

PRIVATE ORDERING AND DISPUTE RESOLUTION★

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In this article, we discuss the current state of Alternative Dispute Resolution ('ADR') law, practice and education in South Africa, with a particular focus on the potential role for mediation in commercial disputes. Our angle is to frame the material with a discussion of economic and contract theory, particularly that on private ordering and relational contracting. We link this socio-legal theory to more specific theory on ADR itself, and then contextualise ADR in South Africa. We discuss the role of ADR in commercial practice generally and provide a detailed account of the South African construction industry specifically. Our major conclusion is that ADR is often the most appropriate form of dispute resolution, particularly where social capital is at stake. This provides the link between ADR theory and private ordering/relational theory. Another important conclusion is that South Africa needs more specialist mediators, as well as a legal and political environment which incentivises such training.

I INTRODUCTION

The evidence suggests that alternative dispute resolution ('ADR') is on the rise in the South African commercial sector. ADR, of course, has been a firm fixture of South African employment law for many years.¹ It is also coming to the fore in modern consumer legislation, whether through the National Consumer Tribunal,² the Rental Housing Tribunal,³ or the various industry ombuds.⁴ Even in the sector of blue-chip commercial work, arbitration clauses are very common — perhaps even the norm — in commercial

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¹ This is the role of the Commission for Conciliation, Mediation and Arbitration ('CCMA'), set up under the Labour Relations Act 66 of 1995.

² The National Consumer Tribunal is mentioned as a forum for dispute resolution in both the Consumer Protection Act 68 of 2008 and the National Credit Act 34 of 2005. On ADR in the consumer law sphere, see generally Tanya Woker 'Consumer protection and alternative dispute resolution' (2016) 28 *SA Merc LJ* 21.

³ This forum determines disputes related to residential leases as a preliminary step before formal litigation under the Rental Housing Act 50 of 1999. See further *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC).

⁴ Insurance (both the long-term and short-term insurance industries separately), banking and financial services (generally) are examples of industries that have dedicated ombuds set up by statute. There is also a general Consumer Goods and Services Ombud.

contracts drafted by South African law firms,⁵ while the current King Code of Corporate Governance touts mediation as the recommended format for corporate dispute resolution.⁶ Legal scholarship in South Africa is also showing a renewed interest in ADR. One need only browse recent editions of our leading law journals,⁷ or the catalogues of our leading law publishers,⁸ to confirm this. Similarly, ADR courses at the University of Cape Town, where two of the authors are based, are always fully subscribed, demonstrating student and practitioner interest in acquiring ADR-related skills.⁹

The reasons for this trend are not hard to find. Curial adjudication involves a lengthy wait for a trial date, exacerbated by heavy legal fees. Aside from time and money, other business reasons may point to ADR as not just being the ‘alternative’, but perhaps also the ‘appropriate’ form of dispute resolution, particularly where a valuable business relationship or confidential information is involved. Of course, there are those who argue against settlement and ADR in general — legal and moral arguments can be raised against the privatisation of dispute resolution.¹⁰ While noting the importance of some of this criticism, our aim is to contextualise our argument. Rather than a blunt, reductive argument against adversarial public litigation, we will use (inter alia) socio-legal theory, comparative scholarship¹¹ and, in Michelle Wright and Alan Rycroft’s cases, personal experience to answer anti-ADR com-

⁵ Compare the general trend of the underlying narrative in P M Nienaber ‘Toegepaste reg oor arbitrasiens en dies meer’ (2016) 27 *Stellenbosch LR* 393.

⁶ The *King III Code on Corporate Governance for South Africa* (2009) included a ch 11 on alternative dispute resolution. This position is maintained in the *King IV Report on Corporate Governance for South Africa* (2016).

⁷ Nienaber op cit note 5; Woker op cit note 2; F D J Brand ‘Judicial review of arbitration awards’ (2014) 25 *Stellenbosch LR* 247; Ronan Feehily ‘The certainty of settlement’ (2016) 27 *Stellenbosch LR* 25; Ronan Feehily ‘The role of the commercial mediator in the mediation process: A critical analysis of the legal and regulatory issues’ (2015) 132 *SALJ* 372; Alan Rycroft ‘What should the consequences be of an unreasonable refusal to participate in ADR?’ (2014) 131 *SALJ* 778.

⁸ John Brand, Felicity Steadman & Christopher Todd *Commercial Mediation: A User’s Guide* (2012); P Ramsden *The Law of Arbitration* (2009); Paul Pretorius (ed) *Dispute Resolution* (1993); T Wiese *Alternative Dispute Resolution in South Africa: Negotiation, Mediation, Arbitration and Ombudsmen* (2016); E Patelia & MA Chicktay *Appropriate Dispute Resolution: A Practical Guide to Negotiation, Mediation & Arbitration* (2015); C G Marnewick *Mediation Practice in the Magistrates’ Courts* (2015); Laurence Boulle & Alan Rycroft *Mediation: Principles, Process, Practice* (1997).

⁹ The University of Cape Town offers a final year LLB elective in Dispute Resolution as well as separate LLM courses in Negotiation, Mediation and Commercial Arbitration. The UCT Law@Work programme (aimed at professionals) offers a quarterly certificate course in Commercial and Court-Aligned Mediation in conjunction with Mediation in Motion, an NPO promoting mediation training and services.

¹⁰ Most famously, Owen Fiss ‘Against settlement’ (1984) 93 *Yale LJ* 1073.

¹¹ There are several key comparative collections on ADR: Arnold Ingen-Housz (ed) *ADR in Business: Practice and Issues Across Countries and Cultures Vol 2* (2011); Klaus J Hopt & Felix Steffek *Mediation: Principles and Regulation in Comparative Perspective* (2013); Felix Steffek (ed) *Regulating Dispute Resolution* (2013).

plaints within our frame of reference. Our primary focus will be on negotiated forms of settlement in a commercial context. (We will not touch on private ordering in African customary law, including in contractual exchanges.¹²) Such negotiation may be directly party-to-party or through a mediator. Of course, much of what we deal with below could also apply *mutatis mutandis* to more adjudicative ADR processes, such as arbitration.

Our inquiry will proceed as follows: in part II, we will give an account of the law-and-society literature on contracting with reference to dispute resolution. In particular, we aim to highlight a phenomenon known as 'private ordering' or 'order without law', in terms of which relationships, including commercial relationships, can be adequately (and perhaps even successfully) managed without direct recourse to adjudication through the courts. This is for two reasons — first, the relational dimension of business contracts; and secondly, the transaction costs involved in the enforcement of contracts through the courts. We will analyse the theoretical and empirical authorities supporting these arguments.

In part III, we will review the trend towards private dispute resolution in South Africa, both descriptively and normatively. As stated above, we will comment particularly on the role of negotiation and mediation in this regard, and the potential which these forms of ADR have to facilitate private ordering in commercial transactions. We will also explore the arguments for and against out-of-court settlement of disputes.

Part IV will contextualise our preceding arguments to give a law-in-action account of settlement ADR in the construction industry in South Africa. Michelle Porter-Wright is a director at a Johannesburg law firm dealing specifically with construction industry dispute resolution. This article will rely on her personal experiences in practice as a benchmark against which to test the arguments of parts II and III.

We will conclude the analysis in part V with an evaluation of the congruence between the private ordering literature and the ADR trend in South Africa.

II PRIVATE ORDERING

In this part of our article, we will defend aspects of the law-and-society literature, as well as a particular strand of economic theory, on contracting. Particularly, we will focus on scholarly trends which could be collected under the heading 'relational contract theory', which includes our central concern,

¹² For mainstream ADR literature which touches on the theme of African customs or customary law, see R B G Choudree 'Traditions of conflict resolution in South Africa' (1999) 1 *African Journal on Conflict Resolution* accessible at www.accord.org.za; John Brand 'Amicable dispute resolution in South Africa' in Arnold Ingen-Housz (ed) *ADR in Business: Practice and Issues Across Countries and Cultures* Vol 2 (2011) 591; Kenny Aina 'Amicable dispute resolution: The Nigerian experience' in Arnold Ingen-Housz (ed) *op cit* at 601; Amadou Dieng 'ADR in sub-Saharan African countries' in Arnold Ingen-Housz (ed) *op cit* at 611.

'private ordering'. We justify our focus on contract theory in an article on ADR with reference to the commercial context of our argument (business relationships rest on contracting, as indeed does ADR), and the fact that much of our focus in the subsequent parts below will be on motivating for the economic and relationship-preserving advantages of ADR. Hence the link between relational contract theory's insights and the ADR movement will become apparent as our argument develops.

(a) *Relational contracting*

Relational contract theory describes the organic business relationship that exists between contracting parties who do repeat business with each other — the given transaction is analysed as one embedded in a broader social milieu.¹³ A once-off ('discrete') contract, although the model for conventional legal analysis, is a business rarity. Even if a given contract involves a one-time cash-on-delivery exchange, if the market in which that exchange takes place rewards contracting parties for having a sound reputation, there will be broader dimensions to the transaction than just the specified terms. This is what Macneil terms 'contractual relations', in the sense that parties who do repeat business, or who rely on a marketable reputation, need to manage their relationships with contracting counterparts.¹⁴ In a context where the contract is intended to endure over a long period of time, or where the parties will enter into multiple repeat transactions, the importance of the business relationship is all the more acute. Relational contract theory hence contextualises a contractual transaction within the setting of underlying economic interests, as well as social factors, such as inter-personal connections between the parties.¹⁵ The literature on this topic talks of joint welfare maximisation through co-operation rather than competition;

¹³ The literature is fairly extensive. By way of introduction, see the essays collected in David Campbell (ed) *The Relational Theory of Contract: Selected Works of Ian Macneil* (2001); Jean Braucher, John Kidwell & William C Whitford (eds) *Revisiting the Contracts Scholarship of Stewart Macaulay* (2013); David Campbell, Linda Mulcahy & Sally Wheeler (eds) *Changing Concepts of Contract: Essays in Honour of Ian Macneil* (2016). For a South African perspective, see Luanda Hawthorne 'Relational contract theory: Is the antagonism directed at discrete exchanges and presentiation justified?' in Graham Glover (ed) *Essays in Honour of AJ Kerr* (2006) 137 and 'The first traces of relational contract theory — The implicit dimension of co-operation' (2007) 19 *SA Merc LJ* 234; Tamara Cohen 'Implying fairness into the employment contract' (2009) 30 *ILJ* 2271; Tamara Cohen 'The relational contract of employment' 2012 *Acta Juridica* 84.

¹⁴ These ideas are central to Macneil's work on relational contracts. See by way of example Ian R Macneil 'The many futures of contracts' (1974) 47 *Southern California LR* 691 and Ian R Macneil *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980).

¹⁵ This is a central element of the argument in Hugh Collins *Regulating Contracts* (1999) chs 5 & 6.

through seeking mutually profitable engagements where the parties' economic interests intersect; and through building trust through reciprocity.¹⁶

Empirically, these ideas make sound business sense, at least to the present authors. Trust, the bedrock of co-operation, is built up between contracting parties, leading to mutual benefit.¹⁷ Relational contract theory is comfortable and easily defensible within a living contractual relationship, while the relations between the parties remain healthy. Relational contract theory however, is not comfortable in an adversarial setting once the business relationship breaks down.¹⁸ This is perhaps why relational contract theory is more popular amongst businesspersons than lawyers — once a relationship is broken, a legal dispute is more likely to turn on concrete rights than on norms of practice. If trust and reciprocity have been destroyed and amicable solutions are no longer possible, formal litigation (and possibly other forms of adjudication) will result in a win/lose situation once the chosen tribunal makes its decision. Here disputes are usually determined by an interpretation of the actual written contract and the rights created therein. In this type of approach, relational contract theory is not an easy fit, although Macneil did describe a trend in the United States towards a 'neo-classical' contract law, which contained more room for context-sensitive flexible standards and discretionary adjudication.¹⁹ It appears that South African contract law may also be moving increasingly towards this path under our Constitutional Court's direction.²⁰

Thus, the conclusion to draw here is that while most contractual situations are relational, contract *law* is (largely) not. Also, litigation is likely to destroy a contractual relationship, so this avenue should only be entertained where the business relationship is no longer worth preserving. This leads logically to the proposition that party-to-party negotiation, or even third-party facilitated negotiation in the form of mediation, offers relationship-preserving potential for managing conflict or resolving disputes.

(b) *Transaction cost economics*

Transaction cost economics, a branch of the new institutional economics,²¹ is the strand of economic theory most closely associated with relational

¹⁶ See the sources cited in note 13 above. See in particular David Campbell 'Ian Macneil and the relational theory of contract' in Campbell (ed) op cit note 13 at 3.

¹⁷ For a brief explanation, see David Campbell 'What do we mean by the non-use of contract?' in Braucher et al (eds) op cit note 13 at 164.

¹⁸ Compare Jonathan Morgan *Contract Law Minimalism* (2013) at 103–8.

¹⁹ For a discussion of the differences between 'classical', 'neo-classical' and 'relational' contract law, see Ian Macneil 'Contracts: Adjustment of long-term economic relations under classical, neo-classical and relational contract law' (1978) 72 *Northwestern Univ LR* 854. For an argument as to how this relates to the South African context, see Andrew Hutchison 'Relational theory, context and commercial common sense: Views on contract interpretation and adjudication' (2017) 134 *SALJ* 296.

²⁰ This is the argument advanced in Hutchison *ibid*.

²¹ For a more recent collection of essays, see Claude Ménard & Mary M Shirley (eds) *Handbook of New Institutional Economics* (2005).

contracting.²² The basic proposition behind transaction cost economics, as Williamson explains, is that transactions generate costs, similar to the concept of friction in physics.²³ This is a factor to be considered in framing an economic organisation; structuring a transaction ex ante; or enforcing a contract ex post.²⁴ For example, in a contractual relation which is intended to last for a lengthy period of time, is it worth the costs involved to negotiate and draft a detailed written contract which provides for every possible instance? To the extent that this is even possible (compare Macneil's discussion of predicting the future at the time of contract drafting — 'presentation'),²⁵ such discussions may signal perceived bad faith to a counterpart, or simply involve costs in time and money which are not worth incurring. Similarly, when it comes to contract enforcement, it may be that the costs of engaging legal representation, the delay in getting a court date, the time spent preparing for and conducting litigation, followed (even if successful) by the difficulties of execution of a court order, outweigh the cost of simply bearing the loss in question, (possibly) writing it off as a tax-deductible expense, and resolving never to do business with that particular counterpart again. In an organisational setting, questions may arise as to whether a supply chain is best managed by vertical integration, or by relational contracting, such as in a contractual network.²⁶ The emergent picture is that while contract law and the legal rights it creates may be perfectly valid on paper, economic factors may make those rights worthless to a particular party in the context of its given business dispute. The key component of the analysis is predicting what are the costs of doing business in a particular way.

A related empirical discussion can be found in the work of Macaulay, whose interviews in various contracting sectors suggested that there is a difference between 'the real deal' and 'the paper deal', or that business often involves a 'non-contractual relation'.²⁷ The general idea is that businesspersons will resort to legal representation, or litigation, only as an absolute last straw. The reason for this is clear: involving lawyers is bad for business as it destroys valuable commercial relationships. Applying Williamson's analysis to Macaulay's 'non-use' of contracts, one might say that legal representation and

²² See especially the work of Oliver E Williamson, such as *The Economic Institutions of Capitalism* (1985).

²³ Williamson *ibid* at 19.

²⁴ *Ibid* at 20–2.

²⁵ This concept is (again) central to Macneil's work. See the sources mentioned in note 14 above.

²⁶ Williamson *op cit* note 22; W W Powell 'Neither market nor hierarchy: Network forms of organization' (1990) 12 *Research in Organizational Behavior* 295; Marc Amstutz & Guenther Teubner (eds) *Networks: Legal Issues of Multilateral Co-operation* (2009).

²⁷ See in particular Stewart Macaulay 'Non-contractual relations in business — A preliminary study' (1963) 28 *American Sociological Review* 55. Further examples of Macaulay's work and secondary essays thereon can be found in Braucher et al (eds) *op cit* note 13.

litigation increase the transaction costs in a particular contract or contractual dispute, which should hence be avoided if the goal is to make a profit or build a reputation.

From an ADR point of view, the connection here is to the common arguments in favour of ADR, namely that it typically costs less in terms of legal representation (certainly this is the case for negotiation or mediation, but even adjudicative forms of ADR can result in savings of time and money), with additional payoffs, such as confidentiality. In addition, business relationships cost time and money to build — the loss of these could potentially be a heavy transaction cost of litigated dispute resolution.

(c) *Non-legal sanctions*

What then is the substitute for limiting or punishing recalcitrant or bad-faith behaviour through the courts? The answer is that if formal legal dispute resolution is to be avoided, there must be some other method for ensuring a counterpart's compliance with contractual expectations. The answer proposed by the socio-legal literature is that this is a normal process of human socialisation, resting on non-legal or economic sanctions.²⁸ In his seminal article on this topic, Charny suggests that compliance with commercial norms is achieved through three means. First, there is the fact that parties may have a mutual desire to do repeat business with each other. If there is non-compliance, future possibilities for exchange may be more limited or even no longer available, with economic repercussions. Secondly, in a market where participants are known to one another, or where information is available through formal or social media, a business reputation (or goodwill) is a tangible economic asset, which negative gossip, bad press, or public litigation may damage, thereby reducing its value.²⁹ Hence a party to a contractual relationship has a reputational interest in complying with established norms. Thirdly, (and possibly more intangibly) there is the forum of conscience, where personal honour or guilt may motivate a contracting party to adhere to accepted standards.³⁰ The net result of these factors is that economic pressure can be brought to bear on a counterpart through

²⁸ Most famously David Charny 'Nonlegal sanctions in commercial relationships' (1990–1991) 104 *Harvard LR* 373. See further Collins op cit note 15 at ch 5.

²⁹ These reputational and ethical considerations are captured in Michael Wheeler '5 principles of negotiation to boost your bargaining skills in business situations' (2016) *Program on Negotiation — Harvard Law School*, who argues that there are five considerations which underlie ethical business contracts: reciprocity, publicity, the trusted friend, universality and legacy, each drawn from the following questions: 'Would I want others to treat me or someone close to me this way? Would I be comfortable if my actions were fully and fairly described in the newspaper? Would I be comfortable telling my best friend, spouse, or children what I am doing? Would I advise anyone else in my situation to act this way? Does this action reflect how I want to be known and remembered?' Available at <https://www.pon.harvard.edu/daily/negotiation-training-daily/questions-of-ethics-in-negotiation/>, accessed on 24 February 2017.

³⁰ These are the three suggestions put forward by Charny op cit note 28 at 392–7.

relational means. Of course, what is not mentioned here are more conventional forms of leverage, described in the economic literature as 'hostages' or 'collateral',³¹ where valuable items are held by one party by agreement in order to compel performance by a counterpart without requiring a resort to the courts. Deposits, liens and other rights of security, and more subtle forms of coercion relying on market power or influence, all fall into this category. These would usually fall under the description 'self-help'. Where such self-help happens without the need for court enforcement, arguably we are dealing with a 'non-legal' sanction.³² (Some such measures will be lawful, others unlawful — this is a question largely of public policy.³³)

The potential of non-legal sanctions can be fully explored in ADR, both in terms of facilitating or framing negotiations, or in forcing settlement. This may result in the more powerful party leveraging its market power, but could also level the playing field, such as when a consumer relies on the reputational concerns of a large supplier to ensure compliance. In the sense that ADR allows for a broader spectrum of party-to-party solutions, as well as confidentiality, there may be greater individual control over reputational damage, as well as a possibility to preserve repeat business. In a consumer setting, the avoidance of litigation costs often makes non-legal sanctions the only realistic form of ensuring compliance with contracts. Non-legal sanctions may hence be a motivating factor in the choice of ADR as a dispute resolution method or to facilitate an out-of-court settlement.

(d) *Order without law*³⁴

The literature on private ordering includes some extremely influential empirical studies emanating largely from the United States,³⁵ but also

³¹ Williamson *op cit* note 22 ch 7.

³² Self-help can however result in less-than-honest responses, which have been justified as a defence strategy (as in self-defence) and has been called 'defensive dishonesty', a way to limit risk. Dees & Cramton call this the Mutual Trust Principle, which says: 'Obligations to refrain from specific kinds of morally regrettable conduct are diminished (perhaps eliminated) for an individual when the following two conditions are present: (1) the individual is operating in a trust-deficient social context, and (2) refraining from the regrettable conduct would cause the individual to bear significant incremental risks or incur significant incremental costs.' See J G Dees & P C Cramton 'Shrewd bargaining on the moral frontier: Toward a theory of morality in practice' (1991) *Business Ethics Quarterly* 135; see also J G Dees & P C Cramton 'Promoting honesty in negotiation: An exercise in practical ethics' 1993 *Business Ethics Quarterly* 4.

³³ Compare the literature on summary execution against property held under an agreement of pledge ('parate executie' clauses).

³⁴ For an overview of the 'private ordering' literature, see Barak D Richman 'Firms, courts and reputation mechanisms: Towards a positive theory of private ordering' (2004) 104 *Columbia LR* 2328.

³⁵ See for present purposes Robert C Ellickson *Order Without Law: How Neighbors Settle Disputes* (1991); Lisa Bernstein 'Opting out of the legal system: Extralegal contractual relations in the diamond industry' (1992) 21 *Journal of Legal Studies* 115; Lisa Bernstein 'Merchant law in a merchant court: Rethinking the code's search for

elsewhere.³⁶ The genre of this writing is broadly law and society, in some cases with a fairly pronounced economic analysis. As above, the hypothesis is that unlike Hobbes's argument in *Leviathan*,³⁷ in the absence of a recourse to formal, centralised law, society will not necessarily descend into a hostile and anarchic state of nature, but will rather self-regulate, through the imposition of non-legal norms and standards enforced by society itself, rather than by the state.³⁸ (There is of course an overlap with the concept of 'legal pluralism' here, which also defends a view that 'semi-autonomous social fields' have normative force, creating binding customs outside of centralised law.³⁹ We have chosen to retain the terminology of 'private ordering' as we think that this terminology works better for our analogy to ADR. In addition, our argument is one largely based on economic interests — since this is not law, we do not motivate for recognition of a parallel legal system.)

In the interests of brevity, this article will mention the work of just three scholars. From a US perspective, Ellickson described the norms of a community of cattle ranchers located in Shasta County, California.⁴⁰ Ellickson's empirical study, which involved interviewing members of this community, found that non-legal norms governed issues like who was responsible for building and maintaining a common boundary fence; how to prevent cattle roaming off an owner's land; or who was liable if a stray cow caused a motor vehicle accident.⁴¹ Conflict or disputes over this type of issue were resolved through the application of unwritten social conventions, backed up by non-legal sanctions.⁴² Community members did not resort to the formal law or legal structures when faced with this type of situation.⁴³ Similarly,

immanent business norms' (1995–1996) 144 *Univ of Pennsylvania LR* 1765; Lisa Bernstein 'Private commercial law in the cotton industry: Creating cooperation through rules, norms and institutions' (2000–2001) 99 *Michigan LR* 1724.

³⁶ We refer here to Marcel Fafchamps 'The enforcement of commercial contracts in Ghana' (1996) 24 *World Development* 427. Other developing world examples exist: see the overview in Richman op cit note 34.

³⁷ Thomas Hobbes *Leviathan* (1651).

³⁸ See the sources in notes 34–6 above. The Leviathan idea is discussed in (for example) Williamson op cit note 22 at 164–6 and recurrently in Ellickson op cit note 35.

³⁹ For the concept of 'legal pluralism' in South Africa, see Chuma Himonga & Thandabantu Nhlapo (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014) 45; T W Bennett 'African customary law' in Matthias Reimann & Reinhard Zimmermann (eds) *Oxford Handbook of Comparative Law* (2006) 641 at 666–71. For the world literature, see (ex pluribus) John Griffiths 'What is legal pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1; Sally Engle Merry 'Legal pluralism' (1988) 22 *Law and Society Review* 869. For the concept of a 'semi-autonomous social field', see Sally Falk Moore 'Law and social change: The semi-autonomous social field as an appropriate subject of study' (1972–1973) 7 *Law and Society Review* 719.

⁴⁰ Ellickson op cit note 35.

⁴¹ Ibid; see in particular part I of this work for the empirical findings.

⁴² Ibid.

⁴³ Ibid.

Bernstein conducted several separate empirical studies of specific industries in the US in the course of her published research. She conducted influential investigations into the New York diamond industry;⁴⁴ the largely South-Eastern US cotton industry;⁴⁵ and the US national grain industry.⁴⁶ In each case, she found a system with repeat players, which operated according to industry norms and customs. In all cases there were industry specific rules, not captured in formal legal sources, which were enforced either by non-legal sanctions, or by independent dispute resolution tribunals (or both).

To give an African equivalent, Fafchamps described the privately ordered nature of Ghanaian commercial enterprise in the manufacturing and trading sectors.⁴⁷ He was able to derive therefrom broader conclusions about how Ghanaian commercial practice could be enhanced by structural and regulatory developments, such as by the introduction of a small claims court and national credit bureaux.⁴⁸ Fafchamps's findings similarly confirm that in the absence of recourse to (or availability of) formal legal mechanisms, economic considerations would govern commercial practice, resulting in a privately ordered marketplace.

Although the communities described by Ellickson, Bernstein and Fafchamps were largely homogeneous and established, it is interesting to see that in these communities of merchants (in Bernstein's and Fafchamps's cases), or commercial farmers (in Ellickson's case), business was conducted according to a private commercial code of normative conduct, which was outside of formal law. The conclusions derived by these authors were largely of the law-and-economics variety, centring on themes such as co-operation versus competition, the effectiveness of non-legal sanctions, and hence the efficacy of a privately ordered system. While other scholars have pointed out that the homogeneity of the communities in question may have facilitated private ordering, the incongruence with the state-of-nature hypothesis is striking.⁴⁹ It would thus seem that in the absence of law, economics rules the market place and will fill regulatory gaps in the system. From the perspective of relational contract theory, where a contract is a three-dimensional construction of the specific agreed transaction, the supervening business relationship, and the underlying economic interests of both parties, we see that the relational and economic dimensions of a transaction are capable of governing it in the absence of enforceable law.⁵⁰ This is the essence of private ordering.

⁴⁴ Bernstein 1992 *Journal of Legal Studies* op cit note 35.

⁴⁵ Bernstein 1996 *Univ of Pennsylvania* op cit note 35.

⁴⁶ Bernstein 2001 *Michigan LR* op cit note 35.

⁴⁷ Fafchamps op cit note 36.

⁴⁸ *Ibid* at 443–6.

⁴⁹ This idea is central to the argument of Richman op cit note 34.

⁵⁰ For the idea of a three-dimensional analysis of contracts, see Collins op cit note 15; Hugh Collins 'The contract of employment in 3D' in Campbell et al (eds) op cit note 13 at 65.

(e) Comment: Private ordering and ADR

As has been suggested above, relational contract theory, transaction cost economics and non-legal sanctions are all firmly compatible with ADR. Possibly this type of analysis is more at home in negotiated forms of ADR, particularly those aimed at settlement. As argued in the preceding sub-part, however, privately ordered systems, such as those described by Bernstein in particular, may also operate in the setting of adjudicative forms of ADR. The point is that dispute resolution is privatised and managed entirely by the parties to the transaction, either individually, or as members of a community or group. Private ordering theory is hence a good fit for ADR, with all the relational advantages of preserving commercial partnerships⁵¹ and networks;⁵² allowing creative settlements which ‘grow the pie’ toward a mutually profitable outcome;⁵³ ensuring the ability to bring market pressure to bear on a party to facilitate an economically realistic settlement; and, most importantly, creating the ability to maintain control over proceedings in terms of time, costs incurred, confidentiality, whether the settlement is binding or not, the nature of the forum and the identity of the decision-maker.

III ADR IN SOUTH AFRICA

(a) South African ADR processes and relationship preservation

Before commenting on the present status of mediation practice in South Africa, it is worth considering the link between the relational contract and ADR processes. In fact the relational focus of mediation is regarded as one of its central advantages. As has been pointed out:

‘Besides being person-centred, mediation also has a relational focus. This signifies that its methods and philosophy are concerned with the human side of dispute resolution, including the opportunity for the venting of emotions, acknowledgment of strongly-held feelings and attention to future relations between the parties. Mediation can preserve or improve relationships by taking into account the real interests of the parties, by providing an accessible and participatory procedure, by modelling constructive negotiation and problem-solving techniques and by humanising the management of conflict. This

⁵¹ For a construction industry perspective on the advantages of a ‘partnering’ approach, see M Latham ‘Constructing the Team: Final Report of the Government/Industry Review of Procurement and Construction Arrangements in the UK Construction Industry’ (1994), available at <http://constructingexcellence.org.uk/wp-content/uploads/2014/10/Constructing-the-team-The-Latham-Report.pdf>, accessed on 30 November 2016; J Egan ‘Rethinking Construction: Report of the Construction Task Force to Deputy Prime Minister John Prescott’ (1997), available at http://constructingexcellence.org.uk/wp-content/uploads/2014/10/rethinking_construction_report.pdf, accessed on 30 November 2016.

⁵² See the sources cited in note 26 above.

⁵³ This phrase (and the general idea) is taken from Roger Fisher, William Ury & Bruce Patton *Getting to Yes: Negotiating an Agreement Without Giving In* (2011 [original ed 1981]) especially in ch 4.

constitutes the “gentler art” of reconciliation, rather than the confrontationist science of court battle.⁵⁴

Apart from these reasons, mediation is often chosen when adverse publicity must be avoided and/or a confidential process is required.⁵⁵ Other factors supporting a non-adversarial process are the following:⁵⁶

- (i) when there are no great issues of principle or policy involved;
- (ii) when there is the time, resources and commitment to negotiate a mutually satisfactory agreement;
- (iii) when the level of conflict between the parties is moderate;
- (iv) when there is a rough equality of bargaining power between the parties;
- (v) when the parties have the capacity and abilities to negotiate;
- (vi) when there is more than a single issue in dispute;
- (vii) when there are no clear legal principles or other standards to guide the parties’ decision-making; and
- (viii) when there is some external or institutional encouragement for the parties to settle in mediation.

In contrast, arbitration is chosen:⁵⁷

- (i) when negotiation and/or conciliation has failed;
- (ii) when there is an agreement or statute which requires arbitration;
- (iii) when either party feels there is an important issue of principle involved that requires a definitive ruling;
- (iv) when either party wants to take a stand on the issue;
- (v) when the dispute involves a purely legal question;
- (vi) when the dispute cannot be resolved without making complicated findings of fact;
- (vii) when either party wants a definitive ruling on an existing policy affecting many people;
- (viii) when an individual feels pressurised/disempowered in the conciliation process and wants a third party to make a ruling; and
- (ix) when a party is confident about the level of skill of its representative in arguing the case.

These factors echo the concerns of Fiss over settlement as a norm for dispute resolution in terms of power imbalances, the possible absence of authoritative consent and the lack of a foundation for continuing judicial involvement.⁵⁸ Fiss asserted that judges and courts are society’s chosen way of resolving disputes, ‘to explicate and give force to the values embodied in

⁵⁴ Boule & Rycroft op cit note 8 at 37.

⁵⁵ Lawrence Freedman & Michael Prigoff ‘Confidentiality in mediation: The need for protection’ (1986–1987) 2 *Ohio State Journal on Dispute Resolution* 37–45.

⁵⁶ Compare John Brand, Casper Lötter, Carl Mischke & Felicity Steadman *Labour Dispute Resolution* (1997) 78.

⁵⁷ Patelia & Chicktay *Appropriate Dispute Resolution* op cit note 8 at 59.

⁵⁸ Fiss op cit note 10.

authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when parties settle.⁵⁹ The argument is that settlement deprives a court of the opportunity to create precedent to guide the resolution of other disputes.⁶⁰ We concede that there will always be disputes where the public interest requires court adjudication. But our concern is narrower — disputes between parties in an established relationship where there is no public interest in the settlement.

There has been an attempt to integrate the mediation and arbitration processes in the med-arb and arb-med processes. Med-arb (also known as 'con-arb') is the process in which a third party attempts, through mediation, to help parties to a dispute to reach a settlement; but, if this is not possible, to then determine the dispute by making a final and binding arbitral award.⁶¹ This process is generally seen as an efficient hybrid process which offers the best of both worlds — the opportunity for the parties to reach their own settlement, failing which the parties have the finality of an arbitral award. In the event that mediation fails, the parties need not educate another third party; the person who has been serving as mediator knows much of the information he or she will need to make a decision.⁶² Objections to med-arb are usually based on an understanding of the mediation process, which requires frank disclosure and confidentiality as key components to the successful resolution of disputes. These components would be withheld, it is argued, if the parties know in advance that the mediator could later arbitrate the dispute.⁶³ Arbitration requires that justice is seen to be done. How then does the arbitrator retain the image of impartiality after having indicated possible weaknesses in a party's case during the mediation phase? How does the arbitrator make a decision, on the evidence in the arbitration, having given indications during the reality testing portion of the mediation phase of possible limitations in the position of one or other party?

To deal with these problems, a variation was developed. Arb-med (or 'Arb-con') is a process by which the parties to a dispute agree to go to a single third party who first arbitrates but does not disclose the determination to the parties. With the determination sealed in an envelope and not subject to

⁵⁹ *Ibid* at 1085.

⁶⁰ The American Bar Association drew attention to some of these problems in its 2003 'Vanishing trial project'. See http://www.abanet.org/litigation/journal/opening_statements/04winter_openingstatement.pdf, accessed on 16 March 2017.

⁶¹ Barry Bartel 'Med-Arb as a distinct method of dispute resolution: History, analysis, and potential' (1991) 27 *Williamette LR* 661; Brand et al *op cit* note 56; Camilla Leeds & Albert Wocke 'Methods of reducing the referral of frivolous cases to the CCMA' (2009) 33 *Journal of Labour Relations* 28; J A Faris 'Exploring the alternatives in alternative dispute resolution' (1994) 27 *De Jure* 331; Barney Jordaan 'Hybrid ADR processes in South Africa' (2011) 9 *ADR Bulletin* available at <http://epublications.bond.edu.au/adr/vol12/iss5/2/>, accessed on 16 March 2017.

⁶² Stephen Goldberg, Frank Sander & Nancy Rogers *Dispute Resolution* 2 ed (1992) 226.

⁶³ Alan Rycroft 'Rethinking the con-arb procedure' (2003) 24 *ILJ* 699.

alteration, the third party then conciliates the dispute. Failing settlement in the conciliation, the determination is disclosed to the parties and becomes binding upon them.⁶⁴

Both these processes offer ways to tackle matters which do not settle in mediation but where the relational aspects of the contract require a 'softer' process than litigation. Certainly the arbitration phase in both med-arb and in arb-med contains the risk of a damage to the relationship, but in both processes the psychological imperative is to retain control of the outcome through negotiation rather than going to the arbitration phase or risk the opening of the sealed envelope.

(b) *ADR in South Africa: The status quo*

If our assumption is correct — that ADR is not only compatible with, but appropriate to, the relational contract and private ordering — then why does South Africa lag so dramatically behind other countries in the establishment of ADR as a default position for the resolution of disputes? We suggest that the answer lies in a combination of factors. First, there is a lack of political will and a hostility from many in the legal profession. Secondly, there is little censure from judges for not attempting ADR. Finally, and until recently, there has been a lack of available training in commercial mediation.

(i) *Political will and hostility to ADR*

On the first argument of a lack of political will, a predictable response is that this cannot be the case. After all, over 40 statutes in South Africa recommend conciliation and arbitration as ways to resolve disputes.⁶⁵ However, legisla-

⁶⁴ Brand et al op cit note 56 at 64.

⁶⁵ The Antarctic Treaties Act 60 of 1996; the Child Justice Act 75 of 2008; the Children's Act 38 of 2005; the Commission on Gender Equality Act 39 of 1996; the Companies Act 71 of 2008; the Constitution of the Republic of South Africa, 1996; the Consumer Protection Act 68 of 2008; the Development Facilitation Act 67 of 1995; the Electricity Regulation Act 4 of 2006; the Estate Agency Affairs Act 112 of 1976; the Extension of Security Tenure Act 62 of 1997; the Financial Advisory and Intermediary Services Act 37 of 2002; the Financial Services Ombuds Scheme Act 37 of 2004; the Further Education and Training Colleges Act 16 of 2006; the Gas Act 48 of 2001; the Health Professions Act 56 of 1974; the Higher Education Act 101 of 1997; the Human Rights Commission Act 54 of 1994; the Income Tax Act 58 of 1962; the KwaZulu-Natal Ingonyama Trust Act 3 of 1994; the Labour Relations Act 66 of 1995; the Land Reform (Labour Tenants) Act 3 of 1996; the Local Government: Municipal Finance Management Act 56 of 2003; the Local Government: Municipal Systems Act 32 of 2000; the National Credit Act 34 of 2005; the National Environmental Management Act 107 of 1998; the National Forests Act 84 of 1998; the National Land Transport Act 5 of 2009; the National Land Transport Transition Act 22 of 2000; the National Payment System Act 78 of 1998; the National Ports Act 12 of 2005; the National Sport and Recreation Act 110 of 1998; the National Water Act 36 of 1998; the Pan South African Language Board Act 59 of 1995; the Pension Funds Act 24 of 1956; the Petroleum Pipelines Act 60 of 2003; the Post Office Act 44 of 1958; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; the Probation Services Act 116 of 1991; the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; the Promotion

tion is simply a declaration of intent.⁶⁶ It does not guarantee a sustained commitment to the ADR project, to promoting ADR, to training mediators, and to funding the process. The failure of ADR to take root generally can be seen most clearly through a comparison with the one area in which ADR has been an acknowledged success: in the resolution of employment disputes.

Hostility to ADR — by many, but not all, in the legal profession — is seen in the track record of legislative initiatives. The Mediation in Certain Divorce Matters Act 24 of 1987 provided little scope for meaningful mediation.⁶⁷ The Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991 promised an alternative to civil litigation, but was never implemented.⁶⁸ The present pilot scheme of mediation in the magistrates' courts started with a bold scheme for mandatory mediation with penalties for avoiding mediation. The final draft provides for voluntary mediation with no penalties for non-co-operation.

The 2011 version of what is now known as the 'Voluntary Court-Annexed Mediation Rules of the Magistrates' Courts' provided that while a litigant could refuse to submit to mediation, if the court found that the refusal was unreasonable and that mediation may have resulted in substantially the same finding as the court, the court was empowered to make 'such order as to costs as it considers appropriate, against the litigant that refused mediation'. Despite support in 2011 by the Joint High Court, Magistrates' Courts and ADR Committees of the Law Society of South Africa, the 2014 version of the rules removed this opportunity to create a lively tension between a refusal to mediate and costs. In response to this, the South African Dispute Settlement Accreditation Council ('DiSAC')⁶⁹ proposed that the rules

of National Unity Act 34 of 1995; the Public Protector Act 23 of 1994; the Recognition of Customary Marriages Act 120 of 1998; the Rental Housing Act 50 of 1999; the Restitution of Land Rights Act 22 of 1994; the Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991; the Skills Development Act 97 of 1998; the South African Institute for Drug-Free Sport Act 14 of 1997; the State Information Technology Agency Act 88 of 1998; and the Telecommunications Act 103 of 1996.

⁶⁶ As Winthrop Jordan put it, 'while statutes usually speak falsely as to actual behaviour, they afford probably the best single means of ascertaining what a society thinks behaviour ought to be' — quoted by Mark Tushnet *The American Law of Slavery 1810–1860: Considerations of Humanity and Interest* (1981) 18.

⁶⁷ Despite the title of the Act, what the Family Advocate is empowered to do is to institute an enquiry, not mediate. Compare M de Jong 'Judicial stamp of approval for divorce and family mediation in South Africa' (2005) 68 *THRHR* 95 who writes (at 96): 'Because the purpose of an enquiry in terms of section 4 of this Act is to evaluate the parties and the circumstances of a case in order to furnish the court with a report and recommendation on matters concerning the welfare of any minor children, the activities of family advocates and family counsellors should rather not be regarded as mediation (even though they sometimes indeed try to mediate disputes between divorcing parties).'

⁶⁸ The Act remains unrepealed and is supported by Rules of Courts for Short Process and Mediation Proceedings (see GNR2196 in GG 14188 of 31 July 1992).

⁶⁹ The Dispute Settlement Accreditation Council ('DisAC'), which was established in 2010, exists to define and publish national accreditation standards for

should provide a clear mechanism first for reporting to the court where parties failed or refused to participate in mediation proceedings, and, secondly, for recording the reasons why parties refused to participate in mediation proceedings. DiSAC argued that this would not be introducing any new penalty or duty on the parties, but would merely serve to inform the court on matters it already takes into account when considering costs orders.⁷⁰

The South African Law Commission committed considerable resources in the 1996–1997 period on several reports under its general project on ADR (Project 94).⁷¹ Not much has come from these serious contributions, including the compelling argument on the urgent need to bring South African arbitration law in line with international norms. It was only on 13 April 2016 that cabinet approved the draft International Arbitration Bill for submission to Parliament for debate and approval. After considerable delay the Act was passed as Act 15 of 2017, and took effect on 20 December 2017.⁷² At the time of writing it is far too early, a few months into the operation of the Act, to be able to assess its impact.

Turning then to the comparison with the successful system for the resolution of employment disputes, it is helpful to consider what contributed to the success of the Commission for Conciliation, Mediation and Arbitration ('CCMA'). Few would dispute that the establishment in 1983 of the Independent Mediation Services of South Africa ('Imssa') was pivotal in transforming both public and state attitudes to mediation and arbitration.⁷³ Initially, trade-union leaders needed convincing because private mediation was seen as a process in which workplace power imbalances would be transferred to an apparently legitimate forum. Slowly FOSATU and then COSATU thawed in their attitudes to Imssa and its credibility grew. What Imssa achieved was the privatisation of labour disputes. These disputes were mediated and arbitrated by Imssa's panel of mediators and arbitrators, as opposed to the defunct conciliation board system and the sometimes

dispute-resolution practitioners, including mediators and arbitrators, as well as for training courses, trainers and assessors. DisAC has a national mediation accreditation standard. The standards are based on those of the International Mediation Institute.

⁷⁰ DiSAC 'Comments on the "Court-Annexed Mediation Rules of the Magistrates' Courts"' (22 May 2013) para 2.5.

⁷¹ The 1997 Issue Paper 8 on Alternative Dispute Resolution; the 1997 Discussion Paper 69 on a Draft International Arbitration Act for South Africa; the 1999 Discussion Paper 87 on Community Dispute Resolution Structures; and the 1999 Discussion Paper 83 on Domestic Arbitration.

⁷² See GN 1454 in GG 41347 of 20 December 2017.

⁷³ In 1983, Loet Dowes Dekker, an influential industrial relations academic at the Wits Business School, received funding for a launching conference on the establishment of Imssa. This led to the training of arbitrators and mediators and soon Imssa was functioning. Julian Riekert was appointed as the first director, followed a little later by Charles Nupen.

controversial industrial court.⁷⁴ Imssa had a vibrant and progressive training department, which used effective teaching methodology together with reputable materials, training over 200 mediators and arbitrators over fifteen years. By the 1990s, Imssa was dealing with 1500 mediations and arbitrations annually.⁷⁵

The prominence given here to Imssa's influence is not to deny that several other dispute resolution organisations were functioning and influential at that time,⁷⁶ but to suggest that its influence was to spill over decisively into subsequent legislative developments. Many of the key drafters of parts of the Constitution were Imssa panellists or key users of its services.⁷⁷ The Ministerial Task Team to draft the Labour Relations Act 66 of 1995 ('LRA') consisted mainly of Imssa panellists.⁷⁸ The successful establishment of the CCMA was due in large measure to adequate funding and the transfer of mediatory and arbitral skills from Imssa panellists to CCMA commissioners.⁷⁹

The success of the CCMA can largely be attributed to considerable state funding allowing free services to the public,⁸⁰ sound and sustained training of conciliators and arbitrators, an attempt to avoid strict legal formalities in its relatively speedy processes, good publicity about its services (helped mainly

⁷⁴ See Alan Rycroft (ed) *The Private Regulation of Industrial Conflict: Proceedings of the Labour Law Conference 1989* (1990).

⁷⁵ Imssa tried to carry on parallel to the state-funded CCMA, which was established in 1995. By 2000, cash-flow problems threatened Imssa's survival due to debtors not paying for Imssa's services and a shrinking pool of international donor funding available to non-governmental organisations in South Africa. Imssa closed in November 2000 with a debt of R5 million, R3 million of which was owed to its panellists for their services. In reality more and more parties — employers as well as unions — saw little point in paying for a service which was being provided for free by the state.

⁷⁶ ADRASA (Alternative Dispute Resolution of SA), ACCORD (African Centre for the Constructive Resolution of Disputes), CCRS (Community Conflict Resolution Service), The Resolutions Board and MCC (Mediation and Conciliation Centre) all offered mediation services.

⁷⁷ For example, Tito Mboweni, Cyril Ramaphosa, Halton Cheadle, Paul Benjamin, Charles Nupen, Nicholas Haysom. Geoff Budlender, as the then Director-General of Land Affairs, was instrumental in introducing mediation as a statutory mechanism for dealing with land disputes. At the political level, Jayendra Naidoo, Jay Naidoo, Halton Cheadle, Nicholas Haysom, Geoff Schreiner and Johnny Cope-lyn were instrumental in forging the concept of Peace Committees in the National Peace Accord. Jayendra Naidoo and Halton Cheadle conceived the Nedlac model of social dialogue expressed in the NEDLAC statute.

⁷⁸ In particular, Ray Zondo, Dhaya Pillay and Andre van Niekerk; Halton Cheadle's association with Imssa was mainly as a user of its services.

⁷⁹ Charles Nupen and Thandi Orleyn, both Imssa National Directors, became directors of the CCMA. Most Imssa panelists became CCMA commissioners and arbitrators on bargaining councils. John Brand and Felicity Steadman, Imssa panelists, designed the first training materials for CCMA commissioners. Imssa panelists, such as Sarah Christie, Sue Albertyn and Yunus Shaik played important roles in establishing the CCMA in different provinces.

⁸⁰ The Government grant in 2016 was R750 471 000: see (2015–2016) *Annual Review* 133.

by trade unions), and access by the public to 20 offices nationally.⁸¹ The CCMA employs some 340 full-time and part-time commissioners in all nine provinces of South Africa. During the 2015/2016 financial year, 136 959 conciliations were held. CCMA figures indicate that the average duration of a conciliation is two hours for individual disputes. About 74 per cent of disputes are settled at conciliation.⁸² By any standards these statistics speak of an efficient and effective dispute resolution system.

A factor which is inescapable about many labour disputes is that relational theory fits the on-going employment contract. Reinstatement as the default remedy for unfair dismissal indicates an underlying belief that the employment contract can be restored. During the subsistence of an employment relationship, the Labour Relations Act and the Employment Equity Act 55 of 1998 allow claims for unfair labour practices and unfair discrimination. This recognises that, even in a potentially conflicting relationship, conciliation and arbitration are capable of restructuring matters to allow the contract to continue.⁸³

These factors do not apply to other areas of dispute resolution governed by statute. For instance, as the national debate on access to land heats up, there are no signs of a creative and sustainable role for mediation in terms of the Restitution of Land Rights Act 22 of 1994 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. Similarly, there is no national panel of environmental mediators or state funding to promote mediation under the National Environmental Management Act 107 of 1998. There are simply no parallels to the CCMA.

A modest exception applies in the realm of tax law. From 2003, new regulations commenced prescribing the circumstances under which tax disputes may be settled.⁸⁴ The taxpayer is given the option of referring a

⁸¹ For a general critique of the CCMA, see Paul Benjamin (2013) 'Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)' *ILO Working Paper No 47 Governance and Tripartism Department, International Labour Office, Geneva*, available at http://www.ilo.org/ifpdial/information-resources/publications/WCMS_210181/lang-en/index.htm, accessed on 17 March 2017. H Bhorat, Kalie Pauw & Liberty Mncube (2009) 'Understanding the efficiency and effectiveness of the dispute resolution system in South Africa: An analysis of CCMA data' July 1, 2009 *Development Policy Research Unit DPRU Working Paper No 09/137*, doi: <http://dx.doi.org/10.2139/ssrn.2184182>, accessed on 17 March 2017; John Brand 'CCMA: Achievements and challenges — Lessons from the first three years' (2000) 21 *ILJ* 77; Hanneli Bendeman 'An analysis of the problems of the labour dispute resolution system in South Africa' (2006) 6 *African Journal on Conflict Resolution* 81, available at <http://www.acord.org.za/ajcr-issues/%e9%bf%bcan-analysis-of-the-problems-of-the-labour-dispute-resolution-system-in-south-africa/>, accessed on 20 March 2017.

⁸² (2015–2016) *Annual Review* op cit note 80 at 123.

⁸³ Cohen 2012 *Acta Juridica* op cit note 13.

⁸⁴ Settlement circumstances under s 107B of the Income Tax Act and s 93A of the Customs and Excise Act 91 of 1964 provided for in GN 467 in GG 24639 of 1 April 2003; the rules include a Code of Conduct for Facilitators. This is presently regulated in terms of s 103(2) of the Tax Administration Act 28 of 2011. See Rule 13 of the Rules Promulgated Under Section 103 of the Tax Administration Act.

matter to ADR. In 2015–2016, SARS received and dealt with 6221 dispute cases through the ADR process; 421 dispute cases were dealt with at head office, 5617 at regional level and 183 cases through the Tax Board process.⁸⁵

(ii) *Judges and ADR*

In other jurisdictions, ADR has been promoted by judicial responses to a refusal by a party to attempt mediation. In 2009, Feehily argued that it was unlikely that commercial mediation would become a prominent form of dispute resolution until heavy costs penalties were deployed by the courts.⁸⁶ So far, this prediction has been accurate. A rare example of a judicial expectation of mediation as a prior step to litigation is *MB v NB*.⁸⁷ In this case, Brassey AJ held that the failure by attorneys to send a divorce matter to mediation resulted in many days wasted in court and in chambers, and as a consequence, deprived the attorneys of their attorney-and-client costs.⁸⁸ While only the attorneys were deprived of their costs in this case, the risk now exists that parties who unreasonably refuse to mediate will also be deprived of their costs.

There will often be cases where mediation is not appropriate.⁸⁹ Clearly, if a litigant articulates why it refuses to mediate, and the court accepts this explanation, this cannot be held against it. However, where public policy unambiguously requires the parties to engage in ADR and there are practical issues at stake, such as the use of the courts' resources in lengthy litigation, it is submitted that courts increasingly should take into account a refusal to participate in ADR as a factor when awarding costs.

This needs to be more than a judge-driven evolution of dispute resolution norms. Perhaps this is the intention of Rule 40.9 of the Law Society's Draft Uniform Rules, which reads: 'A member shall advise their clients at the earliest possible opportunity on the likely success of such clients' cases and not generate unnecessary work, nor involve their clients in unnecessary expense.' A specific reference to ADR would, of course, provide the necessary and desirable clarity.⁹⁰

(iii) *Training in commercial mediation*

A lack of training in commercial mediation is another possible reason for the delay in ADR becoming normative. Starting at law schools, the curriculum assumes that litigation is the primary method of dispute resolution: civil and criminal procedure courses and moot court competitions create the impres-

⁸⁵ *Annual Report South African Revenue Service 2015–2016* (2016) 55.

⁸⁶ Ronan Feehily 'Cost sanctions: The critical instrument in the development of commercial mediation in South Africa' (2009) 126 *SALJ* 291 at 311. See also Rycroft op cit note 7 at 778–86; Feehily 2015 *SALJ* op cit note 7.

⁸⁷ 2010 (3) SA 220 (GSJ).

⁸⁸ *Ibid* paras 59–61.

⁸⁹ Such as in the case of *Golden Arrow Bus Services (Pty) Ltd v City of Cape Town & others, In re: City of Cape Town v Golden Arrow Bus Services (Pty) Ltd & others* [2013] ZAWCHC 60. See the reasons set out in para 27.

⁹⁰ Rycroft op cit note 7 at 786.

sion that all disputes are resolved in court. There is very little training in negotiation and mediation skills. Then, once in practice, law graduates discover that fees are earned not in earnest attempts to negotiate or mediate, but in prolonging the matter until the date of the trial.

However, in the last ten years, private businesses and universities have steadily trained commercial mediators. In some cases, the training has been specialised: Law@Work⁹¹ has recently run several training courses for mediators in the field of medical negligence. In addition, there are now a number of commercial mediation service providers: Tokiso Dispute Settlement (Pty) Ltd, Equillore Group,⁹² the Association of Arbitrators of Southern Africa and the Arbitration Foundation of South Africa.

These initiatives recognise the need for ADR in the commercial world. Nevertheless, the pace of transformation is sluggish. Clues as to why this is the case may be found in a closer study of the resolution of disputes in the construction industry.

IV DISPUTE RESOLUTION IN THE CONSTRUCTION INDUSTRY

It is commonly understood that arbitration and litigation, and increasingly adjudication, are the predominant forms of dispute resolution in the South African construction industry. While Michelle Porter-Wright's practice has seen an increase in the number of mediations in recent years (driven largely by the soaring costs of arbitration and litigation), mediation is less widely adopted. This is despite mediation being particularly well-suited to construction disputes, given that they tend to arise as a result of a breakdown in communication between parties.⁹³

Unfortunately, there are a number of systemic hurdles to the adoption of mediation as a mainstream format of dispute resolution in the South African construction industry. The purpose of this section of the paper is to outline a few of these hurdles, from Porter-Wright's practical experience. In short, first, there is a lack of legislative endorsement of mediation by the South African government. (This confirms the more general argument put forward in part III(b)(i) above.) Secondly, there is a lack of endorsement by standard-form construction contracts. Thirdly, mediation is approached in an inherently adversarial manner, with the mediator being relied upon for a solution or determination to the detriment of meaningful engagement and problem solving. Fourthly, mediation has a reputation for becoming increasingly cumbersome, costly and adversarial. Finally, there is a lack of skilled mediators with a working knowledge of construction disputes, which is

⁹¹ A training unit at the Faculty of Law, UCT. See note 9 above.

⁹² On its website, Equillore states that it has settled over 45 000 cases for government and corporate clients with 85 per cent of matters being settled after the first mediation meeting. See <http://www.equillore.com/wp/>, accessed on 17 March 2017.

⁹³ Madelene de Jong 'A pragmatic look at mediation as an alternative to divorce litigation' 2010 *TSAR* 515 at 522.

coupled to a perception that mediation is not suited to complex technical disputes of fact commonly encountered on projects.

(a) A lack of legislative endorsement in civil disputes

In continuation of the argument in part III(b)(i) above, but with specific reference to high-value commercial disputes involving construction contracts, the high courts, which deal with the complex, high-value disputes that are often a by-product of construction projects, do not currently offer a court-annexed mediation facility. Nonetheless, the implementation of compulsory high court-annexed mediation in South Africa remains on the cards. The Ministry of Justice and Constitutional Development is aware that compulsory court-annexed mediation is a growing trend internationally and that the common view is that South Africa should follow suit. The Department has asked the South African Law Reform Commission to investigate the matter and advise on the implementation of such a system. In 2014, the ministry also mandated the investigation into the implementation of enabling legislation and the preparation of a Bill. The Minister of Justice and Constitutional Development further appointed a Mediation Advisory Committee which is responsible, inter alia, for assisting the Department in investigating the possibility of implementing appropriate enabling legislation in South Africa.

To date, however, no new developments may be reported and this lack of legitimacy remains a major hurdle to the adoption of mediation as a viable format of ADR, both in civil and construction disputes.

(b) A lack of endorsement in CIDB-approved standard-form contracts

In the South African construction industry, the standard-form construction contracts that are currently available, and those endorsed by the Construction Industry Development Board ('CIDB'), do not actively encourage the use of mediation as a standard format for dispute resolution.

The standard contracts used most commonly are the Joint Building Contracts Committee Principal Building Agreement ('JBCC PBA'), the South African Institution of Civil Engineering General Conditions of Contract ('GCC'), and the International Federation of Consulting Engineers ('FIDIC') and Institution of Civil Engineers New Engineering Contract ('NEC') suites of contracts.⁹⁴ While these contracts render it mandatory to take disputes that cannot be settled by the employer's agent to arbitration, only an outdated version of the GCC (the 1999 contract) stipulates that disputes *must* go to mediation. Unfortunately, the subsequent 2004 GCC contract eliminated mediation as a necessary step and introduced adjudication as a compulsory default instead. In the 2010 edition, the default mechanism is amicable settlement with the assistance of an impartial third

⁹⁴ See generally P A Ramsden *McKenzie's Law of Building and Engineering Contracts and Arbitration* 7 ed (2014).

party called the neutral.⁹⁵ In the JBCC PBA 2014, mediation is listed as optional, applicable only if both parties agree. Further, in both the FIDIC 1999 suite, as well as in the NEC suites, no formal mediation clauses are applicable, whether mandatory or optional.

The lack of contractually endorsed mediation options in these four standard-form contracts is perhaps not surprising given that they are fundamentally liability driven, and not collaborative, styles of contract. In short, these contracts generally reflect the traditional format of construction procurement, which is characterised by a split between design, on the one hand, and construction, on the other hand.⁹⁶ The result is that the contractor is excluded from the design development process. However, such separation is a notorious driver of disputes. The industry would be well advised to move toward more collaborative styles of contract, such as the PPC2000 suite, which represents a fundamental shift in approach to construction procurement, and which is currently enjoying success in the United Kingdom.⁹⁷ We suggest that a move towards more collaborative styles of contract, and the problem-solving that typically characterises them, will more naturally accommodate mediation as a format of dispute resolution.

As an ancillary point, there is also a marked misunderstanding of mediation in South Africa. While adjudication, expert determination, arbitration and litigation are binding procedures, mediation is not. Significantly, since mediation is not binding, the parties retain an attractive level of flexibility over the scope, amount and details of the resolution of the dispute. This crucial point is still not properly understood in the construction industry.

(c) *The adversarial mindset*

Porter-Wright's practice generally deals with a particular type of dispute, namely high-value construction and related disputes, such as warrant

⁹⁵ The *SAICE Management Guide to the General Conditions of Contract 2010* (2010) states that it is recommended that the 'GCC 2010 Amicable Settlement Procedures' at page 163 of the *Management Guide* be used in order to provide structure to the dispute resolution process; namely negotiation, mediation, conciliation, mini-trial and expert evidence. The contract, however, makes no express reference to the GCC 2010 Amicable Settlement Procedures. The *SAICE Management Guide* incorporating the Amicable Settlement Procedures is available from SAICE directly. See www.saice.org.za, accessed on 19 June 2017.

⁹⁶ While the NEC is a more collaborative contract form, Wright views the NEC as being a fundamentally traditional and liability driven contract. Her reasons for this view fall beyond the scope of this article. For discussion of collaboration under the NEC3 *Engineering and Construction Contract*, see Terry Boxall, Andrew Hutchison & Michelle Wright 'NEC3ECC Clause 10.1: An enforceable contractual duty of trust and cooperation in the construction industry?' (2017) 28 *Stellenbosch LR* 97.

⁹⁷ See <http://www.ppc2000.co.uk/>, accessed on 12 June 2017. In short, PPC2000 moves away from the traditional split between design and build, and integrates the design, supply and construction processes, from inception to completion, by setting up an 'integrated team', and providing a practical basis for all the key players to work together, according to agreed timetables, from early design right through to commissioning and handover.

external legal representation. This, we admit, may have influenced the argument advanced here. Nonetheless, in Porter-Wright's experience, mediators in these sorts of disputes are appointed repetitively from a relatively small pool of lawyers; generally advocates who have obtained senior counsel status.

Naturally, lawyers are schooled in adversarial styles of civil litigation. As such, and where lawyers preside as mediators (or where lawyers make submissions on behalf of parties at a mediation), the result is a discernible lack of engagement between the parties, who habitually rely on the mediator to problem-solve by way of suggestion or determination. Further, the lawyer/mediator tends to use persuasion as a means of bringing the parties closer together, which perpetuates an adversarial mindset. In Porter-Wright's opinion, mediations which are championed by lawyers often degenerate into hostile and unhelpful engagements. As a result, she often advises clients to minimise lawyer representation.

It is interesting, then, that a lack of problem solving during the mediation process has been found in an empirical study to be a pervasive characteristic of construction mediations in South Africa. In their study, Povey, Cattell & Michell observed that the majority of available mediation time was allocated to gathering information on a dispute (43 per cent) and drafting the final determination or agreement (27 per cent).⁹⁸ In considering the role of problem solving during that study, it was significant that when asked how negotiation/bargaining took place, 58 per cent of the respondents stated that no solution-seeking discussions took place at all.⁹⁹ Rather, once the information on the dispute had been obtained, the onus was placed on the mediator to suggest or submit an opinion or decision, without any further involvement from the parties.¹⁰⁰

A related practice which drives adversarial behaviours during mediation, and which in our view is not to be encouraged, is the tendency of parties to agree to binding, but not final, determinations from the mediator once proceedings are completed. In this way, the mediation transforms into an adjudication or expert determination, with the decision binding the parties temporarily, pending the outcome of arbitration or litigation. The obvious shortcoming with such a procedure is the mediator's insight into the weaknesses of the parties' cases, which will be highlighted to the mediator as part of the parties' respective negotiation strategies, given the 'without prejudice' nature of the mediation. Where a determination is sought in this manner, our perception is that the parties are inherently guarded in their respective positions and are discouraged from pursuing a settlement.

The stage at which the dispute is mediated also has a bearing on the

⁹⁸ Althea Povey, Keith Cattell & Kathy Michell 'Mediation practice in the South African construction industry: The influence of culture, the legislative environment, and the professional institutions' (2005) 21 *Negotiation Journal* 481 at 487–8.

⁹⁹ *Ibid* at 489.

¹⁰⁰ *Ibid*.

procedure's likely success. Mediations work better where the employer has a vested interest in completing the project and maintaining the working relationship with the contractor. Where disputes arise after the contractor has demobilised or the contractual relationship is terminated, the parties, and the employer in particular, have less interest in engaging one another meaningfully. As such, the industry would do well from the increased use of mediation as a project-management tool.

(d) Protracted, costly and adversarial

In the mediations with which Porter-Wright's practice is involved, the procedures adopted can become process driven, on account of requirements of the mediator and/or the parties' lawyers. The mediation can often become blurred with more adversarial, process driven forms of dispute resolution, such as adjudication or expert determination.¹⁰¹ For example, the parties almost always exchange 'pleadings' (sometimes called 'position papers' or 'statement of issues') in an attempt to crystallise issues in advance of the mediation. To compensate for a lack of a formal disclosure or discovery process, the parties often request documents from one another in advance of proceedings and in factually intensive disputes; it is not uncommon for a mediator to call for detailed chronologies of events, coupled to bundles of extensive supporting documentation. At the mediation itself, the parties' respective lawyers often make opening submissions, akin to those seen in arbitration or motion court. Further, it is not unheard of for mediations to run for many months, even years. These procedures tend to hike the costs associated with mediation, and decrease its efficacy and popularity.

(e) Lack of skilled mediators

The identity of the mediator is the single largest determinant of the outcome of the mediation. In order to mediate most effectively a construction matter, the mediator must be able to convince the parties of their risk, both with regard to the outcome at a hearing and with regard to the costs associated with preparing for, and pursuing, the matter. A mediator must be well prepared on the strengths and weaknesses of each party's case and must push the parties to reflect on the risks of further litigation. A proper analysis of the risks involved is a fundamental component of a successful mediation. It is often said that a good mediator tells each party how bad their case is until they decide to settle.

Further, parties to a construction dispute are unlikely to be swayed by the mediator's evaluation of the risks involved if the mediator is not well versed in construction disputes, which are hugely specialised endeavours. Relative ignorance of common industry parlance, such as RFI ('Request for Informa-

¹⁰¹ Jacques Joubert 'Judicial activism essential to kick-start mediation' (2014) 14 *Without Prejudice* 42.

tion¹⁰²),¹⁰² prolongation costs,¹⁰³ critical path schedules,¹⁰⁴ change orders,¹⁰⁵ shop drawings¹⁰⁶ and the like, will cause experienced construction professionals to question the quality of the mediator's risk assessment and reduce the likelihood of a settlement. Furthermore, the mediator should have experience actually presiding over construction disputes. Only an individual who has the requisite experience can credibly evaluate the risks associated with pursuing a construction claim.

There is no substitute for knowledge and experience when it comes to selecting an effective construction mediator. These skills are in critically short supply in South Africa and this is a major reason for the general reluctance by parties to mediate. As the South African market matures and more lawyers specialise in this area, the situation ought to improve. In addition, the industry is well advised to focus on the standards of training, accreditation and education of mediators.¹⁰⁷

Often, a related concern is the suitability of mediations for the resolution of complex technical issues. It is a perception that mediators (especially non-construction professionals) are simply unable to cut through the parties' often wildly differing views on the applicable technical positions and the parties lose faith in the likelihood of a reasonable settlement.

The picture that emerges from this law-in-action account is that the ideals of relational/private-ordering theory are not fully reflected in the actual state of dispute resolution in the South African construction industry. Indeed, as we saw in part III(b) above, this is in fact just a micro-snapshot of a much bigger commercial sector picture.

What can we learn from this disconnect from a theory point of view, and how should we refine our theory to reflect better law and practice in the field of dispute resolution in South Africa? Thus far, we have suggested several practical answers to the question of how to further ADR implementation. In part V, we turn to a final summative conclusion, which will link the theory, the law and practice.

V CONCLUSION

So why is it then that despite the legal, political, economic and practical obstacles thrown up in parts III and IV above, we still think that ADR is often

¹⁰² RFI is a question to another stakeholder of the project asking for more information, clarifications, additional details or anything else that is not clear in any other document (such as, for example, the design drawing, specifications or standards).

¹⁰³ Prolongation claims are claims for additional time-related costs ordinarily associated with delays caused by the employer.

¹⁰⁴ In project management, a critical path is the sequence of project activities which amounts to the longest overall duration. This determines the shortest time possible to complete the project.

¹⁰⁵ A change order is work that is added to or deleted from the original scope of work of a contract, which alters the original contract value and/or completion date.

¹⁰⁶ A shop drawing is a detailed construction and fabrication drawing that shows the proposed material, shape, size and assembly of the parts.

¹⁰⁷ Feehily 2015 *SALJ* op cit note 86 at 379.

the appropriate form of commercial dispute resolution? A focus on interpersonal relationships and the role that these play in business may appear a bit 'touchy-feely' to many hard-nosed commercial litigators. At the same time, it is an incontrovertible truth that a successful business requires not only financial capital, but also human and social capital, to succeed. The importance of human agency, even in blue-chip dealings between juristic persons, cannot be denied; nor can the role of a business person's personal network of clients, associates and contacts. Viewed in this light, a business relationship goes beyond personal trust and loyalty — it has quantifiable monetary value. This type of contextual analysis, typical of relational contract theory, would of course be at the forefront of any form of reality checking which a commercial mediator or other ADR agent would pose to parties in conflict: what are the anticipated costs of a protracted court battle in money, time and social and human capital, and is there a more economically efficient alternative?

Of course, even the most idealistic and communitarian ADR advocate must acknowledge that ADR is not always appropriate or even efficient. In part III above, we discussed the typical checklists that a party should go through in deciding whether to choose ADR, and if so, the form thereof. In addition to mediation, there are several variants, hybrids and alternatives to choose from. Our aim has been to highlight the procedural advantages of ADR from a relational point of view. Upon entering the realm of reality, however, we saw that there is a disconnect between the ideals of economic and contract theory as set out in part II and the nature of the South African dispute resolution environment and industry. Although there is extensive evidence of legislative intent to move towards an ADR regime, this has not yet been fully implemented. There is also a lack of support for ADR amongst the South African legal fraternity — lawyers tend to steer clients towards litigation, and judges do not usually penalise them for this. The major exception to this trend is in the realm of employment disputes, where the CCMA has enjoyed considerable success.

In the construction industry, which is a highly relational context given the long-term nature of construction projects and the presence of repeat players in the market, we saw that ADR tends to take more adversarial forms, such as adjudication or arbitration, rather than mediation. The major obstacles here are established industry norms, such as the prevalence of an adversarial mindset amongst parties, as well as a lack of an enabling legal environment, where standard form contracts do not provide for mediation. We also saw that there are high barriers to entry as an ADR practitioner in this industry, since specific, detailed knowledge of construction practice is required to sustain legitimacy in the eyes of disputing parties. This legitimacy issue is not an insurmountable obstacle. However, it does favour a certain type of dispute resolution agent, particularly senior litigation practitioners rather than specialist mediators.

This brings us to an important part of our argument, namely that there is a need in South Africa for specifically trained mediators, and particularly

mediators with inside knowledge of law and commercial practice. In some industries, such as the construction industry as we highlighted in part IV, a mediator does not just need to be well versed in legal and ADR theory and procedure, but also needs to be a construction-industry insider.

As discussed in part III above, there is a growing availability of mediator training courses, including some which embed this type of knowledge in legal education curricula. For an ADR regime to catch on, particularly in the form of mediation, a new batch of dispute resolution agents is needed with the necessary training and experience to capitalise on the trend towards ADR. Moreover, if there is an economic demand for a certain type of professional, it is our belief that the market will provide for the training and supply of such persons. We hope that our argument here, addressed to the legal fraternity, particularly legal academics and practitioners, will be a spur in this direction.

It is possible for private ordering to be determinative in resolving disputes. There is ample empirical evidence to support this argument. However, the available literature tends to focus on homogenous communities or specific industries. An ADR culture in South Africa requires a diverse and heterogeneous population of South African commercial parties and their legal practitioners to accept ADR as a better way of resolving disputes. Relational contract theory is observable everywhere in business practice, but has had little impact on business law. This is because relationships tend to be destroyed by litigation, the realm of law and lawyers. Private ordering keeps disputes in the relational regime and out of the courts. We hope that the importance of ADR will be recognised in South Africa amongst those who value social capital as a source of business revenue.