The use of the ICC Mediation Rules in resolving South African commercial disputes

PH Vosloo

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

Supervisor: Mrs MB Schoeman

Graduation Copy May 2017

It all starts here ™

NORTH-WEST UNIVERSITY
YUNIBESITI YA BOKONE-BOPHIRIMA
NOORDWES-UNIVERSITEIT

ACKNOWLEDGEMENTS

The writer is absolutely indebted to his supervisors, Mrs Michelle Schoeman as well as Mr Grey Stopforth for their positive contributions as well as knowledge, guidance and especially their patience through this long process that led to the writer’s final draft.

Many thanks and love is deserved by the writer’s wife, Mrs Belinda Vosloo for her support through the long hours and tough times in regards to the writing of this dissertation. Many thanks are also deserved by the writer's family who, without their constant encouragement and support, this dissertation would have never been finalised.

The staff members of NWU Potchefstroom including the Masters Faculty and the library deserve acknowledgment for making the writing of this dissertation a lot easier.

Lastly, many thanks are deserved by Mrs Doepie de Jongh and Mrs Lesley Wyldbore for their unprecedented support leading up to the final draft.

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CCMA	Commission for Conciliation, Mediation and Arbitration
CEDR	Centre for Effective Dispute Resolution
ICC	International Chamber of Commerce
LCIA	London Court of International Arbitration
LRA	Labour Relations Act
NPA	National Prosecuting Authority

ABSTRACT

Alternative dispute resolution (ADR) is the collective name given to several alternative methods when resolving disputes between parties without having to litigate there on. One of the most commonly used ADR methods is mediation. It involves the use of a neutral third party who encourages and facilitates the proceedings in an attempt to find a solution to the dispute.

Mediation has numerous advantages. The parties control the process (which includes the appointment of the mediator, applicable timeframe, where the mediation is to be held and the costs of the mediation) as well as the outcome thereof. The mediation process can also assist parties to acquire a better understanding of each other's needs and interests so that they may look for a solution which accommodates these needs and interests as far as possible. This is of great importance when resolving disputes arising in the commercial sector. The reason can be contributed to the financial implications that may occur in commercial disputes as well as the parties' interests. Mediation can be a particularly useful tool when the parties in dispute have an on-going relationship (such as a joint venture or long-term supply contracts) as it helps maintain good relations between them.

Mediation differs from other ADR methods. Firstly, mediation is one of the few ADR methods that are not regulated by statute. This position however is slowly changing. In South Africa, for example, there has recently been the introduction of the Court Based Mediation Rules (Rules). These rules regulate the mediation process. The International Chamber of Commerce (ICC) introduced the ICC Mediation Rules (mediation rules). These became operational as from the first of January 2014. The mediation rules provide for a flexible procedure aimed at achieving a negotiated settlement with the help of a neutral facilitator the mediation rules are applicable before any litigation between the parties has commenced. The Mediation Rules reflect modern practices. They also set clear parameters for the conduct of proceedings whilst recognizing and maintaining the need for flexibility. Anyone can use ICC mediation rules, whether a company, state, state entity, international organization or individual. Membership, no

affiliation to the ICC, is required in order to be able to make use of the mediation rules and services.

Secondly, unlike arbitration, adjudication and litigation, the neutral, third party, namely the mediator does not make a final and binding decision. In fact, the mediator does not make any decision in respect of the resolution of the dispute but instead facilitates the process. Furthermore, certain ADR methods such as arbitration for example are time consuming and costly especially in South Africa, thus defeating one of the main objectives of ADR. These delays are costly for the commercial sector. Mediation could, therefore, be seen as a viable option, particularly when resolving commercial disputes.

Key words: International Chamber of Commerce (ICC) Mediation Rules; alternative dispute resolution (ADR); mediation; Commercial mediation

TABLE OF CONTENTS

ACKNOWLEDGEMENTS **i**

LIST OF ABBREVIATIONS **ii**

ABSTRACT **iii**

Chapter 1: Introduction **1**

1.1 Research question ***2***

1.2 Method ***3***

1.3 Structure of argument ***3***

Chapter 2: A general overview of mediation **6**

2.1 Introduction ***6***

2.2 Alternative dispute resolution ***7***

2.3 Dispute resolution methods ***8***

2.4 Mediation ***8***

2.5 Characteristics of mediation ***10***

2.5.1 Voluntariness *10*

2.5.2 Confidentiality *11*

2.5.3 Flexibility *12*

2.5.4 Informality *12*

2.5.5 Opportunity for creativity *12*

2.5.6 The mediator controls the process but the parties control the final result *13*

2.6 Benefits of mediation ***13***

2.6.1 Settlement rate *13*

2.6.2 Speed *11*

2.6.3 Cost *14*

2.6.4 *Win-win scenario vs win-lose scenario* *14*

2.6.5 *Preserving the business relationship* *15*

2.7 ***Disadvantages of mediation*** ***16***

2.7.1 *Finality and enforceability* *15*

2.7.2 *Time* *16*

2.7.3 *Lack of openness* *17*

2.7.4 *Argument of 'second-hand justice'* *17*

2.6 ***Phases and stages of mediation and a general mediation process*** ***18***

2.6.1 *Phase prior to the commencement of the mediation* *18*

2.6.2 *Opening of the process and initial arguments or opening address* *19*

2.6.3 *Exploration and analysis of the dispute* *19*

2.6.4 *Finding options to be brought under consideration* *20*

2.6.5 *Negotiations and choosing an option* *20*

2.6.6 *Establishing deadlocks or finalising a settlement agreement* *20*

2.7 ***Different types of mediation styles*** ***21***

2.8 *Commercial mediation* *22*

2.3 ***Conclusion*** ***24***

Chapter 3: The South African position on commercial mediation **26**

3.1 ***Introduction*** ***26***

3.2 ***Development of commercial mediation within the South African Constitution and legislation*** ***26***

3.2.1 *South African Constitution v contractual freedom including a discussion on boilerplate clauses* *26*

3.2.2 *Statutory development of Mediation in South Africa* *28*

3.3 ***Corporate governance*** ***30***

3.3.1 Support for mediation by the South African judiciary 32

3.3.2 Court-based mediation rules 34

3.4 Conclusion 36

Chapter 4: An exposition of the ICC mediation rules 38

4.1 Introduction 38

4.2 Brief overview of the rules 39

4.2.1 Key characteristics of the ICC mediation rules 42

4.2.2 Guidance notes to the ICC mediation rules 45

4.2.3 Model clauses 46

4.3 Advantages and disadvantages of the ICC mediation rules 47

4.3.1 Advantages 47

4.3.2 Disadvantages 48

4.4 Conclusion 48

Chapter 5: Comparison between the South African position of using mediation to resolve commercial disputes to that of the mediation rules used by the ICC 50

5.1 Introduction 50

5.2 Implementation of the ICC mediation rules to South African contract law 51

5.3 Costs 53

5.4 Place of mediation 54

5.5 Language 55

5.6 Referral to mediation contractual agreements and referral by the courts 55

5.7 Selection and appointment of the mediator 57

5.8 Conduct of the mediation 58

5.9 Termination of the proceeding 59

5.10 In-depth provision concerning confidentiality 59

5.11 Other possible areas where the ICC rule could be implemented 60

5.12 International disputes 61

5.13 *Financial short fallings in regards to implementation of mediation in South Africa 61*

5.14 Conclusion 62

Chapter 6: Conclusion and recommendations 64

6.1 Conclusion 64

6.2 Recommendations 67

BIBLIOGRAPHY 69

***Literature* 69**

***Case law* 73**

***Legislation* 74**

***International law instruments* 74**

***Internet sources* 75**

ADDENDUM A: ICC Mediation Rules 81

ADDENDUM B: Court Based Mediation Rules 90

Chapter 1: Introduction

In recent years a dramatic increase in the number of commercial disputes being referred for Alternative Dispute Resolution (ADR) has occurred.[1] The recent financial crisis, political unrest, and legal development amongst others are to blame for many parties to a dispute not being willing to spend the necessary time or money in lengthy dispute resolutions and now seek more effective resolution processes.[2]

Therefore, especially in commercial dispute resolution, a financially cost-effective, adaptable, and efficient solution is needed to help businesses resolve commercial disputes.[3]

A commercial sector can, be briefly, be defined as:[4]

> The part of a country's economy that includes all businesses except those involved in manufacturing and transport.

Some examples include hotel chains, restaurant franchises, healthcare services and educational institutes.[5] It is paramount to understand exactly what commercial disputes are before understanding the ways to resolve said disputes.

In order to explore the increased use of commercial mediation, familiarity with basic principles of commercial disputes is necessary. This information helps provide the ability to form and maintain constructive international commercial and public relations by plan and design, rather than by default.[6] To better appreciate the impact of a commercial dispute, it is important to understand the nature of a dispute in general, especially in a commercial context.

---

1 The London Court of International Arbitration (LCIA) reported an increase of 10% from 2013 to 2014 in referred commercial disputes. Anon 2014 http://www.out-law.com/en/articles/2014/august/international-arbitration-centres-experiencing-an-unprecedented-increase-in-commercial-disputes/.

2 Law and Practice of international Commercial Arbitration A Redfern 41

3 Strong 2014 *Wash UJL & Pol'y* 11.

4 Cambridge Business English Dictionary 2016 http://dictionary.cambridge.org/dictionary/english/commercial-sector.

5 Anon date unknown https://www.reference.com/business-finance/commercial-sector-2ed5d2d8b5ff a35b.

6 Dress 1988 *Loy LA Int'l & Comp L Rev* 569.

Commercial disputes may arise in various circumstances, for example, when shareholders in a company have disputes with one another, non-payment on the delivery of goods or services rendered, disputes pertaining to payment and/or finalisation of commercial projects and so forth. Commercial disputes can arise from multiple situations depending on the financial and personal interests of the parties' who are involved in the dispute.

Commercial disputes can, at times, arise when parties breach contractual agreements or do not fulfil contractual obligations. A commercial dispute can also arise from numerous other circumstances faced by companies such as labour disputes, internal disciplinary disputes and in some cases even in criminal matters.[7]

Generally, commercial disputes include disputes that result from non-payment for delivery of goods and matters concerning the imbursement or finalisation of projects.[8] Here ADR could serve as a tool to resolve disputes in a South African context. The use of ADR to resolve a dispute is enforced by section 34 of the South African Constitution, which reads:[9]

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

ADR could be used to bridge gaps and fill possible voids in the resolution of commercial disputes because of its flexible and win-win nature.[10] ADR in this dissertation is the collective name given to several methods of dealing with disputes without resorting to litigation in the courts.

1.1 Research question

Can South Africa benefit from the incorporation of the ICC mediation rules in its current ADR practises especially in the resolution of commercial disputes?

---

7 Stok, Folk and Kon Attorneys 2016 http://www.stoklaw.com/complex-business-disputes.html.
8 Omni Bridgeway date unknown http://omnibridgeway.com/commercial-disputes/.
9 Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).
10 Pretorius *Dispute Resolution* 12

This dissertation will focus on the use of mediation in the resolution of commercial disputes as opposed to other ADR methods such as arbitration, conciliation ombudsman and negotiations, to name but a few.

1.2 Research methodology

In 2014, the International Chamber of Commerce[11] mediation[12] rule came into being.[13] An analysis of these rules is provided. This dissertation ultimately investigates the possibilities of the application of the ICC 2014 rules within the field of alternative dispute resolution (ADR) in South Africa. A comparative analysis of South African developments in mediation (more specifically its court based mediation rules) and the ICC mediation rules is therefore provided.

This dissertation is a literature study based mainly on relevant textbooks, law journals, legislation, case law and internet sources relating to commercial mediation.

The single greatest limitation or shortcoming in this dissertation is that of academic resources pertaining to the ICC mediation rules. The ICC mediation rules are relatively new as they were released in 2014. There are, therefore, a limited number of resources available for reference.

Although there are a number of resources available in general on ADR, there are limited resources available in regard to this specific topic; these include court decisions, academic resources and legislation.

1.3 Structure of argument

Chapter 2 investigates mediation as a method for resolving commercial disputes for dispute resolution.. Mediation(more specifically commercial mediation), as well

---

11 Hereafter referred to as the ICC.

12 Can be defined as the resolution of a dispute appointing an independent person between the parties to the dispute in order to aid them in the resolution of their disagreement.

13 Carlevaris date unknown http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/.

as its principles, advantages and disadvantages, will be discussed in more detail in Chapter 2.[14]

Chapter 3 addresses the use of commercial mediation within a South African context. Mediation, as a form of ADR, has not been fully used in a South African commercial context as parties to a dispute have in the past favoured more traditional forms of dispute resolution (such as arbitration and litigation).[15]

Chapter 4 provides a detailed discussion of the ICC mediation rules. These rules came into force on 1st January 2014 and provide a flexible process with the aim of reaching a negotiated settlement with the assistance of a neutral facilitator.

Being relatively, new the mediation rules reflect an up-to-date practice and provide a clear framework for the mediation process while respecting and upholding flexibility.[16] (The ICC is among the leading providers of dispute resolution services for persons, industries, and countries, among others seeking alternatives to court litigation.[17]).

Furthermore, Chapter 5 draws a comparison between the current South African position in respect of mediation and the ICC mediation rules. It could be argued that using the ICC mediation rules as a framework for the implementation of mediation in a South African commercial context could be a viable option

In conclusion, Chapter 6 will be the writers attempt to answer his research question by providing a short analysis of his previous 5 chapters and making recommendations on how mediation in South Africa could benefit from the introduction and implementation of the ICC mediation rules in the resolution of commercial disputes. The aim of this chapter is to see whether the desired result would be to adopt the ICC mediation rules in the development of commercial mediation in a South African context or not. Chapter 6 therefore tries to indicate

---

14 For the purpose of this dissertation the definition of commercial mediation will be defined in Chapter 2

15 See Mcfarlane, Rethinking Disputes: The mediation alternative - In General.

16 Anon date unknown http://www.iccwbo.org/products-and-services/arbitration-and-adr/media

17 Goldsmith, Ingen-Housz and Pointon *ADR in business* 236.

whether the writer’s research shows a promising indication that the above can be realised or ultimately why the said implementation would not be beneficial.

Chapter 2: A general overview of mediation

2.1 Introduction

In many jurisdictions, litigation is seen as a superior way of settling disputes. This is specifically true if the court system has independence, the respect of society, and rules and procedures in place to ensure fairness.[18] Furthermore, the litigation process focuses on procedural considerations, prescribed legislation and the legality of administrative decisions. ADR on the other hand is aimed at achieving an interest-based solution, rather than a rights-based decision that rarely reflects the true intentions of the disputing parties. Despite the fact that ADR may give rise to a different outcome, as in the case of a court order, it is nonetheless important to determine when, and where not to use ADR methods.[19]

Mediation in the commercial sector has been referred to as 'the slumbering giant' in terms of ADR.[20] It has been placed on the slow burner when it comes to commercial and corporate disputes due to a more litigious method of dispute resolution being the more traditional method.[21]

There lies great potential in the implementation of mediation in commercial disputes. This may be attributed to the fact that mediation may be seen as a more feasible process used in the resolution of commercial disputes as its characteristics complement the wants of modern-day commercial disputants—such as flexibility, timesaving, and financially feasible, to name but a few.[22]

Chapter 2 will provide a short but critical discussion on the nature of Mediation and its relationship with litigation. A short discussion on the different ADR methods now follow but the focus of this chapter will be mediation. Due to the restrictions of formal ADR processes, and the adaptive nature of informal processes, it is necessary to distinguish commonly used ADR methods from one

---

18 Blake, Brown and Sime *A practical approach to ADR* 3.

19 Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49 (2004);

20 Love 2001 *Ohio St J Disp Resol* 597.

21 Goldsmith, Ingen-Housz and Pointon *ADR in business* 8.

22 Mcfarlane, Rethinking Disputes: The mediation alternative 159

another. These methods include arbitration, adjudication, expert determination, conciliation, mediation, and facilitation. Finally, the definition, characteristics and process applicable to commercial mediation as a specialised ADR method is discussed. This discussion is particularly important to support the use of commercial mediation, and will furthermore be important for the discussions in subsequent chapters.

2.2 Alternative dispute resolution

The acronym ADR is the generally accepted term for alternative dispute resolution. ADR also symbolises all forms of dispute resolution other than litigation or adjudication through the courts.[23] This suggests that litigation is seen to be the first choice.[24] Contrary to this notion, some believe that ADR should rather refer to the 'appropriate' dispute resolution because it provides an opportunity to resolve a dispute or conflict through the effective use of a process that is best suited for the particular dispute.[25]

ADR has become more than a mere alternative to litigation, as it involves the selection of a process, which is best suited to a particular dispute and the parties to the dispute.[26] Another variation for the use of ADR is 'amicable' dispute resolution. This implies that ADR focuses on an interest-based settling of disputes. Amicable dispute resolution signifies that disputes can be resolved in a peaceful way, and that most ADR methods use an adapted form of mediation when settling a dispute.[27] It also suggests that both arbitration and adjudication are excluded as ADR processes due to their formal nature. The goal of ADR is not to replace adversarial litigation, but rather to provide a broader range of processes and mechanisms to parties that find themselves in a dispute or conflict. ADR includes a range of mechanisms that assist the parties in resolving their differences creatively and effectively. Whatever the case may be, the terminology and methodology of ADR is constantly evolving.

---

[23] Pretorius *Dispute Resolution* 1.
[24] Blake, Brown and Sime *A practical approach to ADR* 3.
[25] Blake, Brown and Sime *A practical approach to ADR* 5.
[26] Pretorius *Dispute Resolution* 1.
[27] Tercier "Foreword" 4; Guillemin "Reasons for choosing ADR"14.

2.3 Dispute resolution methods

There is a vast array of ADR options available. First of all, there are formal dispute resolution methods which bare similarity to litigation. These options are also referred to as adjudicative ADR methods[28] and include arbitration, adjudication and expert determination.[29] Secondly, there are informal dispute resolution methods, also referred to as non-adjudicative ADR methods.[30] These methods focus on informal processes for settlement where the parties have more control over the process as well as the intended outcome. Negotiation, facilitation, conciliation, and mediation are examples hereof.[31] For purpose of this dissertation, focus shall be placed on mediation, more specifically commercial mediation.

2.4 Mediation

Mediation involves a neutral third party which seeks to facilitate the resolution of a dispute. Process that would today be categorised as mediation has been used as the main method of resolving conflict dating back to before the industrial revolution.[32] The process is flexible and can be agreed in advance by way of a written agreement between the parties.[33] It can also be seen as a structured negotiation process that involves an acceptable impartial neutral third party to assist the parties in dealing with their dispute and, if possible, to reach an agreement. The mediation process is voluntary in its initiation and continuation.[34]

Lately, mediation in the modern sense has been used to solve industrial disputes, as well as disputes in other fields of law.[35] Only recently has mediation surpassed

---

28 Blake, Brown and Sime *A Practical Approach to ADR* 31.
29 Pretorius *Dispute Resolution* 5.
30 Blake, Brown and Sime *A Practical Approach to ADR* 24-25.
31 Stitt *Mediation a practical guide* 1-18.
32 Brand, Steadman and Todd *Commercial Mediation* 2.
33 Blake, Brown and Sime *A Practical Approach to ADR* 28.
34 Pretorius *Dispute Resolution* 4.
35 Nupen "Mediation" 50.

arbitration to become the preferred ADR method in the resolution of international commercial disputes.[36]

Mediation can be defined in different ways and it is, therefore, important to highlight the definition of mediation in a commercial sense. Different definitions can reflect differences between the routes that mediation processes may take. In general, two approaches exist in defining mediation, the first being a conceptualist approach while the second is a descriptive approach. [37]

The conceptualist definition of mediation can be described as:[38]

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

The descriptive approach definition can be described as:[39]

> A process of dispute resolution in which the disputants meet with the mediator to talk over and then attempt to settle their differences.

The main difference between the two above definitions is their formality. The descriptive approach is seen as a vague definition that leaves the door open for self-determination and flexibility, whereas the conceptualist is far more descriptive and rigid.

Mediation for the purposes of this dissertation is defined as a process:[40]

> Where a skilled, impartial third party assists disputants in reaching a voluntary, mutually agreeable resolution to all or some of the disputed issues.

The above definitions highlight some characteristics of mediation. Further characteristics of mediation are that it is a confidential and flexible process

---

36 Morek 2013 http://kluwermediationblog.com/2o13/12/o9/whats-new-in-the-new-icc-media tion-rules.

37 Zumeta 2000 http://www.mediate.com/articles/zumeta.cfm.

38 Folberg and Taylor *Mediation* 7; Moore *The mediation process* 15; Astor and Chinkin *Dispute resolution in Australia* 135-136; Feehily *The development of commercial mediation in South Africa* 56.

39 Roberts 1992 *Mediation Quarterly* 11; Feehily *The development of commercial mediation in South Africa* 56.

40 Moore *The mediation process* 15.

facilitated by a neutral third party which, among others, will be elaborated on hereunder.

2.5 Characteristics of mediation

Mediation has certain distinguishing characteristics, namely that it is a voluntary, flexible, informal and confidential process. The use of an impartial third party and the fact that any settlement discussions are executed on a 'without prejudice' basis are further characteristics of mediation. The opportunity for coming to creative solutions for the dispute that the mediator controls the process and the parties determine the content of the process and the outcome of the dispute are also seen as distinguishing characteristics of mediation.[41]

2.5.1 Voluntariness

Mediation is a voluntary process where both parties to the dispute freely decide to make use of mediation in an attempt to resolve a dispute. Parties are, as a result, more motivated to reach an amicable solution to the dispute in question.[42]

The voluntary and consensual nature of mediation is ever present at all stages of the mediation process. These characteristics are present at the commencement of the mediation process, throughout the process itself and at the final outcome thereof.[43] Mediation is a voluntary process founded on the respective parties' self-determination, and without this characteristic, the process cannot be defined as mediation.[44] Hesitation in the use of mediation by prospective parties can be as a result of being pressured into partaking in mediation in the first place.[45] Forcing a party into mediation changes the party's control or choice on how their dispute is finally resolved.[46] This, in turn, decreases the chances of a meaningful settlement

---

41 Brand, Steadman and Todd *Commercial Mediation* 24.

42 Brand, Steadman and Todd *Commercial Mediation* 24.

43 Nolan-Haley 1999 *Notre Dame LR* 775; Nolan-Haley 2015 *Cardozo Journal of Conflict Resolution* 731.

44 Anon 2005 http://www.nhd.uscourts.gov/pdf/NH-Mediation-Conduct%20Code.pdf; Nolan-Haley 2015 *Cardozo Journal of Conflict Resolution* 731.

45 International Mediation Institute 2014 http://imimediation.org/imiinternational-corporate-users-adr-survey-summary; Nolan-2015 *Cardozo Journal of Conflict Resolution* 731.

46 See Shestowsky 2008 *Ohio St J on Disp Resol* 549, 550; Nolan-Haley 2015 *Cardozo Journal of Conflict Resolution* 731.

as the party that was forced into mediation would have been much more cooperative if the party had voluntarily entered into the mediation.

Mediation is, in some cases, involuntary, as the parties may have contractually agreed to enter into mediation if a dispute arises when they initially entered into a business agreement with one another but here it could be argued that they voluntarily agreed to mediate before the dispute even arised as per their contract. Mediation, in this case, is initiated by a contractual clause as a precursor to an adjudicative process. In some cases parties to dispute might even be encouraged by a judge to use mediation here the writer refers to the case law discussed in chapter 3 at 3.3.1.

2.5.2 Confidentiality

The 'cloak of confidentiality' that is cast over the mediation process encourages the parties to be open and honest with the mediator.[47] Both the parties to the mediation as well as the mediator have certain confidentiality obligations to which they are bound. These obligations can be placed into two categories: Firstly, everything discussed during the mediation is classified as confidential and not made available to the public. This is of great importance, especially in the commercial sector as companies and businesses could suffer financially if their ‘dirty laundry’ is aired for the world to see as this could in turn scare away possible investors. Secondly, but most importantly, the mediator himself may conduct meetings with the individual disputing parties, the content of which is not disclosed to the other party without the expression permission of the party to the mediator. This aids in establishing a relationship of trust between the mediator and the respective parties, as well as encouraging the adequate exchange of information among all concerned this is of great importance as it speeds up the ultimate resolution of the dispute.[48]

---

47 Reichert 2004 *Dispute Resolution Journal* 61.
48 Stitt Mediation *A Practical Guide* 1-18.

2.5.3 Flexibility

Even though mediation is seen as a structured[49] process it is still very flexible compared to litigation.[50] The mediation can be structured to suit the specific needs of the parties involved and is not confined to a single pre-structured process.[51] For example the time, manner and duration of the separate mediation sessions can be adjusted to fit the needs of the parties to the mediation as opposed to the ridged structure of arbitration and litigation where the parties are told or ordered to conform and are not given much options.

2.5.4 Informality

Litigation is seen as a very formal process, for example the formalities related to court such as dress code, the rigid process of proceedings, as well as the use of certain language and legal jargon. In contrast to litigation, where the parties are confined to following rigid rules of litigation, the informality of the mediation process should make mediation a more 'user-friendly' and less stressful solution than formal litigation processes.[52].

2.5.5 Opportunity for creativity

Creative opportunities to solve the dispute between the parties can be explored in mediation. These creative solutions cater for more than just the issues in dispute. With help from a mediator, parties to a dispute are given the opportunity to be creative and explore innovative solutions. These solutions may go further than what a court of law or arbitration might be able to go with regard to finding a suitable solution to the dispute. This ‘creativity’ and freedom made possible by mediation is obviously still limited by law.[53] An example of ‘creativity’ is best seen in the solutions found in mediation agreements, such as the granting of housing allowances for striking workers instead of wage increases.

---

49 See para 2.6 below in regards to the structure of mediation.
50 Brand, Steadman and Todd *Commercial Mediation* 24.
51 Irish Commercial Mediation Association 2016 http://www.icma.ie/about-mediation/what-is-commercial-mediation/.
52 Stitt Mediation a practical guide 1-18.
53 Stitt Mediation a practical guide 1-18..

2.5.6 The mediator controls the process but the parties control the final result

A mediator can be described as the process manager when it comes to the mediation process. His only duty is to facilitate, plan and manage the process itself and not force any solution onto any party. The parties themselves govern the content of the mediation by having the final say in the outcome of the proceedings. This is a paramount concept in mediation as it is what distinguishes mediation from other ADR processes, such as arbitration. The mediator can help circumnavigate deadlocks as well as in the formulation of a settlement agreement.[54]

2.6 Benefits of mediation

2.6.1 Settlement rate

The settlement rate is high in areas where mediation has been used as a method to resolve a dispute.[55] Even if the mediation is not entirely successful it can still act as a tool to dramatically shorten litigation as it could settle many facts that might have been disputed in litigation and that would have taken up a lot of court time.[56]

2.6.2 Speed

Mediation is attractive for potential users when it comes to the time it takes to complete the process. Mediation can be put in motion as quickly as parties require, and may take place within days of the process being agreed upon but this is not always the case.[57] Although in most cases mediation shortens the time it would take to resolve a dispute, the mediation of complicated and emotional cases does tend to take much longer.[58] To add to this, the complexity of the underlying agreement in international commercial agreements could also reduce

---

54 Stitt Mediation a practical guide 1-18.
55 http://www.mediate.com/articles/HallV1.cfm.
56 Brand, Steadman and Todd *Commercial Mediation* 24.
57 Irish Commercial Mediation Association 2016 http://www.icma.ie/about-mediation/what-is-commercial-mediation/.
58 Kantor 2011 *New Directions in International Economic Law* 199, 214.

the chances of a ‘quick’ mediation. When looking at the general nature of mediations it could still be argued that it would generally take less time than alternative methods, such as arbitration or litigation.[59]

2.6.3 Cost

Mediation, coupled with a quick and early settlement of the dispute, will ultimately result in momentous savings on legal costs. However, by contrast, late settlement through the use of mediation may even increase the overall costs of the dispute as a result of the disputes negative impact on productivity of the company. An example of this is that a dispute in a commercial company could cause production and sales to stop as a result of an unhappy work force and ultimately the mediation becomes drawn out as a result of uncooperative parties who would rather go to court. This only strengthens the argument for not using mediation as an alternative, but rather to make early use of mediation by either agreeing to use mediation in an underlying agreement, or considering mediation before any other process.[60]

Costs are a significant issue for commercial disputants, and are often the primary reason that parties are looking for alternative means of dispute resolution, in particular mediation, in order to resolve their disputes in a economic manner.[61]

2.6.4 Win-win scenario vs win-lose scenario

In mediation the interests of both parties are taken into each other's consideration. Therefore with mediation neither party ‘loses’ nor ‘wins is the dispute in question, but rather a compromise that is mutually beneficial reached between the parties. This leaves both parties satisfied with the final agreed upon result. Mediation differs from litigation here because traditionally in litigation there is a loser and a winner.[62]

---

59 Stitt Mediation a practical guide 1-18.
60 Stitt Mediation a practical guide 1-18.
61 Feehily 2009 *SALJ* 291.
62 Sander 2000 *J Disp Resol* 3-10.

2.6.5 Preserving the business relationship

Mediation enables the parties to address causes of the dispute and to manage a range of complex business interests that have given rise to it. The process may even deliver outcomes of mutual gain. Because of the win-win nature of mediation, opportunities are created to protect relationships, even those damaged by the initial dispute. Mediation also creates the opportunity to strengthen and develop existing relationships as parties get to know each other better and therefore know exactly where they stand with one another making future business ventures easier.[63]

It could be argued that the above advantages of mediation are of specific importance to the commercial sector. This is because these advantages cater for the wants of commercial disputants. These wants in question are in most part similar to the advantages of mediation.[64]

Certain disadvantages accompany the advantages of mediation. Although mediation shows great potential as a possible tool in the resolution of commercial disputes, as a method it has its own drawbacks.

2.7 Disadvantages of mediation

In spite of the fact that the advantages of mediation greatly outweigh the disadvantages, certain of these disadvantages are discussed below such as: finality and enforceability, lack of openness, and the argument of it being 'second-hand justice', as well as the possibility of mediation ending up as a waste of time.[65]

2.7.1 Finality and enforceability

Depending on the resolution itself the agreements made between the parties are not always enforceable. This can be the case if the resolution was not made an

---

63 Brand, Steadman and Todd *Commercial Mediation* 29.
64 Goldsmith, Ingen-Housz and Pointon *ADR in business* 4.
65 Boulle and Nesic *Mediation* 66.

order of court or contractually agreed to, therefore rendering the process itself lacking in credibility. This is because without a 'rubber stamp' from a court, as such agreements are not enforceable unless made as an order of the court, or at least contractually agreed upon by means of a settlement agreement. Alleviating this problem is not a difficult challenge as the parties, after making their final decisions in mediation, would normally not have a problem with making their final settlement agreement an order of the court.[66]

2.7.2 Time

Closely related to the above aspect of finality and enforceability is the potential waste of time being a great potential disadvantage of mediation. Usually the aspect of time is an advantage when considering mediation as a dispute resolution method. Nonetheless it could just as easily backfire at a later stage. This is because mediation can break down months into the process meaning much of that time gets wasted that could have been spent on litigation or arbitration that would have had definitive results. When a dispute is mediated, the emotional aspects of the dispute are evaluated in more detail, and this, coupled with the complexity of a case, could result in the mediation actually taking longer than litigation.[67]

Lastly, in the absence of a contractual agreement or a court order mediation is not always seen as final or enforceable. A party to mediation could opt to litigate at any stage. This therefore wastes precious time that could have been spent litigating the process in the first place.

To alleviate this problem would be a great challenge but it could be argued that an experienced mediator would have anticipated this problem early in the proceedings. The mediator would, therefore, advise the parties to abandon mediation and rather decide to litigate, which wold put the parties at ease that they had tried to mediate before spending unnecessary resources on litigation.[68]

---

66 Feehily *The development of commercial mediation in South Africa* abstract 266-281
67 Henderson *Ohio St J on Disp Resol* 112.
68 Feehily *The development of commercial mediation in South Africa* abstract IV

2.7.3 Lack of openness

Sometimes it is difficult for the truth to be found in mediation and therefore justice to be served. This is due to the fact that evidence is not given under oath and legal representatives do not have the same tools at their disposal as in litigation (such as cross-examination and having documentary evidence(discovered) at their disposal). Parties in mediation can keep their cards much closer to their chest than is permitted in litigation. This lack of openness can even lead to dishonesty as well as the misuse of the process to the advantage of a dishonest party. This is important as one cannot argue that justice has been upheld if the process was misused.[69]

2.7.4 Argument of 'second-hand justice'

It could be argued that mediation is nothing more than a tool used to force financially poor parties to a dispute into a 'second-hand' way of resolving said dispute and consequently does not offer the same procedural safeguards other procedures might have.[70] Less privileged parties to a dispute in some cases cannot actually pay for the expenses to assert their rights[71] in the 'primary class' court system through litigation and are therefore forced to make use of mediation because it is a more affordable option. This predicament, therefore, does not uphold justice to be served.[72] Antiquated beliefs were that mediation was a 'soft' method that showed feebleness or uncertainty from the side of the party to the dispute who suggested or supported mediation. Therefore parties in the past leant towards sluggish and costly adjudication procedures.[73]

---

69 Anon date unknown http://adr.findlaw.com/mediation/what-are-the-disadvantages-of-mediation.html.
70 Feehily *The development of commercial mediation in South Africa* 275.
71 Right to access to justice see section 34 of the Constitution.
72 Boulle and Nesic *Mediation* 66.
73 Stitt Mediation a practical guide 7

2.6 Phases and stages of mediation and a general mediation process

Numerous academics write that assisted negotiations (being another word for mediations) are conducted through separate phases or stages.[74] Seven distinct phases of assisted negotiation process can be distinguished. These stages will now be compared with and integrated into a general mediation process. As previously mentioned the mediation process is flexible and may be tailored to suit the specific dispute as well as the disputing parties. However, generally, mediation will comprise the following phases, namely:[75]

1. First steps towards mediation.
2. Opening address and initial arguments.
3. Exploration and analysis of the dispute.
4. Finding options to be brought under consideration.
5. Choosing a specific option.
6. Establishing deadlocks and finalising a settlement agreement.

2.6.1 First steps towards mediation

Firstly, upon the dispute arising, the mediation provider is contacted by either of the parties either individually or by mutual consent, or in terms of a contractual agreement which makes provision for mediation as a dispute resolution method. Thereafter the mediator usually makes contact with the parties through an authorised representative or through legal representatives (if the parties refer the mediator to their lawyers) before the mediation takes place. The purpose of this contact is to create clarity with regard to the mediation and create consensus on aspects such as:[76]

1. Terms of the agreement to mediate.
2. Explanation of the mediation process and preparation for said process.
3. Explaining the mediation opening arguments and agreeing on who will go first.

---

74 Feehily *The development of commercial mediation in South Africa* 36.
75 Brand, Steadman and Todd *Commercial Mediation* 35.
76 Brand, Steadman and Todd *Commercial Mediation* 36.

4. The mediator identifying any other interested parties.
5. Identifying language requirements, as well as time issues, date and venue of the mediation.

The above can be closely associated with a preparation phase and this phase in mediation involves determining the vital elements, such as coming to terms with objectives and evaluating how to deal with all the parties concerned.[77] The difference between this stage and the below opening stage is that this phase can be completed via correspondence and even phone calls, whereas the opening phase is the actual start of the mediation proceedings which is done in person.

2.6.2 Opening address or opening of the process and initial arguments

The reason behind this 'opening stage' is to lay the foundation for the process itself and to ensure its effectiveness and clarity in person. At this stage, a brief explanation of mediation is given to the parties by the mediator, including aspects such as confidentiality, without prejudice, and privilege, as well as the process of the mediation. Thereafter, the parties are granted the opportunity to give a brief explanation of their respective versions of the said dispute.[78]

This phase can also be described as the 'building relationship phase' this has to do with evaluating each other's similarities and differences towards to dispute and eventually aiming towards an outcome that is beneficial to both parties; this, in turn, creates a platform for getting to the next stages effectively.[79]

2.6.3 Exploration and analysis of the dispute

The reason behind this stage of the proceedings is for the parties, including the mediator to fully grasp the crux of the dispute, (each party's position with regard to the dispute), the needs of the parties, as well as their specific goal with regard to the final outcome of the mediation.[80]

---

77 Greenhalgh *Managing strategic relationships* 139.
78 Brand, Steadman and Todd *Commercial Mediation* 37.
79 Greenhalgh *Managing strategic relationships* 139.
80 Brand, Steadman and Todd *Commercial Mediation* 39.

This phase can also be described as the ‘gathering information phase’ which involves building a background with regard to the dispute as well as coming to grips with the possible repercussions of not resolving it.[81]

2.6.4 Finding options to be brought under consideration

Here the mediator assists the parties to reach a wide arrangement of solutions that they are facing in the dispute. The mediator can also encourage, but be careful not to force, the parties to see reason with regard to their position in the dispute and possibly make a couple of sacrifices for the greater good of the resolution. Here the mediator therefore tries to encourage the parties to focus on a win-win outcome.[82]

This phase can also be described as the ‘information using phase’ and has to do with the parties taking their gathered information and using it to put their case to the opposing party, including what their desired outcome of the proceeding would be.[83]

2.6.5 Negotiations and choosing an option

The aim at this stage of the proceeding is for the mediator to support the parties to the mediation in negotiation and deciding on a solution that's viable, economical and most importantly, satisfies both parties' needs.[84]

This phase can also be described as a ‘biding phase’ that involves a situation where the respective parties try and reach a middle ground between their desired outcomes.[85]

2.6.6 Establishing deadlocks or finalising a settlement agreement

At this stage of mediation, the outcome is established and it can take one of two different routes. The parties can reach a deadlock and have to resort to other

---

81 Greenhalgh *Managing strategic relationships* 139.
82 Brand, Steadman and Todd *Commercial Mediation* 40.
83 Greenhalgh *Managing strategic relationships* 139.
84 Brand, Steadman and Todd *Commercial Mediation* 41.
85 Greenhalgh *Managing strategic relationships* 139.

forms of dispute resolution (such as arbitration or litigation) or a settlement agreement can be reached.[86]

This phase can also be described as the 'closing the deal phase' which involves the parties agreeing and committing to a mutually acceptable agreement to resolve the dispute. This phase can also be described as the 'establishing of an agreement phase' where each party's rights and responsibilities with regard to the settlement agreement is established. If the negotiations have broken down on or before this stage then the issues in dispute need either to be settled by an arbitrator, or in court.[87]

2.7 Different types of mediation styles

As a result of the challenges associated with defining mediation it is easier to conceptualise mediation into four different styles of mediation, namely:[88]

1. Settlement
2. Therapeutic
3. Facilitative
4. Evaluative

The easiest way to differentiate between these styles is to describe each one's objectives and the role of the mediator.

In settlement mediation the objective aimed at is to try and reach a compromise between the parties. Therefore this style or model is also known as 'compromise mediation' where the mediator persuades the parties to bargain towards a compromise between the parties' wants and demands.[89]

In therapeutic mediation, also known as a 'transformative' or 'reconciliation' model, the underlying causes of behaviour and the resultant dispute are focused upon and considered, mainly when negotiating a settlement. Here the mediator

---

86 Brand, Steadman and Todd *Commercial Mediation* 42.
87 Greenhalgh *Managing strategic relationships* 139.
88 Feehily *The development of commercial mediation in South Africa* 59-60.
89 Boulle and Nesic *Mediation* 27.

tries to diagnose and cure problems with the relationship that caused the dispute in the first place, thus creating a foundation to resolve the dispute.[90]

In facilitative mediation, emphasis is placed on the interests and needs of the parties and not necessarily their rights and obligations. Therefore the mediator does not focus on the legal entitlements of the parties, but rather their underlying needs and interests. Here the mediator tries to enhance the mediation process by establishing a constructive dialogue between the parties.[91]

Lastly, evaluative mediation can be described as the opposite of facilitative mediation as here the focus is on legal rights and entitlements. It can also be described as 'managerial' or 'advisory' mediation.[92] As the mediator takes up an advisory role.[93]

When evaluating the above it can be argued that commercial mediation is facilitative in nature as both forms are interest based. This evaluation is not that simple as mediation can start out as facilitative but as a result of changing circumstances and the general nature of the dispute can evolve into a hybrid form or another model entirely.[94]

2.8 Commercial mediation

As mentioned before defining mediation is not a straightforward process and mediation can be defined in many different ways depending on the specific objectives at which it is aimed, and it is not enough to apply the above definition directly to a commercial dispute.[95] Commercial mediation can also be defined in different ways in different countries, for example, Ontario's *Commercial Mediation Act* defines mediation as:[96]

---

90 Boulle and Nesic *Mediation* 27.
91 Boulle and Nesic *Mediation* 27.
92 Feehily *The development of commercial mediation in South Africa* 59-60.
93 Boulle and Nesic *Mediation* 27.
94 Feehily 2009 *SALJ* 375.
95 Feehily *The development of commercial mediation in South Africa* 60.
96 Aird and Berlis 2011 http://www.lexology.com/library/detail.aspx?g=cb39ba44-b527-4099-a9f4-09c0a751afb3.

> ...a collaborative process where parties agree to request a neutral person to assist them to reach a settlement in their dispute and where the mediator does not have authority to impose a solution on the parties.

Here the definition aims at putting emphasis on the fact that the mediator cannot impose a solution or force something upon the parties.

From an Irish perspective, the Commercial Mediation Association defines mediation more broadly as:

> A private and confidential dispute resolution process in which an independent and neutral third party, the Mediator, seeks to help the parties to reach a mutually acceptable negotiated agreement.

Consistent with the above and for the purposes of this dissertation commercial mediation can be defined as being:[97]

> A flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and of the terms of resolution.[98]

This final definition highlights the fact that the parties to a mediation (not including the mediator) are ultimately in control of not just the final decision but also the final terms of the resolution, This, in turn, creates a real sense of ownership, as well as responsibility for the parties. As the benefits of mediation become more widely recognised, this means it could have the potential of becoming a more used tool for resolving commercial disputes in the future.

Costs are a significant issue for commercial disputants, and are often the primary reason that parties look to alternative forms of dispute resolution, in particular, mediation, in order to resolve their disputes in a cost-effective manner,[99]

In commercial mediation, the rationale behind the procedures and processes associated with it is that parties to the mediation should always bear in mind all

---

97 Centre for Effective Dispute Resolution (CEDR); Feehily *The development of commercial mediation in South Africa* 60.

98 For the purpose of this dissertation this definition will be a representation of commercial mediation. Therefore, wherever mediation will be described or discussed this definition is referred to by the writer.

99 Feehily 2009 *SALJ* 291.

interests involved regarding why the dispute arose and put these interests above their rights and/or obligations. Once the parties put their interests above their rights and obligations they can then proceed in good faith with the process of resolution. Parties need to realise that commercial mediation is based on interests and not rights. Only once this has been achieved can they see that in a commercial dispute there is a lot more in common with the objectives of the underlying contract than resolution.[100]

The role of the mediator in mediation is strictly that of a procedural facilitator but the mediator does have the power to influence the mediation so as to ensure the parties 'stay on the path' and follow one of the above-mentioned styles.

2.3 Conclusion

The key characteristics of mediation are voluntariness, flexibility, informality, confidentiality, without prejudice, the control of the process by the mediator, and outcome controlled by the parties. When bringing its characteristics into consideration the process of mediation inevitably has disadvantages accompanying its advantages. After evaluating this topic it's apparent that the advantages definitely outweigh the disadvantages. The process of mediation might differ slightly from case to case but the core steps of the process stay the same and were briefly discussed in this chapter.

Mediation offers parties to the disputes an opportunity to 'realistically' evaluate their positions and safely explore settlement options in an informal, self-controlled and flexible environment. As the benefits of mediation become more widely recognised, this means it could have the potential of becoming a more used tool for resolving commercial disputes in the future.

It was found that mediation helps parties to take into consideration commercial and other interests. The mediation process can help parties acquire a better understanding of each other's needs and interests so that they can look for a solution which accommodates these needs and interests as far as possible.

---

[100] Feehily *The development of commercial mediation in South Africa* 3; Antrobus and Sutherland "Some ADR techniques in commercial disputes" 165.

Mediation can be a particularly useful tool when the parties in the dispute have an ongoing relationship.

Commercial mediation has the potential to offer huge benefits to dispute resolution in South Africa. The country has a rich mediation tradition upon which to build, although there is much to be developed. The importance of commercial mediation cannot be underestimated as in commerce parties do not necessarily want to win a dispute but rather solve it in the most cost-effective and timeous fashion, while at all times preserving the business relationship. This leads to a detailed discussion of the South African commercial mediation position.

Chapter 3: The South African position on commercial mediation

3.1 Introduction

In South Africa's legal landscape, mediation could enjoyed a lot of support as an alternative to long drawn-out court battles. Mediation has, however, been slow in establishing itself as a regulated profession that has gained the respect of the legal industry and full support of the public, both of whom stand to gain a great deal from the process use thereof. While mediation is firmly recognised worldwide as a quicker, more cost effective, as well as a more reputable technique of solving commercial disputes than litigation, or arbitration, it is only now being considered in a South African dispute arena.[101] Certain sectors in South African law such as the labour sector and the family law arena have successfully embraced the use of mediation in the resolution of disputes therein. Unfortunately, the same cannot be said about disputes arising within the commercial sector.

This chapter will address this by discussing the current position in respect of the use of commercial mediation in South Africa, of which said discussion will include various statutory measures, case law and corporate governance developments.

3.2 Development of commercial mediation within the South African Constitution and legislation

3.2.1 South African Constitution v contractual freedom including a discussion on boilerplate clauses

The Constitution is the supreme law in South Africa.[102] This means that all other legislation (including the common law of contract), regulations, acts or legal documents (including contracts) must be consistent with the provisions and spirit of the Constitution; thus ‘reasonableness’ and 'good faith'.[103]

---

101 See Brand, Steadman and Todd *Commercial Mediation* 1-57.
102 South African Government 1996 http://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1.
103 Scott, Cornelius and Baqwa *The law of commerce* 125.

Section 34 of the Constitution states that:

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

This section therefore creates direct constitutional support for the utilisation and application of mediation in a South African context.

In *Telcordia Technologies Inc v Telkom SA Ltd*[104] it was decided that private disputes are subject to section 34 of the Constitution and, therefore, nothing prevents individuals from contractually agreeing to resolve their dispute by using other forums, such as mediation instead of the more traditional litigation.

Here it should be noted that resorting to mediation does not by itself affect a party's contractual freedom. It rather upholds a person's constitutional right of access to justice (as may be found in section 34). It could then be argued that even though the Constitution does not directly limit contractual freedom as parties to a dispute made the choice to enter into a contract the Constitution does regulate them indirectly. This is because any agreement or contract that is not in accordance with the Constitution is null and void (meaning if the contract is not in the spirit of the Constitution it can be interpreted as void).[105] It must also be noted that in *Barkhuizen v Napier*[106] the Constitutional Court put emphasis on the fact that it would be difficult to test the constitutionality of a contract's terms as it is neither a law nor a conduct. The court also put emphasis on the fact that contractual terms cannot be subjected to section 36 of the Constitution as it is "a law of general application".[107]

Thus one can conclude that section 34 of the Constitution does not create contractual limitations but in fact opens even more doors with regard to ADR clauses, therefore developing contractual law in a South African perspective.

---

104 2007 5 BCLR 503 (SCA).

105 *Bothma-Batho Transport (Edms) Bpk v S Botha & Son Transport (Edms) Bpk* 2014 1 All SA 517 (SCA).

106 2007 5 SA 323 (CC); Scott, Cornelius and Baqwa *The law of commerce* 125.

107 Cornelius and Baqwa *The law of commerce* 125.

Standard clauses commonly referred to as 'boilerplate' clauses are found in contracts; commercial contracts being no exception. *Domicilium*, jurisdiction, non-variation, and dispute resolution clauses are some of the standard clauses collectively known as the boilerplate clauses. The clause of importance for this dissertation is the dispute resolution clause.[108]

The dispute resolution clause stipulates the manner in which parties are to resolve a dispute arising under the terms of the contract. The procedures—such as time frames, whether the notification must be written, as well as whether the dispute is to be resolved by means of an ADR method and if so which method—are provided for in the clause.[109] This clause contributes towards ensuring that the parties' contractual freedom is not limited as the contract is signed voluntarily by the parties, and more importantly that their constitutional right, as provided for in section 34 of the Constitution, is not violated. This is due to the fact that the parties are exercising their rights in resolving a dispute—whether by alternative means, or the more traditional method of litigation.

3.2.2 Statutory development of Mediation in South Africa

The traditional/pre-colonial method of dispute resolution in South Africa is enshrined in the concept of *Ubuntu.* As seen below *Ubuntu* shares the same common goal as the Western concept of mediation, that being a mutually acceptable result to a dispute. Therefore, to better understand the development of mediation in a South African perspective *Ubuntu* will shortly be discussed.[110]

Colin Lamont in his judgement on hate speech in *Afri Forum v Malema* defined *Ubuntu* as follows:[111]

> Ubuntu is recognised as being an important source of law within the context of strained or broken relationships amongst individuals or communities and as an aid for providing remedies, which contribute towards more mutually acceptable remedies for the parties in such cases. Ubuntu is a concept which, inter alia dictates a shift from (legal) confrontation to mediation and conciliation.

---

108 Anon date unknown http://www.adelaide.edu.au/legalandrisk/contracts/contracthandbook/

109 Anon date unknown http://www.adelaide.edu.au/legalandrisk/contracts/contracthandbook/Module_7.pdf.

110 Feehily *The development of commercial mediation in South Africa* 373.

111 *Afri-Forum v Malema* 2011 6 SA 240 (EqC).

Indirectly supporting *Ubuntu* by honouring its ideals without actually mentioning the word '*Ubuntu'*, the South African legislature has introduced over 40 statutes which provide for the use of mediation in the resolution of disputes. [112] This, therefore, illustrates a distinct shift towards the use of mediation in South Africa. Steps have been taken as towards using mediation, especially in the commercial sector. An example of this can be found in sections 166–167 of the *Companies Amendment Act* 3 of 2011 (hereinafter the *Companies Amendment Act*).

Part C of the *Companies Amendment Act*[113] regarding ADR provides that an alternative either to litigation, or the lodging of a complaint to the commission, is that the parties to a dispute now have the option of referring the dispute to resolution by means of mediation, arbitration or conciliation. Part C of the Companies Act, goes on further to state that a dispute can be resolved by means of ADR facilitated by different groups, such as the Companies tribunal, a predefined accredited entity,[114] or any other appropriate person.[115]

The *Companies Act* goes further to provide for mediation to be made a court order in terms of section 167. This stipulates that if the parties give consent, the resolution to the dispute can be recorded and the mediator may bring an application for the resolution to be confirmed as a consent order by the court in terms of its rules.[116] Here the court then has the discretion to either grant the order as it is, or propose amendments to the draft order before it will agree to grant the order or refuse to make said order. This consent order can include an award of damages that therefore precludes the parties from making the same civil claim. With regard to consent orders, the court also has the discretion to make the

---

112 An example being the *Labour Relations Act* (LRA) 65 of 1995. The first important piece of legislation that encased mediation that was brought into effect by the legislature after apartheid, was *the Labour Relations Act* (LRA) no 65 of 1995. Arguably the focal point of the LRA is the authorisation of the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA is a government-funded self-governing multilateral body whose main goals are to conduct conciliation and arbitration of labour disputes.

113 *Companies Act* 71 of 2008; *Companies Amendment Act* 3 of 2011.

114 This entity includes juristic persons, organs of state, persons appropriately mandated or persons designated by the Minister as such.

115 *Companies Act* 71 of 2008; *Companies Amendment Act* 3 of 2011

116 Section 167 of the Companies Act 71 of 2008; Companies Amendment Act 3 of 2011.

order confidential if it is of the opinion that it would be in the best interests of the parties concerned for the outcome of the proceedings to be held confidentially.[117]

From the above sections[118] of the *Companies Act,* it is clear that in regards to this specific act that mediation has only partially been endorsed by the South African legislature. It has only been endorsed to a point that it is being encouraged, or gives the option to the parties to use mediation or other alternative forms of dispute resolution, and doesn't actually force the parties to first use ADR before resorting to a court-based resolution.

3.3 Corporate governance

Corporate governance can be defined as a:[119]

> ... broad reference to the mechanisms, processes and relations by which corporations are controlled and directed. Governance structures and. The system of rules, practices and processes by which a company is directed and controlled

Corporate governance structures identify the distribution of rights and responsibilities among different participants in the corporation and include the rules and procedures for making decisions in corporate affairs.[120] One important source of support for commercial mediation in South Africa has come from corporate governance directives such as the King III Report for example.

The King III Report[121] concerning corporate governance describes mediation as an important resource in the preservation of stakeholder relationships and reads at principle 8.8:[122]

> External disputes may be referred to arbitration or a court. However, these are not always the appropriate or most effective means of resolving such disputes. Mediation is often more appropriate where interests of the disputing parties need

---

117 Section 167 of the Companies Act 71 of 2008; Companies Amendment Act 3 of 2011.
118 Sections 166-168 Companies Act 71 of 2008; Companies Amendment Act 3 of 2011.
119 Daecher 2009 by http://putii.biz/12.
120 IODSA 2009 www.iodsa.co.za/products_reports.asp?catID=150; Goldsmith, Ingen-Housz and Pointon *ADR in business* 596.
121 IODSA 2009 www.iodsa.co.za/products_reports.asp?catID=150.
122 Principle 8.8 of the King III report IODSA 2009 www.iodsa.co.za/products_reports. asp?catID=150.

> to be addressed and where commercial relationships need to be preserved and even enhanced.

It must also be noted that the King IV Report was released on the 1st of November 2016 and under "Fundamental Concepts", referred to the King III Report which first introduced the dispute resolution mechanism. The only addition the King IV Report has made in respecof the development of dispute resolution is that it states that ADR should be incorporated as an overall managerial tool to maintain stakeholder relationships.[123]

Commercial institutions in South Africa whose legal representatives opt directly for litigation stand the risk of being criticised by stakeholders. This criticism would result from the failure of first trying to mediate the dispute, that could potentially save the stockholders time and money.[124]

The Institute of Directors in Southern Africa updated its code of governance in 2010 and paragraph 81 of said code states:[125]

> It is incumbent upon directors and executives, in carrying out their duties especially their duty of care to a company, to ensure that disputes are resolved effectively, expeditiously and efficiently. This therefore means that the needs, interests and rights of the disputants must at all times be taken into account.

The said code goes further, at paragraph 84 to state:

> External disputes may be referred to arbitration or a court. However, these are not always the appropriate or most effective means of resolving such disputes. Mediation is often more appropriate or the most effective means of resolving such disputes. Mediation is often more appropriate where interests of the disputing parties need to be addressed and where commercial relationships need to be preserved and even enhanced.

This is the first time that ADR, and more specifically mediation, has been implemented in the South African commercial arena.[126] This development in corporate governance coupled with court rules and the *Companies Act* is

---

123 IODSA 2009 www.iodsa.co.za/products_reports.asp?catID=150.
124 IODSA 2009 http://www.iodsa.co.za/; Brand, Steadman and Todd *Commercial Mediation* 7.
125 IODSA 2009 http://www.iodsa.co.za/; Brand, Steadman and Todd *Commercial Mediation* 7.
126 Brand, Steadman and Todd *Commercial Mediation* 7

expected to provide great stimulus in the development of mediation in the South African commercial environment.

Historically, ignorance about the nature and role of mediation were partly to blame for the failure of parties to resort to the use of mediation in the resolution of commercial disputes. This position is changing, albeit slowly. This may be seen by the recent introduction of the court-based mediation rules encouraging the use of alternative methods of resolving commercial disputes; in particular mediation.[127]

3.3.1 Support for mediation by the South African judiciary

Mediation received substantial judicial acknowledgement when the South Gauteng High Court ruled, in *MB v NB*,[128] that the failure of the legal representatives to advise their clients in a divorce matter to use mediation at a much earlier stage in the dispute should be met with the court's displeasure. The court went so far as to penalise the legal representatives by ordering a costs *de bonis properis* order against them due to their failure to advise their clients to consider the possible use of mediation.[129] Judge Brassey in his judgement held mediation in very high regard and put emphasis on the possibilities that mediation could have with regard to resolving disputes. The judge went on to further point out the benefits that could be drawn from the nature of mediation, such as its confidentiality, and impartiality of the mediator, as well as the fact that mediation is interest driven.[130]

In the *MB v NB* case the court based its order against the legal representation on the High Court rules. These rules make it a requirement that the matter of mediation should be brought under consideration at a pre-trial conference. Here the court ruled that the legal representation failed to bring mediation under actual consideration and therefore failed to advise their clients properly.[131]

---

127 Joubert and Brand 2012 http://www.mediate.com/articles/Joubertj1.cfm.
128 *MB v NB* 2010 3 SA 220 (GSJ).
129 *MB v NB* 2010 3 SA 220 (GSJ).
130 Goldsmith, Ingen-Housz and Point on *ADR in business* 400-596.
131 *MB v NB* 2010 3 SA 220 (GSJ).

Although this was a divorce matter that dealt with spousal maintenance, the rationale should be applicable to all civil matters, particularly commercial disputes where the use of mediation in the resolution of commercial disputes would be beneficial to all concerned.

In the lower courts of Bellville in the Western Cape, moves have been taken in the right direction to introduce court-ruled mediation, thus opening doors and ultimately leading the way for the implementation of the 2014 court-based mediation rules. In 2009 the Senior Magistrate of the Bellville Magistrate's Court introduced a directive instructing that all parties are to mediate their disputes before the matter may be set down for trial. Furthermore, a mediation certificate must be submitted to court declaring that the parties at least attended a mediation session. This directive, therefore, greatly encourages the use of mediation and thus ultimately contributes to its development.[132]

In the *Port Elizabeth Municipality v Various Occupiers* case it was held by the honourable Sachs J that:[133]

> In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.

The implementation of court-based mediation rules in the lower courts as well as the precedents created by cases such as the *Port Elizabeth Municipality v Various Occupiers* case in the High Courts are both clear indications that the South African judiciary is leaning towards a more proactive approach to the implementation of and encouragement for the use of mediation as a whole.

---

132 Goldsmith, Ingen-Housz and Pointon *ADR in business* 596.
133 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 39.

A precedent in support of mediation has been created in the *Port Elizabeth Municipality v Various Occupiers*[134] case where the Constitutional Court held:

> One of the relevant circumstances in deciding whether an eviction order would be just and equitable would be whether mediation has been tried. In appropriate circumstances, the court themselves order that mediation be tried.

With the above in mind, it can be argued that in the past South Africa has not approved legislation that provides a real framework (apart from the 2014 court-based mediation rules) that creates certainty with regard to the process of the mediation to parties of a possible mediation.

3.3.2 Court-based mediation rules

In recent times South African courts have become overloaded. This can be seen in the lengthy court rolls, as well as the delay in trials being heard by presiding officers to name but a few examples.[135] The Department of Justice took steps to address the promotion of access to justice—among other reasons—with the introduction of the court-based mediation rules in 2014.[136]

Court-based mediation is a form of mediation that happens with the assistance of the court. It is voluntary and both parties must agree to mediation. The mediation is arranged by an officer of the court named the Dispute Resolution Officer. This officer communicates with the parties and facilitates the selection of a mediator (a list of approved mediators is given to the parties for selection). Further steps in the court case will depend on the outcome of the mediation.[137]

The 2014 court-based mediation rules can be summarised in two different ways, namely, mediating before litigation proceedings have commenced and after litigation proceedings have commenced.

"Mediating before proceedings commence" is when a party that wishes to mediate applies to do so in writing on Form 1 (as found in the rules). In the said form, the

---

134 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217(CC).
135 Feehily *The development of commercial mediation in South Africa* 268.
136 Court annexed mediation Rules of the Magistrates courts preamble.
137 See in general the court annexed mediation rules.

party must describe the nature of the dispute and the parties involved in the process. This form is given to the clerk of the court who then has to firstly contact any possible parties to the dispute requiring their attendance at a meeting within 10 days to start possible mediation proceeding. The clerk then explains why this meeting has been called and explains the nature of mediation. Included in this explanation will be a detailed explanation of the costs involved in the mediation process. After this, a possible agreement might be reached by the parties to enter into mediation proceedings, who should be the appointed mediator and then get the parties to sign the standard form mediation agreement. Finally, the mediator himself will be contacted to arrange a time and date for the proceedings. The clerk also has the duty to forward all necessary documentation to the mediator within 10 days of the agreement being signed.[138]

Should the parties neither have the funds to litigate nor to appoint a mediator, the court-annexed mediation rules could solve said funding problem as it provides for very reasonable fixed tariffs and this thus ensures access to justice for all the parties involved.

Most of the processes with regard to starting a court-based mediation discussed above, apply to mediating after legal proceedings have commenced, this does not stop the court from invoking mediation itself as it can:[139]

> ...enquire into the possibility of mediation and accord the parties an opportunity to refer the dispute to the clerk or registrar to facilitate mediation.

If in either case, the mediation is not successful, the mediator must then inform the court. If the disputants still want to continue to try and resolve the dispute through litigation, then litigation merely continues its course or then starts. But if mediation is successful then the mediator will inform the court of this within five days of the successful mediation; what follows could then be an application for the settlement agreement reached to be made an order of the court if the parties wish to do so.

---

138 Sections 5-6 of the Amended Court-based mediation rules 2014.
139 Section 7 of the Amended Court-based mediation rules 2014.

From the above, it can again be concluded that no actual procedure has been provided by the legislator as to how mediation should take place (except when the mediator addresses this matter at the beginning of the proceeding). Rather it has now been made possible for parties to come to terms on how the procedure at court with regard to commencing a mediation proceeding would come to being.

Here it can be argued that parties who could consider mediation would in some cases be discouraged from implementing mediation as an alternative form of dispute resolution. This is because they cannot themselves be sure just exactly how the process will be conducted as no process is available to research in a South African perspective.

It could lastly be argued that enacting a judicially supported mediation process by the legislator could actually do more harm than good in the development and utilisation of mediation. This is because one of the reasons why mediation is so appealing to parties is that it is a non-structured process controlled by the parties themselves— thereby being less formal.[140] This would obviously not be the case in instances where statutes provide otherwise. It is the writer's opinion that it will only be a matter of time before mediation, in general, will also be subjected to regulations and legislation. Some of the consequences will be to limit the power of mediators, regulate their standards of training and their ethics so as to protect the interests and right of those who opt for mediation.[141]

3.4 Conclusion

Notwithstanding statutory, judiciary, legislative and corporate governance initiatives helping to develop mediation in a South African dispute resolution arena, the mediation of commercial disputes is not yet commonplace in South Africa. Parties to a dispute in commercial fields have been sluggish in the implementation and utilisation of ADR.[142] The expansion of commercial mediation in resolving disputes between companies prior to legal practitioners being given

---

140 Feehily *The development of commercial mediation in South Africa* 75.
141 Feehily *The development of commercial mediation in South Africa* 76.
142 Feehily *The development of commercial mediation in South Africa* abstract IV

instruction to define the dispute in question in terms of law and precedent should be seen as a more viable option to disputants.

Notwithstanding the statutory provisions and corporate governance initiatives creating ample ambit for the use of mediation, mediation of commercial disputes is by no means routine.

There is no regulatory legislation with regard to the general mediation procedure in South Africa apart from the court-based mediation rules. These rules only partially authorise mediation but do not actually make mediation a requirement before entering into litigation; it only makes it a consideration. South Africa has not as yet implemented a rule such as the ICC mediation rules, nor has it implemented a law to regulate procedural aspects of mediations. Therefore, parties who consider and implement mediation should be cautious in regulating the actual procedure by themselves as there are no statutory provisions or rules to assist them.[143]

[143] Goldsmith, Ingen-Housz and Point on *ADR in business* 597.

Chapter 4: An exposition of the ICC mediation rules

4.1 Introduction

A brief overview of the ICC mediation rules will be given in this chapter accompanied by their key characteristics, as well as their advantages and disadvantages.

Over the past number of years, the effect of the International Chamber of Commerce (ICC) in dispute resolution worldwide is unrivalled. It is seen as a leader in international dispute resolution.[144] The ICC has been a facilitator of dispute resolution services for persons, industries, countries, and government entities, as well as global commercial businesses who seek replacements for court-based litigation. The ICC has managed multiple domestic and transnational commercial mediation cases. With regard to international commercial disputes, the ICC is predominantly the better choice for cross-border disputes. This is due to the fact that the ICC has the ability to overcome cultural, religious and political gaps and differences.[145] This includes disputes from a wide range of diverse commercial sectors, contractual agreements and labour sectors.[146]

The ICC introduced ADR rules in 2003, which were designed to facilitate the resolution of disputes by alternative means such as mediation, arbitration and conciliation. Currently about 90% of the ADR measures used have been mediations, with conciliations and neutral evaluations making up the balance.[147] The aforementioned rules became outdated due to the developing nature of ADR, the result of which was the decision to develop a new set of rules to cater for present-day needs.[148]

---

144 See generally ICC, ICC Mediation Rules (2013).
145 Cohen "Conflict resolution across cultures: Bridging the gap" 116-133.
146 See more at http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Introduction/Ten-good-reasons-to-choose-ICC-Mediation/#sthash.wUTSo80J.dpuf.
147 McDermott and Emery *9th ICC International Mediation Competition*.
148 Grierson and Maazouz 2013 https://www.mwe.com/en/thought-leadership/publications/2013/12/icc-launches-new-mediation-rules.

In December 2013 the French-based International Chamber of Commerce launched the ICC mediation rules (hereinafter referred to as mediation rules). These Mediation rules, which comprise expertly drafted and effective provisions,[149] came into effect on the 1st January 2014.They do not only attract parties seeking alternatives to litigation and arbitration, but also parties that want to resolve their dispute in the most timeous, cost-effective and most practical way possible; namely by means of mediation.[150]

The new rules show mediation as becoming more the default approach as their focal point is to create a viable framework for the utilisation of an ICC-facilitated mediation, which reflects modern commercial needs such as a cost-effective and speedy resolution to a dispute, as opposed to older forms such as arbitration, which normally take longer and are less flexible than mediation. Emphasis will be placed on the interpretation and application of the said rules—more specifically the mediation process.

4.2 Brief overview of the rules

The mediation rules are modern and set out clear guidelines for the manner in which proceedings will be conducted, while at all times identifying and upholding the need for a flexible approach. The flexibility of these rules creates the opportunity for tailor-made mediation processes. One of the benefits of the rules being so flexible is that it will allow the parties to tailor the dispute resolution process so as to make it appropriate for resolving their dispute.

The rules may also be used for managing other measures or combinations of processes that are similarly used to resolve disputes. These processes include conciliation and neutral evaluation.[151] The rules are structured and offer a step-by-step approach but are still subject to the will of the parties.

---

149 Grierson and Maazouz 2013 https://www.mwe.com/en/thought-leadership/publications/2013/12/icc-launches-new-mediation-rules.

150 Anon date unknown http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/ introduction/.

151 Anon date unknown http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/#sthash.qoBzHmfZ.dpuf.

This step-by-step approach is particularly useful for parties that are not yet accustomed to mediation, but it should be noted that while the parties can tailor the process to fit their needs, they must still honour the spirit of the ICC itself. The ICC International Centre has the power to decide if it will not manage the resolution proceedings. This happens if the ICC believes that any tailor-made changes (to the ICC mediation rules) are not in the spirit of the rules.[152] Parties, therefore, have the freedom to tailor a mediation procedure precisely to their preferences and the surrounding circumstances of their specific case, while being protected in a safe procedural frame.[153] Mediation through the ICC rules is available to many types of parties, not just commercial parties.

ICC mediation can be used by anyone, including an individual person's business, states or state entities. Being affiliated with the ICC or acquiring membership is not a necessity when using its rules to resolve a dispute. ICC mediations are managed by the ICC International Centre using ICC mediation rules, and as such the ICC is the only entity with the power to direct proceedings using the ICC rules.[154] To better understand mediation under the ICC one must first understand how the ICC defines mediation.

The ICC defines mediation as: [155]

> The settlement technique in which the neutral third party acts as a facilitator to help the parties try to arrive at a negotiated settlement of their dispute.

This definition implies a minimalist descriptive approach, and it also points towards a partial interference role for mediators acting under ICC mediation rules. Therefore, the role of the mediator is limited.[156] To add to said limitations are the rules that govern the process.

---

152 Anon date unknown http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/introduction/#sthash.hc9WABLx.dpuf.

153 Anon date unknown http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Introduction/Ten-good-reasons-to-choose-ICC-Mediation/#sthash.wUTSo80J.dpuf.

154 Anon date unknown http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Introduction/Ten-good-reasons-to-choose-ICC-Mediation/#sthash.wUTSo80J.dpuf.

155 See International Chamber of Commerce 2001 http://www.iccwbo.org/products-and-services/arbitration-and-adr/adr/adr-rules-and-guide-to-adr-rules/guide-to-icc-adr/.

156 International Chamber of Commerce 2001 http://www.iccwbo.org/products-and-services/arbitration-and-adr/adr/adr-rules-and-guide-to-adr-rules/guide-to-icc-adr/.

The ICC mediation rules are a broad spectrum including preliminary provisions, rules to govern agreements referring (as well as not referring to) the use of ICC rules in dispute resolution This also includes rules regulating the place of resolution and the preferred languages to be used in the resolution of the mediation. Rules governing finance of the process and terminations of the proceedings and confidentiality are also covered.

The ICC mediation rules also focus on contractual terms for commencing mediation and also address the means of selection of a mediator. The mediator himself has limited discretion in changing the proceeding according to the instruction of the parties to the dispute.[157] Just as the mediator must honour the instructions of the parties he must also honour the principle of confidentiality.

Confidentiality provisions are clearly set out in the ICC mediation rules. These rules protect the parties to the dispute and support the process itself. This, therefore, saves the parties to the dispute the effort of ensuring confidentiality in a separate agreement and ensures their negotiations can take place in a procedurally controlled environment. The information that is disclosed in the mediation is private and confidential (although it is not confidential that the mediation is taking place). The settlement agreements reached as a result of mediations form part of the content of the mediation and are, therefore, confidential and will remain undisclosed to the public. An exception occurs if the applicable law forces disclosure or if the implementation of such agreement will disclose its content in any event.[158] The ICC also touches on a fundamentally important aspect of any dispute, and that is fees.

When using the ICC mediation rules, there is no need for fee negotiations between the parties to the dispute and the mediator, as any fee or expenses reimbursements are done directly with the Centre. The Centre also makes sure that the mediator spends his time optimally and ensures that the mediator is not the cause of unnecessary expenditures for which the parties could be liable.[159]

---

157 See generally ICC, ICC Mediation Rules (2013).
158 Article 9 of the ICC mediation rules.
159 Anon date unknown http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Introduction/Ten-good-reasons-to-choose-ICC-Mediation/#sthash.wUTSo80J.dpuf.

The ICC also goes out of its way not to alienate any parties and ensure that any procedural disagreement is handled by the ICC.

The ICC mediation rules make it possible for the Centre for ADR to facilitate a process for the parties that creates an equally satisfactory type of mediation that fits their dispute. This is aimed at taking this power away from the mediator, which therefore alleviates any possibility of one of the parties being alienated by the mediator's procedural decisions and lose trust in the process itself. If no mediation agreement existed before the dispute arose the Centre can also play a role in persuading an unwilling party to enter into the ADR process (if the other party suggested the same).[160]

If parties to a dispute firstly entered into mediation, but ultimately failed and then opted to enter into arbitration proceedings or even judicial/litigation proceedings, any communications such as statements, documents, proposals, offers to settle, admissions, submitted in the mediation prior to said arbitration or litigation cannot be used in the arbitration or litigation proceedings.[161] This concept is of great importance in countries that don't give recognition to the concept of 'without prejudice' negotiations or communications.[162]

To add to the above the key characteristics of the ICC mediation rules have been summarised below.

4.2.1 Key characteristics of the ICC mediation rules

The rules are better understood if the following characteristics are considered:[163]

1. **Administration** – the rules are administered by the International Centre. The International Centre is a separate administrative body forming part of the ICC.[164] This creates clarity regarding any concerns that may arise

---

160 See in general the ICC mediation rules.
161 In this regard please refer to the concept of without prejudice as referred to in Chapter 2.
162 Brand, Steadman and Todd *Commercial Mediation* 25.
163 Herbert Smith Freehills 2014 http://hsfnotes.com/adr/2014/04/07/new-icc-mediation-rules-launched/.
164 Herbert Smith Freehills 2014 http://hsfnotes.com/adr/2014/04/07/new-icc-mediation-rules-launched/.

regarding the distribution of communications between the mediation and arbitration bodies of the ICC.[165]

2. **Application of the rules** – any agreement entered into (after 1st January 2014 that refers to the use of the ICC mediation rules) is subject to said rules. If no such agreement is in place, then a party to the dispute can propose ICC mediation by directing an application to the ICC Centre for Alternative Dispute Resolution.[166] The Centre then informs the other party to the dispute of said proposal.[167]

3. **Outline for mediation** – the ICC mediation rules give the Centre the power to decide in which language the mediation shall be conducted, as well as the place where the mediation will occur. It must be noted that the ICC will only decide on these aspects if the parties could not agree upon a place and language among themselves.[168]

4. **Appointment of the mediator** – the parties to the dispute are allowed to mutually recommend a mediator subject to confirmation by the ICC. A list of candidates is also provided for by the Centre if the parties cannot agree on a specific one themselves. Therefore, the ICC does not have to nominate a mediator who is affiliated with the ICC at that point *per se* but it does need to evaluate said mediator to see if he is fit and proper.[169] This means that the mediator becomes associated with the ICC as a result of being nominated by the parties.[170]

5. **Confidentiality** – the content of said mediation as well as any agreements[171] entered into are kept confidential. However, the fact that

---

165 Article 1.1 of the 2014 ICC mediation rules.
166 Herbert Smith Freehills 2014 http://hsfnotes.com/adr/2014/04/07/new-icc-mediation-rules-launched/.
167 Article 3 of the 2014 ICC mediation rules.
168 Article 4 of the 2014 ICC mediation rules and http://hsfnotes.com/adr/2014/04/07/new-icc-mediation-rules-launched/.
169 Herbert Smith Freehills 2014 http://hsfnotes.com/adr/2014/04/07/new-icc-mediation-rules-launched/.
170 Article 5 of the 2014 ICC mediation rules.
171 These agreements when made in writing are enforceable as they are contractual agreements, therefore, they are enforceable in a court of law.

mediation is being held is not confidential.[172] Except if forced by law and with the absence of any contrary agreement. Parties to the mediation are not permitted to use correspondence as evidence in any judicial, arbitral or similar proceedings. This includes any documentary evidence or communications between any of the parties unless they can be obtained in other ways independent from the mediation.[173] Unless otherwise agreed upon in writing or proscribed by law, the parties may commence or continue any judicial, or arbitral proceedings prohibited by law if they so wish. This, therefore, honours the legal principle of privilege and without prejudice.[174]

6. **Manner in which preparation for and conduct of mediation will take place** – The ICC mediation rules stipulate brief rules on how to conduct the mediation or preparation.[175] The ICC mediation rules are, therefore, not aimed at being too rigid but instead are rather aimed at maintaining complete flexibility for the parties to the dispute by providing minimal interference and granting the parties maximum freedom. Article 7 of the rules gives guidance on how to conduct mediations.[176]

Article 7 reads as follows:[177]

> The Mediator and the parties shall promptly discuss the manner in which the mediation shall be conducted. After such discussion, the Mediator shall promptly provide the parties with a written note informing them of the manner in which the mediation shall be conducted. Each party, by agreeing to refer a dispute to the Rules, agrees to participate in the Proceedings at least until receipt of such note from the Mediator or earlier termination of the Proceedings pursuant to Article 8(1) of the Rules. In establishing and conducting the mediation, the Mediator shall be guided by the wishes of the parties and shall treat them with fairness and impartiality. Each party shall act in good faith throughout the mediation.

---

172 Article 9 of the 2014 ICC mediation rules.
173 Herbert Smith Freehills 2014 http://hsfnotes.com/adr/2014/04/07/new-icc-mediation-rules-launched/.
174 Article 9 subsection 2 of the ICC mediation rules.
175 Article 7 of the 2014 ICC mediation rules.
176 Herbert Smith Freehills 2014 http://hsfnotes.com/adr/2014/04/07/new-icc-mediation-rules-launched/.
177 Article 7 of the 2014 ICC mediation rules.

From the above, it can be established that no actual framework for the process of the mediation itself is provided for by the ICC mediation rules. Therefore, one can deduct from this that the ICC leans towards the general principle of flexibility and tailors the process to fit the parties and the dispute itself rather than subjecting itself to a rigid process from which it cannot stray (which is of benefit to the disputants). From the above, it can be argued that the ICC mediation rules complement current commercial needs. It does this by providing clear guidelines for the manner in which proceedings will be conducted while understanding and respecting the need for a flexible approach. This approach is tailored to fit not only the parties (by catering to their wants and needs) but also equally to the dispute itself (refer specifically to Article 7 of the ICC mediation rules).

4.2.2 Guidance notes to the ICC mediation rules

"Mediation Guidance Notes" that accompany the rules provide recommendations on specific aspects of the rules. These above-mentioned notes give helpful guidance on topics such as the following:[178]

1. Interaction amid ‘one-on-one’ and ‘joint’ mediation sessions

Throughout the separate sessions of mediation, the mediator has two options. One is holding joint sessions with all the parties involved, and the other is holding separate mediation sessions. The reason behind holding joint or private session depends on what option would be best to resolve the dispute in question and the requirements of the case.[179] This principle is coupled with Article 7(1) of the rules.

2. Case summaries and their uses

All parties to the mediation need to comprehend the wants and needs of their opposing parties. This opens the door for each party to analyse their own position and therefore have possible settlement options in advance. Case summaries are

---

178 See in general the ICC guidance notes, note 1-41.
179 ICC Guidance note 12.

therefore exchanged between the parties (including the mediator) that set out the background to the dispute.[180]

3. Efficient preparation

The responsibility to be prepared is that of all parties involved including the mediator, and the parties, as well as their respective advisors. As a result of this responsibility Article 7(1) is a disposition from all parties of how the mediation is to be held.

4.2.3 Model clauses

The ICC mediation rules are further complemented by standard contractual clauses that the parties to the dispute could bring under consideration when considering their own dispute resolution framework. These clauses have requirements regarding the relationship and interactions concerning the process of mediation and the emergency arbitrator provisions newly brought about in the recent revisions to the ICC arbitration rules (enforceable from 1st January 2012).[181] These model clauses are found at the end of the mediation rules that provide for four different types of scenarios. These are:[182]

1. The use of the ICC mediation rules as an option for resolution of the dispute;
2. The use of the ICC mediation rules as an obligation for resolution of the dispute;
3. Parallel arbitration accompanied with the obligation to make use of the ICC mediation rules; and
4. A multi-tier agreement. This is prior to resorting to arbitration where an obligation to use the ICC mediation rules must be met.

---

180 ICC Guidance note 24.
181 Herbert Smith Freehills 2014 http://hsfnotes.com/adr/2014/04/07/new-icc-mediation-rules-launched/.
182 McDermott and Emery *9th ICC International Mediation Competition*.

The relevance of mentioning the above clauses is to illustrate that the ICC mediation rules cover a multitude of disputes that originate out of arbitration contractual obligations and multi-tier agreements.

4.3 Advantages and disadvantages of the ICC mediation rules

4.3.1 Advantages

Closely associated with the characteristics of the ICC mediation rules are its benefits. These benefits include:

The rules are international with regards to their nature as derived from its name: "The International Chamber of Commerce" (the ICC). Therefore its mediation rules boast a truly international frame of operations and therefore would not struggle to facilitate an international commercial dispute.[183]

The rules have a flexible approach to language. The ICC mediation rules make it possible for the parties to come to an agreement about the language to be used and therefore grants them the opportunity to resolve the dispute in a language with which they are comfortable.[184]

It can be argued that flexibility is the single most significant benefit of the ICC mediation rules. As with the ICC mediation rules, in looking at its general characteristics, nothing can be seen as ‘set in stone’. The ICC tries to be flexible in all aspects of the dispute and the resolution thereof. This includes aspects such as the process of the mediation, and the place of the mediation session, as well as fees.[185]

As explained previously the ICC honours the general principles of confidentiality associated with mediation.[186]

---

183 Anon date unknown http://www.iccwbo.org/about-icc/organization/icc-global-headquarters/.
184 Article 9 of the 2014 ICC mediation rules.
185 Article 1 of the 2014 ICC mediation rules.
186 Article 9 of the 2014 ICC mediation rules.

4.3.2 Disadvantages

The benefits associated with the ICC mediation rules are quite compelling, however, these rules are not without their flaws.

Although it was stated above that the international aspect of the rules is an advantage, this aspect could also be depicted as a disadvantage, especially with regard to a South African perspective. The reason behind this is that the ICC itself is based in Europe, which means it could not possibly cater for a purely South African dispute and understand from where a South African party's wants, needs and motives to its dispute originate. But this problem could easily be overcome with the proper appointment of the right mediator who has an understanding of the respective party's background and therefore interests. The appointment of a proper mediator is of great importance because it could be argued that a mediator who has an understanding of the wants, needs and motives of the parties in the mediation will naturally be better equipped to help facilitate the resolution of the said dispute.

Although mediation can be seen as a form of alternative dispute resolution that actually caters for access to justice, accessibility to ICC-facilitated mediation could be an issue. Parties to a dispute in South Africa are unable to actually go to their local ICC Centre to resolve a dispute as there are no centres in South Africa to which they could go. With regard to this aspect, it must be kept in mind that the ICC does not need to be the only provider of meditation in a South African perspective. The question should rather be asked whether a framework modelled on the ICC mediation rules could be used in a South African perspective.

4.4 Conclusion

When analysing the ICC mediation rules discussed above it becomes apparent to the reader that the ICC has created a usable framework for the facilitation of international commercial mediation. This has become possible as the ICC mediation rules offer a transparent, flexible and truly international framework for the application of its rules.

The ICC mediation rules (accompanied by their guidance notes) give a complete understanding to many organisational and practical questions that disputants could consider if opting for mediation facilitated by the ICC. This becomes possible because of the easy procedural explanations of the mediation process. The guidance notes facilitate the application of the rules to set the parties at ease when agreeing to use mediation facilitated by the ICC.

From the above, it should become apparent that the ICC has now created an easily applicable and understandable process that could be applied on an international level. The question now must be asked whether the ICC mediation rules can be applied in a South African commercial context.

Chapter 5: Comparison between the South African position of using mediation to resolve commercial disputes to that of the mediation rules used by the ICC

5.1 Introduction

From the previous chapters, it can be concluded that South Africa has in recent years attempted to implement mediation to resolve disputes. These attempts were implemented in the form of the court-based mediation rules of 2014 and specific corporate governance initiatives, as well as the King reports, and the implementation of legislation.[187] An attempt will now be made in this chapter to analyse the possible implementation of the ICC mediation rules in a South African perspective focusing on what the writer believes is of most relevance in regards to the topic in question. This will be achieved by comparing aspects of South African court-based mediation rules, and relevant judicial and legislative developments or shortcomings in South African mediation to equivalent ICC mediation aspects. More specifically, aspects such as costs, place of mediation, language, referral to mediation, contractual agreements and referral by the courts, selection and appointment of the mediator, the conduct of the mediation, termination of the proceedings, confidentiality and international disputes will be subjected to this comparison. A short discussion on the lack of examples of ADR boilerplate clauses for South African contracts and the possible implementation of the ICC mediation rules to alleviate this problem will also be found in this chapter.

The first aspect that becomes apparent when evaluating the previous two chapters is that neither from a South African perspective nor from the ICC mediation rules can a procedural framework for mediation be extracted. The reason for this is found when evaluating the nature of mediation itself and more specifically its characteristic of flexibility. The process of mediation is loosely explained in Chapter 2. The writer is of the opinion that as the process is party controlled, flexible and tailored to fit the parties' needs there is no reason to provide a rigid process of mediation if it will be changed. This, therefore, leads to

---

[187] Legislation such as the *Companies Act* 71 0f 2008.

the question of whether specific aspects of the ICC mediation rules could be implemented towards the development of mediation in South Africa as a whole.

5.2 Implementation of the ICC mediation rules to South African contract law

As explained in Chapter 3 South Africa has no actual procedural framework when it comes to mediation and neither do the ICC mediation rules. The question now arises whether the ICC mediation rules could act as examples of steadfast mediation boilerplate clauses for South African contractual purposes.

In a South African perspective, there is no *Mediation Act* that gives guidance with regard to procedure or provides recommendations on how a mediation clause should look. Much more development in the field of commercial mediation in South Africa has resulted since the implementation of the draft King III Report. This report provides a detailed example of an ADR clause which in part reads:[188]

> If any dispute arises out of or in connection with this Agreement, or related thereto, whether directly or indirectly, the parties must refer the dispute for resolution firstly by way of negotiation and in the event of that failing, by way of mediation and in the event of that failing, by way of Arbitration. The reference to negotiation and mediation is a precondition to the Parties having the dispute resolved by arbitration…

The clause goes on further giving time frames for the negotiation proceeding as well as for the mediation proceeding to be concluded. Ultimately though the clause details how the final arbitrational proceedings will happen, along with the place and the organisation that will facilitate the proceeding. The clause also provides that the agreement will not preclude the parties from seeking interim relief from a court of law once the ADR proceeding has commenced if needs be.

Although steps in the right direction have been taken in the recognition of mediation by the draft King III Report—as well as to make it a prerequisite to arbitration—it could be argued that so much more could have been done to develop mediation in a South African perspective. Therefore, it is believed that the King III Report was a missed opportunity to truly make mediation mainstream in

---

188 IODSA 2009 www.iodsa.co.za/products_reports.asp?catID=150.

South Africa. The reason behind this claimed failure is that the drafters of the King III Report could have provided a whole framework for the use of mediation as they did with arbitration.

The implementation of examples from ICC mediation could be the answer to rectify the above-mentioned failure. The ICC provides a set of recommended clauses each with a slightly different aim. The first of these clauses "Clause A" can be seen as a reminder clause that has the express purpose of simply reminding the parties that the services of the ICC are available to them at all time during the term of the contract. Clause A reads:[189]

> The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC Mediation rules.

The second clause "Clause B" is an obligation-creating clause. Clause B, therefore, goes a step further than Clause A and makes it a contractual obligation to refer to mediation facilitated by the ICC. Clause B explains that mediation here can run parallel with arbitration. Clause B partly reads:[190]

> In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation rules...

The last of the three clause's "Clause C" is the most favourable towards mediation and makes it an obligation to enter into mediation proceedings before even considering arbitration or litigation. This clause partly reads:[191]

> In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation rules…

When comparing these above ICC clauses to the King III Report it is apparent that these clauses concentrate firstly or only on the initial implementation of mediation,

---

189 Anon date unknown http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/suggested-clauses/.

190 Anon date unknown http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/suggested-clauses/.

191 Anon date unknown http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/suggested-clauses/.

while the King III clause concentrates on ADR but mainly arbitration. Therefore, the implementation of an ICC mediation framework with regard to ADR clauses would go a great way towards the development of mediation in a South African context. This is because with regard to referral to mediation it would force parties to use the mediation process if similar clauses to the ICC clauses are included in their contract.

5.3 Costs

One of the most important advantages of mediation (and arguably its biggest attraction) is the financial benefits it might have; namely, that it is usually much cheaper for the parties compared to the more expensive traditional dispute resolution method that is litigation.[192]

The court-based mediation rules of 2014 only briefly touch on this very important aspect of mediation here under "Functions and duties of clerk and registers". Section 76 of the rules accordingly reads as follows:[193]

> 76. (1) a clerk or registrar of the court must explain to all parties-
>
> (a) The purpose of alternative dispute resolution, the meaning, objectives and benefits, including cost saving of mediation; and
>
> (b) Their liability for the fees of the mediator.

This provision (in the South African context) is too vague and leaves many questions that the parties to mediation might have with regard to specific costs of the possible mediation in question. In contrast, the ICC mediation rules provide frameworks for fees and costs, including filing fees, administrative expenses deposits, reimbursements, mediator's fees and expenses, the applicable currency as well as vat, and its scope.[194]

Appendices[195] to the rules are also available that clearly set out fixed amounts for remuneration in respect of filing and administration costs as well as general fees

---

192 Brand, Steadman and Todd *Commercial Mediation* 27.
193 Court based mediation rules of 2014 section 76
194 See Appendix of the ICC mediation rules.
195 See Appendix of the ICC mediation rules.

for the mediation measured by the amount of money that is in dispute.[196] The type of framework provided by these appendices could serve as an appropriate foundation for the South African legislator/minister to create clarity and/or to create fixed fees that a mediator is entitled to claim from parties to mediation. This remuneration could be similar to that of the fixed amounts legislator in South Africa[197] for legal practitioners.[198]

5.4 Place of mediation

There is no clarity provided by any South African legislation on where exactly mediation should take place. There is also no clarity whether mediation should take place within the jurisdiction of the court where the legal dispute would have been subject to litigation. The relevance of this aspect is of administrative importance to the parties involved in the dispute with regard to travelling.

In contrast, the ICC provides under Article 4(1) that:[199]

> In the absence of an agreement of the parties, the Centre may determine the location of any physical meeting of the Mediator and the parties or may invite the Mediator to do so after the Mediator has been confirmed or appointed.

This may not at first glance sound like an important aspect. However, it should be noted that the relationship between the disputants might be strained to such an extent that the parties may agree to mediation but be unable or unwilling to agree on other aspects, including location. Therefore, this provision enables the mediator to make this decision on behalf of the parties if they cannot decide it among themselves. More importantly when looking at international commercial disputes the place where the mediation has to take place becomes significantly important as it might be in a completely different country altogether.

---

196 See Appendix of the ICC mediation rules.
197 Rules Board for Courts of Law Act 107 of 1985; Reg 31 of GG 38399 of 23 January 2015.
198 Article 4 of the ICC mediation rules.
199 Court-based mediation rules 2014.

5.5 Language

Eleven official languages[200] would naturally create difficulty in a multicultural dispute, not to mention languages of international trade partners such as European and Asian countries. The use of a single language or alternatively using the services of an interpreter for the sake of convenience is of paramount importance when it comes to mediation as a matter can't be mediated if the parties don't understand one another. Here again, the court-based mediation rules do not provide clarity on the subject. Again the ICC mediation rules could act as a suitable framework within which to decide upon the mediation language. Here the rules stipulate that if the parties cannot decide on a language for the mediation the ICC will do so for them. This decision is made by the mediator thus alleviating any dispute on the subject.[201]

Parties to mediation do have the right to make use of interpreters if it is deemed necessary. The mediation process is a flexible one and therefore can be tailored to fit the parties to the dispute. This includes proceeding in the parties' preferred languages, thus preventing any situation where a party may have the upper hand in negotiations because the language used better suits that party.

5.6 Referral to mediation contractual agreements and referral by the courts

Sections 77–79 of the court-based mediation rules[202] pertain to the referral of the dispute mediation, be it by the parties to the dispute (litigants) or the court itself.

Section 77 of the court-based mediation rules addresses the issue of the referral to mediation before the commencement of litigation by giving a detailed description of the process to be followed in this situation.[203] The ICC mediation rules (if applied) would not actually improve this aspect of mediation in a South African context. Therefore in making a comparison one can argue that the South

---

200 Section 6(1) of the Constitution.
201 Here again language in ICC mediation rules.
202 Court-based mediation rules 2014.
203 See here ss 77(1)-(6) of the Court-based mediation rules.

African position is actually stronger than that of the ICC, therefore the implementation of the ICC mediation rules would not be a beneficial option.

Section 78 of the court-based mediation rules specifically indicates the referral to mediate by parties to the dispute (litigants) and section 78(1)(a) reads:[204]

> 78 (1) (a) Any party may at any stage after litigation has commenced, but before trial, request the clerk or registrar of the court, in writing, to refer the dispute to mediation.[205]

Section 78 goes on further to give a detailed explanation of the process to be followed if parties to the dispute are referred to mediation, and, if applied, the ICC mediation rules would not complement or improve this process in a South African context. Therefore in making a comparison one can argue that the South African position is actually stronger than that of the ICC, therefore the implementation of the ICC mediation rules would not be a beneficial option.

Section 79 refers to mediation by the court and reads:[206]

> (1) A court may, prior to or during a trial but before judgement, enquire into the possibility of mediation and accord the parties an opportunity to refer the dispute to the clerk or registrar of the court to facilitate mediation.
>
> (2) If during the trial the parties consent to the dispute being mediated, the parties must request the court to refer the dispute to the clerk or registrar of the court to facilitate mediation.
>
> (3) The provisions of rules 76(2), 77(4) and 78(4) apply if a dispute is referred to mediation under this rule.

Here it can be deduced that that application of the ICC mediation rules would not improve referral by courts in a South African perspective as section 79 more than covers this aspect of court-based mediation in South Africa by providing substantial sections in the regulation of this aspect.

---

204 Section 78(1)(a) of the Court-based mediation rules 2014.

205 The clerk of the court can be defined as an Officer of the court responsible for those administrative duties that stem from the conducting of a magistrates court or small claims court. A definition can be found in Centre for Legal Terminology in African Languages *Legal terminology* 40.
A registrar can be defined as a person who is head of a section in the civil service whose duty is to maintain an official register. A definition can be found in Centre for Legal Terminology in African Languages *Legal terminology* 256.

206 Article 79(1)-(3) of the 2014 Court-based mediation rules.

Whether the mediation is initiated by the parties or ordered by the court the above illustrates that South Africa does not need a framework such as the ICC to improve its current regulations. This is because court-annexed mediations rules do cover this aspect effectively. Although it could be argued that when amending these court-annexed rules in the future for whatever reason, the ICC mediation rules would act as a great foundation for such possible amendments. But the same cannot be said if contractual clauses between the parties to a dispute refer any possible dispute between the parties to opt for mediation. Regarding this aspect, there is no framework for mediation in a South African perspective and therefore a grey area exists on this specific aspect. The ICC mediation rule might serve as the catalyst for change in this regard. Article 2 of the ICC mediation rules provides a detailed process of what to do if a party wishes to refer a dispute to the ICC if the parties had a pre-contractual agreement.[207]

5.7 Selection and appointment of the mediator

The South African court-based mediation rules briefly touch on the appointment of a mediator. In section 86[208] mention is made of accreditation of mediators, denoting their standards and qualifications, the former will be determined by the minister. It could be argued that this provision is somewhat limited and significantly limits the parties' choice of mediators and the flexibility of the entire process. The ICC mediation rules might act as a suitable framework to amend and improve this section for the sake of clarity and certainty. Here the ICC stipulates a detailed process of selection of a mediator.[209] In this process, the rules hold that parties may nominate their own mediator subject to the Centre's confirmation. In the absence of a consensus for the appointment of a mediator, a list will be given to the parties as a suggestion for an appointment. If no consensus still exists, only then will the Centre appoint a mediator for the parties.

Article 5 further holds that the possible mediator in question for appointment will also have to declare any possible grounds of his partiality with regard to the

---

207 Refer to a 2 of the ICC mediation rules as annexed.
208 Section 86 of the court-based mediation rules.
209 Article 5 of the ICC mediation rules.

specific dispute in question. This possible partiality will be brought to the attention of the disputants before his appointment. The ICC will also take it upon themselves to make sure that the mediator is qualified to mediate the dispute in question before he is appointed.[210] Article 5 of the ICC mediation rules even make it possible that more than one mediator can be appointed for the dispute in question if it deems this to be necessary.

Therefore, the ICC has a superior selection and appointment process compared to the provisions of the South African court-annexed mediation rules.

5.8 Conduct of the mediation

In the South African court-based mediation rules no real description of how the mediation will be conducted is given and, therefore, the only reasonable assumption that can be made is that a basic process such as the one described in Chapter 2 will be used in a South African context. The ICC mediation rules could be a suitable framework to solve this problem. Here the ICC mediation rules provide at Article 7:[211]

> 1
>
> The Mediator and the parties shall promptly discuss the manner in which the mediation shall be conducted.
>
> 2
>
> After such discussion, the Mediator shall promptly provide the parties with a written note informing them of the manner in which the mediation shall be conducted. Each party, by agreeing to refer a dispute to the Rules, agrees to participate in the Proceedings at least until receipt of such note from the Mediator or earlier termination of the Proceedings pursuant to Article 8(1) of the Rules.
>
> 3
>
> In establishing and conducting the mediation, the Mediator shall be guided by the wishes of the parties and shall treat them with fairness and impartiality.
>
> 4
>
> Each party shall act in good faith throughout the mediation.

---

210 Article 5 of the ICC mediation rules.
211 Article 7 of the ICC mediation rules.

It might be argued that the conduct of the mediation is not of great importance when it comes to the provision of a framework in a South African perspective. From the perspective of possible parties to a dispute, it will create greater clarity on the subject and might even change the minds of parties who were initially doubtful in choosing mediation as an ADR process.

5.9 Termination of the proceeding

In a South African perspective, no regulations or indications are provided that are of similar stature to the ICC mediation rules. Article 8 of the ICC mediation rules provides a list from A to G on when mediation is deemed to be terminated/ finished.

Therefore, the ICC has a superior termination procedure when compared to the non-existent South African equivalent. This thus means that the implementation of the ICC mediation rules with regard to this principle would be beneficial from a South African perspective.

5.10 In-depth provision concerning confidentiality

In a South African perspective, confidentiality with regard to mediation is merely defined and briefly discussed in Annexure 3 of the court-based mediation rules, more specifically at forms 6 and 14.[212]

Here the ICC mediation rules provide a detailed explanation of confidentiality in mediation proceedings. This includes the principle of confidentiality if the mediation in question results in litigation or arbitration proceedings.[213]

Therefore, the ICC has superior provisions concerning confidentiality when compared to the South African equivalent. This consequently means that the implementation of the ICC mediation rules with regard to this principle would be beneficial from a South African perspective.

---

212 Court-based mediation rules 2014.
213 See a 9 of the ICC mediation rules.

5.11 Other possible areas where the ICC rule could be implemented

Many other areas that are mentioned in the ICC rules could be implemented in a South African commercial mediation context, these include:

1. Proposals for time limits within which the mediation is to be conducted.[214] Sections 2–8 of the ICC mediation rules make mention of various time limits that could be set for the actual mediation to take place or be finalised by. Nowhere in the South African court-annexed mediation rules is there mention of similar provisions, and therefore the implementation of similar rules in a South African context would help develop mediation.

2. Liability of the mediator and/or its Centre.[215]

   With regard to this aspect Article 10, sub-article 5 reads as follows:[216]

   > The Mediator, the Centre, the ICC and its employees, the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the Proceedings, except to the extent such limitation of liability is prohibited by applicable law.

   Nowhere in the South African court-annexed rules can similar provisions be found, and this could be a great problem because disgruntled parties could directly blame the process of mediation—and therefore the mediator—if a mediation does not go their way, which could result in legal action being taken against the mediator for damages. A full disclosure from liability as found in the ICC mediation rule could be the answer to this problem.

3. The idea and explanation of flexibility of the process.[217]

   Article 1 of the ICC mediation rules fully explains the characteristic of flexibility with regard to mediation. The court-annexed mediation rules lack such an explanation and therefore puts parties less at ease about the

---

214 Article 2 of the ICC mediation rules.
215 Article 10 of the ICC mediation rules.
216 Article 10 of the ICC mediation rules.
217 Article 1 of the ICC mediation rules.

process than the ICC mediation rules would, therefore an implementation of the ICC rules in this regard would act as a positive point of development.

4. Referral to the ICC rules for Appointment of Experts or Neutral in highly specialised complexed disputes.[218]

   Here the ICC mediation rules ensure that an adequate mediator is appointed to fit the dispute. This is of great importance to ensure that the resolution is fair and ultimately successful. The South African court-annexed rules lack this aspect and would profit from its implementation.

5.12 International disputes

The above only focused on South African steps taken to develop mediation (implementation of court-based mediation rules) and a comparison with this was made with the ICC rules for mediation. The question then is that if a South African commercial entity were to be involved in a legal dispute with a commercial entity based in another country what would be the best way to resolve this dispute? Notwithstanding the basic principles of international private law and the jurisdictional issues accompanied by it, here again, the answer can be found while considering the implementation of the ICC mediation rules. These rules could be the proverbial bridge over troubled jurisdictional waters.

5.13 ***Financial and resource short fallings in regards to the implementation of mediation in South Africa***

It is one thing to say that South Africa might benefit from the implementation of the ICC mediation rule as to develop its mediation, but it's a whole different question if our limited resources and finances could support such a development. The recent financial budget of 2017 has indicated that an estimated growth in the development of ADR has decreased to 7.1% as from 2017 to 2019 as opposed to the 9% from 2013 to 2017.[219] This is a clear indication that less attention has now been paid to the development ADR and thus mediation. This development greatly

---

[218] Article 5 of the ICC mediation rules.
[219] The 2017 Estimates of National Expenditure 2017 e publications RSA pg 588

hurts the possible implementation of new systems or frameworks such as the ICC mediation rules. To add to this disappointing development the NPA (National prosecuting Authority) have been instructed to only appoint the bare essential staff at courts[220] and thus there exists no prospects of expert court based mediation officials being appointed at courts anytime soon.

5.14 Conclusion

Amid the existing weapons in the South African alternative dispute resolution arsenal lays mediation. The ICC mediation rules are very well formulated, extremely confidential, and most appealingly, very flexible as they are party controlled. The ICC offers the parties the facilitation of their own innovative solution to their own specific dispute with the help of a skilled neutral person, namely a mediator. Any party is free to terminate the proceeding after the first discussion with the mediator. As a result, the parties are not legally subjected to any solution unless they agree to it personally in a settlement agreement or contract. This should be seen as a very appealing option for South African local as well as international commercial parties who would rather try and test the waters before jumping right into the deep end of litigation.

In the cutthroat world of commerce and its resultant disputes, where an assortment of tools are available for dispute resolution, it is paramount for courts, legislatures, and the legal fraternity, as well as parties to a dispute, not to be narrow-minded. The implementation of a framework from an already proven source such as the ICC in international commercial disputes will not only improve international dispute resolution, but it will also improve local South African dispute resolution in the form of mediation.

South Africa has recently entered the realm of mediation through the implementation of the court-based mediation rules of 2014 as well as the King reports but it could be argued that government, the legislature, and courts, as well

[220] The 2017 Estimates of National Expenditure 2017 e publications RSA National Treasury pg 394

as private commercial entities, should not stop here or rest on their laurels. The South African commercial community should push for change and the implementation of a world-leading framework for mediation—such as the ICC mediation rules—to act as a framework for the amendment of currently flawed regulations. The implementation of these rules could serve as a catalyst for change and propel existing South African mediation to the forefront of international commercial mediation.

Chapter 6: Conclusion and recommendations

6.1 Conclusion

Initially, the question asked was how South Africa could benefit from the incorporation of the ICC mediation rules, especially in the resolution of commercial disputes. This possible incorporation was posed in a South African context. The desired result would be to adopt the ICC mediation rules in the development of commercial mediation in a South African context. The research shows a promising indication that the above can be realised.

Initially, a foundation was laid for the purpose of better understanding mediation. It was concluded that mediation has the desirable characteristics for it to be considered as a suitable ADR process in solving commercial disputes. The reason for this is that mediation succeeds in providing a flexible, cost-effective alternative to arbitration and litigation for commercial disputes.[221] In describing mediation the following characteristics of mediation were considered and evaluated, these being: flexibility, confidentiality, timeous nature, cost efficiency and informality.

A discussion with regard to mediation in a South African context was given in this dissertation. With regard to the development of mediation in a South African perspective, it was established that mediation has only recently become noticed.[222] Mediation's growth in popularity is made apparent in many fields, such as corporate governance, the judiciary, and the legislation, as well as the implementation of court-based mediation. Although the development of mediation has occurred in South Africa there still is no *Mediation Act* or governing body that could provide real clarity for potential parties to mediation. This, therefore, leads to a discussion on the ICC mediation rules as a solution to the problem.

An attempt was made by the writer to create a better understanding of the ICC mediation rules and an analysis of said rules was given. The ICC mediation rules—including its guidance notes—illustrate a comprehensive disposition of

---

221 Feehily 2009 *SALJ* 291.
222 See Brand, Steadman and Todd *Commercial Mediation* in general.

modern-day mediation. The ICC mediation rules provide understanding to many organisational aspects and answers real-world queries that disputants might have when opting for mediation in the context of the ICC rules. The informal procedural explanations of the mediation process create this possibility. This methodical approach is useful for parties to a dispute that are not yet accustomed to mediation.[223]

Some of the points discussed in this dissertation with regard to the ICC mediation can be summarised as the following: the rules are capable of governing agreements that either refer or do not actually refer to the use of ICC rules. The rules also regulate the location at which the mediation should be held, and the preferential languages to be used in the resolution. Finally, the rules provide a framework for governing finance of the process, and termination of the proceedings, as well as an explanation of its confidentiality.[224]

Lastly, a comparison was made between the ICC mediation rules and current South African mediation. It is apparent from this comparison that South Africa has made a valiant attempt implement mediation. Be it valiant, this attempt to make mediation a more mainstream form of dispute resolution still lacks in fundamental areas including the actual process of mediations, remuneration of the mediator, time and place of the mediation, confidentiality and preferred language of the mediation, to mention but a few.

With the implementation of the court-based mediation rules, it can be seen that mediation has now been endorsed by the South African legislature. Although this is a partial endorsement as it's only to the point that parties are being encouraged to use mediation or other alternative forms of dispute resolution. Nowhere[225] in South African legislation has a framework for mediation in itself been created and therefore there is a need for certainty with regard to specific aspects of mediation. It is in this context that the ICC mediation rules could play an influential role in the development as well as regulation of mediation in a South African context. The ICC mediation rules could act as a framework for basic, yet fundamental aspects

---

223 See in general the ICC mediation rules.
224 See in general the ICC mediation rules.
225 Except for the court-based mediation rules to a degree.

of mediation such as confidentiality, the appointment of a mediator, as well as the resulting settlement agreement.

In South Africa, mediation is growing in relevance every day and the implementation of the court-based mediation rules of 2014 is a testament to this growth. Although the rules have been implemented they lack substance and when compared to the ICC mediation rules it could be argued that South African mediation still needs much encouragement for growth.

When drafting dispute resolution clauses or when considering mediation as an ADR process, South African mediation practitioners can find expert guidance from the ICC mediation rules. The multifaceted approach of the ICC can be of immeasurable value to a turbulent South African dispute resolution arena.

South African mediators and commercial disputants should be optimistic about the possible future advantages that the ICC mediation rules might bring to the ADR landscape in South Africa if it were to decide to implement said rules and become signatories of the ICC. The implementation of a framework created by the ICC mediation rules could greatly improve current mediation processes. Implementation of the ICC mediation rules has the potential to help firmly establish mediation in a South African commercial arena as a process that cannot be ignored by any professional involved in ADR. The ICC mediation rules can at least provide a legal framework to enlighten parties to a dispute (including mediators) when considering mediation. Implementing an ICC influenced framework will not have the effect of totally enacting mediation in a rigid sense but will rather shed light and answer questions for doubtful parties.

Mediation gives the parties to a commercial dispute the opportunity to save the business relationship between them and, therefore, leave the option for future business open.[226] In an international sense, mediation gives parties the opportunity to not be subjected to court proceedings in a country they would not be familiar or comfortable with to take part in a long and expensive litigation process. As mentioned previously, South Africa has not applied its collective

---

[226] Brand, Steadman and Todd *Commercial Mediation* 29.

minds in fully utilising mediation in a commercial sense. Therefore, a guiding hand is needed in the form of the ICC mediation rules to lead South Africa into a modern alternative dispute resolution age. These mediation rules comprise of well thought-out and effective provisions. The mediation rules do not only attract parties seeking alternatives to litigation and arbitration, but also to parties that want to resolve their dispute in the most effective, cost-effective and practical way possible.

Looking at events such as the formation of the ICC mediation rules one can undoubtedly conclude that ADR and more specifically Mediation is a worldwide irreversible trend. This trend addresses real and urgent commercial needs. These needs result from multiple issues such as access to justice and the liberalisation of trade in general. If South Africa wishes to be, a heavy hitter on an international stage it must accepts said issues and embrace the culture of international mediation that is clearly forming. The incorporation of the ICC mediation rules is thus a cultivated step towards the right direction.

Finally, with regard to answering the research question in this dissertation, it should now be apparent that there is definitely a use for the implementation of the ICC mediation rules in a South African perspective. This is because the ICC mediation rules could act as a basic template for mediation in a South African context or even as the foundation of a South African legislation for mediation, however nothing is without defect and the ICC rules could require revision or additional sections to make them plausible and applicable in a South African legal context.

6.2 Recommendations

Considering the above it is recommended that the following considerations in a South African mediation perspective are made:

a.) The ICC mediation rules should not be wholly implemented in a South African perspective, but rather partially to cater to specific shortfalls in South African mediation.

b.) A definite consideration should be made for the implementation of a *Mediation Act* similar to the existing *Arbitration Act* but based on the ICC mediation rules of 2014.

c.) When evaluating mediation (including its characteristics and benefits) it should be brought under much more serious consideration when considering dispute resolution mechanism in South Africa.

d.) Finally, Even though financial and lack of resources in regards to the resent budget constraints faced by legislative and prosecuting authorities hamper the possibilities of developing mediation in the near future, this goal should at least be a long term goal.

BIBLIOGRAPHY

Literature

Antrobus and Sutherland "Some ADR techniques in commercial disputes"

Antrobus M and Sutherland R "Some ADR techniques in commercial disputes: prospects for better business" in Pretorius P (ed) *Dispute Resolution* (Juta Cape Town 1993)

Armstrong F 'Business Litigation and the Litigation Business- Getting to settlement through Mediation'

Armstrong Fergus Business Litigation and the Litigation Business- Getting to settlement through Mediation' Public affairs Ireland (2004) 4.

Astor and Chinkin *Dispute resolution in Australia*

Astor H and Chinkin C *Dispute resolution in Australia* (LexisNexis North Ryde Australia 2002)

Blake, Browne and Sime *A practical approach to ADR*

Blake S, Browne J and Sime S *A practical approach to alternative dispute resolution* (Oxford University Press Oxford 2010)

Boulle and Nesic *Mediation*

Boulle L and Nesic M *Mediation: principles process practice* (Butterworths London 2009)

Brand, Steadman and Todd *Commercial Mediation*

Brand J, Steadman F and Todd C *Commercial Mediation: A users guide to court-referred and voluntary mediation in South Africa* (Juta Cape Town 2014)

Centre for Legal Terminology in African Languages *Legal terminology*

Centre for Legal Terminology in African Languages *Legal terminology: Criminal law, Procedure and Evidence* (Juta Cape Town 2015)

Cohen "Conflict resolution across cultures: Bridging the gap"

Cohen R "Conflict resolution across cultures: Bridging the gap" in Jacquin-Berdal D, Oros A and Verweij M *Culture in world politics* (Palgrave Macmillan New York 2001) 116-133

Dress 1988 *Loy LA Int'l & Comp L Rev*

Dress TP "International commercial mediation and conciliation" 1988 *Loyola of Los Angeles International and Comparative Law Review* 569-582

Feehily 2009 *SALJ*

Feehily R "Costs sanctions; The critical instruments in the development of commercial mediation in South Africa" 2009 *SALJ* 291-315

Feehily *The development of commercial mediation in South Africa*

Feehily R *The development of commercial mediation in South Africa in view of the experience in Europe, North America and Australia* (PhD thesis Cape Town University of Cape Town 2008)

Folberg and Taylor *Mediation*

Folberg J and Taylor A *Mediation: A comprehensive guide to resolving conflicts without litigation* (Jossey-Bass San Francisco 1990)

Goldsmith, Ingen-Housz and Pointon *ADR in business*

Goldsmith JC, Ingen-Housz A and Pointon GH *ADR in business: Practice and issues across countries and cultures* (Kluwer Law International Alphen aan den Rijn 2011)

Greenhalgh *Managing strategic relationships*

Greenhalgh L *Managing strategic relationships: The key to business success* (Free Press New York 2001)

Guillemin "Reasons for choosing ADR"

Guillemin JF "Reasons for choosing alternative dispute resolution" in Goldsmith JC, Ingen-Housz A and Pointon GH *ADR in business: Practice and issues across countries and cultures* (Kluwer Law International Alphen aan den Rijn 2011)

Henderson 1996 *Ohio St J on Disp Resol*

Henderson DA "Mediation success: An empirical analysis" 1996 *Ohio State Journal on Dispute Resolution* 105-549

Kantor 2011 *New Directions in International Economic Law*

Kantor M "Negotiated settlement of public infrastructure disputes" 2011 *New Directions in International Economic Law* 199-222

Love 2001 *Ohio St J Disp Resol*

Love LP "Twenty-five years later with promises to keep: Legal education in dispute resolution and training of mediators" 2001 *Ohio State Journal on Dispute Resolution* 597-641

McDermott and Emery *9th ICC International Commercial Mediation Competition*

McDermott W and Emery E supports the *9th ICC International Commercial Mediation Competition* (7-12 February 2014, Paris) as part of ICC's Mediation Week

Moore *The mediation process*

Moore CW *The mediation process: Practical strategies for resolving conflict* 4th ed (Jossey-Bass San Francisco 2014)

Nolan-Haley 1999 *Notre Dame LR*

Nolan-Haley JM "Informed consent in mediation: A guiding principle for truly educated decision making" 1999 *Notre Dame Law Review* (*Notre Dame LR*) 775-840

Nolan-Haley 2015 *Cardozo Journal of Conflict Resolution*

Nolan-Haley JM "Mediation: The best and worst of times" 2015 *Cardozo Journal of Conflict Resolution* 731-740

Nupen "Mediation"

Nupen C "Mediation" in Pretorius P (ed) *Dispute Resolution* (Juta Cape Town 1993)

Peté *Civil procedure*

Peté S *Civil procedure: a practical guide* (Oxford University Press Cape Town 2011)

Pretorius *Dispute Resolution*

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

Redfern Law and Practice of international Commercial Arbitration

Redfern A Law and Practice of international Commercial Arbitration London Sweet and Maxwell 2004 41

Reichert 2004 *Dispute Resolution Journal*

Reichert K "Confidentiality in international mediation" 2004 *Dispute Resolution Journal* 60-66

Roberts 1992 *Mediation Quarterly*

Roberts M "System or selves? Some ethical issues in family mediation" 1992 *Mediation Quarterly* 3-19

Sander 2000 *J Disp Resol*

Sander FEA "The Future of ADR - The Earl F Nelson Memorial Lecture" 2000 *Journal of Dispute Resolution* 3-8 also available at http://scholarship. law.missouri.edu/jdr/ vol2000/iss1/5

Scott, Cornelius and Baqwa *The law of commerce*

Scott TJ, Cornelius SJ and Baqwa D *The law of commerce in South Africa* 2nd ed (Oxford University Press Cape Town 2014)

Shestowsky 2008 *Ohio St J on Disp Resol*

Shestowsky D "Disputants' preferences for court-connected dispute resolution procedures: Why we should care and we know so little" 2008 *Ohio State Journal on Dispute Resolution* 549-625

Stitt 2004 Mediation a practical guide

Stitt A Mediation a practical guide 2004 *Cavendish Publishing limited London*

Strong 2014 *Wash UJL & Pol'y*

Strong SI "Beyond International Commercial Arbitration - The Promise of International Commercial Mediation" 2014 *Washington University Journal of Law and Policy* 10-39

Tercier "Foreword"

Tercier P "Foreword" in Goldsmith JC, Ingen-Housz A and Pointon GH *ADR in business: Practice and issues across countries and cultures* (Kluwer Law International Alphen aan den Rijn 2011)

Case law

Afri-Forum v Malema 2011 6 SA 240 (EqC)

Barkhuizen v Napier 2007 5 SA 323 (CC)

Bothma-Batho Transport (Edms) Bpk v S Botha & Son Transport (Edms) Bpk 2014 1 All SA 517 (SCA)

MB v NB 2010 3 SA 220 (GSJ)

Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC)

Telcordia Technologies Inc v Telkom SA Ltd 2007 5 BCLR 503 (SCA)

Legislation

Arbitration Act 42 of 1965

Commercial Mediation Act, 2010 (Ontario)

Companies Act 71 of 2008

Companies Amendment Act 3 of 2011

Constitution of the Republic of South Africa, 1996

Labour Relations Act 65 of 1995

Mediation Act 8 of 2004

Official Languages Act 12 of 2012

International law instruments

Amended Court-based Mediation Rules 2014

Court-based Mediation Rules 2012

Court-based Mediation Rules 2014

High Court Rules

ICC Guidance Notes

ICC Mediation Rules (2013)

ICC mediation Rules (2014)

United Nations Commission on International Trade Law

Internet sources

Aird and Berlis 2011 http://www.lexology.com/library/detail.aspx?g=cb39ba44-b527-4099-a9f4-09c0a751afb3

> Aird and Berlis 2011 *Ontario's Commercial Mediation Act, 2010: establishing mediation as an effective alternative to litigation* http://www.lexology.com/library/detail.aspx?g=cb39ba44-b527-4099-a9f4-09c0a751afb3 accessed 14 June 2016

Anon 2005 http://www.nhd.uscourts.gov/pdf/NH-Mediation-Conduct%20Code.pdf

> Anon 2005 *Model Standards of Conduct for Mediators* http://www.nhd.uscourts.gov/pdf/NH-Mediation-Conduct%20Code.pdf accessed 15 June 2016

Anon 2014 http://www.out-law.com/en/articles/2014/ august/ international-arbitration-centres-experiencing-an-unprecedented-increase-in-commercial-disputes/

> Anon 2014 *International arbitration centres experiencing an 'unprecedented increase' in commercial disputes* http://www.out-law.com/en/articles/2014/ august/ international-arbitration-centres-experiencing-an-unprecedented-increase-in-commercial-disputes/ accessed 3 November 2016

Anon date unknown https://www.reference.com/business-finance/commercial-sector-2ed5d2d8b5ffa35b

> Anon date unknown "What is the commercial sector?" *Business and Finance* https://www.reference.com/business-finance/commercial-sector-2ed5d2d8b5ffa35b accessed 14 January 2016

Anon date unknown http://www.iccwbo.org/about-icc/organization/icc-global-headquarters/

Anon date unknown *ICC Headquarters* http://www.iccwbo.org/about-icc/organization/icc-global-headquarters/ accessed 10 November 2015

Anon date unknown http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/

Anon date unknown *ICC Mediation rules* http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/ accessed 10 November 2015

Anon date unknown http://www.adelaide.edu.au/legalandrisk/contracts/contract handbook/Module_7.pdf

Anon date unknown *Module 7: Common Provisions and Boilerplate Clauses* http://www.adelaide.edu.au/legalandrisk/contracts/contracthandbook/Module_7.pdf accessed 1 December 2016

Anon date unknown http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/suggested-clauses/

Anon date unknown *Suggested Clauses for ICC Mediation* http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/suggested-clauses/ accessed 10 December 2015

Anon date unknown http://www. iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Introduction/Ten-good-reasons-to-choose-ICC-Mediation/#sthash.wUTSo80J.dpuf

Anon date unknown *Ten good reasons to choose ICC mediation* http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Introduction/Ten-good-reasons-to-choose-ICC-Mediation/#sthash.wUTSo80J.dpuf accessed 3 May 2014

Anon date unknown http://adr.findlaw.com/mediation/what-are-the-disadvantages-of-mediation.html

Anon date unknown *What are the disadvantages of mediation?* http://adr.findlaw.com/mediation/what-are-the-disadvantages-of-mediation.html accessed 8 October 2015

Anon date unknown http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/introduction/

Anon date unknown *What is mediation?* http://www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/introduction/ accessed 3 May 2014

Cambridge Business English Dictionary 2016 http://dictionary.cambridge.org/dictionary/english/commercial-sector

Cambridge Business English Dictionary 2016 http://dictionary.cambridge.org/dictionary/english/commercial-sector accessed 4 October 2016

Carlevaris date unknown http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/

Carlevaris A date unknown *ICC Dispute Resolution Services* http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/ accessed 3 May 2014

Daecher 2009 by http://putii.biz/12

Daecher 2009 *Company governace* by http://putii.biz/12

Danilovich date unknown http://www.iccwbo.org/about-icc/organization/

Danilovich J date unknown *A word from our Secretary General* (International Chamber of Commerce) http://www.iccwbo.org/about-icc/organization/ accessed

Grierson and Maazouz 2013 https://www.mwe.com/en/thought-leadership/publications/2013/ 12/icc-launches-new-mediation-rules

Grierson J and Maazouz J 2013 *ICC launches new mediation rules* https://www.mwe.com/en/thought-leadership/publications/2013/12/icc-launches-new-mediation-rules accessed 3 May 2014

Herbert Smith Freehills 2014 http://hsfnotes.com/adr/2014/04/07/new-icc-mediation-rules-launched/

Herbert Smith Freehills 2014 *New ICC Mediation rules launched* http://hsfnotes.com/adr/2014/04/07/new-icc-mediation-rules-launched/ accessed 3 May 2014

International Chamber Of Commerce 2001 *Guide to ICC ADR* 12 http://www.iccwbo.org/products-and-services/arbitration-and-adr/adr/adr-rules-and-guide-to-adr-rules/guide-to-icc-adr/ accessed 2 May 2014

International Chamber Of Commerce 2001 *Guide to ICC ADR* 12 http://www.iccwbo.org/products-and-services/arbitration-and-adr/adr/adr-rules-and-guide-to-adr-rules/guide-to-icc-adr/ accessed 2 May 2014

International Mediation Institute 2014 *IMI International Corporate Users ADR Survey* (January to March 2014) http://imimediation.org/imiinternational-corporate-users-adr-survey-summary accessed 2 May 2014

International Mediation Institute 2014 *IMI International Corporate Users ADR Survey* (January to March 2014) http://imimediation.org/imiinternational-corporate-users-adr-survey-summary accessed 2 May 2014

IODSA 2009 www.iodsa.co.za/products_reports.asp?catID=150

IODSA (Institute of Directors of Southern Africa) 2009 *King III report on governance for South Africa* www.iodsa.co.za/products_reports.asp?catID=150 accessed 3 March 2016

Irish Commercial Mediation Association 2016 http://www.icma.ie/about-mediation/what-is-commercial-mediation/

Irish Commercial Mediation Association 2016 http://www.icma.ie/about-mediation/what-is-commercial-mediation/ accessed 8 December 2016

Joubert and Brand 2013 http://www.mediate.com/articles/Joubertj1.cfm

Joubert J and Brand J 2013 *Embedding Mediation in South African Justice* http://www.mediate.com/articles/Joubertj1.cfm accessed 8 October 2016

Model Standards of Conduct for Mediators, Standard I 2005 http://www.nhd.us courts.gov/pdf/NH-Mediation-Conduct%20Code.pdf

Model Standards of Conduct for Mediators, Standard I 2005 available at http://www.nhd.uscourts.gov/pdf/NH-Mediation-Conduct%20Code.pdf accessed 3 October 2016

Morek and Gates 2013 http://kluwermediationblog.com/2013/12/09/ whats-new-in-the-new-icc-mediation-rules

Morek R and Gates LLP 2013 *What's 'new' in the new ICC Mediation rules?* Kluwer Mediation Blog (9 December) http://kluwermediationblog. com/2013/12/09/whats-new-in-the-new-icc-mediation-rules accessed 5 December 2014

Omni Bridgeway date unknown http://omnibridgeway.com/ commercial-disputes/

Omni Bridgeway date unknown *Commercial Disputes* http://omnibridgeway. com/ commercial-disputes/ accessed 3 November 2016

South African Government 1996 http://www.gov.za/documents/constitution/consti tution-republic-south-africa-1996-1

South African Government 1996 *The Constitution of the Republic of South Africa* http://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1 accessed 3 March 2014

Stok, Folk and Kon Attorneys 2016 http://www.stoklaw.com/complex-business-disputes.html

Stok, Folk and Kon Attorneys 2016 *Complex Business Disputes* http://www.stoklaw.com/complex-business-disputes.html accessed 23 November 2016

Zumeta 2000 http://www.mediate.com/articles/zumeta.cfm

Zumeta Z 2000 *Styles of mediation: Facilitative, evaluative, and transformative mediation* http://www.mediate.com/articles/zumeta.cfm accessed 4 October 2016

ADDENDUM A: ICC Mediation Rules

ICC Mediation Rules as found on iccwbo.org

Index

Article 1 Introductory Provisions
Article 2 Commencement Where there is an Agreement to Refer to the Rules
Article 3 Commencement Where there is No Prior Agreement to Refer to the Rules
Article 4 Place and Language(s) of the Mediation
Article 5 Selection of the Mediator
Article 6 Fees and Costs
Article 7 Conduct of the Mediation
Article 8 Termination of the Proceedings
Article 9 Confidentiality
Article 10 General Provisions
Appendix Fees and Costs

Content

Article 1 Introductory Provisions

1

The Mediation Rules (the “Rules”) of the International Chamber of Commerce (the “ICC”) are administered by the ICC International Centre for ADR (the “Centre”), which is a separate administrative body within the ICC.

2

The Rules provide for the appointment of a neutral third party (the “Mediator”) to assist the parties in settling their dispute.

3

Mediation shall be used under the Rules unless, prior to the confirmation or appointment of the Mediator or with the agreement of the Mediator, the parties agree upon a different settlement procedure or a combination of settlement procedures. The term “mediation” as used in the Rules shall be deemed to cover such settlement procedure or procedures and the term “Mediator” shall be deemed to cover the neutral who conducts such settlement procedure or procedures. Whatever settlement procedure is used, the term “Proceedings” as used in the Rules refers to the process beginning with its commencement and ending with its termination pursuant to the Rules.

4

All of the parties may agree to modify any of the provisions of the Rules, provided, however, that the Centre may decide not to administer the Proceedings if, in its discretion, it considers that any such modification is not in the spirit of the Rules.

At any time after the confirmation or appointment of the Mediator, any agreement to modify the provisions of the Rules shall also be subject to the approval of the Mediator.

5

The Centre is the only body authorized to administer Proceedings under the Rules.

Article 2 Commencement Where there is an Agreement to Refer to the Rules

1

Where there is an agreement between the parties to refer their dispute to the Rules, any party or parties wishing to commence mediation pursuant to the Rules shall file a written Request for Mediation (the “Request”) with the Centre. The Request shall include:

a) the names, addresses, telephone numbers, email addresses and any other contact details of the parties to the dispute and of any person(s) representing the parties in the Proceedings;

b) a description of the dispute including, if possible, an assessment of its value;

c) any agreement to use a settlement procedure other than mediation, or, in the absence thereof, any proposal for such other settlement procedure that the party filing the Request may wish to make;

d) any agreement as to time limits for conducting the mediation, or, in the absence thereof, any proposal with respect thereto;

e) any agreement as to the language(s) of the mediation, or, in the absence thereof, any proposal as to such language(s);

f) any agreement as to the location of any physical meetings, or, in the absence thereof, any proposal as to such location;

g) any joint nomination by all of the parties of a Mediator or any agreement of all of the parties as to the attributes of a Mediator to be appointed by the Centre where no joint nomination has been made, or, in the absence of any such agreement, any proposal as to the attributes of a Mediator;

h) a copy of any written agreement under which the Request is made.

2

Together with the Request, the party or parties filing the Request shall pay the filing fee required by the Appendix hereto in force on the date the Request is filed.

3

The party or parties filing the Request shall simultaneously send a copy of the Request to all other parties, unless the Request has been filed jointly by all parties.

4
The Centre shall acknowledge receipt of the Request and of the filing fee in writing to the parties.
5
Where there is an agreement to refer to the Rules, the date on which the Request is received by the Centre shall, for all purposes, be deemed to be the date of the commencement of the Proceedings.
6
Where the parties have agreed that a time limit for settling the dispute pursuant to the Rules shall start running from the filing of a Request, such filing, for the exclusive purpose of determining the starting point of the time limit, shall be deemed to have been made on the date the Centre acknowledges receipt of the Request or of the filing fee, whichever is later.

Article 3 Commencement Where there is No Prior Agreement to Refer to the Rules

1
In the absence of an agreement of the parties to refer their dispute to the Rules, any party that wishes to propose referring the dispute to the Rules to another party may do so by sending a written Request to the Centre containing the information specified in Article 2(1), subparagraphs a)-g). Upon receipt of such Request, the Centre will inform all other parties of the proposal and may assist the parties in considering the proposal.
2
Together with the Request, the party or parties filing the Request shall pay the filing fee required by the Appendix hereto in force on the date the Request is filed.
3
Where the parties reach an agreement to refer their dispute to the Rules, the Proceedings shall commence on the date on which the Centre sends written confirmation to the parties that such an agreement has been reached.
4
Where the parties do not reach an agreement to refer their dispute to the Rules within 15 days from the date of the receipt of the Request by the Centre or within such additional time as may be reasonably determined by the Centre, the Proceedings shall not commence.

Article 4 Place and Language(s) of the Mediation

1
In the absence of an agreement of the parties, the Centre may determine the location of any physical meeting of the Mediator and the parties or may invite the Mediator to do so after the Mediator has been confirmed or appointed.
2
In the absence of an agreement of the parties, the Centre may determine the language(s) in which the mediation shall be conducted or may invite the Mediator to do so after the Mediator has been confirmed or appointed.

Article 5 Selection of the Mediator

1
The parties may jointly nominate a Mediator for confirmation by the Centre.

2
In the absence of a joint nomination of a Mediator by the parties, the Centre shall, after consulting the parties, either appoint a Mediator or propose a list of Mediators to the parties. All of the parties may jointly nominate a Mediator from the said list for confirmation by the Centre, failing which the Centre shall appoint a Mediator.
3
Before appointment or confirmation, a prospective Mediator shall sign a statement of acceptance, availability, impartiality and independence. The prospective Mediator shall disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the Mediator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the Mediator's impartiality. The Centre shall provide such information to the parties in writing and shall fix a time limit for any comments from them.
4
When confirming or appointing a Mediator, the Centre shall consider the prospective Mediator's attributes, including but not limited to nationality, language skills, training, qualifications and experience, and the prospective Mediator's availability and ability to conduct the mediation in accordance with the Rules.
5
Where the Centre appoints a Mediator, it shall do so either on the basis of a proposal by an ICC National Committee or Group, or otherwise. The Centre shall make all reasonable efforts to appoint a Mediator having the attributes, if any, which have been agreed upon by all of the parties. If any party objects to the Mediator appointed by the Centre and notifies the Centre and all other parties in writing, stating the reasons for such objection, within 15 days of receipt of notification of the appointment, the Centre shall appoint another Mediator.
6
Upon agreement of all of the parties, the parties may nominate more than one Mediator or request the Centre to appoint more than one Mediator, in accordance with the provisions of the Rules. In appropriate circumstances, the Centre may propose to the parties that there be more than one Mediator.

Article 6 Fees and Costs

1
The party or parties filing a Request shall include with the Request the non-refundable filing fee required by Article 2(2) or Article 3(2) of the Rules, as set out in the Appendix hereto. No Request shall be processed unless accompanied by the filing fee.
2
Following the receipt of a Request pursuant to Article 3, the Centre may request that the party filing the Request pay a deposit to cover the administrative expenses of the Centre.
3
Following the commencement of the Proceedings, the Centre shall request the parties to pay one or more deposits to cover the administrative expenses of the

Centre and the fees and expenses of the Mediator, as set out in the Appendix hereto.

4

The Centre may stay or terminate the Proceedings under the Rules if any requested deposit is not paid.

5

Upon termination of the Proceedings, the Centre shall fix the total costs of the Proceedings and shall, as the case may be, reimburse the parties for any excess payment or bill the parties for any balance required pursuant to the Rules.

6

With respect to Proceedings that have commenced under the Rules, all deposits requested and costs fixed shall be borne in equal shares by the parties, unless they agree otherwise in writing. However, any party shall be free to pay the unpaid balance of such deposits and costs should another party fail to pay its share.

7

A party's other expenditure shall remain the responsibility of that party, unless otherwise agreed by the parties.

Article 7 Conduct of the Mediation

1

The Mediator and the parties shall promptly discuss the manner in which the mediation shall be conducted.

2

After such discussion, the Mediator shall promptly provide the parties with a written note informing them of the manner in which the mediation shall be conducted. Each party, by agreeing to refer a dispute to the Rules, agrees to participate in the Proceedings at least until receipt of such note from the Mediator or earlier termination of the Proceedings pursuant to Article 8(1) of the Rules.

3

In establishing and conducting the mediation, the Mediator shall be guided by the wishes of the parties and shall treat them with fairness and impartiality.

4

Each party shall act in good faith throughout the mediation.

Article 8 Termination of the Proceedings

1

Proceedings which have been commenced pursuant to the Rules shall terminate upon written confirmation of termination by the Centre to the parties after the occurrence of the earliest of:

a) the signing by the parties of a settlement agreement;

b) the notification in writing made to the Mediator by any party, at any time after it has received the Mediator's note referred to in Article 7(2), that such party has decided no longer to pursue the mediation;

c) the notification in writing by the Mediator to the parties that the mediation has been completed;

d) the notification in writing by the Mediator to the parties that, in the Mediator's opinion, the mediation will not resolve the dispute between the parties;

e) the notification in writing by the Centre to the parties that any time limit set for the Proceedings, including any extension thereof, has expired;

f) the notification in writing by the Centre to the parties, not less than seven days after the due date for any payment by one or more parties pursuant to the Rules, that such payment has not been made; or
g) the notification in writing by the Centre to the parties that, in the judgment of the Centre, there has been a failure to nominate a Mediator or that it has not been reasonably possible to appoint a Mediator.
2
The Mediator shall promptly notify the Centre of the signing of a settlement agreement by the parties or of any notification given to or by the Mediator pursuant to Article 8(1), subparagraphs b)-d), and shall provide the Centre with a copy of any such notification.

Article 9 Confidentiality

1
In the absence of any agreement of the parties to the contrary and unless prohibited by applicable law:
a) the Proceedings, but not the fact that they are taking place, have taken place or will take place, are private and confidential;
b) any settlement agreement between the parties shall be kept confidential, except that a party shall have the right to disclose it to the extent that such disclosure is required by applicable law or necessary for purposes of its implementation or enforcement.
2
Unless required to do so by applicable law and in the absence of any agreement of the parties to the contrary, a party shall not in any manner produce as evidence in any judicial, arbitral or similar proceedings:
a) any documents, statements or communications which are submitted by another party or by the Mediator in or for the Proceedings, unless they can be obtained independently by the party seeking to produce them in the judicial, arbitral or similar proceedings;
b) any views expressed or suggestions made by any party within the Proceedings with regard to the dispute or the possible settlement of the dispute;
c) any admissions made by another party within the Proceedings;
d) any views or proposals put forward by the Mediator within the Proceedings; or
e) the fact that any party indicated within the Proceedings that it was ready to accept a proposal for a settlement.

Article 10 General Provisions

1
Where, prior to the date of the entry into force of the Rules, the parties have agreed to refer their dispute to the ICC ADR Rules, they shall be deemed to have referred their dispute to the ICC Mediation Rules, unless any of the parties objects thereto, in which case the ICC ADR Rules shall apply.
2
Unless all of the parties have agreed otherwise in writing or unless prohibited by applicable law, the parties may commence or continue any judicial, arbitral or similar proceedings in respect of the dispute, notwithstanding the Proceedings under the Rules.

3
Unless all of the parties agree otherwise in writing, a Mediator shall not act nor shall have acted in any judicial, arbitral or similar proceedings relating to the dispute which is or was the subject of the Proceedings under the Rules, whether as a judge, an arbitrator, an expert or a representative or advisor of a party.
4
Unless required by applicable law or unless all of the parties and the Mediator agree otherwise in writing, the Mediator shall not give testimony in any judicial, arbitral or similar proceedings concerning any aspect of the Proceedings under the Rules.
5
The Mediator, the Centre, the ICC and its employees, the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the Proceedings, except to the extent such limitation of liability is prohibited by applicable law.
6
In all matters not expressly provided for in the Rules, the Centre and the Mediator shall act in the spirit of the Rules.

Appendix – Fees and Costs

Article 1 Filing Fee

Each Request pursuant to the Rules must be accompanied by a filing fee of US$ 2,000. The filing fee is non-refundable and shall be credited towards the deposit of the party or parties having filed the Request.

Article 2 Administrative Expenses

1
The administrative expenses of the ICC for the proceedings shall be fixed at the Centre's discretion depending on the tasks carried out by the Centre and shall normally not exceed the following:

US$ 5,000	for amounts in dispute up to and including US$ 200,000;
US$ 10,000	for amounts in dispute between US$200,001 and US$ 2,000,000;
US$ 15,000	for amounts in dispute between US$ 2,000,001 and US$ 10,000,000;
US$ 20,000	for amounts in dispute between US$ 10,000,001 and US$ 50,000,000;
US$ 25,000	for amounts in dispute between US$ 50,000,001 and US$ 100,000,000;
US$ 30,000	for amounts in dispute over US$ 100,000,000.

2
Where the amount in dispute is not stated, the administrative expenses may be

fixed by the Centre at its discretion, taking into account all the circumstances of the case, including indications regarding the value of the dispute, but they shall normally not exceed US$ 20,000.

3

In exceptional circumstances, the Centre may fix the administrative expenses at a higher figure than that which would result from the application of the above scale, provided that the Centre shall inform the parties of such possibility beforehand and shall normally not exceed the maximum amount for administrative expenses foreseen in the scale.

4

The Centre may require the payment of administrative expenses in addition to those provided in the scale described in Article 2(1) of this Appendix as a condition for holding the proceedings in abeyance at the request of the parties or of one of them with the acquiescence of the other. Such abeyance fee shall normally not exceed US$ 1,000 per party per year.

Article 3 Mediator's Fees and Expenses

1

Unless otherwise agreed by the parties and the Mediator, the fees of the Mediator shall be calculated on the basis of the time reasonably spent by the Mediator in the proceedings. These fees shall be based on an hourly rate fixed by the Centre when appointing or confirming the Mediator and after having consulted the Mediator and the parties. The hourly rate shall be reasonable in amount and shall be determined in light of the complexity of the dispute and any other relevant circumstances.

2

If agreed by the parties and the Mediator, the Centre may fix the Mediator's fees on the basis of a single fixed fee for the whole proceedings, rather than an hourly rate. The single fixed fee shall be reasonable in amount and shall be determined in light of the complexity of the dispute, the amount of work that the parties and the Mediator anticipate will be required of the Mediator, and any other relevant circumstances. The Centre, at its discretion, may increase or decrease the amount of the single fixed fee based upon a reasoned request of a party or the Mediator. Prior to increasing or decreasing the single fixed fee, the Centre shall invite observations from all parties and the Mediator.

3

The amount of reasonable expenses of the Mediator shall be fixed by the Centre.

4

The Mediator's fees and expenses shall be fixed exclusively by the Centre as required by the Rules. Separate fee arrangements between the parties and the Mediator are not permitted by the Rules.

Article 4 Prior ICC Arbitration

When a mediation is preceded by the submission of a request for arbitration pursuant to the ICC Rules of Arbitration concerning the same parties and the same or parts of the same dispute, the filing fee paid for such arbitration proceedings shall be credited to the administrative expenses of the mediation, if the total administrative expenses paid with respect to the arbitration exceed US$ 7,500.

Article 5 Currency, VAT and Scope

1

All amounts fixed by the Centre or pursuant to any Appendix to the Rules are payable in US$ except where prohibited by law, in which case the ICC may apply a different scale and fee arrangement in another currency.

2

Amounts paid to the Mediator do not include any possible value added tax (VAT) or other taxes or charges and imposts applicable to the Mediator's fees. Parties have a duty to pay any such taxes or charges; however, the recovery of any such taxes or charges is a matter solely between the Mediator and the parties.

3

Any ICC administrative expenses may be subject to value added tax (VAT) or charges of a similar nature at the prevailing rate.

4

The above provisions on the costs of proceedings shall be effective as of 1 January 2014 in respect of all proceedings commenced on or after such date under the present Rules or the ICC ADR Rules.

Article 6 ICC as Appointing Authority

Any request received for an authority of the ICC to appoint a Mediator will be treated in accordance with the ICC Rules for Appointment of Experts or Neutrals and shall be accompanied by a non-refundable filing fee of US$ 2,000 per Mediator. No request shall be processed unless accompanied by the said filing fee. For additional services, the ICC may at its discretion fix ICC administrative expenses, which shall be commensurate with the services provided and shall normally not exceed the maximum amount of US$ 10,000

ADDENDUM B: Court Based Mediation Rules

GOVERNMENT NOTICE

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

No. R. 183 **18 March 2014**

RULES BOARD FOR COURTS OF LAW ACT, 1985 (ACT NO. 107 OF 1985)

AMENDMENT OF RULES REGULATING THE CONDUCT OF THE PROCEEDINGS OF THE MAGISTRATES' COURTS OF SOUTH AFRICA

The Rules Board for Courts of Law has, under sections 6(1) and 6(2) of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), read with sections 9(6)*(a)* and 9(6)*(b)* of the Jurisdiction of Regional Courts Amendment Act, 2008 (Act No. 31 of 2008), with the approval of the Minister of Justice and Constitutional Development, made the rules in the Schedule.

SCHEDULE

Definition

1. In these rules "the Rules" means the Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa published under Government Notice No. R. 740 of 23 August 2010, as amended by Government Notice Nos. R. 1222 of 24 December 2010, R. 611 of 29 July 2011, R. 1085 of 30 December 2011,

This gazette is also available free online at www.gpwonline.co.za

R. 685 of 31 August 2012, R. 115 of 15 February 2013, R. 263 of 12 April 2013 and R. 760 of 11 October 2013.

Amendment of the Rules

2. The Rules are hereby amended by –

(a) the insertion of the heading "**Chapter 1**" before rule 3 of the Rules; and

(b) the insertion of the following Chapter before rule 70 of the Rules.

"**Chapter 2**

Objectives

70. The objectives of this Chapter are to give effect to-

(1) section 34 of the Constitution of the Republic of South Africa, 1996, which guarantees everyone the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum; and

(2) the resolution of the Access to Justice Conference held in July 2011, under the leadership of the Chief Justice, towards achieving delivery of accessible and quality justice for all, that steps be taken to introduce alternative dispute resolution mechanisms, preferably court-annexed mediation or the Commission for Conciliation, Mediation and Arbitration kind of alternative dispute resolution, into the court system.

Purposes of mediation

71. The main purposes of mediation are to–

(a) promote access to justice;

(b) promote restorative justice;

This gazette is also available free online at www.gpwonline.co.za

(c) preserve relationships between litigants or potential litigants which may become strained or destroyed by the adversarial nature of litigation;

(d) facilitate an expeditious and cost-effective resolution of a dispute between litigants or potential litigants;

(e) assist litigants or potential litigants to determine at an early stage of the litigation or prior to commencement of litigation whether proceeding with a trial or an opposed application is in their best interests or not; and

(f) provide litigants or potential litigants with solutions to the dispute, which are beyond the scope and powers of judicial officers.

Purpose of rules

72. The purpose of the rules in this Chapter is to provide the procedure for the voluntary submission of civil disputes to mediation in selected courts.

Definitions

73. For the purposes of this Chapter–

'**action**' means litigation commenced by the issue of summons;

'**alternative dispute resolution**' means a process, in which an independent and impartial person assists parties to attempt to resolve the dispute between them, either before or after commencement of litigation;

'**application**' means litigation commenced by notice of motion;

'**defendant**' includes any respondent and any party who would be defending a dispute if litigation were initiated;

'**dispute**' means the subject matter of actual or potential litigation between parties or an aspect thereof;

'**litigant**' means a party to litigation;

'**litigation**' means court proceedings commenced by action or application proceedings;

'**mediation**' means the process by which a mediator assists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute;

'**mediation session**' means the period that a mediator and the parties are engaged in mediation of the dispute;

'**mediator**' means a person selected by parties or by the clerk of the court or registrar of the court from the schedule referred to in rule 86(2), to mediate a dispute between the parties;

'**potential litigation**' means litigation which may arise out of a dispute;

'**statement of claim**' means a written statement signed by the party, in which a party intending to claim any relief against another party sets out in clear and concise terms the material facts on which the claim is based;

'**statement of defence**' means a written statement, signed by the defendant, in which the defendant sets out in clear and concise terms the material facts on which the defendant's defence is based.

Application of rules

74. (1) The rules in this Chapter apply to the voluntary submission by parties to mediation of—

(a) disputes prior to commencement of litigation; and

(b) disputes in litigation which has already commenced and as contemplated in rules 78 and 79.

(2) These rules apply to courts to be designated by the Minister by publication in the *Gazette*.

(3) The application of these rules is subject to the provisions of any other law and the procedure provided for in any other law, for the mediation of disputes between parties to litigation.

Referral to mediation

75. (1) Parties may refer a dispute to mediation—

(a) prior to the commencement of litigation; or

(b) after commencement of litigation but prior to judgment;

Provided that where the trial has commenced the parties must obtain the authorisation of the court.

(2) A judicial officer may at any time after the commencement of litigation, but before judgment, enquire into the possibility of mediation of a dispute and accord the parties an opportunity to refer the dispute to mediation.

Functions and duties of clerks and registrars

76. (1) A clerk or registrar of the court must explain to all parties—

(a) the purpose of alternative dispute resolution, the meaning, objectives and benefits, including costs saving, of mediation; and

(b) their liability for the fees of the mediator.

(2) A clerk or registrar of the court must–

(a) inform the parties that they may be assisted by practitioners of their choice, at their own cost;

This gazette is also available free online at www.gpwonline.co.za

(b) in consultation with the parties, execute the duties in rules 77 and 78;

(c) if the parties agree to mediation, assist them to conclude a written agreement to mediate, which must be signed by the parties; and

(d) upon conclusion of an agreement to mediate, forward to the mediator—

(i) a copy of the agreement to mediate;

(ii) copies of the statement of claim and statement of defence, if mediation is to occur prior to commencement of litigation;

(iii) in action proceedings, copies of the summons and plea, or statement of defence if no plea has been filed; and

(iv) in application proceedings, copies of the founding, answering and replying affidavits, or statement of defence, if no answering affidavit has been filed.

Referral to mediation prior to commencement of litigation

77. (1) A party desiring to submit a dispute to mediation prior to commencement of litigation must make a request in writing to the clerk or registrar of the court, which would ordinarily have jurisdiction to hear the matter, if litigation were commenced.

(2) The request referred to in subrule (1) must indicate—

(a) whether relief is being claimed by or against the party seeking to mediate;

(b) the full names of the other party or parties or name or names by which the other party or parties to the dispute are known to the party seeking mediation;

(c) the physical and postal addresses of the other party or parties to the dispute;

(d) the facsimile number or electronic mail address of the party seeking mediation, if such party has a facsimile number or email address; and

(e) the nature of the dispute and the material facts on which the dispute is based.

(3) The clerk or registrar of the court must inform all other parties to the dispute that mediation of the dispute is being sought and must call upon the party seeking mediation and all other parties to the dispute to attend a conference within 10 days, for the purposes of determining whether all or some of the parties agree to submit the dispute to mediation.

(4) If at the conference referred to in subrule (3), some or all of the parties between whom mediation is possible, agree to submit the dispute to mediation, the clerk or registrar of the court must–

(a) in collaboration with the parties appoint a mediator or, if the parties cannot agree on a mediator, the clerk or registrar of the court must appoint a mediator;

(b) confer with the mediator and set the date, time and venue for mediation; and

(c) assist the parties to conclude a written mediation agreement between the parties, which must be signed by them and contain the following particulars:

This gazette is also available free online at www.gpwonline.co.za

(i) The particulars referred to in subrule 2*(b)*, *(c)* and *(d)*;

(ii) a statement that the parties have agreed to mediate the dispute between them;

(iii) the date, time and venue of the mediation;

(iv) the name of the mediator;

(v) the period of time that will be allocated for each mediation session;

(vi) the time within which mediation will be concluded and the method by which any periods or time limits may be extended;

(vii) the confidentiality and privilege attaching to disclosures at the mediation;

(viii) the consequences of any party not abiding by the agreement; and

(ix) where there are multiple parties to the dispute, the terms of any settlement agreement are not binding on any party who has not participated in mediation.

(5) A party claiming relief must lodge a statement of claim with the clerk or registrar of the court within 10 days of the signature of the agreement referred to in subrule 4*(c)*, and forward a copy of the statement of claim to all other parties to the mediation proceedings.

(6) The party or parties against whom relief is being claimed must lodge a statement of defence with the clerk or registrar of the court within 10 days of receipt of the statement of claim, and forward a copy of the statement of defence to all other parties to the mediation proceedings.

This gazette is also available free online at **www.gpwonline.co.za**

Referral to mediation by litigants

78. (1) *(a)* Any party may at any stage after litigation has commenced, but before trial, request the clerk or registrar of the court, in writing, to refer the dispute to mediation.

(b) The clerk or registrar of the court must inform all other parties to the dispute that mediation of the dispute is being sought and must call upon the party seeking mediation and all other parties to the dispute to attend a conference within 10 days for the purposes of determining whether all or some of the parties agree to mediation.

(2) After the commencement of trial but prior to judgment any party may apply to court to refer the dispute to mediation.

(3) If the court refers the dispute to mediation, the provisions of subrule (4) and rules 76(2) and 77(4) apply.

(4) *(a)* In action matters, if pleadings have closed, the summons or declaration and plea, as referred to in the rules, will serve as the statement of claim and statement of defence, respectively.

(b) If a plea has not been delivered, the defendant must deliver a statement of defence within 10 days of the conclusion of the agreement to mediate.

(c) In application matters, the founding affidavit will serve as the statement of claim and the answering affidavit, if delivered, will serve as the statement of defence.

(d) If no answering affidavit has been delivered, the respondent must deliver a statement of defence within 10 days of the conclusion of the agreement to mediate.

Referral to mediation by court

79. (1) A court may, prior to or during a trial but before judgment, enquire into

This gazette is also available free online at www.gpwonline.co.za

the possibility of mediation and accord the parties an opportunity to refer the dispute to the clerk or registrar of the court to facilitate mediation.

(2) If during the trial the parties consent to the dispute being mediated, the parties must request the court to refer the dispute to the clerk or registrar of the court to facilitate mediation.

(3) The provisions of rules 76(2), 77(4) and 78(4) apply if a dispute is referred to mediation under this rule.

Role and functions of mediator

80. (1) At the commencement of mediation the mediator must inform the parties of the following:

(a) The purposes of mediation and its objective to facilitate settlement between the parties;

(b) the facilitative role of the mediator as an impartial mediator who may not make any decisions of fact or law and who may not determine the credibility of any person participating in the mediation;

(c) the inquisitorial nature of mediation proceedings;

(d) the rules applicable to the mediation session;

(e) all discussions and disclosures, whether oral or written, made during mediation are confidential and inadmissible as evidence in any court, tribunal or other forum, unless the discussions and disclosures are recorded in a settlement agreement signed by the parties, or are otherwise discoverable in terms of the rules of court, or in terms of any other law;

(f) the mediator may during the mediation session encourage the parties to make full disclosure if in the opinion of the mediator such disclosure may facilitate a resolution of the dispute between the parties;

(g) no party may be compelled to make any disclosure, but a party may make voluntary disclosures with the same protection referred to in subrule (1)*(e)*;

(h) the mediator will assist to draft a settlement agreement if the dispute is resolved; and

(i) if the dispute is not resolved, the mediator will refer the dispute back to the clerk or registrar of the court, informing him or her that the dispute could not be resolved.

(2) A mediator must, within 5 days of the conclusion of mediation, submit a report to the clerk or registrar of the court informing him or her of the outcome of the mediation.

(3) A mediator may postpone a mediation session if the parties agree.

Suspension of time limits

81. The time limits prescribed by the rules in Chapter I for the delivery of pleadings and notices, the filing of affidavits or the taking of any step by any litigant are suspended from the time of conclusion of an agreement to mediate to the conclusion of the mediation proceedings.

Settlement agreements

82. (1) In the event that the parties reach settlement, the mediator must assist the parties to draft the settlement agreement, which must be transmitted by the mediator to the clerk or registrar of the court.

(2) If a settlement is reached at mediation in a dispute which is not the subject of litigation, the clerk or registrar of the court must, upon receipt of the settlement agreement from the mediator, file the settlement agreement.

(3) If a settlement is not reached at mediation in a dispute which is not the subject of litigation, the clerk or registrar of the court must, upon receipt of the report from the mediator, file the report.

(4) If a settlement is reached at mediation in a dispute which is the subject of litigation, the clerk or registrar of the court must at the request of the parties and upon receipt of the settlement agreement from the mediator, place the settlement agreement before a judicial officer in chambers for noting that the dispute has been resolved or to make the agreement an order of court, upon the agreement of the parties.

(5) If a settlement is not reached at mediation in a dispute which is the subject of litigation, the clerk or registrar of the court must, upon receipt of the report from the mediator, file the report to enable the litigation to continue, from which time all suspended time periods will resume.

(6) Settlement agreements must be reduced to writing and signed by the parties.

Multiple parties and multiple disputes

83. (1) Where there are multiple parties to a dispute, parties who are agreeable to mediate may proceed to do so and parties who do not agree to mediate may proceed to litigation.

(2) Where there are multiple aspects to a dispute, the parties may agree that some aspects be mediated upon and other aspects be proceeded with to litigation.

(3) Where any aspect of a dispute remains unsettled after mediation, the parties may proceed to litigation on the unsettled aspect.

Fees of mediators

84. (1) Parties participating in mediation are liable for the fees of the mediator, except where the services of a mediator are provided free of charge.

(2) Liability for the fees of a mediator must be borne equally between opposing parties participating in mediation: Provided that any party may offer or undertake to pay in full the fees of a mediator.

(3) The tariffs of fees chargeable by mediators will be published by the Minister together with the schedule of accredited mediators referred to in rule 86(2).

Representation of parties at mediation proceedings

85. (1) Subject to subrules (2) and (3), parties to mediation must attend mediation sessions in person.

(2) Where a juristic person or a firm or a partnership is a party to mediation proceedings such entity must be represented by an official from that juristic person, firm or partnership, who must be duly authorised to represent the entity, to conclude a settlement and sign a settlement agreement on behalf of such entity.

(3) Where the state or an organ of state is a party to mediation proceedings the state or such organ must be represented by an official, duly authorised to represent the state or such organ to conclude a settlement and sign a settlement agreement on behalf of the state or organ of state, and be assisted by the State Attorney.

(4) Any party to mediation proceedings may be assisted by a practitioner or practitioners.

Accreditation of mediators

86. (1) The qualification, standards and levels of mediators who will conduct mediation under these rules, will be determined by the Minister.

This gazette is also available free online at www.gpwonline.co.za

(2) A schedule of accredited mediators, from which mediators for the purposes of this Chapter must be selected, will be published by the Minister.

Forms and guidelines

87. Forms and guidelines for assistance to parties, clerks of the court, registrars of the court, judicial officers and mediators in mediation proceedings will be published together with the promulgation of these rules.".

Amendment of rule 70 of the Rules

3. Rule 70 of the Rules is hereby amended by the substitution for the number "70" of the number "88".

Amendment of annexures to the Rules

4. The annexures to the Rules are hereby amended by the insertion after Annexure 2 of the following Annexure:

This gazette is also available free online at www.gpwonline.co.za

"ANNEXURE 3

Mediation Forms

(Rule 87)

Form No:

MED-1	Application for referral to mediation prior to litigation
MED-2	Invitation to respondent to engage in mediation prior to litigation
MED-3	Application for referral to mediation after litigation commenced
MED-4	Invitation to mediation after litigation commenced
MED-5	Explanation of process and rights
MED-6	Agreement to mediate
MED-7	Notice to Cash Hall to receive payment of mediator's fees
MED-8	Statement of Claim
MED-9	Statement of Defence
MED-10	Instructions to mediator
MED-11	Postponement of mediation
MED-12	Mediation time sheet
MED-13	Outcome of mediation
MED-14	Settlement Agreement
MED-15	Mediator's Report

This gazette is also available free online at www.gpwonline.co.za

FORM MED-1

(Rules 77(1) and (2))

COURT: FILE NO:

APPLICATION FOR REFERRAL TO MEDIATION
(Prior to litigation)

PARTIES:

AA Claimant

And

BB Respondent

(To be completed by claimant/mediation clerk)

1. I the undersigned, the Claimant/Representative of the Claimant, apply for referral to mediation of a dispute between the above parties.

2. My particulars/particulars of the entity I represent are:

Surname/Name _____

First Names _____

Residential address _____

Business Address _____

Postal Address _____

Telephone _____

Cellular phone _____

Fax no _____

Email _____

This gazette is also available free online at www.gpwonline.co.za

3. Particulars of the Respondent:

Surname/Name _____

First Names _____

Residential address _____

Business Address _____

Postal Address _____

Telephone _____

Cellular phone _____

Fax no _____

Email _____

4. Summary of claim by claimant:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Signed at _____ on this _____ day of _____

_____

CLAIMANT

PERSONAL CAPACITY/

DULY AUTHORISED

(Attach copy of Authority/ Resolution)

FORM MED-2

(Rule 77(3))

COURT: FILE NO:

INVITATION TO RESPONDENT TO ENGAGE IN MEDIATION
(Before commencement of litigation)

PARTIES:

AA Claimant

And

BB Respondent

(To be completed by mediation clerk)

PARTICULARS OF RESPONDENT

Surname/Name _____

First Names _____

Residential address _____

Business Address _____

Postal Address _____

Telephone _____

Cellular no _____

Fax no _____

Email _____

1. Mediation is a process by which disputes can be resolved amicably with the assistance of an impartial mediator quickly and cost effectively.

2. The claimant has applied for mediation in a claim against you as set out in the attached application for mediation.
3. You are invited by the mediation clerk of the above court to a meeting for the purpose of explaining the process of mediation and thereafter, by consent, to consider an agreement to mediate. This may avoid formal court proceedings being instituted against you.
4. The meeting will take place on _____ in Room _____, _____ Magistrates' Court at _____ am/pm.

_____

MEDIATION CLERK

DATE STAMP

This gazette is also available free online at www.gpwonline.co.za

FORM MED-3

(Rule 78(1))

COURT: FILE NO:

APPLICATION FOR REFERRAL TO MEDIATION
(After commencement of litigation)

PARTIES:

AA Claimant

And

BB Respondent

(To be completed by party(ies)/mediation clerk)

1. I the undersigned, the Claimant/Respondent or Representative, apply for referral to mediation of the matter under Court Case No _____

2. PARTICULARS OF CLAIMANT:
   Surname/Name _____
   First Names _____
   Residential address _____
   Business Address _____
   Postal Address _____
   Telephone _____
   Cellular no _____
   Fax no _____
   Email _____

This gazette is also available free online at www.gpwonline.co.za

3. PARTICULARS OF RESPONDENT:

Surname/Name _____

First Names _____

Residential address _____

Business Address _____

Postal Address _____

Telephone _____

Cellular no _____

Fax no _____

Email _____

4. Summary of claim/defence

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Signed at _____ on this _____ day of _____

_____

CLAIMANT/RESPONDENT

(If more than one claimant or respondent separate annexures should be used to provide particulars of further claimants and/or respondents)

FORM MED-4

(Rule 78(1))

COURT: FILE NO:

INVITATION TO MEDIATION

(After commencement of litigation)

PARTIES:

AA Claimant

And

BB Respondent

(To be completed by mediation clerk)

PARTICULARS OF APPLICANT/RESPONDENT

Surname/Name _____

First Names _____

Residential address _____

Business Address _____

Postal Address _____

Telephone _____

Cellular no _____

Fax no _____

Email _____

1. Mediation is a process by which disputes can be resolved amicably with the assistance of an impartial mediator quickly and cost effectively.

2. The claimant/respondent has applied for mediation in a dispute between you and the claimant/respondent, as set out attached application for mediation.
3. You are invited by the mediation clerk of the above court to a meeting for the purpose of explaining the process of mediation and thereafter, by consent, to consider an agreement to mediate.
4. Notwithstanding the litigation which is in progress, you are invited to mediate.
5. The meeting will take place on _____in Room_____, _____Magistrates Court at _____ am/pm.

_____

MEDIATION CLERK

DATE STAMP

Form MED-5

(Rule 76(1) & (2))

COURT: FILE NO:

EXPLANATION OF PROCESS & RIGHTS

PARTIES

AA Claimant

And

BB Respondent

The parties hereby acknowledge that:

1. They have been informed of the following:
   (a) The purpose of alternative dispute resolution;
   (b) The meaning, objectives and benefits of mediation;
   (c) The cost saving that is likely to result from mediation;
   (d) They are equally liable for the fees of the mediator, but either party may elect to pay the mediator's fees in full;
   (e) They may be assisted by legal representatives of their own choice, at the mediation proceedings, but the cost of such legal representation is for their own account.
2. They are not compelled to refer the dispute between them to mediation, but that if they do engage in mediation, they have the option of continuing with litigation, if mediation is not successful.

This gazette is also available free online at www.gpwonline.co.za

Signed by the Claimant/ attorney at _____ on _____

Signed by the Respondent/attorney at _____ on _____

_____

MEDIATION CLERK

This gazette is also available free online at www.gpwonline.co.za

FORM MED-6

(Rules 77(4) & 78(3))

COURT: FILE NO:

AGREEMENT TO MEDIATE

(Prior to and after litigation)

PARTIES:

AA Claimant

And

BB Respondent

(To be completed by mediation clerk)

We, the undersigned, (hereinafter referred to as "the Parties") agree to mediate the dispute between us, as set out in the Application for Referral to Mediation, on the terms and conditions in this agreement.

1. PARTICULARS OF CLAIMANT:

Surname/Name _____

First Names _____

Residential address _____

Business Address _____

Postal Address _____

Telephone _____

Cellular no _____

Fax no _____

Email _____

This gazette is also available free online at www.gpwonline.co.za

2. PARTICULARS OF RESPONDENT:

Surname/Name _____

First Names _____

Residential address _____

Business Address _____

Postal Address _____

Telephone _____

Cellular no _____

Fax no _____

Email _____

3. MEDIATOR

The Parties hereby agree to appoint the under mentioned mediator:

Surname _____

First Names _____

Address _____

Telephone _____

Cellular no _____

Fax no _____

Email _____

4. MEDIATOR'S FEES

4.1 The Parties and the mediator agree that the fees to the mediator will be paid in accordance with the tariff determined by the Minister.

4.2 A deposit of R_____ toward the mediator's fees and expenses, as determined by the mediation clerk, will be paid to the clerk of the court prior to the commencement of mediation. Any unearned amount in fees, paid as deposit, will be refunded to the Parties.

4.3 The Parties shall be jointly and severally liable for the mediator's fees and expenses.

4.4 Should payment not be timely made, the mediator may, at his/her sole discretion, stop all work on behalf of the Parties and withdraw from the mediation.

4.5 The Parties understand that they shall be responsible for two hours of the mediator's time at the above stated rate for any appointment which they do not attend and do not provide at least 24 hours advance notice of the cancellation.

5. DATE, TIME AND VENUE

5.1 The first mediation session will be held on / / at am/pm.

5.2 The mediation venue will be_____

but may be changed by agreement between the Parties and the mediator.

6. DURATION OF MEDIATION

The Parties agree that the anticipated duration of the mediation is _____hours/days.

7. MEDIATION PROCESS

7.1 The Parties understand that mediation is a process in which a mediator facilitates communication between the Parties and, without deciding the issues or imposing a solution on the Parties, enables them to understand the issues and reach a mutually agreeable resolution of their dispute.

7.2 The Parties understand that it is for the parties, with the mediator's concurrence, to determine the scope of the mediation and this will be accomplished early in the mediation process.

8. NATURE OF MEDIATION

8.1 The Parties understand that mediation is an agreement-reaching process in which the mediator assists parties to reach agreement in a collaborative, consensual and informed manner.

8.2 It is understood that the mediator has no power to decide disputed issues for the Parties.

8.3 The Parties understand that mediation is not a substitute for independent legal advice.

This gazette is also available free online at www.gpwonline.co.za

8.4 The Parties understand that the mediator's objective is to facilitate the Parties themselves reaching their most constructive and fairest agreement. The Parties also understand that the mediator has an obligation to work on behalf of each party equally and that the mediator cannot render individual legal advice to any party and will not render therapy within the mediation.

8.5 The Parties state their good faith intention to complete their mediation by an agreement. It is, however, understood that any party may withdraw from or suspend the mediation at any time, for any reason.

8.6 The Parties also understand that the mediator may suspend or terminate the mediation if she/he feels that the mediation will lead to an unjust or unreasonable result, if the mediator feels that an impasse has been reached, or if the mediator determines that s/he can no longer effectively perform his/her facilitative role.

9. MEDIATOR IMPARTIALITY

9.1 The Parties understand that the mediator must remain impartial throughout and after the mediation process. The mediator shall therefore not champion the interests of any party over another in the mediation or in any court or other proceeding.

9.2 The mediator will provide copies of correspondence, draft agreements, and written documentation to the Parties' legal representatives at a party's request.

9.3 The mediator may communicate separately with an individual mediating party, in which case such discussions shall be confidential between the mediator and the individual mediating party unless they agree otherwise.

10. MEDIATOR'S INDEMNITY

The Parties agree that the mediator shall not be liable for any act or omission directly or indirectly connected to the mediation.

11. FULL DISCLOSURE

Each of the Parties agrees to fully and honestly disclose all relevant information and documents, as requested by the mediator, and all information requested by

any other party to the mediation, if the mediator determines that the disclosure is relevant to the mediation discussions.

12. CONFIDENTIALITY

12.1 It is understood between the Parties and the mediator that the mediation will be strictly confidential and without prejudice.

12.2 Mediation discussions, written and oral communications, any draft resolutions, and any unsigned mediated agreements shall not be admissible in any court proceeding, unless such information is discoverable in terms of the normal rules of court. Only a mediated agreement, signed by the Parties may be so admissible.

12.3 The Parties further agree to not call the mediator to testify concerning the mediation or to provide any materials from the mediation in any court proceeding between the Parties.

12.3 The Parties understand the mediator has an ethical responsibility to break confidentiality if he/she suspects another person may be in danger of harm.

13. LITIGATION

The Parties agree to refrain from pre-emptive maneuvers and adversarial legal proceedings (except in the case of an emergency necessitating such action), while actively engaged in the mediation process.

14. PRESCRIPTION

The Parties are aware that the process of mediation shall not suspend, stay or interrupt prescription of any of the parties' claim and the onus rests on each party to take steps to interrupt such prescription for the duration of the mediation.

15. SETTLEMENT AGREEMENT

Should the Parties settle the dispute between them, the Parties agree to reduce the terms of the settlement to writing, with the assistance of the mediator.

16. BREACH OF AGREEMENT

Any party breaching this agreement shall be liable for and shall indemnify the non-breaching parties and the mediator for any loss, including all costs, expenses, liability and fees, including attorneys' fees, which may be incurred as a result of such breach.

17. NON-VARIATION AND WAIVER

The Parties agree that any amendment or variation or waiver of any term of this agreement must be in writing and signed by the parties, including the mediator.

SIGNED AT_____ ON_____

WITNESSES:

1. _____

2. _____

_____

CLAIMANT

PERSONAL CAPACITY/ DULY AUTHORISED

(Attach copy of authority/ resolution)

WITNESSES:

1. _____

2. _____

_____

RESPONDENT

PERSONAL CAPACITY/ DULY AUTHORISED

(Attach copy of authority/ resolution)

FORM MED-7

COURT: FILE NO:

NOTICE TO RECEIVE MEDIATOR'S FEES

PARTIES:

AA Claimant

And

BB Respondent

To: The Cash Hall/Clerk of Court

Please accept the amount of _____ on behalf of the Claimant/Respondent, being the deposit/further payment of mediator's fees.

Particulars:

Mediator _____

Date of Mediation _____

Estimated duration of mediation _____

_____

MEDIATION CLERK

DATE STAMP

This gazette is also available free online at www.gpwonline.co.za

FORM MED-8

(Rule 77(5))

COURT: FILE NO:

STATEMENT OF CLAIM

PARTIES:

AA Claimant

And

BB Respondent

(To be completed by the claimant)

Description of claim

State:

(a) Date and description of the event.

(b) The nature of the breach or the loss suffered.

(c) The relief you require.

(if inadequate space attach additional pages)

This gazette is also available free online at **www.gpwonline.co.za**

SIGNED AT _____ ON _____

_____

CLAIMANT

PERSONAL CAPACITY/

This gazette is also available free online at www.gpwonline.co.za

FORM MED-9

(Rule 77(6) & 78(4))

COURT: FILE NO:

STATEMENT OF DEFENCE

PARTIES:

AA Claimant

And

BB Respondent

(To be completed by the respondent)

1. PARTICULARS OF THE RESPONDENT:

Surname/Name _____

First Names _____

Residential address _____

Business Address _____

Postal Address _____

Telephone _____

Cellular no _____

Fax no _____

Email _____

2. Description of the defence:

(a) State whether you agree or disagree with the claimant's statement of claim.

(b) If you deny the claim, explain your version.

This gazette is also available free online at www.gpwonline.co.za

(c) If you agree with the claim, state your proposal for settlement.

(if inadequate space attach additional pages)

SIGNED AT _____ ON _____

RESPONDENT
PERSONAL CAPACITY/
DULYAUTHORISED

FORM MED-10

(Rule 76(2))

COURT: FILE NO:

INSTRUCTIONS TO MEDIATOR

PARTIES:

AA Claimant

And

BB Respondent

TO MEDIATOR	
MEDIATION DATE	

Please receive copies of the following documents:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

_____

MEDIATION CLERK

DATE STAMP

This gazette is also available free online at www.gpwonline.co.za

FORM MED-11

(Rule 80(3))

COURT: FILE NO:

POSTPONEMENT OF MEDIATION

PARTIES:

AA Claimant

And

BB Respondent

By agreement between the parties, the mediation session held on _____ from_____to _____has been postponed to_____at _____am/pm.

_____

MEDIATOR

NAME

DATE

FORM MED-12

COURT: FILE NO:

MEDIATION TIME SHEET

PARTIES:

AA Claimant

And

BB Respondent

DATE	TIME	CLAIMANT SIGN	RESPONDENT SIGN

MEDIATOR

NAME

DATE:

This gazette is also available free online at www.gpwonline.co.za

FORM MED-13

(Rule 80(2)

COURT: FILE NO:

OUTCOME OF MEDIATION

PARTIES:

AA Claimant

And

BB Respondent

To: The mediation clerk

1. Mediation held on _____ was successful/unsuccessful.
2. The Settlement Agreement is attached.
3. By agreement the parties require the settlement to be made/not to be made an order of court.

_____

MEDIATOR

NAME

DATE:

This gazette is also available free online at www.gpwonline.co.za

FORM MED-14

(RULE 82)

COURT: FILE NO:

SETTLEMENT AGREEMENT

PARTIES:

AA Claimant

And

BB Respondent

Whereas the parties referred their dispute to mediation;

And whereas the parties have settled the dispute between them with the assistance of the mediator;

And whereas the parties hereby record the terms and conditions of the settlement;

Now therefore it is agreed as follows:

1. TERMS OF SETTLEMENT

This gazette is also available free online at www.gpwonline.co.za

_____

_____

_____

_____

_____

2. AUTHORITY TO ENTER INTO SETTLEMENT

Each person signing this agreement in a representative capacity warrants that he or she has full authority to bind his or her principal to this agreement.

3. CONSENT TO JUDGMENT

The Claimant/Respondent agrees that in the event of failure to comply with any term of this agreement, the Claimant/Respondent shall be entitled to lodge with the clerk/registrar of the court the written Consent to Judgment signed by the Claimant/Respondent and obtain judgment in accordance with the provisions of section 58 of the Magistrates' Courts Act 32/1944.

4. NON PAYMENT

Should any amount payable in terms of this agreement not be paid on the due date the full amount outstanding shall immediately become due, owing and payable.

5. CONFIDENTIALITY

5.1 It is understood between the parties and the mediator that the mediation will be strictly confidential and without prejudice.

5.2 Mediation discussions, written and oral communications, any draft resolutions, and any unsigned mediated agreements shall not be admissible in any court proceeding, unless such information is discoverable in terms of the normal rules of court. Only a mediated agreement, signed by the parties may be so admissible.

This gazette is also available free online at www.gpwonline.co.za

5.3 The parties further agree to not call the mediator to testify concerning the mediation or to provide any materials from the mediation in any court proceeding between the parties.

5.4 The parties understand the mediator has an ethical responsibility to break confidentiality if s/he suspects another person may be in danger of harm.

6. ORDER OF COURT

The parties agree that this settlement agreement is/is not forthwith to be made an order of court.

7. BREACH

In the event that this agreement has not been made an order of court and any party breaching the agreement, the aggrieved party will be entitled to make application to court to make this agreement an order of court and to enforce the terms of hereof.

8. NON-VARIATION AND WAIVER

The parties agree that any amendment, waiver or variation of any term of this agreement must be in writing and signed by all parties.

SIGNED AT_____ON_____

WITNESSES:

1. _____

2. _____

_____

CLAIMANT

PERSONAL CAPACITY/

DULY AUTHORISED

(Attach copy of authority/ resolution)

WITNESSES:

1. _____

2. _____

_____

RESPONDENT
PERSONAL CAPACITY/
DULY AUTHORISED
(Attach copy of authority/ resolution)

This gazette is also available free online at www.gpwonline.co.za

FORM MED-15

(Rule 80(2))

COURT: FILE NO:

MEDIATOR'S REPORT

PARTIES:

AA Claimant

And

BB Respondent

To: The mediation clerk

1*(a)* Mediation between the parties was held on the following dates and at the following times:

Date: _____ Time: _____

Date: _____ Time: _____

Date: _____ Time: _____

(b) Mediation was concluded on _____

2. Mediation was fully successful and a settlement agreement was concluded.

OR

3*(a)* Mediation was partially successful and the following was agreed upon:

_____

_____

_____

(b) An agreement was/was not concluded

This gazette is also available free online at www.gpwonline.co.za

OR

4 *(a)* Mediation was not successful for the following reasons:

_____

_____

_____

_____

(b) The parties have elected to continue with litigation/take no further steps/take time to consider what they would elect to do.

_____

MEDIATOR

NAME

DATE"

COMMENCEMENT

5. These rules come into operation on 1 August 2014.

This gazette is also available free online at www.gpwonline.co.za