



A critical assessment of the conciliation hearing in
Germany and South Africa from a comparative point of
view

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By Ines Ilies

1809726

Supervised by Prof. Alan Rycroft

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ABSTRACT

This work gives an overview of the resolution of individual labour disputes through conciliation in Germany and South Africa. In a rapidly evolving labour environment, parties have an increased interest in obtaining legal clarity on the outcome of a dispute. Neither employers nor employees can afford delays. Access to justice is essential. An amicable settlement serves this aim and is likely to bring the dispute to a swift end in a speedy and inexpensive proceeding. Thus Germany and South Africa both developed a mechanism of mandatory conciliation as the starting point of every individual rights dispute, which aims to grant easy and fast access to justice at a low cost. In South Africa the Commission for Conciliation, Mediation and Arbitration (CCMA) has been established to resolve individual labour disputes through conciliation. In Germany a preliminary conciliation hearing takes place before the chairperson in the Labour Court of first instance. This work aims to critically assess the conciliation procedure in both countries, illustrate similarities and differences and suggest improvements. The question that arises is: what are the significant elements in the conciliation procedure of both countries and how do these elements impact the process and success rate? This research attempts to answer this question.

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A critical assessment of the conciliation hearing in Germany and South Africa from a comparative point of view

A. Introduction

The nature of the labour relationship is such that disputes between an employer and an employee arise frequently. As a result, it is important to have procedures and mechanisms in place to resolve individual labour disputes when they arise.

In Germany as well as in South Africa individual labour disputes are resolved by special institutions which include labour courts and administrative boards. Such institutions and procedures aim at making the individual dispute resolution system more accessible to everyone by resolving the unequal power relationship between the parties of an employment relationship while balancing cost and time efficiency.

In South Africa the Commission for Conciliation, Mediation and Arbitration (CCMA) has been established to resolve individual labour disputes through conciliation. In contrast, in Germany a preliminary conciliation hearing takes place before the chairperson in the labour court of first instance. It is therefore particularly interesting how both countries developed two mechanisms to fulfil the same aim, that are however, delivered by two completely different institutions, in South Africa through an administrative board, in Germany through the judiciary.

This work will therefore focus on examining the main elements of conciliation in both jurisdictions. It will be divided in three chapters. In the first section, I will explain how an individual right dispute is defined in both countries. The second section concerns the individual labour dispute resolution system as a whole. In order to get a better understanding on the similarities and differences of the conciliation hearing in both countries, it is important to have a general understanding about the differences between both individual dispute resolution systems. I will therefore, firstly consider the legislative framework of each system, secondly, its historical development as a separate system of labour law and thirdly, the main institutions. The third section concerns the conciliation procedure. In this section I will firstly, discuss the jurisdiction of the CCMA in conciliation hearings as well as the jurisdiction of the Labour Court of first instance in Germany. Secondly, I will demonstrate key elements of the conciliation hearing in both countries. Thirdly, I will assess similarities and differences between both systems. Finally, in the conclusion, I will make suggestions

on how both systems could improve their process by implementing key features from each other that would further improve their success rate.

This work does not intend to assess whether one system works better than the other. Rather, it aims to illustrate that, while social and economic conditions in both countries are not comparable, both mechanisms provide solutions to challenges that arise in each individual labour dispute resolution system.

Thus, this work engages with the question of what significant elements in the conciliation procedure of both countries are and how these elements impact the process and success rate.

B. The scope of an individual rights dispute

This work focuses only on the labour dispute resolution system in individual rights disputes. Thus, the question arises how an individual rights disputes can be defined and distinguished from other labour disputes.

The International Labour Organisation that aims to set international labour standards defines an individual labour dispute as the following: ‘a disagreement between a single worker and his or her employer, usually over existing rights. It can also include situations in which a number of workers disagree with their employer over the same issue, but where each worker acts as an individual.’¹ Thus, an individual rights disputes concerns the employment relationship between employers and employees.

In Germany, starting point for the definition of what constitutes an individual rights disputes is section 2(1) Point 3 of the Labour Courts Act (LCA).² It stipulates that an individual rights dispute must arise from an employment relationship that exists between the parties or that previously existed between them or that they intended to establish.³ However, it must be distinguished between individual labour disputes as opposed to collective labour disputes. The labour court’s competence in Germany covers both areas and the distinction sometimes becomes blurred. Yet, collective disputes usually involve groups of employees –represented by a trade union and concern trade unions’, works councils’ and employers’ associations activities and

¹ Labour dispute systems: Guidelines for improved performance ILO 2013, available at https://www.ilo.org/ifpdial/informationresources/publications/WCMS_211468/lang--en/index.htm.

² Weiss, Manfred, Schmidt, Marlene, Hlava, Daniel, *Labour Law and Industrial Relations in Germany* 2020 Kluwer Law International, part I chapter 9.

³ Section 2 (1) Point 3 of the LCA.

behaviours as well as the interaction between the two sides of industry while individual labour disputes cover – in most cases – an individual employee and employer.⁴ In addition, labour disputes in Germany are divided into ‘disputes of rights’ and ‘disputes of interests’. When collective bargaining fails to establish an agreement on employment terms, interest disputes occur.⁵ Extrajudicial techniques such as arbitration and mediation are commonly used to resolve them.⁶ Because interest disputes are not adjudicated on the basis of legal standards, statutory courts have no substantial role to play in this situation. For example, in disputes between work councils and management, arbitration awards on appeal can only be heard by labour courts on the question whether the arbitration committee has exceeded its discretion in the particular case, thus, ‘the court cannot replace the decision by its own’.⁷ Also disputes between trade unions and employer’s associations on the terms of a collective agreement can, if not resolved through voluntary mediation, only be solved by industrial action in the form of lock-out or strike.⁸ In contrast to that, individual rights disputes are generally solved through specialised labour courts.

In South African labour law, an individual rights dispute can arise ‘from the employment contract itself and from the regulatory framework such as legislation, collective agreements and workplace agreements’ that govern the employment relationship.⁹ While the distinction between individual and collective labour law plays an important role, the labour legislation does not directly distinguish between individual ‘rights disputes’ and ‘interest disputes’. However, the distinction is embedded in terms of the institutions and processes of the Labour Relations Act 66 of 1995 (LRA). In section 64(1)(c), for example, the LRA provides that employees may not strike ‘if the issue in dispute is one that either party has a right to refer to arbitration or the Labour Court in terms of this Act’.¹⁰ Thus, the Act divides disputes into those that may be referred to arbitration or to adjudication – which is mainly the case with disputes of right – and those disputes that may be subject to industrial action – which

⁴ Weiss, Manfred ‘Labour Dispute Settlement by Labour Courts in Germany’, 1994 15 *ILJ* 1, at p. 1.

⁵ Fornasier, Matteo ‘Streitbeilegung im Arbeitsrecht: Eine rechtsvergleichende Skizze’, *Rabels Zeitschrift*, 2017, at p. 541.

⁶ Schregle, Johannes ‘Die Regelung von Arbeitsstreitigkeiten aus rechtsvergleichender Sicht’, *GewerkMH* 1980.

⁷ Weiss op cit note 4 at p. 1.

⁸ Ibid.

⁹ Grogan, John (2010) *Labour Litigation and Dispute Resolution*, p. 11.

¹⁰ Section 64 (1)(c) of the LRA.

is generally the case with disputes of interest.¹¹ Thus, just as in the German context, a dispute of interest generally – but not always – forms part of collective labour law and is therefore not the subject of this work.

C. The individual labour dispute resolution system¹²

In order to get a deeper understanding about the importance of the conciliation hearing, one needs to understand how it is embedded into the Individual Labour Dispute resolution system of each country. For this purpose, the main legislative instruments and statutory institutions will be highlighted.

I. The main legislative instruments

1. Germany

In Germany, the core instrument for individual labour law disputes is the Labour Courts Act (LCA). This Act was enacted in 1953 and defines the competences and composition of the labour courts, the appellate labour courts and the Federal Labour Court as well as the procedural rules.¹³ In addition, the LCA is supplemented by the Code of Civil Procedure (CCP), which is also applicable in Labour Court proceedings with a few exceptions stated in section 46 of the LCA. Furthermore, in relation to labour rights disputes, Art. 95 of the Basic Law in conjunction with section 48(1) LCA and sections 17 to 17b of the Courts Act (CA) establishes a separate system of labour courts in Germany. The preliminary conciliation hearing is found in section 54 of the LCA.

2. South Africa

Just like Germany, South Africa implemented a separate system of labour courts. The constitution of South Africa in section 169 provides that the High Court ‘may decide any constitutional matter’ that falls within the exclusive jurisdiction of the Constitutional Court, or a matter assigned ‘by an Act of Parliament to another court of

¹¹ Collier, Debbie & Fergus, Emma & Cohen, Tamara, Du Plessis, Meryl, Godfrey, Shane, Le Roux, Rochelle, Singlee, Sufinnah (2020), *Labour Law in SA Context and Principles*, chapter 6.2.2.

¹² In this context only the statutory dispute resolution system will be considered, however, acknowledging that especially in South Africa private dispute resolution agencies play a significant role in solving individual rights disputes.

¹³ Section 1, Sections 46ff., Sections 80ff. of the LCA.

a status similar to a High Court',¹⁴ and gives room to labour courts to act upon individual labour law disputes. The core legal instruments in South African Labour Law are the Labour Relations Act 66 of 1995 (LRA), the Basic Conditions of Employment Act of 1997 (BCEA) and the Employment Equity Act 55 of 1998 (EEA). The LRA establishes the labour dispute resolution structure, the institutions and processes for resolving disputes. The conciliation procedure in the CCMA is embedded in section 135 of the LRA and further supplemented in the CCMA Rules.¹⁵

II. The statutory institutions of labour dispute resolution

In both countries labour disputes are resolved by specialist institutions such as labour courts, tribunals and administrative boards which are more or less separated from other dispute resolution forums. In Germany this separation is particularly strong since it is established by Article 95 of the Basic Law, while in South Africa there still is some concurrent jurisdiction of the Labour Court with the High Court.¹⁶

1. Historical development

The following will take a look on how the separate system of Labour Dispute Resolution historically developed in each country and how conciliation became an essential element of it.

a. Germany

The emergence of separate labour courts in Germany 'resulted from a general dissatisfaction with the performance of ordinary state courts in resolving labour disputes.'¹⁷ Employers were not satisfied because ordinary state courts were 'not sufficiently acquainted with the customs and usages of employment', while workers 'feared that the courts were biased in favour of employers.'¹⁸ Trade unions, in particular, were mistrustful of the judges of the ordinary courts whom they considered part of 'the ruling power elites'.¹⁹ Therefore, they promoted the creation of courts

¹⁴ Section 169 of the LRA.

¹⁵ Rules for the Conduct of Proceedings before the CCMA, 21 February 2020.

¹⁶ Section 157 (2) of the LRA.

¹⁷ Fornasier op cit note 5 at p. 541.

¹⁸ Ibid.

¹⁹ Weiss op cit note 4 at p. 3.

where not only professional judges but also lay members from labour would participate.²⁰

Initially, specialized courts for labour disputes were a regionally limited phenomenon.²¹ Under French occupation in the beginning of the 19th century, courts were set up on the model of the French conseils de prud'hommes in Rheinland and in Großherzogtum Berg.²² In France, the conseils de prud'hommes operated as a lowest level court for individual disputes. Disputes were resolved by a judgment only if conciliation failed by the court. Judges were not professionals, rather laypersons from the employers and the employees side.²³

In 1890 the industrial courts and in 1904 the commercial courts in Germany followed this example. They were established as a tripartite court composed of two laypersons and one chairperson, who had to be a professional judge or higher civil servant. However, they only had jurisdiction to settle individual rights disputes of factory workers, commercial clerks and apprentices and were only courts of first instance, thus, their decisions were subject to appeal by ordinary courts.²⁴ Yet they served as the predecessor of Germany's modern labour court system.

After World War I trade unions were the main initiator for an autonomous labour court system disconnected from the ordinary courts. The more labour law as a separate system with influences of both- individual and collective elements-developed, the more it became evident that civil law courts were not capable of handling the specific problems that typically arise in the employment relationship. Therefore, a separate labour court system was introduced in Germany by the Labour Courts Act in 1926.²⁵ It distinguished between individual rights and interest disputes. For individual rights disputes the Act created a separate system of labour courts. However, proceedings in the second and third instance were still part of the ordinary civil courts, handled by labour chambers. Only under the LCA of 1953 an independent labour court system with three instances was established.²⁶

²⁰ Weiss op cit note 4 at p. 3.

²¹ Fornasier op cit note 5 at p. 544.

²² Junker, Abbo *Grundkurs Arbeitsrecht*, § 12 Rn. 837.

²³ Ibid.

²⁴ Ramm T 'Labor Courts and Grievance Settlement in West Germany' in B Aaron Labor Courts and Grievance settlement in Western Europe (1971) at p. 84.

²⁵ Reichold, Hermann *Arbeitsrecht*, § 5 Rn. 8.

²⁶ Junker op cit note 22 at § 12 Rn. 835.

The system proved to be working over the years and labour court decisions found great acceptance with employers, employees and trade unions. Trade unions ‘emphasized the high level of acceptance enjoyed by labour court decisions.’²⁷ Labour law in Germany is mainly judge-made law and therefore the development of labour law through a highly specialized judiciary was seen to be necessary. Moreover, the procedural rules of the labour court system are ‘specifically tailored to the characteristics of employment relations’, thus, found to accommodate the needs of both- employers as well as employees - in the best possible way.²⁸

As for the conciliation procedure, one can trace its development back to the early beginnings of the industrial and commercial courts.²⁹ The Industrial Courts Act (ICA) from 1890 introduced a preliminary conciliation hearing in labour law matters. It specified that ‘if the parties appear at the hearing, the industrial court shall work towards an amicable settlement of the dispute. It may attempt conciliation at any stage of the proceedings and shall repeat it at the end of the hearing’.³⁰ The current wording of the conciliation hearing in section 54 of the LCA has its roots in section 495 of the Code of civil procedure from 1924. Although the wording is very similar, section 495 of the Code of civil procedure from 1924 did not establish specific rules for the conciliation hearing itself, thus left it to the discretion of the judge to decide how to conduct the conciliation. Moreover, the conciliation hearing in the civil procedure and the labour law conciliation hearing differed in another significant point. While in the civil procedure, conciliation was initiated by a separate application before the submission of a claim to the court, thus, took part completely isolated from the court procedure, in labour proceedings it already formed part of the court hearing, which is still the case today.³¹

b. South Africa

The first labour legislation in South Africa that established mechanisms for dispute resolution was the Industrial Conciliation Act of 1924, which was later amended by the Labour Relations Act of 1956.³² At that time, ‘labour dispute resolution took place

²⁷ Waas, Bernd ‘Germany’ in ILO Publication *Resolving Comparative Individual Disputes*, A comparative overview, 2016, at p. 157.

²⁸ *Ibid.*

²⁹ Kramer, Barbara *Güteverhandlung- Prozessuale Schlichtung im Arbeitsrecht*, at p. 377.

³⁰ Section 39 of the ICA.

³¹ Kramer *op cit* note 29 at p. 378.

³² Industrial Conciliation Act of 1924; Labour Relations Act 28 of 1956.

in the industrial councils, conciliation boards and the Industrial Court as well as in the Labour Appeal Court and Appellate Division of the Supreme Court, which was acting in its statutory capacity as the highest court in labour matters.³³ The civil courts also played an important role in labour matters, especially in actions of breach of contract or judicial review.³⁴

However, the old dispute resolution institutions were not successfully resolving disputes. In the Explanatory Memorandum of the draft Labour Relations Bill, the drafters noted:

‘The existing statutory conciliation procedures are not user friendly. Successful navigation through them requires a sophistication and expertise beyond the reach of most individuals and small business. Errors made in the initiation of conciliation procedures are often fatal to an applicant's claim for relief. The merits of the dispute often get lost in a thicket of procedural technicalities.’³⁵

In addition, the drafters highlighted a lack of resources, personnel who were poorly paid and insufficient training. The industrial court was positioned outside of the formal judicial hierarchy, and it did not have the status of a High court. The industrial court's processes with appeals to the Labour Appeal Court and the Appellate Division was too technical and thus inaccessible. That led to increased costs and lengthy delays.³⁶ For example, it took up to three years before an unfair dismissal case was determined by the Appellate Division³⁷ and especially the poorest people, in particular agricultural workers and domestic servants lacked protection against the employers. Because of the complexity of court procedures, they were often denied access to dispute resolution because they were often not unionised and had no financial means to afford legal services.³⁸

Moreover, the drafters of the LRA from 1995 criticised the fact that exclusive jurisdiction over labour matters was neither given to the Industrial Court nor to the

³³ Grogan op cit note 9 at p. 2.

³⁴ Ibid.

³⁵ Explanatory Memorandum on the Labour Relations Bill (1995) 16 *ILJ* 278.

³⁶ Steenkamp A./Bosch C. (2012), ‘Labour dispute resolution under the 1995 LRA: problems, pitfalls and potential’, 2012, *AJ* 120.

³⁷ Explanatory Memorandum on the Labour Relations Bill (1995) 16 *ILJ* 278.

³⁸ Christie, S. (1998) ‘One-stop shopping: has the CCMA made dispute resolution any easier?’ Track Two: Constructive Approaches to Community and Political Conflict, 7(2), available at <https://journals-co-za.ezproxy.uct.ac.za/doi/pdf/10.10520/EJC111715>.

LAC, thus, they concluded that the ‘overlapping and competing jurisdictions and the use of different courts prevent the development of a coherent and developing jurisprudence on labour relations.’³⁹

Furthermore, the unsuccessful resolution of dispute through Industrial councils and conciliation boards is displayed in the statistics of the Department of Manpower. The success rate was 20% for conciliation boards and less than 30% for industrial councils. At the same time independent mediation and arbitration services became more popular. Their success rate in South Africa was over 70%.⁴⁰

Thus, the LRA from 1995 aimed to address these problems by providing what was lacking in the former system- easier access to the dispute resolution system and quick and inexpensive settlement mechanisms through conciliation, mediation and arbitration.⁴¹ For this purpose, the LRA created a new institution, the Commission for Conciliation, Mediation and Arbitration.⁴² In addition, sectoral bargaining councils that replaced the former industrial councils were given the responsibility to resolve disputes in many economic sectors and a specialist system of labour courts with national and exclusive jurisdiction on labour disputes as well as the status of a High Court was established.⁴³

2. The main institution

Against this historical backdrop, both countries established a system of specialist labour law institutions. The most prominent institutions are discussed below.

a. Germany

Labour jurisdiction in Germany is three tiered: it is exercised by the labour courts of first instance, appellate labour courts and the Federal Labour Court. There are

³⁹ Explanatory Memorandum on the Labour Relations Bill (1995) 16 *ILJ* 278.

⁴⁰ Du Toit, D., Godfrey, S., Cooper, C., Giles, G., Cohen, T., Conradie, B. and Steenkamp (2015), *Labour Relations Law*, Chapter I, 4.3.

⁴¹ Explanatory Memorandum on the Labour Relations Bill (1995) 16 *ILJ* 278.

⁴² The CCMA has offices in all nine provinces amounting to 21 regional offices in total.

⁴³ Benjamin, P. (2013) ‘Assessing South Africa’s Commission for Conciliation, Mediation and Arbitration (CCMA)’ ILO working paper no. 47. Geneva: Governance and Tripartism Department, International Labour Office at p. 5. The German influence in the drafting of the LRA is outlined in Selina Rohr (2017) ‘German Works Councils – A Model for South African Workplace Forums?’ (LLM Dissertation, UCT). The author notes that ‘the task team to draft the LRA was assisted throughout the drafting process by the ILO and three international experts, one of whom was Manfred Weiss, a German Labour Law and Comparative Law Professor at the University of Frankfurt.’ See also Weiss, Manfred (2005) ‘Trade unions and institutionalised workers’ participation: the German experience’ *Law, Democracy & Development* Vol. 9, No. 2.

currently 113 labour courts of first instance and 18 appellate labour courts that are financed by the individual states. The Federal Labour Court in Kassel, however, is administered by the Federal Minister of Labour and Social Affairs and the Federal Minister of Justice.⁴⁴

(1) Labour courts of first instance

The first instance labour courts are composed of panels, each with a professional judge as chairperson and one lay judge from both the employer and employee sides.⁴⁵ The practise of lay judges has a long tradition in the German labour dispute resolution system. It goes back to the Trade Courts Act of 1890 and the principle was kept ever since.⁴⁶ ‘Lay judges have expert knowledge and practical experience. Their participation ensures that the career judges must explain their reasoning and reduces the risk that an approach is one-sided.’⁴⁷ Also, ‘empirical research suggests that where lay judges are involved a greater rationality and legitimacy can be observed’.⁴⁸ Lay judges are appointed for a term of five years by the Minister of Labour and Social Affairs from a list submitted by labour organizations and employer’s associations as well as trade unions.⁴⁹

In order to be appointed as a lay judge, the employer or employee must be at least 25 years old and live or work in the judicial district of the court and be a German citizen.⁵⁰ Lay judges are given the same judicial power as career judges.⁵¹ Thus, in the decision-making process, their vote counts as much as the one from the professional judge, which in practise means that the professional judge in labours courts of first instance can be out-voted by the lay judges.⁵²

(2) Appellate labour courts

Appellate labour courts, as courts of second instance, have exclusive jurisdiction to hear appeals against decisions of the labour courts of first instance. Just like the courts

⁴⁴ Junker op cit note 22 § 12 Rn. 839.

⁴⁵ Section 16(2) of the LCA.

⁴⁶ Waas op cit note 27 at p. 159.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Section 20(2), 37, 43 of the LCA.

⁵⁰ Section 21(2) of the LCA.

⁵¹ Waas op cit note 27 at p. 139.

⁵² Weiss op cit note 2.

of first instance, they are composed of panels each with one professional judge as a chairman and two lay judges.⁵³ The minimum age of the lay judges in the Appellate court is 30 years and in order to become a lay judge in this court the person should have served in the Labour Court of first instance for at least five years.⁵⁴ In addition, the professional judges of the labour courts of first instance as well as the appellate labour courts are appointed by the Ministry of Labour and Social Affairs of the state, where they are serving.

(3) The Federal Labour Court

The Federal Labour Court can hear appeals of judgements by the Appellate Labour Court and consists of nine senates composed of a chairperson, two associate judges and one lay judge from each of the employee and employer groups.⁵⁵ However, lay judges in the Federal Labour Court are supposed to have special insights in labour matters, thus they should have served in the Labour Court of first instance or the Appellate Labour Court for several years already. Another speciality of the Federal Labour Court is that a grand senate is formed. It consists of the president of the Federal Labour Court, one professional judge from each of the senates and three lay judges from each of the employee and employer groups.⁵⁶ The grand senate has two tasks: Firstly, it must be called upon if a senate wishes to deviate from the decision of another senate or the grand senate. Secondly, one of the nine senates of the Federal Labour Court can refer a decision to the grand senate on a question of fundamental importance if, in the opinion of the senate, this is necessary in order to develop the law or to ensure uniform case law.⁵⁷

(4) Non-specialized courts

In addition to the three tiered system, the Federal Constitutional Court of Germany and the European Court of Justice, as institutions not specialized in labour matters, can also play a role in shaping labour dispute resolution. In the context of labour law, the Constitutional Court can be called upon to hear a constitutional complaint if a violation

⁵³ Section 35 of the LCA.

⁵⁴ Weiss op cit note 4 at p. 9.

⁵⁵ Section 41(2) of the LCA.

⁵⁶ Section 46(1) of the LCA.

⁵⁷ Section 45 of the LCA.

of fundamental rights is asserted⁵⁸ and a preliminary ruling by another court can be considered.⁵⁹ Numerous decisions of significance for labour law originate from the Constitutional Court, with more in the field of collective labour law, on the Collective Bargaining Unity Act, in particular on the right to lock out or on co-determination in companies.⁶⁰ Moreover, the European Court of Justice gives preliminary rulings in accordance with Article 267 of the Treaty of the Functioning of the European Union (TFEU) on a referral from a national court, in particular on the interpretation of the TFEU and on the validity and interpretation of the acts of the institutions of the Union, namely the EU directives in the field of labour law, which can also involve labour law matters.

(5) Arbitration tribunals

Arbitration tribunals in rights disputes rarely play a role in Germany. Even though the legislative framework governing arbitration tribunals is set out in section 1025-1066 of the Civil Procedure Code, there is only one case where an arbitral tribunal can act upon request in an individual rights disputes: where the employment relationship is governed by a collective agreement and the parties of the collective agreement expressly excluded the jurisdiction of the labour courts; however this only applies to collective agreements of certain groups such as stage artists, workers in the film industry or artists.⁶¹ Thus, the possibility of excluding state jurisdiction by concluding an arbitration agreement is very limited in labour disputes and almost redundant in individual rights disputes. However, in collective rights disputes arbitration tribunals are used more frequently.⁶²

b. South Africa

The significance of the South African dispute resolution system is that individual labour disputes are not only solved through the institution of a specialist judiciary but also through informal tribunals and administrative boards. This has a long tradition. In terms of the 1995 LRA, several institutions, including the CCMA, the Labour

⁵⁸ Article 93(1) Nr. 4a of the Basic Law.

⁵⁹ Article 100(1) of the Basic Law.

⁶⁰ Junker op cit note 22 § 12 Rn. 841.

⁶¹ Section 101(2) of the LCA.

⁶² Section 101(1) of the LCA.

Court and the Labour Appeal Court were created, and the industrial councils were transformed into bargaining councils with a range of new functions.⁶³

(1) The CCMA

The CCMA is established in terms of sections 112 to 126 of the LRA as the primary dispute resolution institution in order to solve individual labour disputes through conciliation and arbitration. It has juristic personality and is an independent statutory body that does not belong to and is not controlled by any political party, trade union or business.⁶⁴ However, the CCMA is still an organ of the state, thus its actions and decisions can be subject to judicial review.⁶⁵

It is governed by a tripartite Governing Body, which consists of a chairperson and nine other members, nominated by the National Economic, Development and Labour Council (NEDLAC) and appointed by the minister for a period of three years.⁶⁶ In addition to governing the CCMA, the Governing Body also ‘appoints and terminates the appointment of commissioners’ and accredits and subsidises bargaining councils and private dispute resolution agencies.⁶⁷

Each of the 9 provinces of the Republic of South Africa has several offices of the CCMA and each provincial office has a team of full-time commissioners as well as part-time commissioners employed on renewable fixed term contracts, who conciliate, facilitate, mediate and, in some instances, arbitrate disputes. In contrast to full-time commissioners, who are employees of the CCMA, part-time commissioners, who handle around 60 per cent of the case load in the CCMA, are independent contractors.⁶⁸ Furthermore, ‘CCMA commissioners, unlike Labour Court judges, do not have to have legal qualifications’, however more senior commissioners are mostly ‘legally qualified or have experience in arbitrating disputes’.⁶⁹ In general, commissioners receive extensive training that goes beyond skills in mediation and arbitration.⁷⁰

⁶³ Benjamin, P. (2019) ‘South African Labour Law Mapping the Changes - Part 1: The History of Labour Law and its Institutions’ 40 *ILJ* 2189.

⁶⁴ CCMA official website, available at <https://www.ccma.org.za/About-Us/Our-People/Commissioners>.

⁶⁵ Grogan op cit note 9 at p. 44.

⁶⁶ Section 116 of the LRA.

⁶⁷ Benjamin op cit note 43 at p. 10.

⁶⁸ *Ibid.*

⁶⁹ ILO, National Labour Law Profil: South Africa, available at https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm.

⁷⁰ Benjamin op cit note 43 at p.12.

Section 115(1) to (6) of the LRA established the functions of the CCMA. Its main function is the resolution of disputes through conciliation and arbitration. It covers individual labour disputes of first instance, as long as bargaining councils or statutory councils do not exist or are not able to resolve such disputes.⁷¹ The first step in all individual labour disputes is referral to conciliation. Only if conciliation fails, may the dispute be referred for arbitration to the CCMA or adjudication by the labour courts. In contrast to conciliation, arbitration is a more formal proceeding and the commissioner has the power to make a decision, ‘which in most cases is final, binding and may be made an order of the Labour Court.’⁷² Moreover, con-arb is a mechanism where conciliation and arbitration take place in one sitting. The process begins with conciliation and if the parties are unable to reach an agreement, the same person moves on to arbitrate the dispute.⁷³

In addition to its dispute resolution functions the CCMA was also given responsibilities in dispute prevention, facilitation, institution building, training, education and providing information to employers, employees and their organisations.⁷⁴ Furthermore, the CCMA operates an electronic case management system to track disputes referred to it and is required to publish information about its activities, which it does through annual reports.⁷⁵ It also established rules of conduct for conciliation and arbitration proceedings and is required to review these rules every two years.⁷⁶

(2) Bargaining councils

‘Bargaining councils are joint employer and union bargaining institutions,’ established in terms of sections 27 to 34 of the LRA, for a sector (defined in section 213 as an industry or a service) and area.⁷⁷ They operate in the public as well as the private sector. Originally, they performed mainly collective bargaining functions. However,

⁷¹ Mashele, Rapatsa (2018) ‘The Commission for Conciliation, Mediation and Arbitration (CCMA) and Alternative Dispute Resolution (ADR) in labour relations in South Africa: an appraisal of efficacy and challenges’ *Juridical Tribune*, vol. 8(Special).

⁷² Bhorat, H., Paul, K. and Mncube, L. (2009) ‘Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa: An Analysis of CCMA Data.’ *Working paper no. 09/137*, 1 July 2009.

⁷³ Section 191(5A) of the LRA; for problems which can arise with the same Commissioner conciliating and arbitrating, see Rycroft, Alan (2003) ‘Rethinking the Con-Arb Procedure’ 24 *ILJ* 699-711.

⁷⁴ Benjamin op cit note 63.

⁷⁵ Grogan op cit note 9 at p. 48.

⁷⁶ Section 115(1)(e) of the LRA.

⁷⁷ Benjamin op cit note 43 at p. 7.

their role expanded under the LRA of 1995 and now they also perform similar dispute resolution functions as the CCMA for particular industries. The intention behind this was to ‘shift part of the burden of dispute resolution from the CCMA to private processes and also to give parties to councils greater control over such processes in order to tailor them to their needs.’⁷⁸

There are currently 35 accredited bargaining councils in the Republic of South Africa, however, a council does not have to be accredited in order to resolve a dispute.⁷⁹ Yet, councils may only perform dispute resolution functions when a non-party is involved if the councils have been accredited by the CCMA in terms of sections 52 and 127 of the LRA or the non-party consents to the jurisdiction of the council.⁸⁰ Accredited bargaining councils perform similar dispute resolution functions as the CCMA and once a council has been accredited it will appoint a panel of conciliators and arbitrators to conduct these functions.⁸¹ Their responsibility to resolve disputes arises ‘from the collective agreements concluded in the council and other statutory instruments.’⁸² Typically, those agreements deal with ‘minimum wages, hours of work, overtime, leave pay, notice periods, and retrenchment pay.’⁸³ However, in contrast to the CCMA, their jurisdiction may only be sectoral, regional or industry-wide, which at the same time means that they are specialised in that specific industry and therefore most competent in assisting the parties.⁸⁴

(3) The Labour Court

The Labour Court is regulated by section 151 to 166 of the LRA and is established as a court of ‘law and equity’.⁸⁵ It consist of a Judge President, a Deputy Judge President and as many judges as the Judge President considers necessary.⁸⁶ Each case before the labour court is heard by a single judge.⁸⁷ Labour court judges must either be judges of

⁷⁸ Du Toit et al. op cit note 40 Chapter III, 4.1.

⁷⁹ CCMA Annual Report 2019/2020, available at <https://www.ccma.org.za/About-Us/Reports-Plans/Annual-Reports/Token/ViewInfo/ItemId/52>.

⁸⁰ Du Plessis, JV, Fouche, MA (2019) *A practical guide to Labour Law*, chapter 19.2.

⁸¹ Ibid chapter 19.3.1.

⁸² Benjamin op cit note 43 at p. 7.

⁸³ Ibid.

⁸⁴ Bhorat, H. et al. op cit note 72.

⁸⁵ Section 151(1) of the LRA.

⁸⁶ Grogan op cit note 9 at p. 51.

⁸⁷ ILO, National Labour Law Profil: South Africa, available at https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm.

the High Court or legal practitioners with knowledge and expertise in labour law.⁸⁸ Furthermore, NEDLAC plays an important role in the appointment of the judges, ‘enabling the social partners to play an active role in determining the composition of the Court’.⁸⁹ The Labour Court has jurisdiction to deal with several disputes. They range from ‘employment contract and constitutional matters to many other labour matters, such as matters arising out of the LRA (e.g. some dismissals) and the EEA (discrimination).’⁹⁰ The Labour Court also has jurisdiction to review arbitration awards of the CCMA and bargaining councils, thus, has the power to supervise the activities of these forums in fulfilling their statutory dispute resolution mandate.⁹¹ In addition, it has concurrent jurisdiction with the High Court.⁹² Its concurrent jurisdiction has been subject to debate and confusion for several years until the issue finally reached the Constitutional Court in *Chirwa v Transnet Ltd & others* and the court ruled that where employees have a remedy under the LRA, ‘the matter falls within the exclusive jurisdiction of the Labour Court’ and ‘the High Court did not have jurisdiction in respect of the applicant’s claim’.⁹³

(4) The Labour Appeal Court

The Labour Appeal Court was established as a ‘final court of appeal in respect of all judgments and orders made by the Labour Court in respect of matters within its exclusive jurisdiction’.⁹⁴ It is regulated by section 167 to 183 of the LRA. Matters before the Labour Appeal Court are heard by three judges sitting in a panel and a majority decision constitutes a decision of the court.⁹⁵ In addition, Labour Appeal Court judges must be judges of the High Court of South Africa.⁹⁶ The jurisdiction of the Labour Appeal Court is provided for in sections 172 and 173 of the LRA. It is limited to appeals against final orders and judgments of the Labour Court. Thus, the Labour Appeal Court may only hear matters over which the Labour Court has jurisdiction. ‘Where, however, the Labour Court has wrongly assumed jurisdiction,

⁸⁸ Grogan op cit note 9 at p. 54.

⁸⁹ Benjamin op cit note 43 at p. 6.

⁹⁰ Du Plessis et al. op cit note 80 chapter 19.7.

⁹¹ Benjamin op cit note 43 at p. 6.

⁹² Collier et al. op cit note 11 chapter 6.6.3.

⁹³ *Chirwa v Transnet Ltd & others* (2008) 29 ILJ 73 (CC).

⁹⁴ Section 167(2) of the LRA.

⁹⁵ Collier et al. op cit note 11 chapter 6.7.1.

⁹⁶ ILO, National Labour Law Profil: South Africa, available at https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm.

the Labour Appeal Court may still hear the appeal on that issue, in order to establish that the Labour Court had no jurisdiction.⁹⁷ In addition, it may determine questions of law under section 158(4) of the LRA.⁹⁸

(5) Non-specialized courts

Non-specialized labour courts, in particular, civil law courts might also have jurisdiction over individual labour law matters. In the labour law context, the High Court, for example, has jurisdiction over claims for breach of contract by employees against their employers and over claims from delict for infringement of rights not covered by labour legislation.⁹⁹ Furthermore, in case the High Court has jurisdiction over a certain contractual dispute, the same applies for the Magistrates' Court, however Magistrates' Courts' are limited to claims of less than specified values.¹⁰⁰ In addition, the Constitutional Court plays a role in shaping labour dispute resolution. Just like in the German context, the Constitutional Court can be called upon to hear a constitutional complaint if a violation of fundamental rights is asserted. Since rights, such as the one to fair labour practise, are included into the Bill of Rights, 'a dispute involving the extent of this right conferred by labour legislation is a constitutional matter'.¹⁰¹

D. The Conciliation mechanism

In a rapidly evolving labour environment, parties have an increased interest in obtaining legal clarity on the outcome of a dispute - for example, on the validity of a termination - as quickly as possible, as otherwise the execution of the contract will become more complicated.¹⁰² Neither employers nor employees can therefore afford delays. Access to a fair dispute resolution mechanism is essential. An amicable settlement serves this aim and is likely to bring the dispute to a swift end in a speedy

⁹⁷ Grogan op cit note 9 at p. 58.

⁹⁸ Collier, Debbie et al. op cit note 11 chapter 6.7.2.

⁹⁹ See for illustration, *Archer v Public School-Pinelands High School and Others (CA12/18) [2019] ZALAC 70* (25 November 2019), where the Labour Appeal Court held that 'the employee had both an unfair dismissal claim and a contractual claim arising from the termination of his employment contract. This entitled him to pursue a claim in the CCMA and an independent contractual claim in either the High Court or the Labour Court, which have concurrent jurisdiction to determine a contractual claim in terms of section 77 of the BCEA.'

¹⁰⁰ Grogan op cit note 9 at p. 59.

¹⁰¹ Ibid at p. 60.

¹⁰² Fornasier op cit note 5 at p. 565.

and inexpensive proceeding. Thus, Germany and South Africa both developed a mechanism of mandatory conciliation as the starting point of every individual rights dispute, which aims to grant easy and fast access to justice at a low cost.

This chapter will therefore engage with the conciliation mechanism. It will firstly, look at the jurisdiction in conciliation; secondly, look at the core elements of the procedure, and thirdly, capture the main similarities and differences in both countries.

I. Jurisdiction in conciliation hearings

1. Germany

As already seen above, the labour courts are the most dominant factor of conflict resolution in German labour law. This is also the reason why labour courts have a wide jurisdiction in individual rights disputes. Since the preliminary conciliation procedure forms part of every labour court hearing of first instance, the jurisdiction of the labour courts goes hand in hand with jurisdiction in conciliation hearings.

Labour courts have substantive jurisdiction over several types of disputes listed in the LCA. In most cases, their jurisdiction is exclusive. Section 2(1) point 3 of the LCA is the main provision for the jurisdiction of labour courts. It establishes that labour courts have exclusive jurisdiction over every legal dispute between employers and employees specified there. In addition, this section also separates the jurisdiction of the labour courts from the jurisdiction of the civil law courts. In particular, point (3)(b) of section 2(1) of the LCA is one of the most important provisions since it provides for jurisdiction over disputes ‘concerning the existence or non-existence of an employment relationship’, thus, it includes ‘all disputes concerning the effectiveness of a dismissal or an agreement to terminate the employment relationship by mutual consent’.¹⁰³ Moreover, disputes concerning the classification of the relationship between the parties as an employment relationship are included. 80 % of all labour disputes fall under section 2(1) point (3)(b) of the LCA.¹⁰⁴ This means that labour courts have exclusive jurisdiction over almost all legal conflicts between employers and employees arising from the employment relationship. In this context, employees are defined as ‘manual workers, white-collar workers...and even persons

¹⁰³ Waas op cit note 27 at p. 138.

¹⁰⁴ Junker op cit note 22 §12 Rn. 850.

who are not employees in a strict sense but who are treated as if they would be employees because they are economically dependent in a similar way (e.g., freelance journalists)'.¹⁰⁵ In addition, section 5(1) of the LCA specifies that apprentices also fall under the jurisdiction of labour courts. However, the employment relationship has to be one in a civil law context, thus the provision explicitly excludes those employment relationships between the State as an employer and its employees. These disputes are governed by public law and adjudicated by public law courts, section 126(1) of the Civil Servants Act.¹⁰⁶

Another section that is particularly interesting and demonstrates how far the jurisdiction in conciliation hearing goes, is section 2(1) point 9 of the LCA, which provides for the labour courts to have jurisdiction in tort disputes between employees, if the tortious conduct is connected to the employment relationship. This rule takes into account that the employment relationship was the starting point of the dispute and therefore extends the jurisdiction of the labour court for reasons of expediency to closely connected claims.¹⁰⁷

As regards the *rationae loci*, the jurisdiction for conciliation hearings lies either with the courts where the employee's usual place of work is or if a usual place of work cannot be localised, the courts have jurisdiction from whose district the employee performed or last usually performed his work.¹⁰⁸

In conclusion, the jurisdiction for conciliation hearings in the Labour Court of first instance covers virtually all individual rights conflicts between an employer and an employee arising from the employment relationship. Thus, great importance is given to the conciliation mechanism.

2. South Africa

Similar to the labour courts in Germany, the CCMA has jurisdiction to conciliate a wide range of disputes. Generally speaking its jurisdiction reaches from 'labour disputes of the LRA and the Employment Equity Act, to - although to a lesser extent- the Basic Conditions of Employment Act'.¹⁰⁹ Although the CCMA has jurisdiction

¹⁰⁵ Weiss op cit note 4 at p. 5.

¹⁰⁶ Erfurter Kommentar zum Arbeitsrecht /Koch, ArbGG § 2 Rn. 11.

¹⁰⁷ Waas op cit note 27 at p. 138.

¹⁰⁸ Sections 48(1)(a), 46(2) of the LCA in relation with 12 or 29 of the CCP.

¹⁰⁹ Collier et al. op cit note 11 chapter 6.4.2; In *September and Others v CMI Business Enterprise CC* (2018) 39 *ILJ* 987 (CC) it was held that in terms of CCMA Rule 15 a CCMA commissioner is 'not

over many disputes in conciliation hearings, important examples are disputes over ‘alleged unfair dismissals and unfair labour practises’ as well as ‘disputes concerning freedom of association, organisational rights, the interpretation or application of collective agreements, picketing rules and workplace forums’.¹¹⁰ The vast majority of cases that are referred to the CCMA for conciliation are individual rights cases. Almost 59% of all referrals in 2019/20 concerned unfair dismissal cases and 9 % were unfair labour practice disputes.¹¹¹ Failure to refer a dispute that falls under the jurisdiction of the CCMA to conciliation can have significant consequences on subsequent proceedings such as ‘litigation, statutory arbitration or industrial action’.¹¹² For example, conciliation is a pre-requisite for a protected strike.¹¹³

However, the CCMA will lack jurisdiction for conciliation on five grounds: firstly, where a referring party has failed to comply with the time periods in an Act and has not obtained condonation for its failure.¹¹⁴ Secondly, where someone who is not an employee (as defined in the applicable Act) refers a dispute to conciliation.¹¹⁵ In this regard, the LRA, BCEA and EEA share the same definition of an employee, specifically excluding an independent contractor.¹¹⁶ However, in contrast to German labour law, the definition includes all employees, whether employed in the public or private sector because only very few acts by the state as an employer are regarded as administrative acts and the inclusion of public employees is presumed to prevent inconsistency, complexity and duplicity of labour law.¹¹⁷ Thirdly, the CCMA has no jurisdiction for conciliation where legislation does not provide for a dispute to be referred to the CCMA at all (for example, disputes about restraint of trade). Fourthly, it has no jurisdiction when a dispute falls within the exclusive jurisdiction of a

bound by a party's categorisation of the nature of the dispute’ and has the right to investigate and identify its true nature.

¹¹⁰ Grogan op cit note 9 at p.132.

¹¹¹ CCMA Annual Report 2019/2020 op cit note 79.

¹¹² Grogan op cit note 9 at p.132.

¹¹³ Section 64(1) of the LRA.

¹¹⁴ Section 191(1)(b) of the LRA.

¹¹⁵ A person is no longer an employee at the end of a fixed term contract. In *Ukweza Holdings (Pty) Ltd v Nyondo and Others* (2020) 41 ILJ 1354 (LAC) it was held that the CCMA lacks jurisdiction where there is no dismissal because a fixed term contract has terminated by effluxion of time. Similarly, in *Uthingo Management (Pty) Ltd v Shear NO and Others* [2009] 6 BLLR 590 (LC) it was held that if an employee resigns, the CCMA lacks jurisdiction unless that employee can establish that there was a dismissal as defined by the LRA.

¹¹⁶ See Section 213 of the LRA, Section 1 of the BCEA and s 1 of the EEA.

¹¹⁷ Explanatory Memorandum on the Labour Relations Bill (1995) 16 ILJ 278; In terms of section 2 of the LRA the Act does not apply to members of the National Defence Force and the State Security Agency.

bargaining council and lastly, no jurisdiction is given in case parties agreed to determine the dispute by private arbitration in terms of the employee party's employment contract, a collective agreement or otherwise.¹¹⁸

There is a significant number of 'out-of-jurisdiction' referrals. Since the CCMA's establishment in 1995 this number has consistently been around 20-25 per cent of total referrals and mostly concerns claims that are in the jurisdiction of other institutions such as bargaining councils.¹¹⁹ Although most of those referrals can be dealt through a screening process and redirected by the CCMA's front office staff to the appropriate institution, not all of them can be so redirected. If commissioners find at the beginning of the conciliation procedure that they lack jurisdiction, they must terminate the meeting and explain the reasons for that to the parties.¹²⁰

Thus, the jurisdiction for conciliation hearings in the CCMA is similar to the one of first instance labour courts in Germany very wide and covers most individual rights disputes arising between an employer and an employee.

II. The conciliation procedure in Germany

1. The preliminary conciliation hearing in Germany

In Germany, the right to access to justice is embedded in article 20(3) of the Basic Law. It 'imposes a duty on the state to guarantee the provision of justice, in other words, to ensure that legal protection is offered through an independent judiciary.'¹²¹ The conciliation hearing, in particular, as the core mechanism of individual labour dispute resolution is designed in a way that allows it to grant quick and inexpensive access to justice. Thus, every individual rights case referred to the court begins with a conciliation between the parties. The purpose of the procedure is to achieve an agreement in the dispute but also – if a settlement is not reached – to prepare the court hearing, which takes place in front of the same chairperson that conducted the conciliation.¹²²

¹¹⁸ Section 188A of the LRA; in *Naidoo v Liberty Holdings* (JR558/16) [2019] ZALCJHB 56 (19 March 2019) it was held that the CCMA may have no jurisdiction to hear a dispute where the employee is contractually bound to refer the dispute to private arbitration.

¹¹⁹ Benjamin op cit note 43 at p.15.

¹²⁰ Section 147(3) of the LRA.

¹²¹ Waas op cit note 27 at p. 137.

¹²² Section 54(1) of the LCA.

The advantages of conciliation have been recognized and discussed by many scholars and practitioners over the years. Already in 1916 scholars argued that an amicable settlement can lessen the burden of an uncertain outcome of the legal dispute by avoiding the accumulation of incalculable costs.¹²³ Moreover, it was stated that amicable solutions are often more appropriate, if only because contentious judgments cannot exclude possible inequities.¹²⁴ Ultimately, an amicable settlement allows for ‘the consideration of individual interests and assessment of the circumstances of the individual case, whereby the cheapest and most realistic individual solution can be found’.¹²⁵ Others added that ‘speed, cost savings and quicker enforceability contribute to a win-win situation for both parties’ and that the dispensation of certain formalities leads to the jurisdiction moving closer to the popular ideal.¹²⁶

Nevertheless, in the early phase of labour jurisdiction, efforts to resolve disputes amicably were primarily due to the fact that the applicable law was perceived to be ‘less than adequate for deciding labour disputes’.¹²⁷ The interests of the parties could often be better served by concluding a settlement than by applying the relevant legal provisions. Moreover, an amicable solution facilitated the continuation of the employment relationship.¹²⁸

Today there are other considerations: it has been argued that modern labour law as a ‘differentiated regulatory system is able to produce just solutions that are in line with the interests of the parties in most cases and, on the whole, meet their needs’.¹²⁹ Moreover, most labour disputes take place after the termination of the employment relationship, so that the restoration of the relationship of trust between the parties to the dispute is less urgent. One of the important aims of modern labour dispute resolution is therefore to ‘facilitate access to justice for employees with a view to ensuring that litigants are on an equal footing’.¹³⁰ Thus, the labour court procedure is designed to reduce litigation costs, ‘by expediting proceedings and by limiting the right of an employer to recover attorney’s fees from the employee-plaintiff in the event

¹²³ Nordhausen, Richard ‘Weshalb der erwerbstätige Mittelstand das Güteverfahren braucht’ in Deinhardt, *Deutscher Rechtsfriede, Beiträge zur Neubelebung des Güteverfahrens*, Leipzig 1916 at p. 186.

¹²⁴ Ibid.

¹²⁵ Seifert, Christian, *Die Entwicklung des Gütegedankens im arbeitsgerichtlichen Verfahren* at p. 20.

¹²⁶ Nordhausen op cit note 123 at p. 186.

¹²⁷ Fornasier op cit note 5 at p. 565.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

the claim is dismissed'.¹³¹ Another effective tool to ensure that proceedings before labour courts are 'speedy and inexpensive is to provide assistance to the parties so as to facilitate their reaching an amicable settlement'.¹³²

Thus, in modern labour dispute resolution, the importance of the conciliation procedure has not decreased. Several hundred thousand of cases in Germany are managed by the mechanisms of conciliation every year¹³³ and an amicable settlement is often the better solution for the parties than a time-consuming, costly and unpredictable adjudication process.

2. The Procedure

In Germany, section 54 of the LCA is the core legislation that provides for a mandatory conciliation hearing in the court proceedings of first instance. Section 54 (1) of the LCA reads as follows:

§ 54 Conciliation hearing

(1) The oral proceedings shall begin with a hearing before the chairman for the purpose of reaching an amicable settlement between the parties (conciliation hearing). For this purpose, the chairman shall discuss the entire dispute with the parties, freely assessing all the circumstances. In order to clarify the facts of the case, he or she may take any action that can be taken immediately. However, questioning on oath is excluded. The chairman may, with the consent of the parties, continue the conciliation hearing at a further meeting to be held as soon as possible.¹³⁴

Neither the parties nor the court can waive the right to a conciliation hearing. Not even on grounds of obvious futility.¹³⁵

a. Structure

The hearing takes place before the chairperson in the courtroom without the lay judges. It forms part of the court hearing, thus it is not private and confidential, but rather open to the public. However, the public can be excluded from the conciliation hearing for

¹³¹ Fornasier op cit note 5 at p. 565.

¹³² Ibid.

¹³³ Federal Ministry of Labour and Social Affairs, Annual Report 2019, available at https://www.bmas.de/SharedDocs/Downloads/DE/Arbeitsrecht/Statistiken/Ergebnisse-Statistik--Arbeitsgerichtsbarkeit-2019.pdf;jsessionid=FA2CD63844DB0AF0EBD93CDCA5A89626.delivery1-replication?__blob=publicationFile&v=1.

¹³⁴ Section 54(1) of the LCA.

¹³⁵ Seifert op cit note 125 at p. 20.

reasons of expediency.¹³⁶ For the purpose of the conciliation, the chairperson is required to discuss the entire dispute with the parties and evaluate all the evidence given immediately.¹³⁷ However, the chairperson cannot ask questions under oath. Moreover, admissions made by the parties in the conciliation hearing in accordance with section 288 of the Code of Civil Procedure shall only have binding effect if statements have been declared on record and parties cannot make motions in the conciliation hearing. Moreover, the conciliation hearing must be held in one session. The estimated duration for the hearing is around 15-20 minutes.¹³⁸ However, it is permissible to hold a second or further conciliation hearing with the consent of all parties to the proceedings, which must take place as soon as possible, regularly within two weeks. In practice, most chairpersons do not make use of this option, rather if conciliation in the first meeting is unsuccessful a date is set for the court hearing in first instance.¹³⁹

b. Informality

Even though the conciliation procedure is part of the preliminary court hearing, it has some elements of informality. For example, the court often has only superficial knowledge of the parties' dispute before the hearing. Other than in civil procedures, there is only very limited written preliminary communication in advance of the labour court proceedings and a request to the defendant to respond to the action in writing is usually not made prior to the conciliation.¹⁴⁰ This promotes a certain degree of informality and allows for an unbiased communication in court.

Another element of informality is that the chairperson in the conciliation has considerable freedom on how to conduct the hearing. It is not uncommon that the chairperson during the conciliation indicates to the parties his or her legal opinion and offers solutions thereby trying to influence the parties willingness to come to an agreement.¹⁴¹ In addition to that, the chairperson will also point out the legal situation and litigation risks including duration and costs of proceedings and propose

¹³⁶ Section 52(3) of the LCA.

¹³⁷ Section 54(1) of the LCA.

¹³⁸ Kroiß(ed.)/Mayer, *FormularBibliothek Zivilprozess - Arbeitsrecht*, § 2 Gerichtliche Verfahren 1. Instanz Rn. 281.

¹³⁹ Erfurter Kommentar zum Arbeitsrecht op cit note 106 § 54 Rn. 4

¹⁴⁰ Section 46(2) sentence 2 and 47(2) of the LCA.

¹⁴¹ Weiss op cit note 4 at p. 12.

solutions.¹⁴² The law assigns an active role to the court in settlement efforts, which may also be expressed in settlement proposals.¹⁴³ Moreover, the discussion must take place in such a way that even a party unfamiliar with the law can follow the assessments and, if necessary, prepare a contentious hearing.¹⁴⁴ However, the chairperson cannot give legal advice to a party. All proposals of the chairperson are non-binding, thus the decision-making power lays in the hand of the parties to determine the outcome of the dispute.¹⁴⁵ The purpose of the conciliation is not to persuade the parties to reach an agreement at any price, yet, due to the chairperson's high level of discretion in conducting the conciliation, it is often hard to draw the line. The Federal Labour Court argued that the limit is reached where grounds for challenge within the meaning of sections 49 and 42 of the CCP begin, especially a threat by the judge can entitle a party to challenge a court settlement.¹⁴⁶ In case the parties dispute the validity of a court settlement, this dispute shall be settled in the same proceedings in which the settlement was concluded.¹⁴⁷

c. Access to conciliation

The first step to every conciliation hearing in Germany is a claim with the Labour Court of first instance. Claims can be filed in writing with the court or with the claims office of the Labour Court of first instance.¹⁴⁸ Most claims in individual labour disputes are filed by employees.¹⁴⁹ The claims office of the Labour Court therefore aims to grant easy access for employees by providing help to file a formally correct complaint with the court. An employee can file a complaint as a 'walk-in' with the office. The officer will then ensure the correct designation of the parties and the correct formulation of the application (if necessary, by discussing the matter) and point out to the employee any easily recognisable concerns about the conclusiveness or obvious ambiguities. However, the officer has to comply with the principle of impartiality and may not refuse to file a claim on grounds that an action is futile.¹⁵⁰

¹⁴² Section 139 of the Code of Civil Procedure.

¹⁴³ BAG 12.5.2010, *NZA* 2010, 1250.

¹⁴⁴ BeckOK *ArbR/Hamacher*, Rolfs/Giesen/Kreikebohm/Meßling/Udsching (eds.), ArbGG § 54 Rn. 22, 23.

¹⁴⁵ Seifert op cit note 125 at p. 41.

¹⁴⁶ BAG 12.5.2010, *NZA* 2010, 1250.

¹⁴⁷ Ibid.

¹⁴⁸ Section 49(2) of the LCA in relation with 496 of the CCP.

¹⁴⁹ Federal Ministry of Labour and Social Affairs, Annual Report 2019 op cit note 133.

¹⁵⁰ MüKoZPO/Deppenkemper, Rauscher/Krüger (eds.), ZPO § 496 Rn. 8.

In addition, strict time limits to access the conciliation procedure apply. The time periods for referring disputes, for example, where an employee alleges unfair dismissal are very short. Employees have three weeks from the notification of dismissal to refer their complaint to the court and the conciliation hearing should then take place within two weeks after service of the complaint because of the urgency of dismissal cases.¹⁵¹

Thus, the conciliation mechanism is easily accessible. Employees receive legal counselling on the formulation of a claim through the claims office of the Labour Court, which lessens the burden of having to be legally represented. At the same time, the system is structured in such a way that procedures take place after a short amount of time, which promotes the efficiency of the process.

d. Representation

Another element that allows for easy access to the individual labour dispute resolution system and reduces costs for the parties is linked to representation in conciliation hearings. In contrast to ordinary court proceedings the parties do not have to be represented in labour court hearings of first instance.¹⁵² Thus, each party can choose to present their own case in court. This is because legal representatives are presumed to make the process expensive, technical and are responsible for delays. This interferes with the objectives of the conciliation hearing to make the procedure cheap, informal and expeditious. Therefore, before 1953, the Labour legislation completely excluded representation by lawyers in court hearings of first instance and only allowed representation by representatives of trade unions and employers' confederations. In that case members were automatically entitled to free legal protection in labour law matters through membership fees.¹⁵³

However, after 1953 legal representatives have been reintroduced into the labour proceedings of first instance. Parties can choose whether they want to be represented in court. Representation is granted by a lawyer as well as a representative of a trade union or by an employer confederation.¹⁵⁴ Thus, it gives parties flexibility in choosing a representative depending on their needs. At the same time, it grants

¹⁵¹ Section 61a (1) of the LCA.

¹⁵² Section 11(2) of the LCA.

¹⁵³ Weiss op cit note 4 at p. 12.

¹⁵⁴ Waas op cit note 27 at p. 140.

accessibility to the individual labour dispute resolution system and reduces costs by avoiding compulsory representation. In fact, in practise, only few employees are actually legally represented in conciliation hearings.¹⁵⁵

e. Costs

Furthermore, the rules on costs in labour court proceedings and in particular on conciliation hearings differ from other ordinary civil procedures. For example, the court fees are considerably lower in labour court proceedings and fees do not have to be paid in advance.¹⁵⁶ While the general rule is that the losing party in labour court proceedings pays the court fees of first instance according to section 12 of the LCA in relation to 91 of the CCP, conciliation hearings allow for an omission of court fees in cases where the parties reach an agreement before the judge.¹⁵⁷ This provision is aimed to promote the willingness to settle.

In addition, legal representatives can charge a higher fee if a settlement is reached during the conciliation hearing (a fee rate of 3,5).¹⁵⁸ If no agreement is reached and the process continues in the court of first instance they can only charge a fee rate of 2,5.¹⁵⁹ Thus, legal representatives are more willing to promote an amicable agreement and advise their clients to consider the advantages of this option.

Even if conciliation fails, the economic risks for the employees in pursuing their rights in court are reduced. Section 12a(1) of the LCA stipulates that the employer cannot pass on the costs of legal representation by a lawyer to the employee. This applies despite the employer winning or losing the case in court and therefore reduces the financial burden on the employee. And in consequence, promotes access to the labour dispute resolution system.

Thus, in general, provisions in labour court proceedings are designed to reduce litigation costs and to make the procedure more accessible, especially for employees.

¹⁵⁵ Dendorfer, R.; Ponschab, R. 'Mediation und Konfliktmanagement im Arbeitsrecht', in W. Moll (ed.): *Münchener Anwaltshandbuch Arbeitsrecht*, § 82.

¹⁵⁶ Waas op cit note 27 at p. 141.

¹⁵⁷ Section 12, 12a of the LCA.

¹⁵⁸ First, the total amount in dispute must be ascertained. The basic charge of 1.0 is calculated using the fee table of the Lawyers' Fees Act based on the amount in dispute. Subsequently, the factor by which the basic fee is multiplied must be determined. This depends on whether only a procedural fee (then 1.3 fee rate), an appointment fee (then 1.2 fee rate) or additionally a settlement fee (then 1.0 fee rate) can be claimed. All three have to be taken into account in case of a settlement agreement. This results in a fee rate of 3.5.

¹⁵⁹ Kroiß op cit note 138 Rn. 273.

They do so by significantly reducing the court costs in conciliation hearings and legal representation.

f. Non-attendance at conciliation

The importance that is given to the conciliation hearing as a first step of the court proceedings, is further underlined by the non-attendance of one or both parties. Section 54 (4) and (5) of the LCA distinguishes between non-attendance of one party and non-attendance of both parties. The consequences are different: If one party does not attend or does not negotiate, section 54(4) of the LCA provides that the further hearing can follow immediately. ‘Non-attendance’ in this context is understood as physical absence. ‘Non-negotiation’ in this context is defined as a party not making any statements on the dispute in court. In that case, the presiding judge can determine the case alone, issuing a default judgement on the facts available.¹⁶⁰

If both parties do not appear or do not negotiate at the conciliation hearing, the proceedings must be suspended pursuant to section 54(5) of the LCA. This legal consequence is mandatory. The question arises how non-negotiation needs to be understood in section 54(5) of the LCA. It is significant that the requirement of negotiation is fulfilled even when both parties clearly state that they do not intend a settlement but rather focus their discussion on the further proceeding.¹⁶¹ Thus, as long as both parties make statements in court the requirement is met.

In case the judge suspends the proceedings in terms of section 54(5) of the LCA, a date for a contested hearing before the panel of first instance shall be fixed at the request of one of the parties. No reasons need be given for the request. However, it may only be filed within six months after the initial conciliation hearing.¹⁶²

Thus, non-attendance in the conciliation hearing has considerable consequences on the further proceedings. In that way, the legislator ensured that parties try to first resolve their conflicts through an amicable agreement before pursuing adjudication right away.

¹⁶⁰ BeckOK *ArbR/Hamacher* opt cit note 142 § 54 Rn. 63.

¹⁶¹ *Ibid* Rn. 64.

¹⁶² Section 54(5) of the LCA.

g. The Outcome

In most cases the conciliation results in one of the following outcomes: the action is withdrawn, an agreement is reached, or a date is set for the court hearing before the entire panel.¹⁶³ If a settlement agreement is reached it will be recorded by the chairperson.¹⁶⁴ Thereby, the settlement agreement has a dual legal nature: it is on the one hand a procedural act and on the other hand a contract under private law and therefore enforceable. In the courts practice, it is often concluded as a revocable agreement, so that the parties have the opportunity to decide within the revocation period whether they want to accept the proposed settlement or not.¹⁶⁵

In case the parties decide to proceed with litigation in court, amicable settlements are encouraged throughout the entire litigation proceedings.¹⁶⁶ It is not limited to the conciliation hearing under section 54 of the LCA. In fact, Dendorfer and Ponschab in their assessment about the efficiency of amicable settlements in labour courts found that, even if the first attempts to negotiate a compromise fail, the parties frequently manage to reach an acceptable agreement in the further proceedings. New facts and insights emerge in many cases and the side who was initially hesitant to compromise eventually agrees to settle the matter.¹⁶⁷

h. Statistics

The conciliation procedure is ‘structured in such a way as to ensure that disputes are quickly resolved.’¹⁶⁸ In general, the time taken to resolve a case in the labour courts has been ‘the shortest of all jurisdictions’ and ‘the relative brevity of proceedings results primarily from the fact that the majority of labour court cases end with a compromise agreement between the parties in the conciliation process’.¹⁶⁹ The efficiency of the conciliation mechanism is further illustrated in the statistics of the Federal Ministry of Labour and Social Affairs:¹⁷⁰ while a total of 328,713 actions were lodged with the labour courts in 2019 about 60 per cent of them were settled. Only

¹⁶³ Weiss op cit note 4 at p. 12.

¹⁶⁴ Section 54 of the LCA.

¹⁶⁵ BeckOK *ArbR/Hamacher* op cit note 142 § 54 Rn. 17.

¹⁶⁶ Section 57(2) of the LCA.

¹⁶⁷ Dendorfer op cit note 155.

¹⁶⁸ Waas op cit note 27 at p. 159.

¹⁶⁹ Ibid.

¹⁷⁰ The numbers from 2019 are the most recent numbers published by the Federal Ministry of Labour and Social Affairs.

23,686 cases proceeded to a final judgment by the court. In addition, 311,643 of all cases were brought by employees, trade unions and works councils. Also, most of the cases are dealt within a short amount of time. The statistics capture time periods for actions contesting the lawfulness of a dismissal. The time taken to deal with these actions in 2019 was the following: 47,674 actions were dealt with within one month, 86,688 actions were dealt with in one to three months, 32,440 in three to six months and 16,817 in six to 12 months. Only in 2,909 cases did the action take more than 12 months to reach a resolution.¹⁷¹

This again, highlights how most individual labour law cases are efficiently dealt with at a very early stage. In addition, the fact, that most of the actions were brought before the court by employees, trade unions and works councils illustrates the accessibility of the procedure and its ability to balance unequal power relationships.

i. Virtual dispute resolution in conciliation

A recent development in conciliation hearings is virtual dispute resolution. Due to social distancing through the covid pandemic in 2020/2021, labour courts were challenged to find alternative ways of conducting their service and procedures had to be adapted. This development also affected the conciliation procedure. Video hearings became an essential tool to provide access to conciliation during this time.

(1) Section 128 a of the CCP

In fact, video hearings in labour court proceedings were already permissible at the request of the parties for both conciliation and chamber hearings since 2002.¹⁷² Section 128 a (1) of the CCP stipulates:¹⁷³

§ 128a

Hearing by means of video and audio transmission

(1) The court may, on application or ex officio, allow the parties, their representatives and assistants to be present at another place during oral proceedings and to perform procedural acts there. The hearing shall be transmitted simultaneously in sound and vision to that place and to the courtroom.

¹⁷¹ Federal Ministry of Labour and Social Affairs, Annual Report 2019 op cit note 133.

¹⁷² Section 128a of the CCP.

¹⁷³ Section 128a of the CCP is applicable in labour court proceedings by way of reference in Section 46(2) sentence 1 of the LCA.

Section 128 a of the CCP regulates that the parties and their representatives can take part in the hearing in another location than the court room. This other location can be chosen by the parties and does not have to be a room provided by the court.¹⁷⁴ In addition, it regulates that the hearing has to be transmitted simultaneously in picture and sound to the location of the parties and to the court room.¹⁷⁵ This is necessary because court proceedings are governed by the principle of transparency.

In order to have a video hearing in terms of Section 128a of the CCP the court has to make an order to permit a virtual hearing. After the order, the desired participants are invited by the court via a separate e-mail, in which they receive an ID and a link to enter the conference room on the day of the hearing.¹⁷⁶

However, in practice, the provision, which has last been updated in 2013 has rarely been used in labour court hearings before the pandemic.¹⁷⁷ There are several reasons for that: One reason is that there is currently no nationwide or even cross-jurisdictional technical standard for the establishment and use of a uniform video conferencing system. Thus, most federal states rely on the use of commercial solutions for conciliation hearings, such as Skype for Business, Zoom, Microsoft Teams or Cisco WebEx.¹⁷⁸ Data protection concerns have been raised against the use of these systems in the judiciary, which have not yet been conclusively clarified.

Further difficulties arose in the context of a non-attendance situation. Many scholars engaged in technicalities of defining non-attendance in a virtual hearing. Non-attendance therefore had to be redefined by the courts. It occurs ‘if the party neither appears (physically) in the courtroom nor a transmission is made by means of video and audio’.¹⁷⁹

It has also been criticized that the order for a virtual conciliation hearing pursuant to section 128 a CCP has to be made by ‘the court’.¹⁸⁰ This means that the whole chamber, thus, the chairperson as well as the lay judges have to reach a decision

¹⁷⁴ LAG Düsseldorf 13.1.2021, *BeckRS* 2021, 3353.

¹⁷⁵ Section 128a of the CCP.

¹⁷⁶ Oltmanns, Sönke ‘Die Digitalisierung des Arbeitsgerichtsprozesses: Status quo und Perspektiven’ *NZA* 2021, 525.

¹⁷⁷ Francken, Johannes Peter/Natter, Eberhard ‘Die arbeitsgerichtliche Videoverhandlung’, *NZA* 2021, 153.

¹⁷⁸ Waas op cit note 27 at p. 155.

¹⁷⁹ Windau, Benedikt, ‘Die Verhandlung im Wege der Bild- und Tonübertragung’, *NJW* 2020, 2753.

¹⁸⁰ Francken/Natter op cit note 177.

on the permission of a virtual hearing. As a result the lay judges have to decide on the permissibility of virtual conciliation even though they are not allowed to take part in the hearing itself.

These difficulties illustrate that section 128a of the CCP was not intended for conciliation hearings, thus, was not tailored to the peculiarities of labour court proceedings, but rather to ordinary court proceedings. Yet, the pandemic and the requirement of social distancing came with the necessity to find new solutions.

(2) Section 114 of the LCA

Therefore, the legislator decided in May 2020 to introduce a new section 114 of the LCA, which was limited until the 1st January 2021.¹⁸¹ The aim of this new provision was to comply with the requirements of social distancing without having to compromise the efficiency of the labour dispute resolution system. The challenge was to ensure the functioning of the labour courts. At the same time the right to justice of those seeking legal protection had to be balanced out with individual rights such as the right of health protection for judges, lay judges, participants and the public.

A draft bill of section 114 of the LCA provided that, in derogation of section 128a of the CCP, the chairperson – instead of ‘the court’ - could unilaterally oblige the parties to attend video hearings, in case the parties or their representatives were able to provide the technical requirements for video and audio transmission.¹⁸² Furthermore, the draft bill for section 114 LCA proposed that no fixed place of hearing was envisaged for the judge, thus, a hearing from the judges office would also have been possible.¹⁸³ However, these regulations did not make it into the final version of section 114 of the LCA.

Instead, the main innovation introduced by section 114(1) of the LCA was that lay judges were from this point on also allowed to attend the proceedings from another location. Yet, this allowance did not impact the preliminary conciliation hearing, since lay judges are not permissible there at all. In addition, the suggestion of the draft bill to allow hearings from the judges office did not find its way into the provision. The reason for this was its incompatibility with the principle of transparency. However, section 114(3) of the LCA allowed the judge in conciliation hearings to unilaterally

¹⁸¹ Francken/Natter op cit note 177.

¹⁸² BeckOK *ArbR/Hamacher* opt cit note 142 § 54 Rn. 18.3.

¹⁸³ Windau op cit note 179.

order the virtual hearing on request of the parties. However, the order of a video conference for the hearing of first instance still had to be made by order of ‘the court’, thus the whole chamber including the lay judges.

(3) The pilot project in Baden-Württemberg

Only a few months after the implementation of section 114 of the LCA, in July 2020, labour courts in Baden-Württemberg started a pilot project for virtual conciliation hearings.¹⁸⁴ The initiative to conduct conciliation hearings by video conferencing initially came from the judges. Around 20 % of all judges showed interest in conducting conciliation hearings solely by virtual hearings. This picture changed at the beginning of the second lockdown in October 2020. Parties and legal representatives increasingly applied for the scheduling of a video hearing by invoking section 114(3) of the LCA.

However, the actual usages of video hearings in conciliation differed. Two judges conducted more than 200 virtual conciliation hearings between August and early December 2020. They directly invited the parties to a video hearing and only refrained from doing so if one of the parties insisted on a hearing in person and a hybrid hearing was not possible at all.¹⁸⁵ However, the majority of the judges involved in the project proposed to the parties to hold a video hearing only in selected cases. They made little use of video hearings in the beginning and only conducted between 5 and 30 conciliation hearings each until December 2020.¹⁸⁶

After the project the judges were asked to evaluate their experience with the virtual conciliation procedure. Their assessments on the efficiency of the virtual conciliation hearing varied. Some judges felt that video communication was more stressful and less personal. Others felt that after a certain familiarization, the procedure was even more disciplined and concentrated than in the court room.¹⁸⁷ Overall, the disadvantages of non-verbal communication between the court and the parties were not seen, or only to a limited extent in conciliation hearings. In addition, the settlement rate during the time period of the project was not lower than in a face-to-face hearing.¹⁸⁸ Moreover, legal representatives, were quickly convinced of the advantages

¹⁸⁴ Francken/Natter op cit note 177.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

of this form of hearing. They preferred not only that they did not have to travel to the different locations of the courts for the conciliation, but also saw the advantage that in the event of time delays, they could pursue their work in the office until the chairperson called the hearing in the virtual courtroom.¹⁸⁹

The pilot project shows that especially in conciliation hearings the benefits of virtual dispute resolution outweigh its disadvantages. In light of the positive feedback from the judges involved in the pilot project, it is therefore not surprising that several labour court judges and other federal states in Germany expressed their interest in a license for the video conferencing system used.¹⁹⁰

(4) The future of virtual hearings

With the expiry of section 114 of the LCA on the 1st of January 2021, virtual conciliation hearings in labour courts, again, are solely regulated by section 128a of the CCP.¹⁹¹ Nevertheless, the individual dispute resolution system can benefit from virtual conciliation hearings even after the pandemic. Virtual hearings grant more access to the labour dispute resolution system and will in the long-run reduce the costs for the parties, in particular, regarding travel expenses and time off from work. This is especially the case because conciliation hearings on average take 15 to 20 minutes, but parties and their legal representatives sometimes travel for several hours to the court, which may in some cases undermine the value of hearings in court.

However, certain changes should be made in order to apply virtual dispute resolution to conciliation hearings in labour courts. The regulation of section 128a of the CCP should be changed, in regard of ‘the court’ that has to decide on the permission of a virtual hearing. The ‘chairman's solution’ appears to be preferable, whereby the chairman can order permission for virtual hearings, instead of having to consult the whole ‘chamber’ first.¹⁹² In addition, a better equipment of courts with video conferencing technology as uniformly as possible throughout Germany is essential. A uniform platform for all courts will also help to get data protection concerns out of the way.

¹⁸⁹ Francken/Natter op cit note 177.

¹⁹⁰ Ibid.

¹⁹¹ Oltmanns op cit note 176.

¹⁹² Francken/Natter op cit note 177.

In conclusion, video hearings will probably not become a substitute for face-to-face hearings. However, they can supplement traditional court procedures in suitable cases and limit the expenses for the parties and the court. The preferred field of application for video hearings will be conciliation in labour courts. The reason for this is the short amount of time that preliminary conciliation is allocated in the procedure and the fact that conciliation is conducted by the chairperson alone. Thus, the hearings can make use of laptops or mobile devices without having to install additional hall cameras in the court room that capture the interactions of the chamber. Virtual dispute resolution in conciliation will contribute to granting more access, more settlements and further efficiency of the individual labour dispute resolution system. It is therefore a development that should remain.

III. The conciliation procedure in South Africa

1. Conciliation in the CCMA

In South Africa, section 34 of the Constitution provides 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.’¹⁹³ In giving effect to section 34 of the Constitution, the legislature established the CCMA in terms of section 112 of the Labour Relations Act 66 of 1995 as the primary institution for individual labour dispute resolution (other than litigation). The CCMA’s successes have been recognized by many authors as well as the International Labour Organisation. Benjamin, for instance, states that ‘the CCMA has provided an unprecedented level of access to social justice for employees, particularly those who are unfairly dismissed.’¹⁹⁴ Brand further elaborates that the CCMA’s achievements have been ‘cheap and easy access, simplicity of process, expedition and high levels of legitimacy.’¹⁹⁵ In addition, Leeds and Wöcke argue that the excessive number of disputes referred to the CCMA and the ‘high number of out-of-jurisdiction cases’, given South Africa’s level of employment, is largely due to ‘the

¹⁹³ Constitution of the Republic of South Africa, 1996.

¹⁹⁴ Benjamin, Paul ‘Conciliation, Arbitration and Enforcement: The CCMA’s Achievements and Challenges’ (2009) 30 *ILJ* 26.

¹⁹⁵ Brand, John ‘CCMA: Achievements and Challenges- lessons from the First Three Years’ (2000) 21 *ILJ* 77.

ease of access to the CCMA.¹⁹⁶ And while speedy justice cannot always be guaranteed by labour courts,¹⁹⁷ the compulsory conciliation mechanism promotes the efficiency of the labour dispute resolution system through ‘simplified dispute referral forms’ and ‘short time periods for referring disputes’.¹⁹⁸

As a first step in individual dispute settlement, the Labour Relations Act 66 of 1995 emphasizes reaching a consensus. Before proceeding to arbitration or adjudication, most issues must therefore be resolved through conciliation in the CCMA. Conciliation is a process in which an independent, neutral third party (the commissioner) interacts with the disputants to facilitate a settlement agreement. It is a flexible, informal, confidential, and accessible process that can take a variety of forms under the LRA, such as ‘mediation, fact-finding, or the issuance of an advisory award.’¹⁹⁹

Its values are diverse: firstly, it is beneficial to a relationship to settle disputes through an amicable agreement, ‘especially in the labour law context, where -at least in theory- the employment relationship continues even after the dispute.’²⁰⁰ In particular, when parties are unable to talk directly with one another because of a lack of skills or willingness, or when parties are unable to find a solution on their own, the facilitation of the communication through a neutral third party can make all the difference in resolving the dispute. Secondly, conciliation allows for individual solutions designed by the parties themselves and comes with less uncertainty about the outcome than litigation. Thirdly, conciliation reduces the burden ‘on the CCMA and other dispute resolution forums by avoiding the need for arbitration and litigation while keeping the parties’ costs low.’²⁰¹ Fourthly, it makes the parties feel heard and allows for the restoration of dignity.

Since its establishment, the conciliation mechanism has become a growing success. As of 7 November 2021, the day of the CCMA’s 25th anniversary, 3 566 370

¹⁹⁶ Leeds, C. & Wöcke A (2009) ‘Methods of reducing the referral of frivolous cases to the CCMA’, *South African Journal of Labour Relations*, Vol 33 No 1.

¹⁹⁷ See for example, van Niekerk’s assessment on the efficiency of the labour courts: ‘Speedy justice runs the risk of becoming yet another platitude serving not to promote the cause but, on the contrary, to mask a reality in which the expeditious resolution of labour disputes remains elusive. In the Johannesburg Labour Court, parties to three-day trials and opposed reviews ready for set down are having to wait at least 12 months to be heard.’; Van Niekerk, Andre (2015) ‘Speedy social justice: Streamlining the statutory dispute resolution processes’, 36 *ILJ* 837.

¹⁹⁸ Benjamin op cit note 194.

¹⁹⁹ Collier et al. op cit note 11 chapter 6.4.1.

²⁰⁰ Ibid.

²⁰¹ Ibid.

case referrals have been received since 11 November 1996, while the CCMA's caseload has been steadily increasing. Moreover, despite this increase, the CCMA has continuously maintained a settlement rate of more than 70% over the years.²⁰²

2. The procedure

a. Structure

The conciliation procedure is regulated by section 135 of the LRA and further supplemented by the Rules for Conduct of Proceedings before the commission for conciliation mediation and arbitration (CCMA Rules). Although conciliation is a rather informal, thus flexible procedure, it generally follows a guideline. Brand, for this purpose, divides conciliation into eight steps.²⁰³

As soon as a referral for conciliation is received, 'the matter is laid down and a commissioner is appointed to conduct the conciliation'.²⁰⁴ Conciliation starts in a joint session. The first step is introductions and housekeeping. In the second step, the conciliation process is explained, and ground-rules are established. In particular, the parties need to understand that in conciliation the decision-making power lies with the parties and the commissioner plays only a facilitating role. The commissioner is there to help the parties reach an amicable agreement and generally 'not to judge, recommend or advise'.²⁰⁵ Moreover, the parties need to be aware of the difference between conciliation as a consensus-seeking process and adjudication through courts. They also need to be educated about the consequences of failure to reach an agreement and the element of confidentiality. All information shared in joint sessions as well as in private sessions will be treated as confidential. Furthermore, conciliation is without prejudice, thus, whatever offer, concession, or admission the parties make during the process may not be used later in a court or another process. This step is crucial because parties are 'more likely to communicate openly and be more creative' if they know what to anticipate, feel comfortable and are 'not afraid of repercussions'.²⁰⁶ In step three, both parties make an opening statement, which is a brief summary about the

²⁰² CCMA official website, 'CCMA Commemorates its 25th anniversary', available at <https://www.ccma.org.za/Media/ArticleID/1617/CCMA-COMMEMORATES-ITS-25th-ANNIVERSARY-MEDIA-ADVISORY>.

²⁰³ Brand, John, Lötter, Casper, Mischke, Carl, Steadman, Felicity & Ngcukaitobi, Tembeka (eds.) (2009) *Labour Dispute Resolution*, chapter 9.

²⁰⁴ Benjamin op cit note 43 at p. 17.

²⁰⁵ Brand et al. op cit note 203 chapter 9.

²⁰⁶ Ibid.

dispute. In order to select what approach to adopt in conciliation, the commissioner must establish the issues in disagreement and have the opportunity to pose further questions. There is no rule as to who starts with the opening statement, however, the commissioner in choosing the first party must maintain his or her impartial role. The fourth step concerns the particular process to be followed. The commissioner has the authority to choose ‘the most appropriate process for the resolution of the dispute, which may include mediation, a fact-finding exercise or an advisory award.’²⁰⁷ The next step is about analysing the dispute. In this step, the commissioner will identify common grounds and discover the underlying needs, interest and concerns of the parties and move away from their positions. In this step, the commissioner aims to uncover the conflict's cause. In the sixth step settlement options are explored. The commissioner encourages brainstorming, generates different options, considers possible risks with the parties, uses reality checks, and presents possible outcomes. Following this, the commissioner assists the parties in a seventh step to choose an option for settlement. They work with the parties to come up with a solution that is feasible, cost-effective and meets the parties' needs to the greatest extent possible. However, if the parties are not willing to settle the dispute, the commissioner will try to break the deadlock by recognised strategies and refer the parties to the consequences of non-settlement.²⁰⁸ The last step in conciliation is ‘finalising an agreement or confirming a deadlock’.²⁰⁹ If the parties reach a settlement, the commissioner helps the parties to draft an agreement. This agreement must be signed by both parties. Due to the large number of cases referred to the CCMA, commissioners are given approximately one hour to try to reach an agreement between the parties. This period has been criticized as insufficient, as it does not allow for enough time to reach a settlement that equally serves both parties’ needs.²¹⁰

An issue in conciliation arises in regard of measuring the fairness of a settlement agreement. While the CCMA Rules do not expressly require the commissioner to test the fairness of an agreement, the labour courts have been more definite. In *Sejane v. CCMA and others* (J2789/99) [2001] ZALC (1 October 2001),

²⁰⁷ Van Niekerk, A., Christianson M., McGregor M, Smit, Nicola, Van Eck Bruno Paul Sefan. (2019) *Law@work*, 5th ed., LexisNexis South Africa chapter 4, p. 487.

²⁰⁸ Rycroft, Alan (2016) ‘Legal review of the mandatory mediation process in South Africa’, 1.1. *Mediation Theory and Practice* 79–93 where judicial attitudes to giving advice, scenario-setting and reality-testing, pressure to settle are discussed.

²⁰⁹ Brand et al. op cit note 203 chapter 9.

²¹⁰ Steenkamp/Bosch, op cit note 36; Benjamin op cit note 42 at p. 15.

almost a year after an agreement had been entered into in the course of a mediation, the employee brought a review application to set aside the agreement as null and void, claiming that the commissioner forced him to sign the agreement. The employee ‘had not raised any objection to the employer, a large company, being represented by its human resources manager and an attorney.’²¹¹ The employee did not have a representative and it appeared that he was not a literate person. It was argued that the employee ‘was prejudiced in that he was not legally represented.’²¹² The court was not satisfied that it had not been ‘explained properly to the applicant what the consequences could be if he consented to the employer being legally represented while he proceeded in person.’²¹³ The court said:

‘Clearly the playing fields were unequal ... In my view, the second respondent [the commissioner] was derelict in her duties for not properly considering the interests of the applicant in respect of representation. Consequently, the agreement is set aside.’ (paras 11–13)

This is a judgment with serious implications. It challenges the view in the earlier case *Macyusuf v. Northwest Communication Services* (1999) 20 ILJ 1061 (LC) ‘that a commissioner is not required to pass judgment on the legality of the agreement or the desirability of its terms;’²¹⁴ rather it imposes on a commissioner an obligation to check that an unrepresented party has a clear understanding of what is in a settlement agreement.

b. The commissioner

Conciliation commissioners are well-trained, skilled and experienced in the fields of conciliation, mediation, and arbitration. They are given considerable powers set out in section 142 of the LRA. A commissioner who has been appointed to resolve a dispute has the authority to conciliate the dispute and determine the procedure to be followed including mediation, fact-finding and making recommendations and an advisory arbitration award.

There are different models used in professional mediation that may impact the dynamics of conciliation. Therapeutic, evaluative, facilitative and settlement

²¹¹ *Sejane v. CCMA and others* (J2789/99) [2001] ZALC (1 October 2001).

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Macyusuf v. Northwest Communication Services* (1999) 20 ILJ 1061 (LC).

mediation are the models most used. Conciliation in its more conventional sense uses a facilitative approach, it is thus ‘a process in which the third party does not judge, recommend or advise’.²¹⁵ Rather the commissioner conducts the process, keeps the parties in a dialogue and improves the negotiation process while intervening only on a very low level.²¹⁶ Commissioners have to remain neutral during as well as after the conciliation. That means, they should support the parties’ efforts to reach an agreement but not influence the process in favour of one party.²¹⁷ Thus, Brand argues that commissioners, in order to maintain their neutrality, should only conduct fact-finding and make recommendations in exceptional cases or when the parties have consented to it.²¹⁸ In addition, commissioners should not give advice that may result in them being partial.²¹⁹ This may create tension when mediators choose to use an evaluative approach to conduct the proceedings. The evaluative approaches’ main objective is to achieve an agreement based on the parties’ legal rights and obligations, as well as the expected range of court outcomes.²²⁰ The mediators intervene with the procedure on a higher level and the parties have less control over the outcome. At the same time, outcomes are more likely to be in the range of court verdicts and parties are aware of their legal risks due to the mediator providing them with their professional expertise.²²¹ As Rycroft argues in the context of mediation in the CCMA ‘the process of mediation can be robust and evaluative. The acceptable borderline for advice-giving, scenario-setting, pressure to settle and monitoring the settlement agreement are fact-specific.’²²² Thus, only the specific situation will determine whether the approach chosen by the mediator may cross a line. In addition, commissioners are provided with an ethical framework, the Code of Conduct for Commissioners, which was developed in terms of section 117 of the Labour Relations Act No. 66 of 1995. Under the section of general attributes of commissioners, it states that, in order for the ‘conciliation, mediation and arbitration processes to be seen to be fair and just and gain the confidence of the commissioners shall: act with honesty, impartially, due diligence and independent of

²¹⁵ Brand et al. op cit note 203 chapter 9.

²¹⁶ Boulle L & Rycroft A (2005) *Mediation: Principles, Process, Practice* pp 28-30.

²¹⁷ S McCorkle ‘The murky world of mediation ethics: Neutrality, impartiality, and conflict of interest in state codes of conduct’ (2005) 23 *Conflict Resolution Quarterly*, p. 166.

²¹⁸ Brand et al. op cit note 203 chapter 9.

²¹⁹ See for example, *Kasipersad v. CCMA and others* (2003) 24 *ILJ* 178 (LC), where the Labour court argued that a commissioner ‘who gives advice on any matter other than about procedure acts ultra vires’.

²²⁰ Boulle & Rycroft op cit note 216 pp 28-30.

²²¹ Ibid.

²²² Rycroft op cit note 208.

any outside pressure in the discharge of their statutory functions and conduct themselves in a manner that is fair to all parties'.²²³

Other powers of the commissioner in conciliation, outlined in section 142 of the LRA include: 'subpoena any person for questioning' whose presence might help resolve the dispute, or who possesses books, documents, or other objects relevant to the dispute. In addition, they may 'call an expert witness, administer the oath and after obtaining the necessary written authorisation, enter premises and retain for a reasonable period any book, document or object',²²⁴ thus, the commissioner's power goes far beyond those of the chairperson in the conciliation hearing in Germany.

c. Elements of professional mediation

In contrast to Germany, conciliation procedures in South Africa- just like procedures in traditional mediation- are private and confidential and are conducted on a without prejudice basis. Other elements of professional mediation used in conciliation are informality and separate meetings. These elements play an effective part in the settlement of the dispute.

(1) Confidentiality

Confidentiality is a key figure in the mediation process. Mediators need to 'keep in confidence information that came to their knowledge during the process.'²²⁵ This principle 'not only contributes to the parties trust but also benefits the efficiency of the mediation process.'²²⁶ Thus, the Code of Conduct for Commissioners states that

²²³ Rule 17 of the Code of Conduct for Commissioners, available at <https://www.worklaw.co.za/SearchDirectory/Legislation/COMMISSIONERS.asp>.

²²⁴ Section 142(1) (a)-(f) of the LRA; Van Niekerk op cit note 207 chapter 4 p. 487.

²²⁵ Rule 16 of Rules for the Conduct of Proceedings before the CCMA provides that conciliation proceedings are private and confidential and are conducted on a without prejudice basis. The rule 'no person may refer to anything said at conciliation proceedings during any subsequent proceedings, unless the parties agree in writing' was tested in *Kasipersad v. Commission for Conciliation, Mediation and Arbitration and others* (2003) 24 ILJ 178 (LC) where the court's starting point was s158(1)(g) of the LRA which empowers the Labour court to review the performance or purported performance of any function provided for in the LRA on any grounds that are permissible in law. The court then noted that 'the prohibition against reference to statements made at the conciliation during any subsequent proceedings, as well as the prohibition against the commissioner or any other person testifying about the conciliation process, conflicts with the right of the applicant to administrative justice and the power of the Labour court to review the performance of any function by the CCMA.' The conclusion reached by the court was that 'the CCMA Rules, as subordinate legislation, must yield to the LRA and to the Constitution.' See Rycroft, Alan (2016) 'Legal review of the mandatory mediation process in South Africa' 1.1 *Mediation Theory and Practice* 79-93, at 83.

²²⁶ Omer, Saphira (2016) *A theory of mediators' ethics*, Cambridge University Press, part II chapter 3.

‘information disclosed to commissioners in confidence by a party during the course of conciliation, should be kept by commissioners in the strictest confidence and should not be disclosed to the other party or to third parties unless authority is obtained for such disclosure.’²²⁷ This applies in particular when conciliation is unsuccessful, with a view for subsequent arbitration or court proceedings. The protection of confidentiality is ultimately served by the exclusion of the public from conciliation hearings.

The validity and effectiveness of conciliation depends on the confidentiality of communications and information. A process that is private rather than open to the public is more likely to make the parties feel comfortable. It encourages an open exchange of information that alerts the mediator to difficulties and concerns that, if addressed, could lead to the resolution of the dispute. It is also important that the neutrality of the mediator be maintained. One of the key elements in reaching an agreement is information that has been disclosed to the mediator by the parties, even though they did not want it disclosed to the other side. If a mediator would be required to provide this information in a subsequent court hearing, it would jeopardize the mediation process by ‘undermining future parties expectations of mediator neutrality.’²²⁸

(2) Separate Meetings

Furthermore, the commissioner can separate the parties into side-meetings throughout the conciliation. Separate meetings are seen as one of the most crucial components of mediation.²²⁹ They are often used if it is determined that a joint meeting is not conducive to consensus-building. The CCMA Practice and Procedure Manual states that:

‘The purpose of meeting with parties during side caucus is to give the parties an opportunity to supply the commissioner with information that such party was not prepared to disclose to the other party. This is also the appropriate stage for the commissioner to assist the parties by doing reality testing during which the strengths and weaknesses of the parties’ cases, the parties’ prospects of success and the likely outcome of an arbitration or adjudication are

²²⁷ Code of Conduct for Commissioners op cit note 223.

²²⁸ Deason, Ellen E. (2001) ‘The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?’, 85 Marquette Law Review 79.

²²⁹ Boule & Rycroft op cit note 216 at p 105.

discussed so that the parties may reconsider their positions. During this stage the options available to a party and the worse and best scenarios should be highlighted.²³⁰

Where a joint meeting would be beneficial to the process, the commissioner calls the parties back together after side-meetings.

High levels of anger, abuse, deadlocks, or the necessity for confidential discussions between the conciliator and a party are common reasons for parties to separate. Commissioners may also hold side-meetings to further the settlement process, examine ideas, discuss alternatives, come up with solutions and address the parties' concerns.²³¹ In addition, separate meetings allow commissioners to coach the parties on how to communicate constructively as well as on negotiation approaches and techniques.²³²

Generally, the commissioner has the power to decide when to separate the parties. However, a party can also request a side-meeting. The commissioner will usually conduct side-meetings with both parties, one after another, in order to preserve impartiality. The commissioner will also ensure that both side meetings take equal time, as far as possible and it is common to give the 'withdrawing party a task to perform while they are alone, for example checking figures or contacting advisers.'²³³

Typically, a separate meeting will begin with the reassurance of the confidential nature of mediation. This means that all information shared in side-meetings are confidential and without prejudice. In addition to that, the commissioner will determine what information can be transferred from one side-meeting to the other and acquire specific authorisation before disclosing this information to the other party.

Thus, separate meetings are an effective tool for settlement. They allow parties to vent emotions, detach from their fixed positions, consider different pathways and share information that they were apprehensive about releasing in the joint room.

(3) Informality

Another characteristic of mediation is informality. Even though mediation follows a certain guideline in the way it is conducted, it is far more flexible than court procedures. Parties should be able to start a case, prepare it for submission to the institution and present it with little or no

²³⁰ CCMA Practice and Procedure Manual (2006) 7.9.

²³¹ Brand et al. op cit note 203 chapter 9.

²³² Boule & Rycroft op cit note 216 at p 105.

²³³ Ibid at p 108.

assistance. Mediation's informality allows the parties to be more engaged than they would be in a court proceeding. Court proceedings come with specific rules on the process designed to formally structure the hearing. Mediation is informal. This concerns the flexibility of mediators to decide on the style of mediation that they think is suitable for the specific disputes as well as managing the process by taking decisions on seat-arrangements, side-meetings, breaks and interventions. The Labour Relations Act requires a commissioner to 'determine a process to attempt to resolve a dispute, which may include – (a) mediating the dispute; (b) conducting a fact-finding exercise; (c) making a recommendation to the parties, which may be in the form of an advisory arbitration award.'²³⁴ As a result, the mediator can direct the parties' attention to their underlying needs and interests rather than their positions. Another benefit is that informality contributes to expeditious procedures. It takes less time to talk about resolving a problem than it does to go through formal procedures. In addition, informal communication is generally also less stressful than formal legal action, allows for greater influence over the outcome, and frequently results in mutually beneficial solutions. Unlike matters brought before a court or in arbitration, where the decision may be in favour of only one side, the outcome is agreed upon by both parties. Elements of professional mediation therefore benefit the conciliation procedure.

d. Access to conciliation

Furthermore, easy referral procedures and the absence of formal pleadings have proven to be a highly effective element in facilitating access to the CCMA. In order to access conciliation a party has to fill out a CCMA case referral form (LRA Form 7.11) that is written in plain English and clearly explains what information is required in each section of the form. It is necessary for parties to identify the nature of the dispute, but they do not have to submit a detailed explanation. After completing the form, the referring party has to guarantee that a copy of the form is provided to the other party and a confirmation that a copy was sent needs to be submitted to the CCMA. This can be done via fax or post. In addition, each of the CCMA's regional offices has a referral office who assists parties to fill out the referral form. Such CCMA-assisted 'walk-in' referrals accounted for approximately 40% of all individual disputes in 2019/2020, with a significant decrease of 12 % due to the covid-19 pandemic and the closing of many regional offices of the CCMA during 2020/2021.²³⁵ A significant innovation

²³⁴ Section 135(3) of the LRA.

²³⁵ CCMA Annual Report 2020/2021, available at <https://www.ccma.org.za/About-Us/Reports-Plans/Annual-Reports/Token/ViewInfo/ItemId/52>.

was the implementation of a free digital platform during the pandemic to refer conciliation and arbitration disputes and make enforcement as well as condonation applications to the CCMA. Thus, the simplicity of the referral mechanism ensures that ‘literacy and a lack of skill and recourses, are not an entry barrier to the system’ and enables parties to refer conflicts without the assistance of representatives.²³⁶ For instance, since the CCMA was established, the number of cases referred by trade unions on behalf of employees has declined significantly.²³⁷

In addition, time limits for referring disputes to conciliation are short. If an employee claims unfair dismissal, for example, they have 30 days to file a complaint.²³⁸ For issues involving unfair labour practices, 90 days are allowed, and for disputes involving the EEA six months.²³⁹ In contrast to that, civil lawsuits based on contracts, such as employment contracts, can be brought to court within three years of the claim occurring. In case the referring party has missed these strict conciliation deadlines, they must file a request for condonation with the CCMA, requesting that the failure to refer the case on time be excused.²⁴⁰ A late application may be condoned on good cause shown. The reason for this short referral period in conciliation is that parties need to obtain legal clarity on the outcome of the dispute, for example, on the validity of a termination, as quickly as possible, as otherwise the execution of the contract may become complicated. It also gives employers legal certainty, knowing that they will not be subjected to claims filed years after a dismissal.²⁴¹

After a referral is received the commission must in terms of Rule 11 of the CCMA's Rules for the Conduct of Proceedings notify the parties at least 14 days prior to the scheduled date for conciliation. In addition, strict time constraints of only 30 days apply for commissioners to resolve the dispute. The CCMA succeeds in meeting these short time periods. For example, in 2019/2020 only 1.25% were heard after the statutory 30-day period.²⁴²

Another way of granting easy and quick access has emerged through pre-conciliation. This mechanism was developed as a tool to deal with the huge conciliation caseload. It is regulated by Rule 12 of the CCMA's Rules for the Conduct

²³⁶ Brand *op cit* note 195.

²³⁷ Benjamin *op cit* note 43 at p. 15.

²³⁸ Section 191(1)(b)(i) of the LRA.

²³⁹ Section 191(1)(b)(ii) LRA; Collier et al. *op cit* note 11 chapter 6.4.3.1.

²⁴⁰ Rules 9 and 31 of the Rules for the Conduct of Proceedings before the CCMA.

²⁴¹ Benjamin *op cit* note 43 at p. 15.

²⁴² CCMA Annual Report 2019/2020 *op cit* note 79.

of Proceedings that allows the commission or a commissioner to contact the parties via telephone or other means before conciliation, in order to seek resolution of the dispute.²⁴³ According to the Practise Note issued by the Governing Body of the CCMA, pre-conciliation is appropriate especially in unfair dismissal and unfair labour practice cases.²⁴⁴ Moreover, the prospects of success of such procedure are greatest if the employee refers the dispute directly on the day of dismissal or shortly after. Often disputes in pre-conciliation are characterized by being less complex and are mostly settled by financial means.²⁴⁵ According to the CCMA report 2020/2021, there were 31 973 pre-conciliations conducted in 2020/21, compared to 36 418 pre-conciliations were conducted in 2019/20. The settlement rate in 2020/21 dropped significantly by 34% from the financial year 2019/20, however, the CCMA states that pre-conciliation remains ‘one of the most efficient ways to manage the caseload and to reduce costs per case, especially considering the financial challenges that are faced by the institution’.²⁴⁶

Thus, the conciliation mechanism is easily accessible. A user-friendly system of referral forms has been established. Referral forms provided by the CCMA are simple and clearly explained and members of the referral office of the CCMA assist parties to fill out forms, which lessens the burden on the parties to be represented. At the same time, the system is structured in such a way that procedures take place after a short amount of time and mechanisms such as pre-conciliation further promote the efficiency of the process.

e. Representation

Moreover, restrictions on the right to legal representation are key factors in reducing time and costs. Initially, the LRA regulated which parties are entitled to attend conciliation hearings. However, this is now done by the CCMA's Rules for the Conduct of Proceedings. Rule 25 distinguishes between the acceptability of legal representatives during conciliation and arbitration.²⁴⁷ The position of policymakers has always been that legal representation should not be allowed during the conciliation processes. Thus, Rule 25 makes it illegal for a lawyer to represent a client in a

²⁴³ Benjamin op cit note 43 at p. 16.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ CCMA Annual Report 2020/2021 op cit note 235.

²⁴⁷ Rule 25 for the Conduct of Proceedings before the CCMA.

conciliation proceeding. Instead, a party is entitled to representation through ‘a director or employee of that party and if a close corporation also a member thereof’; or by any ‘member, office bearer, official of that party's registered trade union or registered employer's organisation.’²⁴⁸ The reason for excluding legal representatives from the procedure are diverse. The Explanatory Memorandum to the Draft of the Labour Relations Bill states:

‘Lawyers make the process legalistic and expensive. They are also often responsible for delaying the proceedings due to their unavailability and the approach they adopt. Allowing legal representation places individual employees and small businesses at a disadvantage because of the cost.’²⁴⁹

In addition to that, legal representation also ‘tilts the balance in favour of the party with greater resources’, which is generally the employer.²⁵⁰ Moreover, the participation of lawyers results in complicated procedures that become more technical and thus, longer and expensive. As a result of this legal representatives have been completely excluded from conciliation.²⁵¹ This general rule needs to be seen in the light of the judgment in *The Casual Workers' Advice Office and Others v CCMA and Others* CASE NO:J645/16 (21 September 2016). The argument of CWAO was that ‘the CCMA is supposed to protect and uphold the rights of workers but CCMA Rule 25 prejudices the rights to a fair hearing of the vast number of workers who do not belong to a trade union and cannot afford a lawyer.’²⁵² The rule therefore prevents the CCMA from fulfilling its function of resolving disputes expeditiously and inexpensively. The CWAO argued that ‘in order to properly access their rights, workers need representation in proceedings before the CCMA. They should be allowed to be represented by either one of the hundreds of community advice offices

²⁴⁸ Rule 25 for the Conduct of Proceedings before the CCMA.

²⁴⁹ Explanatory Memorandum on the Labour Relations Bill (1995) 16 *ILJ* 278.

²⁵⁰ Benjamin op cit note 194.

²⁵¹ This approach is qualified by practice to allow legal representation on procedural ‘in limine’ points. In *Bombardier Transportation (Pty) Ltd v Mthiya NO & others* (2010) 31 *ILJ* 2065 (LC) it was confirmed that Rule 14 of the CCMA Rules ‘requires a conciliating commissioner to consider any jurisdictional points raised, and whether it is capable of being disposed of prior to conciliation, or properly left to the arbitration stage.’

²⁵² *The Casual Workers' Advice Office and Others v CCMA and Others* CASE NO:J645/16 (21 September 2016).

around the country or one or more fellow-employees.’²⁵³ The court declared that, ‘on a proper interpretation of Rule 25, read with rule 35 of the CCMA rules and the provisions of the Labour Relations Act 66 of 1995, a commissioner has a discretion to authorise any party to CCMA proceedings to be represented by any other person, on good cause shown.’²⁵⁴

f. Costs

Small costs are another aspect of accessibility to the individual dispute resolution system. Especially, employees who are unable to afford the expenses of dispute resolution may be denied access to legal institutions if the procedure involves extensive costs. The CCMA services in conciliation are generally free and even though the CCMA has the authority to issue costs orders, the commissioners rarely do so.²⁵⁵ This accessibility is further confirmed by data gathered on the referrals through employees. ‘According to data for the period between 2003 and 2005, 31 per cent of dismissal or unfair labour practice cases were referred by low-paid employees earning less than R1,000, whilst 90 per cent of employees who referred cases to the CCMA earned less than R5,000 per month.’²⁵⁶ Thus, conciliation succeeds in granting affordable access to the individual dispute resolution system in South Africa.

g. Non-attendance

While in Germany most cases of non-attendance in a preliminary conciliation hearing result in the judge issuing a default judgement on the facts of the case, the consequences of non-attendance in the CCMA are different. Even though conciliation is mandatory in many cases, non-attendance rates are typically around 15%, with the absence of the employer being the most common reason.²⁵⁷ In 2020/2021 non-attendance at conciliation was beyond average at 13%. In the same period in 2019/2020, non-attendance stood at 16%.²⁵⁸

²⁵³ *The Casual Workers' Advice Office and Others v CCMA and Others* CASE NO:J645/16 (21 September 2016).

²⁵⁴ *Ibid.*

²⁵⁵ Collier et al. op cit note 11 chapter 6.4.1.

²⁵⁶ Benjamin op cit note 43 at p. 14.

²⁵⁷ See Benjamin, P. ‘Assessing South Africa’s Commission for Conciliation, Mediation and Arbitration (CCMA)’ (2013) *ILO working paper* no. 47. Geneva: Governance and Tripartism Department, International Labour Office at p.14 stating that ‘Many employers therefore deliberately refrain from attending conciliation. In 2010/2011 the absence of the employer accounted for 75 per cent’.

²⁵⁸ CCMA Annual Report 2020/2021 op cit note 235.

Initially, the CCMA Rules required all parties to attend a conciliation meeting in person, regardless of whether they were represented. This was based on the repealed section 135(4) of the LRA, which governed attendance at conciliation proceedings. Moreover, the earlier Rules also allowed commissioners to ‘dismiss the matter by issuing a written ruling’ after considering whether the party had previously failed to attend a conciliation meeting in relation to that dispute, the reason for their absence, whether conciliation was practicable without them, and the likely detriment to the other party of such a ruling.²⁵⁹ However, the Labour Appeal Court held that the power to dismiss a matter at conciliation conflicted with the LRA in the sense that if the disagreement is not settled within 30 days, the commission is compelled to arbitrate or the Labour Court is required to adjudicate.²⁶⁰ Thus, the commissioner may only dismiss a case when it can no longer be submitted to conciliation; however, the absent party can still request arbitration after 30 days.²⁶¹

Thus, the present rule for conciliation attendance provides that where the referring party fails to attend conciliation in South Africa, the presiding commissioner has the discretion to: ‘a) continue with the proceedings; b) adjourn the conciliation to a later date within the 30-day period; or c) conclude the proceedings by issuing a certificate that the dispute remains unresolved.’²⁶² In addition, according to the CCMA, attendance in conciliation has significantly improved by 35 per cent since the start of SMS notifications being sent to the parties on the date of the hearing.²⁶³

h. The Outcome

If the dispute between the parties is resolved through conciliation, the parties sign a settlement agreement, thus ending the dispute. In that case, the commissioner must issue an outcome certificate proving that conciliation took place and confirming that the dispute has been resolved.²⁶⁴ Furthermore, the settlement agreement may be made ‘an order of the Labour Court (section 158(1)(c) of the LRA) or an arbitration award (section 142A of the LRA).²⁶⁵ In the latter case, the CCMA may make a settlement agreement an arbitration award, either by agreement between the parties or on

²⁵⁹ Grogan op cit note 9 at p. 149.

²⁶⁰ *Premier Gauteng v Ramabulana NO* (2008) 29 ILJ 1099 (LAC).

²⁶¹ Grogan op cit note 9 at p. 149.

²⁶² Rule 13 for the Conduct of Proceedings before the CCMA.

²⁶³ Benjamin op cit note 43 at p. 18.

²⁶⁴ Section 135(5) (c) of the LRA.

²⁶⁵ Du Plessis et al. op cit note 80 chapter 19.2.

application. Even if the conciliation proceedings are defective for some other reason, a valid agreement between the parties remains binding.²⁶⁶

Moreover, the quality of settlement agreements is assessed on a daily basis by the Senior Mediation Commissioner in each regional office. They are reviewed on whether they are ‘legible, clear, unambiguous, legal, enforceable, and sustainable’, as well as whether they resolve the dispute.²⁶⁷

If conciliation fails and the dispute remains unresolved after 30 days (or any further extension period agreed upon by the parties), ‘a certificate of non-resolution will be issued and, depending on the nature of the dispute, any party to the dispute may refer it to arbitration or to the Labour Court.’²⁶⁸ When a signed copy of a certificate is made available to the parties, a certificate is said to have been issued.²⁶⁹ And following the failure of statutory conciliation, arbitration may be held immediately, either before the same person or before another.²⁷⁰

A party that wants to challenge an agreement on the grounds that consent was not genuine must go to the Labour Court. The CCMA does not have the authority to set aside or revoke such agreement.²⁷¹ The Labour Court, on the other hand, has ruled that a settlement agreement can only be challenged if it has been made into an arbitration award.²⁷²

Moreover, a party who believes a certificate should not have been issued or that ‘the dispute was mischaracterized’ has only one option: to request a review of the matter. Only the Labour Court can invalidate a certificate. Thus, certificates of outcome may not be set aside by arbitrators.²⁷³ Moreover, parties that want to contest the validity of a certificate must do so as soon as possible, because courts have concluded that an invalid certificate that is not challenged in a timely manner acquires validity over time.²⁷⁴

²⁶⁶ Grogan op cit note 9 at p. 158.

²⁶⁷ Benjamin op cit note 43 at p. 18.

²⁶⁸ Du Plessis et al. op cit note 80 chapter 19.2.

²⁶⁹ Grogan op cit note 9 at p. 161.

²⁷⁰ Brand et al. op cit note 203 chapter 9.

²⁷¹ Grogan op cit note 9 at p. 157.

²⁷² *Cindi v CCMA* (2015) 36 *ILJ* 3080 (LC). Section 158(1)(c) of the LRA empowers the Labour Court to make any arbitration award or any settlement agreement an order of the Court.

²⁷³ Grogan op cit note 9 at p. 164.

²⁷⁴ *Fidelity Guards Holdings v Epstein NO* (2000) 21 *ILJ* 2009 (LC); *WECWA v Halgang Properties* (2001) 22 *ILJ* 1421 (LC); *Magalies Waterboard v LA Grange NO* (2002) 23 *ILJ* 2382.

i. Statistics

The CCMA has operated an electronic case management system to track disputes reported to it since its inception. This system stores information about both, the administration and the content of cases. The data is then merged into an annual report of operations at the conclusion of each fiscal year. This allows for monitoring performance targets and the efficiency of processes. It shows that while the CCMA has received 3,6 million referrals between 1995 and 2021, it consistently achieved a settlement rate of approximately 70% in all disputes referred to it.²⁷⁵ In 2019/20 a total number of 221 547 matters had been referred to it. This is a 14 percent rise from the previous year, with an average of 879 new referrals every working day. Furthermore, individual cases make up most disputes referred to the CCMA. In 2019/20, alleged unfair dismissal accounted for about 59 percent of all referrals and unfair labour practices for 9% in total.²⁷⁶ Also, most of the cases are dealt within a short amount of time. From the day of referral to the first hearing the turnaround time is on average 23 or 24 days and in 2020/2021 ‘99.4% conciliable cases were heard at first event, with only four conciliations heard outside the 30 days’ timeframe.²⁷⁷

These figures illustrate that the CCMA is accessible and that the public generally trusts it. Despite a massive workload, the CCMA has resolved disputes expeditiously.

j. Virtual dispute resolution

The Covid-19 pandemic has affected the CCMA and its services as well. Efforts to stop the spread of Covid-19 have prevented access to conciliation and the CCMA had to quickly adapt and develop in order to carry out its responsibilities as effectively as possible while under lockdown. Pre-covid individual labour dispute resolution was based on physical interaction. As of April/May 2020, when South Africa entered alert Level 5 lockdown, the CCMA could not open its doors and provide full-scale operations without a clear directive. However, CCMA services were still available on a limited basis. Prioritization was given to all cases referred and scheduled prior to and during the lockdown. A directive issued on May 2020 encouraged the use of telephonic

²⁷⁵ Benjamin, P. ‘South African Labour Law Mapping the Changes - Part 2: The History of Labour Law and its Institutions’ (2020) 41 *ILJ* 1.

²⁷⁶ CCMA Annual Report 2019/2020 op cit note 79.

²⁷⁷ CCMA Annual Report 2020/2021 op cit note 235.

or digital online platforms that satisfy the CCMA or the commissioner, video conferencing facilities and proceeding at the employer's premises as well as electronic signatures (as defined by the Electronic Communications and Transactions Act of 2002) in referral forms and settlement agreements.²⁷⁸ With effect from 8 June 2020, the CCMA launched a free digital platform for CCMA users to refer conciliation and arbitration disputes and make enforcement and condonation applications.²⁷⁹ This platform is accessible through the CCMA website and its Facebook page.

Virtual hearings come with chances as well as with risks. While the CCMA, despite its telephonic pre-conciliation, was not used to conducting hearings online before the pandemic, there are some learnings from traditional mediation that can be taken. Mediation has already been using online dispute resolution mechanisms for years. Discussions in online mediation involve the risks of impersonal processes. Faceless communication through the Internet eliminates non-verbal communication and increases the probability of misunderstanding. Moreover, mediators are not able to build the same level of rapport through interpersonal skills as they could when parties are present.²⁸⁰

Another risk comes with confidentiality. The use of technology may lead to actual records of the hearing, which bear the risk of being made public and mediators may struggle to ensure that parties are alone in the room. The CCMA addresses this risk by clearly setting out a protocol that has to be followed in video conference hearings. Firstly, participants have to ensure that there is no ambient noise in the background; secondly, they 'must mute their microphones when not speaking'; thirdly, 'the commissioner shall invite parties to speak'; fourthly, participants must remain in the hearing until the proceedings are completed, or until the commissioner directs otherwise; and lastly, the party hosting the video conferencing session must record the session and deliver the audio file to a specified e-mail address for retention by the CCMA, in case the CCMA is not the host of the video conference and therefore unable to record the proceedings. Furthermore, 'a signed statement of confirmation

²⁷⁸ CCMA Directive from 09 May 2020: Access to the CCMA during the covid-19 lockdown, available at <https://www.cma.org.za/Media/ArticleID/402/CCMA-DIRECTIVE-ACCESS-TO-THE-CCMA-DURING-THE-COVID-19-LOCKDOWN>.

²⁷⁹ CCMA Annual Report 2020/2021 op cit note 235.

²⁸⁰ Boulle & Rycroft op cit note 216 at p. 118.

that the recording has not been tampered with in any way must accompany the recording.’²⁸¹

Another risk discussed, is the risk that online hearings may exclude those who do not have access to a computer, to the Internet or those who lack in technical skills such as scanning and sending documents or the ability to navigate videoconferencing tools. Especially in South Africa where part of the population does not have easy access to data and to tools such as laptops this risk becomes evident. That is why the CCMA had to conduct several virtual dispute resolutions with one party geographically remote and the other party at the same venue as the commissioner. The CCMA also had to provide laptops. In that situation, there are simple rules that need to be followed. To maintain impartiality, the party who is at the same venue as the commissioner must be in a separate room. And after the virtual hearing, the commissioner should avoid contact with the local party.²⁸²

However, virtual dispute resolution has its advantages. The ‘Internet’s impersonal process may lessen tensions associated with highly emotional disputes.’²⁸³ Parties who are not in close proximity to one another, for example, may avoid hostile exchanges. In addition, virtual dispute resolution is less costly, more flexible, and quicker than traditional mechanisms such as face-to-face mediation or litigation. The parties can be located anywhere and participate in the mediation at their convenience and engage in the proceedings at their leisure, avoiding travel and scheduling conflicts.

In conclusion, virtual dispute resolution promotes the access to the individual labour dispute resolution system. In the covid-19 pandemic the CCMA was given the opportunity to evaluate its service delivery strategy. Online hearings were one of the innovations. Digital referral forms were the other one. The use of digital tools in the legal area has the potential to eliminate numerous practical and financial barriers in access to justice while at the same time lowering the carbon footprint.

²⁸¹ CCMA Directive from 09 May 2020 op cit note 278.

²⁸² Boulle & Rycroft op cit note 216 at p. 118.

²⁸³ Rudolph Cole Sarah & Blankley Kristen M. (2006) ‘Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be’, 38 *U. TOL. L. REV.* 193.

IV. Similarities and differences

Even though it must be acknowledged that social conditions and economic developments are not comparable in South Africa and Germany, it seems like both conciliation mechanisms succeed in providing easy access to individual labour dispute resolution, while achieving a high settlement rate. In both countries the settlement rate has on average been over 60% in the past, with South Africa reaching an even higher settlement rate of approximately 70 % over the last years. In both labour dispute systems receive many cases are referred each year. In Germany a total of 328 713 actions were lodged with the labour courts in 2019, while in South Africa the CCMA had to deal with 221 547 matters in the same year. Despite the differences in its conception, both mechanisms work well for each country. The purpose of the next chapter is therefore to highlight and explain the similarities and differences in the conciliation procedure in Germany and South Africa.

1. Similarities

There are certain aspects of the conciliation procedure in South Africa that are similar to the preliminary conciliation hearing in Germany. For example, the requirement in South Africa of the commissioner as a neutral third party, is paralleled in labour law judges in Germany, who by status, are governed by neutrality and impartiality²⁸⁴. Neutrality of the judge or commissioner is essential for gaining trust and building rapport with the parties. It is the basis for a settlement that addresses both parties' needs and interests. Thus, both, labour law judges as well as commissioners aim to maintain neutrality by working equally hard for both parties.

Similarities also exist with regard to the personnel component in both countries. In Germany 720 judges were employed as labour court judges of first instance in 2019, handling 328,713 actions in total.²⁸⁵ South Africa's CCMA had 772 commissioners employed dealing with 221 547 matters.²⁸⁶ 65 % of them were

²⁸⁴ See Section 49 of the LCA, which is intended to ensure the impartiality of labour law judges.

²⁸⁵ Human Resource Report of the Ministry of Justice, available at: https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/Justizstatistik/Personal/Personal_node.html.

²⁸⁶ Piennar, Hugo, 'Financial strain on the CCMA may mean increased costs for parties to dispute', available at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/Employment/Employment-Alert-18-November-2020-Financial-strain-on-the-CCMA-may-mean-increased-costs-for-parties-to-disputes.html>.

employed as part-time commissioners on renewable fixed term contracts. This has the result of making the process' efficiency heavily reliant on independent contractors who are not fully employed by the CCMA.

Both mechanisms also have in common that provided the conciliation is successful, a voluntary settlement agreement is concluded. Section 54 of the LCA gives the parties in a labour dispute in Germany the freedom to determine the outcome of the settlement, similar to the South African conciliation procedure.²⁸⁷ Settlement proposals of the labour court judges are non-binding in Germany and the chairperson does not have decision-making authority in the conciliation hearing, thus the parties determine the outcome themselves. Moreover, the principle of voluntariness is also reflected in both conciliation procedures in that each party can terminate the proceedings at any time by rejecting a proposed settlement.

In addition, both jurisdictions have mechanisms in place that succeed in granting expeditious resolution for individual rights disputes. This is mainly due to the short time limits for referring disputes to conciliation and fast processing times for disputes by the Labour Court as well as the CCMA. While in South Africa, employees have 30 days to file an unfair dismissal claim, in Germany, the time period is even shorter. Employees have only three weeks from the notification of dismissal to refer their complaint to the court. Furthermore, strict time constraints apply for CCMA commissioners and labour court judges for the conciliation hearing. Commissioners have only 30 days to resolve the dispute and in Germany the conciliation hearing before the labour court judge should take place within two weeks after service of the complaint. Both countries succeed in meeting these short time periods. In the CCMA only 1.25% were heard after the statutory 30-day period in 2019/2020. In 2020/2021 even less, only 0.6 % of cases were heard outside the 30 days' timeframe. Similarly, in Germany, most actions in 2019 were dealt within one to three months.²⁸⁸ Thus, in both countries' conciliation allows parties to obtain legal clarity on the outcome of the dispute in a short period of time.

²⁸⁷ Paragraph 22.3. of the CCMA Practice and Procedure Manual (2006) makes it clear that 'if a settlement agreement has been entered into between the parties, there is no longer a dispute over which the CCMA has jurisdiction.'

²⁸⁸ According to the statistic of the Federal Ministry of Labour and Social Affairs 47,674 actions were dealt within one month, 86,688 actions were dealt within one to three months, 32,440 in three to six months and 16,817 in six to 12 months.

Another similarity is the user-friendly referral system established in both countries. Referral forms provided by the CCMA are simple, clearly explained and members of the referral office of the CCMA assist parties to fill out forms. The same applies for claims with the Labour Court in Germany. The claims office of the Labour Court provides help to file a formally correct complaint with the court and similar to the CCMA, complaints can be referred as ‘walk-ins’. This makes conciliation easily accessible to everyone and lessens the burden on the parties to be legally represented.

Low legal costs are another aspect of accessibility to the individual dispute resolution system that both countries share. While CCMA services in conciliation are generally free, fees in labour court proceedings in Germany are considerably lower than in ordinary civil procedures. For instance, there is a waiver of court fees in cases where the parties reach an agreement in conciliation before the judge.

In addition, labour court judges in Germany - similar to commissioners - have considerable freedoms to conduct the conciliation hearing. Just as the case with commissioners, they often point out the legal risks of other proceedings such as litigation in order to promote a settlement. And similar to evaluative mediation styles used by CCMA commissioners, labour law judges will also give their legal opinion on the dispute and offer solutions. In Germany, the role of the judge goes even as far as suggesting specific settlement agreements to the parties. However, both countries have in common that they prohibit providing legal advice to the parties. The advisory role is solely given to legal representatives. Moreover, before the conciliation, the commissioner as well as the labour court judge in Germany only have very superficial knowledge of the parties' dispute. An unbiased assessment of the dispute contributes to their neutrality and impartiality and as a result of that to the conclusion of an amicable agreement.

Besides, in practice, conciliation in Germany is more flexible than a regular hearing in court. Similar to the concept of informality in the South African conciliation hearings, conciliation in Germany as part of the court hearing of first instance is often interrupted and other matters are brought forward so that the parties can continue their settlement discussion outside the courtroom.²⁸⁹ This not only loosens the atmosphere and creates distance, but also involves the parties more and encourages them to take

²⁸⁹ Schwab/Weth/Berscheid/Korinth (eds.), *Kommentar zum ArbGG*, § 55 Rn. 52.

responsibility for themselves, therefore, aims for more flexibility in reaching agreements as in South Africa.

In addition, both countries face similar concerns regarding the impact of the settlement rate on the commissioner or the labour court judge. In Germany, the settlement rate in conciliation has almost become a ‘question of prestige’ for many judges.²⁹⁰ The personal settlement statistic is an important - because objectively measurable - qualification feature of judicial performance. With regard to the case load judges must deal with, it is no surprise that judges try to reduce their workload by avoiding adjudication and having to write a judgment. Furthermore, a settlement agreement will, in contrast to a verdict by the chamber in the Labour Court of first instance, not be subject to review by the appellate court, thus, an amicable agreement saves judges being held accountable for a decision.²⁹¹ Similar concerns arise in the South African context where the settlement rate is used as an indicator to be re-employment as a commissioner. It has been argued that this may lead to applicants being ‘unduly encouraged to settle when a referral to arbitration would be more appropriate’,²⁹² hurried settling of disputes as well as ‘possibly also superficial settlements that fail to address the underlying causes of conflict or the real needs of the parties’ and commissioners having an undue interest in the outcome of the conciliation process because ‘their future prospects as a commissioner’ are at stake.²⁹³ As a result, parties who are unaided and inexperienced may be under undue pressure to settle. The risk of this happening is heightened by the large caseload and the short time frame for resolving disputes in conciliation.²⁹⁴

Furthermore, in both countries the quality of settlement agreements has been questioned. In Germany, it has been criticised those settlements are usually not future-oriented and do not preserve the relationship between the parties. In most dismissal cases, for example, labour court judges would propose to employees that they leave the company in exchange of a severance payment.²⁹⁵ In the 15-20 minutes allocated to conciliation, judges have neither the time nor the means to discuss the underlying conflict and explore the interests of both parties in more detail. Moreover, the

²⁹⁰ Weiss op cit note 4 at p. 12.

²⁹¹ Kramer op cit note 29 at p. 306.

²⁹² Steenkamp/Bosch, op cit note 36.

²⁹³ Benjamin op cit note 43 at p. 17.

²⁹⁴ Ibid.

²⁹⁵ Dendorfer op cit note 155 Rn. 119, 120.

requirements for negotiation by the parties in the conciliation hearing are low: it is sufficient if a discussion - of whatever kind - has taken place or any substantive motion has been filed. Similar in the CCMA, a common criticism is that commissioners may rush to assess the parties' position in conciliation 'based on a cursory assessment of the facts (a sort of abbreviated fact finding) and propose a settlement that the parties are told would be imposed on them in arbitration if they do not agree.'²⁹⁶ An ILO report from 1999 on arbitration outlined the dangers in conciliation:

'The merits of the dispute can seldom be effectively canvassed in the [then] two hours set aside for conciliation. This leads to an approach being adopted by commissioners which amounts to an attempt to persuade the employer party to pay an agreed sum to avoid the uncertainty and inconvenience of arbitration proceedings, whilst employees trade off their right to have the case judged, with the uncertainty of outcome which that entails, for the certainty of an agreed sum of money. The merits of the dispute receive scant attention in this approach. If this tradeoff cannot be achieved the matter is signed off as unsettled and invariably will proceed to arbitration, usually adding no more detail to the limited information about the dispute in the file than which was provided in the referral forum.'²⁹⁷

Thus, in both countries agreements risk overlooking the underlying cause of the issue and the parties' needs. They may also be only superficial compromises that solely address the conflict's appearances and therefore bear the risks that settlements have not been fully endorsed by both parties.

2. Differences

However, there are also major differences between the two systems. Those differences concern -in particular- the confidentiality of the proceeding, the institutional embedment, representation as well as non-attendance in conciliation and the degree of formality in the process.

While confidentiality in the conciliation hearing before the commissioner is one of the key elements, confidentiality is not envisaged in the preliminary conciliation

²⁹⁶ Brand opt cit note 195.

²⁹⁷ ILO arbitration report 1999, available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2184370.

hearing in Germany because the proceeding is, besides allowing an amicable agreement is mainly intended to prepare for a possible subsequent litigation. Thus, it is structured as part of the hearing in the first instance and governed by the principle of transparency - except for section 54(3) of the LCA which allows the exclusion of the public for reasons of expediency. This is also the reason, why conciliation in Germany does not allow private side meetings between the judge and the parties. In contrast to that, the South African system allows for separate meetings, which are considered an useful tool in overcoming a deadlock between the parties. They also enable the commissioner to establish the underlying interests and needs of the parties. In addition, parties may feel more comfortable sharing certain information in a separate meeting. Another advantage of confidentiality is that it allows parties to rebuild trust. In conciliation, two individuals who from previous experience do not trust each other are expected to provide their counterpart with information that can cause them great emotional and financial harm. If parties believe that their personal needs, strategies, or information will be used against them, they are not willing to reveal them. Therefore, confidentiality is there to deprive 'the disputants of the ability to use the information they gain from the mediation to the detriment of the other party' in arbitration.²⁹⁸ In this way it facilitates a fair interaction between them and a meaningful settlement.

Another difference is the institutional embedment of conciliation in both countries. In Germany conciliation is part of the court procedure, conducted by labour court judges, while in South Africa it is carried out by a separate, highly specialised institution, the CCMA. This institutional embedment may impact the parties and the settlement rate. Parties may be more comfortable resolving the dispute and negotiating outside of a court room. For example, empirical studies show less psychological distress by the parties when they are not in the environment of a court room in front of a judge.²⁹⁹ Thus, the fact alone that conciliation in South Africa is conducted outside of the court room, already impacts the chances of a fair settlement. In addition, negotiation dynamics in a courtroom cause the orientation of the parties towards the judge and not towards each. Empirical studies show that, judges are much more active

²⁹⁸ Brown, Kent L. 'Confidentiality in Mediation: Status and Implications', 1991 J. Disp. Resol. (1991), available at: <https://scholarship.law.missouri.edu/jdr/vol1991/iss2/3> last accessed on 28 December 2021.

²⁹⁹ Seifert op cit note 125 at p. 30.

in conciliation than the parties themselves. Almost every interaction takes place between the judge and one of the participants. Parties hardly ever negotiate with each other without the judge intervening.³⁰⁰

Moreover, the parties expect to receive a concrete settlement proposal from the judge. They may also be more hesitant to decline this proposal and come up with their own solution because of the authority of the judge. The outcome of conciliation might therefore be less driven by self-determination, but rather by the gravitas of the judge conducting the conciliation. In Germany, judges have a dual role in the resolution of individual labour law matters. While the judge helps the parties find an agreement during the conciliation, in case no settlement is reached, the further proceeding takes place in front of the same chairperson that conducted the conciliation. Thus, parties in conciliation may fear to be disadvantaged in the further proceedings if they did not accept the settlement proposal of the judge in the first place. Therefore, they might be coerced to an agreement that in fact does not fit with their individual needs. They are also highly unlikely to make concessions in conciliation in case the matter goes on to a court hearing because it will be difficult for the judge to ignore the concession made earlier. However, the dual role of the chairperson also has its advantages. Conciliation assists the preparation of the court hearing and serves the principle of acceleration in individual labour dispute resolution. Since the further proceeding takes place in front of the same chairperson as the conciliation, the judge is already familiar with the facts of the case, the parties, and their concerns.

In addition, conciliation succeeds in significantly reducing the workload of labour court judges. Judges do not have to spend time to take evidence or write a judgment. For example, data provided by labour law judges in Germany shows that times taken to prepare and conduct a conciliation hearing are considerably shorter than for the preparation of the chamber hearing of first instance. Judges prepare a conciliation hearing for an average of 13 minutes. It takes about 15 minutes to conduct the hearing. In contrast, the preparation of a chamber hearing takes an average of 60 minutes and the execution of the chamber hearing 47 minutes. In addition, drafting, setting down and reviewing a judgement takes 182 minutes.³⁰¹ Thus, labour court judges are interested in reaching a settlement agreement.

³⁰⁰ Kramer op cit note 29 at p. 377.

³⁰¹ Ibid.

The question in this context arises why Germany did not implement an institution for conciliation that is separate from the labour courts. The CCMA, as a separate forum for dispute resolution, is widely regarded as among the most successful post-apartheid institutions with a high degree of visibility and legitimacy in South Africa. It has become an international model for effective dispute resolution, for example followed by countries like Lesotho and Swaziland.³⁰²

In the former German Democratic Republic 1990 a compulsory conciliation mechanism was established with conciliation committees that constituted a separate dispute resolution mechanism for individual rights dispute in the workplace.³⁰³ This mechanism aimed to reduce the burden on a court system that – what was thought by that time- was not fully functioning yet.³⁰⁴ Any workplace dispute had to first be conciliated before the conciliation committee before a proceedings could be brought before the competent court.³⁰⁵ However, not long after its introduction, the mechanism was abolished. The Presidents of the Higher Labour Courts argued that labour law in Germany is mainly based on judicial law and therefore there is a need for a coordinated development of law and no room for an informal conciliation committee. Consequently, the Parliament repealed the mechanism in 1991 because of the fear of legal uncertainty.³⁰⁶ The progressive development of substantive labour law and increasingly complex problems demanded a legal formality in order to ensure an approximately time- and cost-efficient justice system, which at the same time would be accepted by the increasingly organised labour force. Thus, the main reason why conciliation in Germany is conducted by labour courts rather than by a separate institution is the fear of inconsistency of the law.

In contrast to that, South Africa had reasons to establish the CCMA as a forum distinct from the labour court system. The Industrial Court which existed until 1995 was regarded as unsuccessful in resolving labour dispute effectively. Court procedures were deemed to be too technical and inaccessible. At the same time independent mediation and arbitration succeeded in reaching a settlement rate of over 70%.³⁰⁷ In order to grant easier access to the dispute resolution system as well as quick and

³⁰² Benjamin op cit note 43 at p. 45.

³⁰³ Waas op cit note 27 at p. 155.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ Ibid.

³⁰⁷ Du Toit et al. op cit note 40 Chapter I, 4.3.

inexpensive settlement mechanisms the CCMA was therefore established as a separate institution.

Another difference in the German and South African procedure is the qualification of labour court judges and commissioners. Cases in the CCMA are handled by commissioners who are experts in labour disputes and have received significant training in mediation techniques. Judges, on the other hand, are more focused on adjudication and so less specialized and skilled to conduct conciliation. Labour court judges in Germany rarely receive training in mediation techniques. Yet, they are supposed to fulfil the same role as commissioners in guiding the parties to an amicable agreement without being adequately educated and trained in this field.

Another major difference between both jurisdictions is the time periods allocated to the conciliation process. Both systems have to cope with an extensive number of cases. In order to accommodate this caseload, many disputes have to be dealt with in a very short amount of time. While in South Africa conciliation is generally conducted in no more than one hour by the commissioner, in Germany, on average, a conciliation takes 15-20 minutes. The reason for this short time period in Germany is linked to the conciliation procedure being part of the court hearing in first instance. Court hearings in civil law are governed by the principle of acceleration, which is an expression of the constitutional obligation to provide effective legal protection in a timely manner.³⁰⁸

Lastly, differences exist in the context of representation and non-attendance in conciliation. While South Africa completely excludes legal representatives from the conciliation procedure, in Germany parties can choose whether they want to be represented by a lawyer, trade union or employer confederation in court. In both cases legal representation is not compulsory. However, since the conciliation hearing in Germany forms part of the court hearing of first instance, parties that choose to be represented in court might as well use a legal representative for conciliation. The reason for this is that conciliation and the court hearing are not as strictly separated as in South Africa. However, despite this difference both countries succeed in making the process less legalistic and expensive by restricting legal representation.

Moreover, the consequences of non-attendance in conciliation hearings in Germany are stricter than in South Africa. While in Germany most cases of non-

³⁰⁸ Section 9 of the LCA.

attendance in a preliminary conciliation hearing result in the judge issuing a default judgement on the facts of the case, a commissioner may only dismiss a case when it can no longer be submitted to conciliation, for example, when time periods expired.³⁰⁹ Thus, only when the referring party fails to attend conciliation, commissioners have similar discretionary powers as chairpersons in Germany. They can conclude the proceedings by issuing a certificate that the dispute remains unresolved. However, the absent party can further proceed and request arbitration after 30 days, while in Germany the default judgement of the chairperson can only be challenged by an objection in a time period of one week after the delivery of the judgment.³¹⁰ Since in both countries, non-attendance occurs mainly from the employer's side, stricter legal consequences may further strengthen the position of the employee in the hearing and therefore balance out power disparities between employers and employees. As a result of that, this would benefit the effectiveness of the procedure in general.

E. Conclusion (Recommendations)

In conclusion, both countries succeed in providing easy access to individual labour dispute resolution, while achieving a high settlement rate. The CCMA has an exceptionally good track record in resolving labour disputes with settlement rates of 70 %. Similarly, German labour court judges are able to settle matters as effectively with a settlement rate nearly as high as the CCMA.

However, both systems operate in very different ways. While in South Africa individual labour disputes are solved through a highly specialised institution, distinct from the labour court system, in Germany conciliation takes place in front of the labour court judge of first instance. Both systems have their benefits. While in Germany the authority and gravitas of the judge has a big impact on the settlement rate in court, elements of traditional mediation play a significant role in concluding a settlement in South Africa. The implementation of specific elements of one jurisdiction could therefore impact the success rate of the other system.

On the one hand, different elements of traditional mediation can be implemented into the German conciliation procedure.

³⁰⁹ In terms of Section 138(5) of the LRA there are more stringent consequences if a party fails to appear at arbitration.

³¹⁰ Section 59 of the LCA.

In South Africa, conciliation is conducted outside the court room. The location where the procedure takes place is often of decisive importance for the parties from a psychological point of view. If this is a courtroom, experience shows that it is unlikely to have a positive effect on creativity because many parties feel uncomfortable in a courtroom. A solution for Germany could therefore be to hold the hearing in separate premises outside the courtrooms specifically designed for conciliation hearings. This would make the parties more comfortable, increase the overall well-being and the willingness to reach an agreement through a less coercive atmosphere. Furthermore, it would benefit the atmosphere if the judge did not appear wearing a robe but rather, on an equal footing with the parties. There are no legal objections to more informality regarding the dress code of the judge and if a conciliation hearing takes place outside the actual courtrooms in a room equipped for this purpose, the judge should not be expected to wear a 'formal' robe.

In addition, the efficiency of the conciliation procedure benefits from conciliators who are highly specialised in labour dispute matters and have an expertise in mediation techniques. Therefore, as in South Africa, labour court judges in Germany should be familiarized with the principles of mediation and the psychology that can favour an agreement between parties. The German Judicial Academy could offer seminars on this subject as part of the obligatory training for labour court judges. For young judges, such training should take place right at the beginning of their career. This type of training would not only promote the success of the conciliation hearing itself but also all further settlement attempts that are encouraged throughout the entire litigation proceedings of first instance.

Furthermore, side-meetings between the parties and the commissioner in the CCMA have proven to be a useful tool in the facilitation of settlements. Similar to side-meetings with commissioners, separate meetings with the chairperson of the Labour Court would benefit the conciliation process. While the chairperson has a separate meeting with one of the parties, the other party would have to leave the room. The absent party could, however, use the break to reconsider their own position and examine ideas. Separate meetings with the chairperson would open up the possibility of building rapport and trust between the parties and the chairperson. As a result of this, ultimately greater openness would be achieved with regard to the contents of the information shared in conciliation. Nevertheless, in regard to the total duration of the conciliation hearing, side-meetings with the labour court judge have to be kept short,

no more than 3 minutes and should neither be recorded nor included in the protocol of the court hearing.

Moreover, the South African example shows that a confidential meeting rather than one that is open to the public is more likely to make the parties feel comfortable and to create an atmosphere where information, difficulties and concerns are exchanged openly and, if addressed, could lead to the resolution of the dispute. An exclusion of the public in conciliation hearings in Germany would therefore be of great benefit to the settlement efforts of the parties. The exclusion would also be permissible by law because already under the current section 54 of the LCA, an exclusion for reasons of expediency is possible. However, the possibility of admitting individual persons according to section 52 of the LCA and section 175 of the Courts Act would have to remain.

On the other hand, certain aspects from the German system can further improve the South African conciliation mechanism.

Non-attendance rates in conciliation are typically around 15%, with the employer being the non-attending party in approximately 75% of the cases. A high number of non-attendances is a waste of resources and reduces the efficiency of the process. In order to reduce non-attendance rates in the CCMA, particularly by employers, stricter legal consequences for non-appearance similar to the discretionary powers of labour court judges in Germany should be considered. Commissioners should be allowed to penalise parties for non-appearance with fines and the amount of the penalty should be included in the arbitration award. This would not only benefit the effectiveness of the process but also further strengthen the position of the employee in the hearing and therefore balance out existing power disparities between employers and employees.

Moreover, as seen above, the authority and gravitas of the judge has a significant impact on the settlement rate in conciliation. CCMA commissioners, unlike Labour Court judges, do not necessarily have legal qualifications, however more senior commissioners are mostly legally qualified. For the commissioner to achieve a similar authority, parties in South Africa should be allowed to make an application for a senior commissioner to be appointed in conciliation. This is already possible in arbitration and could be restricted to certain circumstances.³¹¹ For example, when the

³¹¹ Section 137 of the LRA.

nature of the question of the legal question, the complexity of the dispute or the public interest allows for it.

In addition, the labour dispute resolution system could benefit from having the same commissioner conducting both, conciliation and in case the dispute remains unresolved, arbitration. There are no legal objections to this. Rather, the dual role of the commissioner and the arbitrator is permissible by section 136(2) of the LRA which permits the appointment of the same commissioner who conciliated as the arbitrating commissioner. However, parties may object to this Con-arb process and another commissioner must then be appointed.³¹² The German conciliation procedure shows that it is beneficial to have the same person conducting conciliation and the further proceedings because of the familiarity with the facts of the case, the parties, and their concerns. Thus, this ultimately serves the principle of acceleration in labour dispute resolution and the efficiency of the process. An obligation to conduct conciliation and arbitration by the same person would lead to more expedition in dispute resolution and therefore enhance the success of the individual labour dispute resolution system as a whole.

These improvements can contribute to the procedure and potentially make the two conciliation mechanisms, that have proven to be working sufficiently in both countries, even more effective. Analysing other jurisdictions, comparing mechanisms in place and their limitations opens up ways to tackle structural blocks, find new perspectives and thus, grant more access to justice in the labour relationship.

³¹² Section 191(5A) of the LRA.

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