the public service and for the resolution of jurisdictional disputes between such bargaining councils.

It excludes the application of the Arbitration Act to bargaining councils. The 2002 amendments⁷⁴ provide for powers and functions of the bargaining council in that the bargaining council has the power to provide industrial support services within the sector and to extend the services and functions of the bargaining council to workers in the informal sector and domestic workers.⁷⁵ In addition to powers of enforcement, a bargaining council can now promote, monitor and enforce compliance with any collective agreement concluded in that bargaining council.⁷⁶ The council has jurisdiction in respect of a dispute between non-parties that is parties that are not parties to the council, but that fall within the registered scope of the council.⁷⁷ In *Kem-Lin Fashions CC v Brunton & Another*,⁷⁸ the Court opined that the legal effect of section 32 of the LRA is that a non-party to whom the agreement has been extended is turned into a party, and is likewise bound.

4.4.2. Procedure at Bargaining Council

A bargaining council may, by collective agreement, establish procedures to resolve any dispute contemplated in the LRA in terms of section 51. The parties to a bargaining council must attempt to resolve a dispute between them in accordance with the constitution of the council.

4.5. Statutory Council or Accredited Private Agency

The LRA provides that a statutory council may be established, on application lodged with the registrar, by a representative of the trade union or representative of the employers'

⁷⁴ Labour Relations Amendment Act No 12 of 2002.

⁷⁵ Section 28 (k) and (l) LRA.

⁷⁶ Section 33 (1) LRA.

⁷⁷ Section 32 (1) LRA.

organisation in a sector and area where no council is registered.⁷⁹ A union, or two or more unions acting jointly, will be regarded as representative if its or their members constitute at least 30% of the employees in a sector and area. The same applies to employers' organisations. Where such organisations acting jointly, will be regarded as representative if its or their members, individual employers, employ at least 30% of the employees in the sector and area.

4.5.1. Powers and functions of statutory councils

Statutory councils may among others perform the following functions;

- The dispute resolution functions referred to in terms of section 51⁸⁰ and
- To conclude collective agreement to give effect to the matters mentioned in paragraphs (a), (b) and (c) of subsection (1) of section 43.⁸¹

If a dispute is referred to the council in terms of the LRA and any party to that dispute is not a party to that council, the council must attempt to resolve the dispute through conciliation or arbitration.⁸² With a view to performing its dispute resolution duties in terms of section 51(3) every council must apply for accreditation in the prescribed manner.⁸³

Any council or private agency may apply to the governing body of the CCMA in the prescribed form for accreditation to arbitrate certain kinds of disputes such as those that remain unresolved after conciliation if the LRA requires arbitration.⁸⁴ However the jurisdiction of such accredited council is limited. Such councils cannot arbitrate on issues such as:

- Disclosure of information,⁸⁵

⁷⁸ 2001 ILJ 109 (LAC).

⁷⁹ Section 39 (2) LRA.

⁸⁰ Section 43(1)(a) LRA.

⁸¹ Section 43 (1) (d) LRA.

⁸² Section 51(3) LRA.

⁸³ Section 52(1) LRA.

⁸⁴ Section 127(1) LRA.

⁸⁵ Section 16 LRA.

- Organisational rights,⁸⁶
- Interpretation of collective agreements,⁸⁷
- Ministerial determinations,⁸⁸
- Cancellation of council registration,⁸⁹
- Demarcation between sectors and areas⁹⁰ and
- Pickets during industrial action,⁹¹

5. THE ROLE OF A WORKPLACE FORUM AND A WORKS COUNCIL

The German system distinguishes between two scenarios, namely, collective bargaining between a trade union and employer's association on branch level for the whole region or between a trade union and a single employer on company level, and collective bargaining between a works council and employer on plant level. This is the discussion I am embarking on. This discussion will show the importance of both forums in the two legal systems.

In South Africa workplace forums have not attracted support in practice. If one compares the two forums one finds that in Germany works councils are the most important actors that might enter into a dispute with the employer. They are not necessarily dispute resolution mechanisms. However, one cannot discuss the important mechanism like German the Arbitration Committee without mentioning them.

5.1. Establishment of a workplace forum and a works council

The workplace forum system is an important innovation brought about by the LRA. It is an important institution modeled in an almost similar fashion than a German's works

⁸⁶ Section 21 & 22 LRA.

⁸⁷ Section 24 LRA.

⁸⁸ Section 61 LRA.

⁸⁹ Section 62 LRA.

⁹⁰ Section 63 LRA.

⁹¹ Section 69 LRA.

council. It is established in terms of Chapter V of the LRA. This Chapter provides that a workplace forum may be established in any workplace in which an employer employs more than 100 employees.⁹²

This is the new concept brought about by the new LRA. It represents a shift from the tradition of adversarial collective bargaining between employers and trade unions over all division of labour between trade unions and workplace forum in representing employee's interests.⁹³ I fully support this institution, especially if one takes into account its success in the European Union, particularly Germany. I believe given a chance, it will prove very useful.

The works council is established in terms of the Works Council Act, *Betriebsrätegesetz/BetrVG*.⁹⁴ The works council system, as it is presently is not an invention of the labour movement. It is basically the innovation of the employers, who wanted to keep the unions out of the establishment and to provide their own policies at plant level. Like in South Africa the unions did not approve of the works councils that is the reason why the council system was re-established.⁹⁵ They protested mainly because their expectations were not met. They wanted to overcome the institutional separation between them and the works council, and they also tried to broaden the scope of matters to be controlled by works councils, especially to include economic questions.⁹⁶ The works council represents both blue-collar and white-collar employees. Both groups elect their own representatives separately.

The Act (*Betriebsverfassungsgesetz/BverfGe*) provides that a works council may be established in every establishment with more than five employees over 18 years of age, three of them having being employed for at least six months. This is one of the most important differences between the works council and the workplace forum in the South African context. The workplace forum can only be established in workplaces with 100 or

⁹² Section 79 (1) LRA.

⁹³ Du Toit *et al* 287.

⁹⁴ The first Works council Act was passed in 1920. The second one was passed in 1952 and amended in 1972.

⁹⁵ In terms of the 1952 Act.

more employees. The works council elects the chairman and his deputy from among its members.⁹⁷

It is up to the employees of respective establishments whether or not they establish the works council. There is no sanction if they fail to do so. However failure to establish such works councils would be to the disadvantage of the employees themselves, because they will forfeit all the rights invested in the works council.⁹⁸

In Germany, collective bargaining aimed at the conclusion of collective agreements is supplemented by a system of worker participation by way of consultation and co-determination. This institutionalisation of worker participation in Germany is an old phenomenon.

The purpose of the LRA amongst others is to promote employee participation in decision-making within the workplace.⁹⁹ Therefore workplace forums are the means by which the LRA, in line with its primary objective, seeks to promote employee participation. It is a step away from adversarial and rigid collective bargaining to joint problem solving and participation on certain subjects.

5.2. Functions of the workplace forum

In regulating workplace forums the legislature provides a clear scope for agreeing on private arbitration. In the first place the constitution of a workplace forum may establish a procedure that provides for the conciliation and arbitration of proposals in respect of which the workplace forum does not reach consensus.¹⁰⁰

⁹⁶ Weiss par 449-450 at 187-188.

⁹⁷ Section 26 *BetrVG*.

⁹⁸ Weiss par 453 at 189.

⁹⁹ Section 1 (d) (iii) LRA.

¹⁰⁰ Section 82 (2) LRA.

Secondly, the parties to a workplace forum may agree on procedures to resolve differences between them if the process of consultation fails to lead to consensus.¹⁰¹

Thirdly, if the process of joint decision-making in the workplace forum fails to bring about consensus, the employer may refer the matter to arbitration in terms of the agreed procedure.¹⁰²

The functions of the Workplace forum are provided for as follows:

- To seek to promote the interests of all employees in the workplace, whether or not they are trade union members,
- To seek to enhance efficiency in the workplace,
- To be entitled to be consulted by the employer with the view to reaching consensus, and
- To participate in joint decision-making.

Workplace forums in South Africa are not successful since only a few of them have since been established. The main problem is that trade unions regarded them as their potential competitors that could be manipulated by management to undermine union strength at plant level.¹⁰³ Prof Olivier,¹⁰⁴ says,

"The LRA has not reconciled the tension between 'workplace unionism/collective bargaining and workplace forum activity nor between the need to democratise the workplace and the need to increase efficiency and productivity."

5.3. Dispute resolution mechanisms i.r.o work-place forum

A collective agreement establishing a workplace forum can set up any dispute resolution machinery that the parties find suitable. If a dispute is not otherwise dealt with in terms of the Act (the constitution of a workplace forum can contain a dispute resolution

¹⁰¹ Section 85 (4) LRA.

¹⁰² Section 86 (4) LRA.

¹⁰³ Du Toit *et al* 291.

¹⁰⁴ *Workplace Forums: Critical Questions from a Labour Law Perspective* (1996) *ILJ* 803 at 807.

procedure) or a collective agreement, it may be referred to the CCMA for conciliation or failing which, arbitration.¹⁰⁵ The parties may agree on a procedure for the conciliation and arbitration of proposals in respect of which the employer and the workplace forum do not reach consensus.¹⁰⁶ Therefore the duties of CCMA are sufficiently wide to cover dispute resolution mechanisms applicable to workplace forums as well.

5.4. Purpose and rights of the works council

The parties may conclude agreements in matters in which the works council has a right of co-determination as well as in matters relating to labour or management relations in the establishment.

The immediate purpose of the work council is to monitor operations, to make sure that all legal requirements, safety regulations, collective agreements and in-house agreements designed to benefit employees are adhered to and implemented as necessary. In addition, the works council has to be involved in social welfare, personnel and economic issues.¹⁰⁷

The works council has a whole range of rights of participation. They are:

- Right of information. The works council has the right to information from the employer as well as any documentation that it might need for the performance of its duties.
- Right of consultation. The works council has the right of consultation. This means that the employer has to discuss the subject matter with the works council and cannot enforce a relevant matter unilaterally.
- Right of veto. The works council is entitled to refuse its consent. If the employer still wishes to implement a measure the works council has legally rejected it, the matter has to be referred to the labour court.

¹⁰⁵ Section 94 LRA.

¹⁰⁶ Section 82 (2) LRA.

¹⁰⁷ Publication of January 2002 by the Ministry of Labour and Social Affairs: *Federal and Social Security at a glance* 24.

- Right to co-determination. This is the most important of all. It means that a specific decision has to be taken. If there is no co-determination the works council will be useless since it could not have the power to induce management to reach an agreement. The works council can insist on participation to the extent granted by the law. Management cannot take any decision without the consent of the works council. This is comparable to joint decision-making in the South African context. There must be consensus, otherwise the actions of the management will be illegal. Co-determination gives both parties equal voice in the decision-making.

*"Workers participation is not seen as an additional burden imposed upon management, but a positive element, as a plus in a competitive world- to the decision making process in enterprises, adding to the credibility of the undertakings and of the European social model."*¹⁰⁸

Prof Weiss,¹⁰⁹ stated:

"...In Germany, the spirit of co-operation is a well-established pattern and it is defined, even by statute. It has enormous impact and it has many connotations. To just give you an idea. It means amongst others, that any means of industrial action, strike or lock out, and so on is absolutely excluded as a means of conflict resolution: both sides, management as well as works councils, have to abstain from any activity which could disturb the peace of the company, of the plant or a group."

5.5. Dispute resolution mechanism i.r.o. works councils

Unlike in Germany, where strikes and lock-outs as means of resolution of conflicts between employer and works council are expressly prohibited,¹¹⁰ in South Africa, industrial action may be called by the workplace forum in respect of matters for

¹⁰⁸Blanpain, Roger and Hanani, Tadashi 1995, *European Works Councils: Implementation of the Directive in the Member states of the European Union*, Peeters at discussion of the Implementation of European Directive of September 1994 introductory remarks 15.

¹⁰⁹ During a discussion on the question of the spirit of co-operation and the prevailing system of labour and industrial relations: the implementation of the European Directive on European Works Councils upon the member states of the European Union 27.

¹¹⁰ Section 74 par 2 *BetrVG*.

consultation once the process of consultation has run its course and ended in deadlock.¹¹¹ In South Africa there is nothing in the LRA prohibiting the strike action as a legitimate means of dispute resolution between employer and workplace forum. Therefore in Germany, as a substitute, there is a special dispute settlement body, called arbitration committee. It is discussed immediately below.

5.5.1. Arbitration Committee

The Arbitration Committee is established in terms of the Works Constitution Act (*BetrVG*).¹¹² It is the most important dispute resolution mechanism in Germany, responsible for resolution of disputes between works council and employer. It is central to German industrial relations. It may be established either as an ad-hoc committee or as a permanent committee.¹¹³ The permanent committee is not used in practice and thereby the ad-hoc committee is preferred. It is feared that the permanent institutions actions may be predicted if the persons serving in the committee were known in advance.¹¹⁴

5.5.1.1. Composition of the arbitration committee

The Arbitration Committee is composed of a certain number of members appointed by the employer, an equal number appointed by the works' council, and a neutral president, who chairs the committee. The Act does not prescribe the number of members to be appointed by each side. Normally this is left to be determined by agreement between the works council and the employer. Works councils tend to favour a larger number of members than the employer. If the parties cannot reach an agreement as to the number of members to be appointed, either side may approach the Labour Court to decide the matter. The establishment of the Arbitration Committee is guaranteed by the law. As such there is a special procedure for this purpose. This procedure is rapid and enables a

¹¹¹ Du Toit *et al* 327.

¹¹² 1972.

¹¹³ Section 76 *BetrVG*.

¹¹⁴ Weiss par 484 at 108.

decision to be reached within few days. Should one side, in spite of a court decision, refuses to appoint members, the arbitration committee may function without them.¹¹⁵

The decision as to who to appoint to the membership of the Arbitration Committee on each side, lies with the employer and works council respectively. In most cases however a majority of the members belong to the enterprise, either as executives on the employer's side, or as employees on the works council's side. However in other instances also trade union officials or officials of employers' associations are appointed. External members may be appointed only in instances where expert knowledge is required which goes beyond the qualifications of union officials or officials of employers' association. The Act does not specify who should serve as the neutral president of the committee. It can be any person whom employer and works council can agree upon. Just like the case with a number of members to be appointed on each side, should the parties fail to reach a consensus as to who is to be appointed the president, the Labour Court shall appoint the president of the arbitration committee. In most cases career judges are appointed to act as presidents of the arbitration committee. The career judges constitute about 95 per cent of all arbitration committee presidents.¹¹⁶

Like all other costs of the works constitution, the costs of the arbitration committee are borne by the employer.

5.5.1.2. Procedure at Arbitration Committee

There are no procedural rules prescribed, since this committee was conceived by the legislature as a rapidly operating and flexible body. It is up to the committee to develop its own procedure. However, since in the majority of cases career judges serve as committee presidents, the procedure tends to resemble the one used in labour courts, which is inflexible and long. The law requires that after oral proceedings the committee shall adopt its decisions by majority vote. The president does not take part in the first

¹¹⁵ Weiss at 198 par 485.

¹¹⁶ Weiss at 199 par 486.

ballot voting. The reason for this is to avoid decisions that would appear to be imposed on the parties. However should there be a tie to the extent that a second ballot is necessary, the president shall have a casting vote. The law requires that the decisions of the arbitration committee are recorded in writing, signed by the president, and forwarded to the employer and works council. It is important to note that during the deliberations of the committee outsiders are not admitted. The exclusion of the public is considered necessary to permit compromises to be reached in resolving conflicts.

5.5.1.3. The Decision of the Arbitration Committee

The Arbitration Committee is bestowed with wide discretion. In finding its decision the arbitration committee shall have due regard to the interests of the establishment and to the interests of the employees concerned. It has to take a decision. It has to find a solution on which the employer and works council could reasonably have agreed upon. It has to balance the interests of both, employer and employees. To this aim it may follow the employer's opinion, or agree with the works council's view. It may however, even diverge from both opinions.

The decision of the arbitration committee settles the dispute between employer and works council. It has the same effect as an agreement between the employer and works council would have had. In cases of co-determination, the decision of the arbitration committee has the effect of a works agreement.

5.5.1.4. Right to Appeal

Any party may appeal the decision of the arbitration committee to the Labour Court within two weeks of the date of the notification of the awards. On appeal, the Court is allowed to consider only if the committee has exceeded its discretionary powers. The Court cannot annul the decision of the committee. In practice, appeal to court in cases of

interest disputes is very rare, meaning that the final decision is reached by the arbitration committee.¹¹⁷

6. INDUSTRIAL ACTION

Resolution of disputes may be by way of strike or lock-outs. In Germany collective bargaining is a very important dispute resolution mechanism. Parties to collective bargaining enter into agreements that are supposed to include peace obligation clauses. Collective agreements are the domain exclusively of the trade unions on the side of employees and a single employer or employers' organisations on the employers' side. There is no room for individual employees. Non-members of the trade union that is a party to a collective agreement are not bound by the collective agreement concerned.

In South Africa the position is different. Non-members of the trade union could be bound as if they were members. The situation is even worse because of the so-called union security arrangements in the form of agency shop and closed shop arrangements. These arrangements are particularly outlawed in Germany.

6.1. Strike

The LRA defines a strike in the following terms:

*"A strike means the partial or complete concerted refusal of work or the retardation or obstruction of work, by persons who are or have been employed by the same employer or different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work whether it is voluntary or compulsory."*¹¹⁸

Halbach et al,¹¹⁹ defines strike as:

"... the jointly and deliberately executed cessation of work by a number of employees with the intention that they will resume work once they have successfully forced through

¹¹⁷ Weiss at 200 par 489.

¹¹⁸ Section 213 of The LRA.

¹¹⁹ Par 4/119 at 331.

their demands in the form of the conclusion of a new collective agreement. A partial refusal to perform work, the so-called work-to-rule or go-slow, is a strike.

Weiss¹²⁰ illustrates this interrelationship between collective bargaining and industrial conflict is the following way;

"...measures of industrial action may legally only be carried out by parties competent to conclude a collective agreement...For the employees' side, this means that a strike can only be called out by a trade union."

Conversely in South Africa a strike may be engaged into *'for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee.'*¹²¹

The Federal Labour Court had to interpret a single phrase, the caption of Article 9 of the Constitution, 'Freedom of association' as well as the provisions of paragraph 3 as an implication of the strike. Paragraph 3 provides:

"The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession...."

The right to strike is therefore implied in collective bargaining. The Courts made it quite clear that individual freedom of association would be meaningless if the organisation itself was not constitutionally protected. Following this insight the so-called collective freedom of association is understood as being implied by the individual freedom of association. One of the main activities of trade unions and employers' associations is of course collective bargaining.

It is accepted that article 9 par 3 of the Federal Constitution guarantees a system of free collective bargaining as an institution in which individual freedom of association can play a relevant role in actual practice. Hence there is a need to have a balance of power between the trade unions and the employers' associations. It is important to give each

¹²⁰ Par 394 at 167.

¹²¹ Section 213 LRA.

side an equal chance of reaching adequate compromise, hence the right to strike as well as lock-out to a certain extent.¹²² There is a notion that collective bargaining without the right to strike will be nothing else but collective begging.

The right to strike is not the right of an individual, but a trade union, unlike in South Africa where this right is the right of an individual exercised collectively. Even if unions are exclusively allowed to call out a strike, non-members in the establishment covered by a strike are entitled to participate in that strike. Strike is too expensive. Therefore trade unions must try by all means to avoid strike.

In principle, strikes are permitted to resolve conflicts of interest between labour and management. Industrial conflict is understood to be complementary to collective bargaining. It is only allowed in so far as it is aimed at the achievement of a collective agreement.

Strike law is dynamic in Germany and it is in the hands of the Courts. Prof Weiss remarked:¹²³

"According to the Federal Labour Court, industrial conflict must be exclusively understood as complementary to collective bargaining. To put it differently: industrial action is allowed in so far its purpose is the achievement of a collective agreement... The right to strike, as derived from Art 9, Section 3 of the Constitution, is understood to be an extension of the collective freedom of association. The consequences of this understandings is that all the strikes declared by a group of employees which are not backed by a trade union (so-called wild cat strikes) are illegal no matter what their goals may be and no matter how justified these goals are..."

Compared to other countries, Germany has a reputation of relative industrial peace. Freedom to take industrial action is constrained by the peace clause in the collective agreements that outlaws industrial action during the subsistence of the agreement and for a period thereafter. Full-scale strikes are permissible only when negotiations have

¹²² Weiss, 29 Bulletin of Comparative Labour Relations Germany 1994 67.

¹²³ Referring to the leading and basic decision of the Federal Labour Court decided on 28th January 1995, AP Nr 1 zu Art 9GG-*Arbeitskampf*, which outlined the basic structure of the strike law and the lock-outs 29 Bulletin 67-68.

completely broken down. However there may be a strike of short duration during negotiations called 'warning strike' (*Warnstreik*) that may be called without the need for a ballot.¹²⁴ Warning strike was adopted and confirmed by the Federal Labour Court¹²⁵ for the simple reason that those small warning strikes led to a quicker compromise, thereby eliminating the necessity for a big strike. The Court remarked with regard to the principle of *ultima ratio*:

"...the principle is only meant for a strike of a longer duration or a strike of indefinite period...If the only intention of a strike is to promote negotiation by demonstrating the counterpart the employees' readiness to go on strike, then this mild pressure by way of a short warning strike, may be exerted before means of negotiations are exhausted."

This means the principle of *ultima ratio* only applies to a normal strike or full-scale strike but not to warning strike. With passage of time the Federal Labour Court moved away from this principle. In the BAG decision¹²⁶ the Court held that the principle of *ultima ratio*:

"...does not require a formal declaration that collective bargaining has broken down as a prerequisite for initiating industrial action of any kind. That initiation rather reflects the free declaration of the party concerned, a declaration that is not open to review and, hence solely determining, that it considers the possibilities of reaching an understanding without recourse to pressure to be exhausted. This means that there is no later determining point of time as from which industrial action other than warning strikes... becomes lawful. There is a uniform point as from which a warning strike, like any other form of industrial action, is not excluded, even though collective bargaining continues..."

The implication of this new approach simply is that this principle of *ultima ratio* has become more or less meaningless.

7. THE ROLE OF ARBITRATION

Arbitration is a process whereby a third party hears the dispute and makes a binding decision. Arbitration differs from mediation and conciliation, in that an arbitrator, who is

¹²⁴ Burgess 131.

¹²⁵ BAG decision of 17th December 1976 EzA Nr 19 zu Art 9GG-Arbeitskampf.

an independent and neutral outsider to the dispute, arrives at a decision in order to finally resolve the dispute presented to him. It is similar to litigation or adjudication, but it retains its quasi-judicial administrative process. The arbitrator hears evidence and argument for each of the parties, considers the law, determines the outcome and issues an award which is final, binding and not subject to appeal to a court of law. It is however, subject to review by a court of law. It must be fair and equitable. The arbitrator must be impartial and unbiased. The proceedings must be fair and lawful.¹²⁷ Any kind of labour dispute may be referred to private arbitration in terms of the Arbitration Act. Parties are free to elect the process that would best suit their needs; they may elect to go private arbitration route in respect of any kind of dispute.

There are two kinds of arbitration. It takes the form of either private or statutory arbitration. These two types are discussed below.

7. 1. Private Arbitration

The explanatory memorandum that accompanied the Labour Relations Bill provided that the Bill recognises and actively promotes private procedures negotiated between the parties for the resolution of disputes and adopts a simple non-technical and non-jurisdictional approach to dispute resolution. If privately agreed procedures exist the parties do not need to follow the statutory procedures. A dispute will proceed through the mechanism agreed to by the parties and relieve the CCMA of a significant percentage of disputes.¹²⁸

Therefore statutory arbitration should only be followed where parties failed to make their own arrangements. This approach is based on the policy of self-regulation. It also serves as a measure to relieve the CCMA of a significant percentage of disputes. In *Eskom v Hiemstra*, the Labour Court remarked,

¹²⁶ 12 September 1984 EZA Nr 19zu Art 9GG – *Arbeitskampf*.

¹²⁷ Du Toit *et al* 584.

“Arbitration is an alternative manner to litigate in a court of law for resolving disputes. The common law principles are geared to the aims and objects expressed by S 34 of the Constitution. The AA is also competitive with these constitution principles.”¹²⁹

In regulating statutory arbitration the LRA expressly recognises that parties may enter into an agreement that one or more disputes will be resolved through arbitration. In general, the LRA seeks to encourage disputants to resolve their disputes themselves where possible.

The LRA recognises and supports private arbitration:

- Parties remain bound to collective agreements that were concluded before the LRA came into effect and that provide for private arbitration.¹³⁰
- In determining the powers of the Labour Court, expert recognition is given to private arbitration to the Arbitration Act.
- In regulatory workplace forums legislator provides clear scope for agreeing on private arbitration.
- The CCMA may if it is apparent that a dispute referred it ought to have been resolved through private arbitration in terms of a private agreement, refer the dispute to the appropriate person or body for resolution through the elected private disputes resolution procedures.¹³¹ In the alternative the CCMA may, in these circumstances, appoint a commissioner to resolve the dispute in terms of the LRA.
- Parties are obliged to arrange for their own procedure in certain circumstances. Every collective agreement must provide for a procedure to resolve the dispute about interpretation or application of the collective agreement.¹³² The selected procedure must require the parties to first attempt to resolve the disputes through conciliation and if it fails to resolve, it goes through arbitration. Thus arbitration is of cardinal importance. The effect of section 24 of the LRA is that parties to collective agreements are obliged to establish their own procedures for the

¹²⁸ Van Kerken 6.

¹²⁹ 1999 20 ILJ 2362.

¹³⁰ Schedule 7 item 13 (2) of the LRA.

¹³¹ Section 147 (6) LRA.

resolution of disputes concerning the interpretation or application of the agreement.

If a collective agreement fails to prescribe a procedure to resolve disputes as required, a dispute about the interpretation or application of the collective agreement may be referred to the CCMA that may resolve the dispute and charge a fee. In this way the arbitration will be performed in terms of the LRA and it will be statutory arbitration.

7.1.1. Nature and types of private arbitration

Private arbitration is a consensual process and can take place if the parties to the dispute agree to use the process. The majority of sections in the Arbitration Act contain the words “unless agreed otherwise.” This means the Arbitration Act regulates the position only in regard to matters not agreed between the parties. This is important to show that there is a need that parties should arrange every aspect of its process to suit their needs, by agreement between them.

Parties may agree on the following:

- The issue of disputes,
- The identity of the arbitrator or a method of selecting an arbitrator, and the person elected must agree to act as such,
- The powers of the arbitrator,
- Type of evidence to be led,
- Kind of representation to be allowed,
- The venue and time for the proceedings,
- They may also agree to exclude the Arbitration Act as applicable legislation and
- The finality of the award. Normally an award is final and no appeal lies against it, however parties may agree as to the fact that the award is not final and may be subject to appeal to another arbitrator appointed by parties.¹³³

¹³² Section 24 LRA.

¹³³ Section 28 Arbitration Act.

There are three different ways, which may be applied in the system of private arbitration. They are:

- Mediation-arbitration,
- Arbitration-mediation and
- Final offer arbitration

7.1.1.1. Mediation-Arbitration (med-arb)

Arbitration and mediation are different processes. Parties may, however agree that the two processes follow one another and that if the first process is unsuccessful an attempt must be made to resolve the disputes through the second process. In private arbitration med-arb is a process where the parties request a third party first to mediate. Failing an agreed resolution, the third party gives a non-binding opinion. The parties can return to the negotiation table and try to reach an agreement.¹³⁴

7.1.1.2. Arbitration-Mediation (Arb-Med)

It is a process in which an independent third party first arbitrates the disputes and arrives at a determination but does not reveal the determination to the parties. The third party thereafter mediates the dispute. If agreement is reached through the mediation process the arbitrator's award is destroyed without revealing it. It is by agreement between the parties that, in these circumstances the award is not issued and it is not final and binding. If no agreement is reached through mediation the third party discloses the award that he made before mediation commenced. Such award will be final and binding and not subject to alteration even though the third party might have gained new insights during mediation proceedings.¹³⁵

¹³⁴ Van Kerken 10.

¹³⁵ Van Kerken 11.

7.1.1.3. Final Offer Arbitration

Each party places its position on the table and the arbitrator selects either of the two positions without considering a compromise between the different positions. It is an excellent mechanism to break a deadlock; it is not suitable to resolve economic disputes that involve rights disputes, or to resolve grievances.

7.2. Statutory Arbitration

Our most important institution is the CCMA, which is a statutory dispute resolution mechanism. If no agreement binds the parties to private arbitration, a dispute that is prescribed for arbitration in the LRA may be resolved through statutory arbitration in terms of the LRA. If this is the case the Arbitration Act does not apply. Only disputes of right may be referred to statutory arbitration.¹³⁶ There is no institution comparable to this institution in Germany. However the German Labour Courts are functioning the way this institution functions through what is called *Güteverfahren*.

7.2.1. Kinds and application of statutory arbitration

There are four different kinds of statutory arbitration. They are as follows:

- Ordinary or normal statutory arbitration,
- Conciliating arbitration,
- Advisory arbitration and
- Pre-dismissal arbitration.

¹³⁶ The following disputes may be referred to arbitration: constructive dismissal, providing less favourable conditions of employment after a s197 takeover, dismissal for a reason related to employees' conduct, dismissal for a reason related to employees' capacity, dismissal for unknown reason, dismissal of a probationary employee, termination of a fixed-term contract of employment, termination of a contract of employment by notice unless the employee alleges that the dismissal is automatically unfair, and Unfair Labour Practice.

7.2.1.1. Ordinary or normal statutory arbitration

The CCMA must first attempt to resolve the dispute by means of conciliation and then by means of arbitration in the event the dispute remains unresolved.¹³⁷ In most cases, at the commencement of the arbitration proceedings, the arbitrating commissioners enquire from the parties whether they are willing to attempt to settle their dispute, and if they can then the matter will end there, if not then arbitration proceedings will proceed. The Commissioner is, through this process, mediating and also arbitrating.

7.2.1.2. Conciliating-arbitration (Corn-Arb)

Despite any other provision in the LRA the council or the CCMA, as the case may be, is obliged to commence the arbitration immediately after certifying that the dispute remains unresolved, if that dispute is of a certain kind namely:

- The dismissal of an employee for a reason relating to probation,
- An unfair labour practice relating to probation, and
- Any other unfair labour practice dispute if no party has objected that the dispute is dealt with in terms of section 191(5) of the LRA.¹³⁸

7.2.1.3. Advisory Arbitration

An advisory arbitration is where an advisory award is issued by the CCMA in regard to situations in regard to a dispute about an alleged refusal to bargain and before a trade union may embark on a lawful strike. As a rule such an award is not binding,¹³⁹ it is however persuasive to parties to adopt a particular action.

¹³⁷ Section 135 LRA.

¹³⁸ Section 191(5A) Amendment Act 12 of 2002.

7.2.1.4. Pre-dismissal arbitration

Pre-dismissal arbitration is the new provision brought about by the 2002 Amendment Act provisions.¹⁴⁰ It applies to a situation where parties are bound to the statutory route. An employer may request a council or an accredited agency or the CCMA to conduct arbitration into allegations about the conduct of an employee. This route should only be taken if such an employee consents. The arbitrator appointed must conduct arbitration in terms of the LRA, and must direct the employer as to what action is to be taken against such an employee if at all. This arbitration is aimed at replacing the internal disciplinary hearing.

7.3. Establishment of the CCMA

The CCMA is established in terms of the LRA. Like the position in Germany, parties involved in labour disputes have the freedom of making their choice as to the mechanisms of dealing with their labour disputes.

The CCMA is designed as a one-stop-shop for resolving disputes. It is the most the important dispute resolution mechanism in South Africa. It is a creation of statute.¹⁴¹ It is an autonomous institution. It enjoys legal personality. It is independent of the State, any political party, trade union, employer, employer's organisations, federation of trade unions or federation of employers organisations.¹⁴² It is therefore in no way linked to any particular body, however it is an organ of state and therefore bound by the Bill of Rights, in particular the provisions concerning administrative justice. It is not a judicial authority therefore its awards are not judicial acts. It has jurisdiction in all nine provinces of the Republic and maintains offices throughout the country. The CCMA is the central agency and other statutory institutions are linked thereto, through collective bargaining and accreditation.

¹³⁹ Section 143(1).LRA.

¹⁴⁰ Section 188A Amendment Act 12 of 2002.

¹⁴¹ Section 112 LRA

¹⁴² Section 113 LRA.

7.4. Functions of the CCMA

The duties of the CCMA are very wide and very important in resolving labour disputes. It has compulsory duties as well as voluntary duties, the most important of which is to attempt to resolve any dispute referred to it by means of conciliation.¹⁴³ This is the main aim and purpose of the establishment of the CCMA.

It also oversees and helps to establish other institutions such as the workplace forum. It may also conduct industrial or workplace ballots and may issue guidelines. It has the duty to accredit bargaining and statutory councils and private dispute resolution mechanisms. It may also assist in conciliating disputes that have not been referred to it.¹⁴⁴

The CCMA may also advise any party to a dispute about the procedures to be followed for the resolution of disputes. In other words it is not bound and does not have a compulsory duty to offer such advice. It may also help the employee or employer to secure legal advice. The CCMA may also produce guidelines in matters dealt with in terms of the LRA.¹⁴⁵ It may also offer training relating to the primary objects of the LRA.¹⁴⁶

It has jurisdiction to conciliate and arbitrate all disputes about the interpretation or application concerning freedom of association and general protection, organisational rights, bargaining councils, private and public service, statutory councils and general provisions concerning councils and workplace forums. The above will be the rights disputes.

The CCMA also has jurisdiction to deal with specific disputes concerning disclosure of information, failure to conclude a collective bargaining regulating organisational rights,

¹⁴³ Section 115 (1) (a) LRA.

¹⁴⁴ Section 115(2) (c).LRA.

¹⁴⁵ Section 115 (2)(g).

¹⁴⁶ Section 1.

and the interpretation of a collective agreement if the agreed procedure fails. It also deals with issues such as interpretation or application of an agency or a closed shop agreement, refusal of parties to closed-shop agreement to admit a registered trade union as a party, the interpretation or application of a Ministerial determination, demarcation, picketing rules, disputes in essential services, unfair dismissal, unfair labour practices and many others.

In general the CCMA has limited jurisdiction over disputes of mutual interest. As such, the CCMA must first determine if it has jurisdiction over a particular dispute, subject to Labour Court review. In *Trees v TA Securities*,¹⁴⁷ Landman J considered this aspect as follows:

"In my opinion the powers given to the commissioner to attempt to resolve the issue and to determine the process to try and resolve the issue, only kick in if the commissioner has the necessary jurisdiction. The legislature...found it too obvious to state that the commissioner should first investigate the jurisdictional facts before entering in the conciliation."

It is important for the referring party to describe the nature of the dispute with enough particularity to enable the opposing parties to understand the nature of the dispute. This will also help the commissioner to determine if it has jurisdiction over such dispute. Such particularities are that there must be a dispute, there must be an existing employment relationship, the dispute falls within the jurisdictional scope of the CCMA, and the parties are not bound by a collective agreement nor does another agency have primary jurisdiction over the parties or the issue.¹⁴⁸

In addition to the above functions of the CCMA, the Labour Relations Amendment Act of 2002 extended the powers of the CCMA. The CCMA may make rules regulating:

- The practice and procedure in connection with the resolution of dispute through conciliation or arbitration.

¹⁴⁷ J615/98 par 16.

¹⁴⁸ Du Toit *et al* 567.

- The process by which conciliation is initiated, and the form, content and use of that process.
- The process by which arbitration or arbitration proceedings are initiated, and the form, content and use of that process.
- The basis on which a commissioner may make any orders as to costs in any arbitration; and
- All other matters incidental to performing the functions of the Commission.¹⁴⁹

7.5. Procedure at the CCMA

In the event a dispute is referred to the CCMA in terms of section 135 a commissioner must be appointed to attempt to settle the dispute through conciliation. Throughout, the LRA uses the phrase 'must attempt.' This is very important in that the LRA does not want to impose anything upon the parties, but rather the parties should attempt, through all the different resolution of disputes proceedings, to reach an amicable settlement. This dispute should be dealt with within 30 days of the referral. There is no specific procedure specified. The commissioner must determine a process to attempt to resolve the dispute that may include mediating the dispute, conduct a fact finding exercise, and making a recommendation to the parties that may be in the form of an advisory arbitration. The commissioner should involve active participation of the parties and must take the middle position but must allow the parties to attempt to reach a settlement.

The parties may agree to the extension of the 30 days period. Basically the jurisdiction of the commissioner to conciliate expires at the end of the 30 days period after referral. The primary role of the commissioner at this stage is to assist parties to resolve their disputes themselves. It is the prerogative of the commissioner to determine the process. However, the commissioner is not empowered to finally determine the dispute when he/she exercises the conciliation powers. Conciliation may be by way of mediation. It is confidential in nature. The CCMA may not disclose to any person or any court any

¹⁴⁹ Section 115 (2A).

information, knowledge or document that it acquired confidentially in the course of its business except on the order of court.¹⁵⁰

In *NUMSA v Cementation Africa Contracts*,¹⁵¹ the Court remarked;

"For the process to be successful the parties need to have sufficient confidence in the commissioner to raise issues or to make concessions. This the parties do because they are confident that the process is confidential, which it has to be in order for the commissioner to be able to assist the parties to resolve the dispute. Conciliation therefore as provided for in this Act, is not a mechanical chairing of a meeting by an independent third party but includes an active participation by the commissioner to intervene in the thought process of the parties in an attempt to resolve the dispute and to do this the commissioner is granted the right to determine his/her own process."

A conciliating commissioner may make factual findings, as well as making a recommendation to the parties, which may be in the form of advisory arbitration awards. A factual finding process is similar to a pre-trial conference. The commissioner must gather facts that are the cause of the dispute, the aim being to arrive at the roots therefore in an attempt to resolve the dispute. These found facts, need to be provided to the immediate parties.

In the event conciliation has failed, or at the end of the 30 days period or any further extended period as agreed between the parties, the commissioner must issue a certificate stating whether or not the dispute has been resolved. A copy of such certificate should be served on the parties to a dispute and the original should be filed with the CCMA. This certificate serves to show that the process has failed. It does not determine the issues in dispute or the nature of the dispute. Following on this process the matter is referred to arbitration.¹⁵²

If the dispute needs to be resolved through arbitration, the CCMA must appoint a commissioner to arbitrate that dispute. Such appointed commissioner may be same one who attempted to conciliate the dispute.¹⁵³

¹⁵⁰ Section 126(3).

¹⁵¹ (1998) 19 ILJ 1208 LC at 1210E.

¹⁵² Section 136.

¹⁵³ Section 136 (2).

7.6. Settlement agreements

In terms of the Amendment Act,¹⁵⁴ the CCMA may by agreement between the parties or on application by one of the parties, make a settlement agreement an arbitration award. It is hoped that the effect of this arrangement would be that the agreement would be enforced as an award and binding upon the parties. Prior to the enactment of this provision, in order for an agreement to be binding as an award, the Labour Court, on application, had to make an award an order of court. This means that in the event one of the parties does not comply with the arbitration award the other party may enforce the award by way of contempt of court proceedings.¹⁵⁵

7.7. Representation at the arbitration proceedings

The limitations to representation at conciliation and arbitration have been removed by the Amendment Act. It is envisaged that the Commission would make rules regarding representation at conciliation and arbitration in terms of the amendments.¹⁵⁶

7.8. *Güteverfahren*

In Germany every case brought before a labour court begins with conciliation procedure (*Güteverfahren*). The oral hearing commences before the chairperson sitting alone. This is a simple informal procedure, where parties sit in front of the chairperson and lay down the basis of their disputes. They do not need to address the chair in any formal manner. There is an occasional interjection from the parties be it the representatives or parties themselves. The purpose of this process is a conciliatory settlement between the parties to a labour conflict.

The chairperson discusses the entire matter in dispute with the parties under free evaluation of all the circumstances involved, with the purpose of seeking to bring about a

¹⁵⁴ Section 142A.

¹⁵⁵ Section 143 (4).

compromise between the parties. For clarification of the underlying facts of the case, the chairperson would take all actions that can take place and would quite often indicate to the parties his legal opinion, thereby influencing them to reach a compromise. Formalities such as examinations under oath are excluded.¹⁵⁷

This procedure may result in one of the following three options:

- The action is withdrawn
- A compromise is agreed upon
- A date is set for a hearing before the entire panel

Even if the attempt to conciliate fails, the panel is obliged to attempt to reach a settlement, during the proceedings.¹⁵⁸

8. THE ROLE OF LABOUR COURTS IN DISPUTE RESOLUTION

In the South African system the Labour Court is established as court of law and equity. It is established in terms of LRA. In the German system, Labour Courts date back to the 19th century. The real starting point of Labour Courts as a specialised branch was the Labour Courts Act.¹⁵⁹ Prior to this period, ordinary courts for civil law matters had jurisdiction in labour disputes. In terms of the Labour Courts Act,¹⁶⁰ the legal basis for the structure, jurisdiction and the procedure of the labour judiciary was laid.¹⁶¹ Whereas German's Labour Court system is three tiered, Labour courts of first instance, *Länd* (State or Regional as some writers refer) Labour Courts, and the Federal Labour Court our system is two-fold, namely the Labour courts and Labour Appeal Court.

¹⁵⁶ Section 115 (2A)(k).

¹⁵⁷ Section 54 (1) Labour Courts Act.

¹⁵⁸ Weiss 291 par 127.

¹⁵⁹ *Arbeitsgerichtsgezet* of 1926.

¹⁶⁰ 1953 revised in 1979.

¹⁶¹ Weiss 265 par 123).

8.1. Ordinary Labour Courts

I will first discuss what I will term *ordinary labour courts*, for convenience, to distinguish them from our Labour Appeal Court and German Federal Labour Court.

8.1.1. Composition

In Germany there are 123 Labour Courts of first instance. These courts are composed of one or more panels. Each panel has a career judge as a chairperson and two lay judges, one from employers' side and one from the employees' side.¹⁶²

A career judge is appointed by the authority determined by the individual *Land*, usually the Minister of Labour and Social Affairs, jointly with the respective *Land* Minister of Justice in consultation with an advisory committee consisting of three benches, equally representing the state's major trade unions, the employers' associations and the judiciary of the labour court system in the relevant *Land*.¹⁶³

As a rule the career judges of the courts of all levels, after three years of service, are appointed indefinitely until they reach retirement age.¹⁶⁴

Lay judges are appointed for a term of four years by the Minister of Labour and Social Affairs of the respective *Land* from lists submitted by the trade unions, labour organisations and employers' associations of the respective judicial districts. Lay judges nominated by trade unions are in most instances union officials. On the side of the employers' association lay judges are nominated from officials, the management board of companies, individual employers, or any other trusted person.¹⁶⁵ In selecting the lay judges the Minister of Labour and Social Affairs must also take into account minority organisations. The lay judges must be at least 25 years old.

¹⁶² Weiss 271 par 123.

¹⁶³ Weiss 277 par 124.

¹⁶⁴ Weiss 278 par 124.

¹⁶⁵ Weiss 280 par 125).

The second type of German labour courts are *Land* Labour Courts.¹⁶⁶ There are 19 *Land* Courts in Germany, each for every State or *Land* with the exception of two states.¹⁶⁷ These courts are courts of second instance. They have exclusive jurisdiction for appeals against decisions of the labour courts of first instance. Their jurisdiction extends throughout one *Land*.¹⁶⁸

These courts are composed of one career or professional judge and two lay judges from the employees' and employers' sides.¹⁶⁹ The South African system of labour courts does not make provision for lay judges. This is an important distinction between the two systems.

Judgments handed down by a *Land* Labour Court may be appealed to the Federal Labour Court. Career judges as well as lay judges of the *Land* Labour Courts are appointed the same way as in the case of Labour Courts of first instance. These institutions may be comparable to our labour courts. In South Africa the Labour Court is composed of a Judge President, Deputy Judge President and as many judges as the President may consider necessary acting on the advice of the National Economic Development and Labour Council (NEDLAC) and in consultation with the Minister of Justice and Constitutional Development and the Judge President of the Labour Court.¹⁷⁰ The Labour Court is constituted before a single judge.¹⁷¹ It has the same authority and inherent powers and standing as a High Court in relation to matters that fall under its jurisdiction and it is also a court of record.¹⁷²

¹⁶⁶ *Landesarbeitsgerichte/LAG*.

¹⁶⁷ Bayern with additional court and Nordrhein-Westfalen with additional two *Land* Labour Courts.

¹⁶⁸ Weiss 272 par 123.

¹⁶⁹ Section 6 (1) *ArbGG*.

¹⁷⁰ Section 151 (1) LRA.

¹⁷¹ Section 151(2)LRA.

8.1.2. Jurisdiction

The Labour Court has jurisdiction in all the nine provinces of The Republic of South Africa. The Minister of Justice and Constitutional Development, acting on advice of the NEDLAC had determined the seat of the Labour Court to be Johannesburg. At present the Court also sits in Durban, Port Elizabeth and Cape Town.¹⁷³ Van Jaarsveld *et al*,¹⁷⁴ remark:

"Except where an Act of Parliament provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters provided for in the Labour Relations Act or where any other Act of Parliament gives jurisdiction to the Labour Court."

The learned authors go on to list matters where the Labour Court has exclusive jurisdiction.¹⁷⁵

The Labour Court has the power to make settlement agreements and arbitration awards an order of court. Section 145(1) LRA provides that the Labour Court may review the CCMA award.

¹⁷² Section 151 (3).

¹⁷³ Van Jaarsveld *et al* par 1017 footnote 2.

¹⁷⁴ Par 1018.

¹⁷⁵ The exercise of rights of freedom of association; freedom of association and victimisation; aspects concerning the administration of contributions for closed shop and agency shop agreements that may be appealed to the Labour Court; the admission of a registered trade union to a closed shop agreement; the admission of a bargaining council; the winding-up and cancellation of the registration of a bargaining council; the interpretation or application of bargaining council determinations; whether a secondary strike is reasonable in relation to its impact on the primary employer; an application to recover the value of payment in kind made by an employer at the request of striking or locked-out employees; interdicts and orders in respect of conduct in contemplation or furtherance of strikes and lock-outs or for equitable compensation in respect of strikes and lock-outs not in compliance with the Labour Relations Act; a breach of picketing rules; interdicts and declaratory orders in respect of socio-economic protest action; an application by a trustee an order declaring that the implementation of an arbitration award made in respect of changes by the employer or its representative in trusts or boards of employer-controlled schemes or social benefit scheme constitutes a breach of fiduciary duty; the winding-up of trade unions and employers' organisations because they do not comply with the Labour Relations Act or on insolvency or cancellation of their registration; the review of arbitration awards of the Commission for Conciliation, Mediation and Arbitration (the CCMA); the non-compliance with a trade union's or employers' organization's constitution; automatically unfair dismissals for operational reasons and dismissals flowing from strikes or closed shop agreements; and unfair labour practice disputes concerning discrimination."

In Germany the disputes over rights are subject to conflict resolution through the courts, the same position as in South Africa, whereas disputes over interests in-so-far as they are collective disputes are settled by mediation, industrial conflict resolution as well as the arbitration committee. Therefore Labour Courts have jurisdiction only over disputes of rights between parties to a collective agreement and parties to an employment contract or between them and third parties, whether it concerns a dispute arising from collective agreements or whether it concerns a dispute about the existence of a collective agreement.

Labour Courts have exclusive jurisdiction in civil litigation between parties to a collective bargaining agreement or between them and third parties relating to collective bargaining agreements or as to the existence or non-existence of collective bargaining agreements.¹⁷⁶

They are also competent to deal with matters concerning the works constitution in the private sector as well as matters referring to the election procedure for employee representatives on the supremacy board and in matters concerning the capacity to conclude collective agreement and collective bargaining jurisdiction of employees and employers' organisations.¹⁷⁷

Labour courts have exclusive jurisdiction over virtually all-legal conflicts between an employer and employee arising from employment relationship. In this context, the 'employee' includes manual workers, white-collar workers, apprentices and even employee-like persons.¹⁷⁸ In most cases, the labour courts are involved mainly on initiatives of employees, unions or works councils.¹⁷⁹ Both systems have a system of courts dealing exclusively with labour matters. These courts are subject to their own rules. In Germany these rules are provided for in terms of the Labour Court Act, and in

¹⁷⁶ Section 2 (1) *ArbGG*.

¹⁷⁷ Section 2a (1) *ArbGG*.

¹⁷⁸ Weiss 303 par 130.

¹⁷⁹ Weiss 304 par 130.

South Africa the procedural rules are provided for in terms of Part D of the LRA. Both labour judiciary systems are independent.

In as far as representation and parties to the proceedings are concerned there is an insignificant dissimilarity in as far as the Labour Appeal Court is concerned.

Perhaps the most significant dissimilarity that is noteworthy is the composition of the courts. Whereas the South African system does not know the position of lay judges, in Germany lay judges are the backbones of the Labour Courts more so that the trade unions and employers associations are directly involved in appointment of such judges.

8.1.3. Limitation on jurisdiction

The Labour Court has no jurisdiction over issues covered by collective agreements and disputes about the interpretation and application of collective agreements. Disputes about the interpretation and application of collective agreements must be directed to the CCMA or the agency designated in the agreement.¹⁸⁰ Generally the labour courts are not prepared to involve themselves in the cuts and thrust of collective bargaining. It has been accepted that it is not the task of the courts to interfere in disputes, which relate to the interests as opposed to the rights of the parties. This means that the courts are not much concerned with disputes such as those concerning a change in condition of employment or the determination of a new remuneration package. However, the courts are directing their tasks in this regard to stipulating and enforcing the rules relating to the bargaining process and to demarcate the rights of the parties. Conradie J¹⁸¹ illustrated the position of the courts in this regard in the following passage:

"A strike or a lockout is like a boxing match. Each opponent tries, within the rules to hurt the other as much as possible. There is a referee to see to it that rules are observed. The court is the referee. It does not intervene simply because one of the opponent is being hurt-that is the idea of the contest. The referee may intervene if one of them is struck

¹⁸⁰ *Denel Informatics Staff Association v Denel Informatics (Pty) Ltd* (1999) 20 ILJ 137 (LC).

¹⁸¹ *Metal and Allied Workers Union of South Africa v National Panasonic* 1991 ILJ 533 (C) on 536 E-G.

below the belt, but he would be astound while the bout is in progress to receive a complaint that something went wrong with the weigh-in."

The LC may decline jurisdiction if it is not satisfied that an attempt has been made to resolve the dispute through conciliation.¹⁸²

The question whether or not the Labour Court has jurisdiction to review private arbitration as well as the difference between the scope of review of voluntary private arbitration and was set out in *ACTWUSA v Veldspun*.¹⁸³

"When parties agree to refer the matter to arbitration, unless the submission provides otherwise, they implicitly if not explicitly abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator. There are many reasons for commending such a course and especially so in the labour field where it is frequently advantageous to all the parties in the interests of good labour relations to have a binding decision speedily and finally made. In my opinion the courts should in no way discourage parties from resorting to arbitration and should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in good faith."

The approach enunciated by the court holds true in other jurisdictions particularly in Europe. The courts are reluctant to disturb the parties' collective bargaining relationship by imposing upon them its own opinion.

8.1.4. Representation

In any proceedings before the Labour Court a party to the proceedings may appear in person or be represented by a legal practitioner, director or employee of a party, any member, office bearer, or official of that parties registered trade union or registered employers organisation, a designated agent of a statutory or bargaining council or an official of the Department of labour.¹⁸⁴

¹⁸² Section 157(4) (a).

¹⁸³ 1994 4 SA 112(A) 169F-H.

¹⁸⁴ Section 161 LRA.

In Germany prior to the enactment of *Arbeitsgerichtsgesetz* / *ArbGG* (Labour Courts Act)¹⁸⁵ and during the Weimar Era, attorneys were excluded from representing parties, only union representatives were allowed to act as counsel. This question of who should be allowed to represent litigants was subject to a very controversial debate. The 1957 Act brought about an important departure from this controversy. Presently attorneys and legal aid representatives of trade unions are allowed to represent parties. However, attorneys are employed far more than legal aid representatives.¹⁸⁶

The Labour Court Act (*Arbeitsgerichtsgesetz*) provides¹⁸⁷ that parties may be represented. Representation through representatives of trade unions, or of employers' associations or of federations of such organisations is permissible, if these persons are entitled to represent pursuant to the articles of association or a power of attorney and the federation, association or their members are a party to the case. The parties are entitled to choose between the attorneys and legal aid representatives of trade unions or employers associations as in the *Land* Labour Courts.

8.2. Labour Appeal Court

The Labour Appeal Court (LAC) is established in terms of the LRA.¹⁸⁸ It is the final Court of appeal in respect of all judgments and orders made by the LC in respect of the matters within its jurisdiction.¹⁸⁹ This Court can be comparable to the German's Federal Labour Court (*Bundesarbeitsgericht* / *BAG*). There is one Federal Labour Court / *BAG* for the whole Germany the same position as in South Africa.¹⁹⁰

8.2.1 Composition

The Labour Appeal Court is composed of the Judge President of the LC, the deputy

¹⁸⁵ 1957.

¹⁸⁶ Weiss 286 at par126.

¹⁸⁷ Section 11(11).

¹⁸⁸ Section 167 (1).

¹⁸⁹ Section 167 (2).

Judge President of the LC and such number of other judges who are judges of the High Court as may be required for the effective functioning of the LAC.¹⁹¹ The LAC is constituted before any three judges whom the Judge President designated from the panel of judges.¹⁹²

The Federal Labour Court/*BAG* on the other hand is of composed several senates and the so-called Large Senate, the Court President, one career judge from each of those senates which are not chaired by the Court President, and six lay judges serving in the *BAG*, three from the employers' side and three from the employees' side. In the event one senate wishes to deviate from a decision made by another senate or by a Large Senate itself, such a senate is obliged to refer the matter to the Large Senate.¹⁹³

This Court is sometimes referred to as the Labour Court of third instance as such it hears appeals from the *Land* Labour Courts. It may be referred to as the final labour court. However the decisions of the Federal Labour Court may be challenged for being not compatible with the Federal Constitution. Therefore such appeal may be lodged with the Federal Constitutional Court.¹⁹⁴

8.2.2. Jurisdiction

The LAC has jurisdiction to hear and determine appeals, against any final judgment and orders of the LC.¹⁹⁵ The LAC decides question of law reserved for it in terms of section 158(4).¹⁹⁶ In the event the matter before the LAC concerns issues, which fall within the jurisdiction of the Constitutional Court, it may dispose of the matter, or refer it the Constitutional Court for decision.¹⁹⁷

¹⁹⁰ Weiss 270 par 123 remarks that initially it had its seat in Kassel (Hessen) and since November 1999 it is situated in Erfurt (Thüringen) in the territory of the former German Democratic Republic.

¹⁹¹ Section 168 (1) LRA.

¹⁹² This is contemplated in s168 (1).

¹⁹³ Weiss 274 par 123.

¹⁹⁴ Weiss 275 par 123.

¹⁹⁵ Section 173(3) (a) LRA.

¹⁹⁶ Section 173 (1) (b) LRA.

The LAC may hear matters as a court of first instance. The Judge President may direct that any matter be heard before the LAC, in which case the LAC is entitled to make any order that the LC would have been entitled to make.¹⁹⁸ The LAC may in its discretion allow evidence to be led on appeal.¹⁹⁹

8.2.3. Representation

In the South African context any person who may appear before the LC has the right to appear before the LAC.²⁰⁰ In the German context representation before the Federal Labour Court by attorneys at law acting as litigation representatives is obligatory; any attorney at law admitted to a German court is entitled to represent.²⁰¹ The reason behind this is that the court deals with question of law only and not question of fact.

8.3. Procedure in Labour Courts in general

Labour Court proceedings are based on the same general principles as proceedings in ordinary courts of civil law. The chairman can order the personal appearance of the parties at any stage of the proceedings.²⁰² However the 1957 Labour Courts Act contains several modifications, designed to guarantee simple, expeditious and inexpensive proceedings.²⁰³ During adjudication, oral evidence is led by witnesses named by the parties. It should if possible, be completed within a single hearing.²⁰⁴ The result of the conciliation proceedings, particularly the decision of the settlement, shall be recorded in writing.²⁰⁵

¹⁹⁷ Du Toit *et al* 625.

¹⁹⁸ Section 175 LRA.

¹⁹⁹ *Fidelity Guards Holding (Pty) Ltd v PTWUJA7A* (1998) 7 LAC 9.5.4.

²⁰⁰ Section 178 LRA.

²⁰¹ Section 11(2) Labour Court Act (*Arbeitsgerichtsgesetz*).

²⁰² Section 51(1) *Arbeitsgerichtsgesetz*.

²⁰³ Weiss 290 par 127.

²⁰⁴ Halbach 564.

²⁰⁵ Section 54(3) *Arbeitsgerichtsgesetz*.

In South Africa the Labour Courts are established in terms of the LRA. There is no special legislation dealing exclusively with labour courts other than the LRA. This system does not have the lay judges, instead the judges are appointed by the President on the advice of NEDLAC and in consultation with the Minister of Justice and Constitutional Development.

9. CONCLUSION

On evaluation one finds that German workers have a variety of avenues to accomplish their industrial relations in the form of board level participation, plant and office co-determination, and collective bargaining. Most importantly is the avoidance of the strike action, which is very expensive for both workers and their trade unions, on the one hand, and the employer or employers' associations on the other.

There are some similarities as well as dissimilarities in the two jurisdictions discussed above. I am briefly discussing the most significant similarities and dissimilarities.

9.1. Similarities and dissimilarities

9.1.1. Labour Courts

Both Germany and South Africa have a system of courts exclusively dealing with labour matters. These courts are subject to their own rules. In Germany these rules are provided for in terms of the Labour Courts Act and in South Africa the rules are provided for in terms of the LRA. Both labour judiciary systems are independent. Representation and parties to the proceedings in these courts are almost the same.

Perhaps the most significant dissimilarity worth noting is the composition of the courts. Whereas South African courts do not know the system of lay judges, lay judges in Germany are the backbones of the Labour Courts particularly because trade unions and employers associations are directly involved in the appointment of such judges.

Every case in Germany labour courts start with a simple procedure of conciliation called *Güteverfahren*. It is a simple informal procedure. Our courts do not know this type of procedure. I submit that this is a very important procedure where disputes could be settled as soon as possible without the need of a long and formal procedure. Our courts would do well to adopt this procedure. It is so of course that we have some institutions that can be approached before the Labour Courts can be, however once a matter is referred to the courts this approach may be invoked to avoid long and formal procedures experienced in our courts.

9.1.2. Industrial Action

The German system does not have a single law dealing with phenomena like strike or lockout. However this system has a dynamic and well-developed law on strikes and lockouts exclusively developed by the Federal Constitutional Court. In South Africa the phenomena are contained in the statute. A strike is explicitly guaranteed in the Constitution of South Africa as well as in the LRA.

9.1.3. Workplace Forum and Works Council

There are some differences between the workplace forum and works council, however it is clear that we have learned from the German system as far as the introduction of the workplace forum system is concerned.

9.1.4. The CCMA

Our most important institution is the CCMA. The CCMA is the central agency and other statutory institutions are linked thereto, through collective bargaining and accreditation. I could not find an institution that is comparable to this one in Germany, however the functions of this institution are comparable to the labour courts procedure namely, *Güteverfahren*.

9.1.5. Collective Bargaining

In Germany collective bargaining is a very important dispute resolution mechanism. Parties to collective bargaining enter into agreements that are supposed to include peace obligation clauses. Collective agreements are the domain, exclusively of the trade unions on one side and a single employer or employers' association on the employers' side. There is no room for individual employees. Non-members of the trade union that is a party to a collective agreement are not bound by the collective agreement concerned.

In South Africa the position is different. Non-members of the trade union could be bound as if they were members. The situation is even worsened because of the so-called union security arrangements in the form of agency and closed shop agreements. These arrangements are particularly outlawed in Germany. I therefore submit that these arrangements need to be revisited.

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