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Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the degree of Masters in Commercial Law in approved courses and minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

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**ABSTRACT**

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The absence of appropriate and effective mechanisms for consumer disputes in a legal system can result in a denial of access to justice. Consumers struggle to have their disputes settled because most of their claims are of small value and some consumers are low-income earners. Costs of litigating a claim in the formal court system are very high and the procedural formalities involved hinder consumers' access to justice. As a result, alternative dispute resolution (ADR) seems to address that challenge as an appropriate approach to consumer disputes because it promises cost effective, efficient and fast mechanisms of resolving disputes.

The purpose of this study is to examine the role of alternative dispute resolution in Lesotho in consumer protection. This is achieved by examining the available dispute resolution processes and how they function. Also, this study makes a comparison with the South African law regulating consumer protection in particular dispute resolution. It discusses ADR in consumer protection at international level as contained in the OECD report and EU Directives.

The problem that exists in the market place is that bargaining power favours the sellers. As a result there are laws in place that protect consumers against manipulative or fraudulent sellers, but those laws do not mean anything to consumers if they cannot be enforced through proper channels for their benefit. Therefore, there have been various ADR mechanisms adopted by different legal systems in order to assist consumers to fully realise their rights.

Some of these ADR mechanisms might be appropriate for consumer disputes but are very advanced and are not appropriate for a country like Lesotho due to the nature of consumers there and the country's economy. Despite South Africa being more economically developed compared to Lesotho it has introduced some of the ADR procedures which are easy to establish and seem to be working well to address consumers' claims. As a result, this study would recommend Lesotho to amend its laws in relation to consumer dispute resolution and revise Consumer policy which has been adopted recently.

**KEY WORDS:**

Consumer; consumer protection; alternative dispute resolution; consumer disputes; ombudsman



Now to Him who is able to do exceedingly abundantly above all we can ask or imagine, according to the power that works in us, to Him be glory in the church forever and ever. Amen (Ephesians 3: 20-21)



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## CHAPTER 1 INTRODUCTION

### 1.1 INTRODUCTION

Sellers and consumers are market actors with differing bargaining power. The consumers invariably possess less bargaining power.<sup>1</sup> To protect consumers from risk posed by sellers, the government's intervention is critical. Consumer protection is often approached as an intervention by governments into the market, especially the protection of lower-income groups.<sup>2</sup> This dissertation investigates the most appropriate, cost effective and efficient methods of dispute resolution in consumer disputes for Lesotho. This chapter discusses the theoretical issues on consumer protection — it establishes the rationale for consumer protection in the form of government intervention. It gives the study background in order to great an understanding of why this study is undertaken. Lastly, it concludes by giving a structural breakdown of chapters.

Consumers contribute significantly towards a successful economy by helping to ensure that markets and public services work effectively.<sup>3</sup> Therefore, they need effective consumer protection and a representative structure must be put in place.<sup>4</sup> The government may want to intervene in the market in order to prevent certain products that may have negative results on consumers.<sup>5</sup> Consumer protection in the form of government intervention is concerned about regulation of prejudicial and manipulative trade practices against consumers.<sup>6</sup>

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<sup>1</sup> SL Rutledge „Consumer Protection and Financial Literacy Lessons from Nine Country Studies: Policy Research Working Paper (2010) 10 available at SSRN: <http://ssrn.com/abstract=1619168> accessed on the 31 August, 2015.

<sup>2</sup> Ramsay I. *Consumer law and Policy: Text and Material on Regulating Consumer Markets* (1989) xii.

<sup>3</sup> Consumer Futures „Consumer protection, representation and constitutional change in Scotland“ March 2014 7 available at <http://www.consumerfutures.org.uk/files/2014/03/Consumer-protection-representation-and-constitutional-change-in-Scotland.pdf> accessed on the 29 March 2015.

<sup>4</sup> Ibid.

<sup>5</sup> Office of Fair Trading „Government in markets Why competition matters –a guide for policy makers“ (2009) 4 available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284451/OFT1113.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284451/OFT1113.pdf) accessed on the 29 March 2015.

<sup>6</sup> Ramsay op cit note 2 at xii.

## 1.2 THEORETICAL ISSUES

### 1.2.1 Rationale for consumer protection

In order to have a clear understanding of what consumer protection is, it is needed to deal with the following questions: what is consumer protection? Why do consumers need protection? When should the government intervene to protect them and how should it do so? Consumer protection is defined as various methods in which the government intervenes in the market with the purpose of protecting a consumer of goods and services.<sup>7</sup> There are different theories of consumer protection. Legal writers frequently argue that consumers generally need protection because a consumer is a weaker party in the market.<sup>8</sup> Consumers are perceived as fragile parties in terms of negotiating in a transaction or contract than their contracting partners.<sup>9</sup> Therefore, the assumption is that they are not able to protect their interests due to inferior bargaining power.<sup>10</sup>

On the other hand there is a theory of economic exploitation, which states that consumers need protection because their choices of trading are confined to terms and conditions set by companies or sellers.<sup>11</sup> Another reason for this theory is that information and complexity imbalances favour companies, consumers are easily exploited.<sup>12</sup> However, exploitation theory is not a dominant theory, and economists seldom consider it as a valid reason for consumer protection, because it fails to consider the availability of competition amongst the companies in the marketplace.<sup>13</sup> The bargaining power against consumers is limited through competition from other companies. Competition gives consumers a big choice as to where they could trade without being exploited, even though they still encounter other challenges.

In as much as consumers have a wide choice in the market where they can buy, they are still exposed to many challenges that warrant government intervention.<sup>14</sup>

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<sup>7</sup> Ibid Introduction. See also SLT McGregor „Consumer education and the OECD electronic commerce consumer protection guideline“ (200) 24 J Consumer Studies & Home Economics 172.

<sup>8</sup> Rulh G. „consumer protection in choice of law“ 44 *Cornell International Law Journal* (2011) 571

<sup>9</sup> Ibid

<sup>10</sup> Ibid

<sup>11</sup> Ibid at 571-2

<sup>12</sup> Ibid.

<sup>13</sup> Ibid at 572. See also Hadfield KG et al „Information-Based Principles for Rethinking Consumer Protection Policy“ (1998) 21 J. of Consumer Policy 134.

<sup>14</sup> S Donoghue et al „The right to be Heard and to be Understood: A Conceptual Framework for Consumer Protection in Emerging Economies (2009) 33 *International Journal of Consumer Studies*“ 457.

This would include the fact that they are less informed about the nature of the products they buy from the market. Products are sold in packages which do not allow both the consumer and the seller to examine them before they can be purchased.<sup>15</sup> Ramsay argues that because products are branded and advertised it is no longer a need for a retailer to hand over the products to consumers; as a result consumers have to select products from the open shelves and this causes confusion to the consumers even when they knew what they were intending to buy.<sup>16</sup> The argument here is that consumers are open to many choices of products in the market and it becomes very hard to make an informed decision before buying.<sup>17</sup> This situation affects the literate people and the illiterate<sup>18</sup>, but the illustration becomes even clearer when it involves illiterate people.

Consumers today are not able to make good choices of the products they buy due to the complicated techniques used to make products.<sup>19</sup> Goods in the market have become complicated and consumers have to rely on experts either to assemble a product or to get it working after purchase.<sup>20</sup> McQuoid-Mason states that: “with the growth of technology, there has been an information gap and consumers are no longer equipped to make decisions concerning the quality of goods and products.”<sup>21</sup> Reich is more elaborative on this issue and identifies three points being „diagnostic information, product testing information and communication“.<sup>22</sup> He states that in order for a consumer to be able to have an access to the product purchased he has to go an extra mile to understand the product and its suitability.<sup>23</sup> A consumer has to get an individual who understands how the product works and even assesses if it will be suitable for the purpose it was purchased for.

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<sup>15</sup> MM Cobbert „Common law protection of the consumer under South African law“ South African law conference papers (1981) 4.

<sup>16</sup> I Ramsay *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets 3ed* (2012) 4.

<sup>17</sup> *Ibid* at 3.

<sup>18</sup> T Woker „Why the Need for Consumer-Protection Legislation? A Look at Some of the Reasons Behind the Promulgation of the National Credit Act and the Consumer Protection Act“ (2010) *Obiter* 230.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid* at 4. See also, Cobbert *op cit* note 15 at 4. He states that, at times goods are bought as different parts of machinery which are even complicated to some consumers who did not examine them upon buying them.

<sup>21</sup> D McQuoid-Mason et al *Consumer Law in South Africa* (1997) 7.

<sup>22</sup> RB Reich „Toward a New Consumer Protection“ (1979) 128 *University of Pennsylvania* 20.

<sup>23</sup> *Ibid*. See also Hadfield *op cit* note 13 at 142.

The consumer needs information regarding how safe the product is for use and its suitability for the purpose for which it was purchased.<sup>24</sup> It is argued that as a result of these extra things, the consumer has to suffer the increased costs even where the cost price was less.<sup>25</sup> These other costs are referred to as „hidden cost“<sup>26</sup> as they were not anticipated by the consumer when buying the product. Vulnerability of consumers is also considered as another reason for consumer protection.<sup>27</sup> The argument here is that consumers are exposed to exploitation and deception in the market because they are not able to resist the temptations of eye-catching presentations of the products in the market and experienced shop assistants.<sup>28</sup> It is clear from this argument that exploitation of consumers still takes place in the market though it is in a different form.

Lastly, consumers need protection because they are not willing to pursue claims even when their rights as buyers have been infringed.<sup>29</sup> There are a number of factors that contribute to this behaviour of consumers; these include the uncertainty of the gravity of the case, and lack of knowledge of the law.<sup>30</sup> Sellers have an experience of doing business and therefore are able to defend or to convince consumers that any default in a product that may be identified by a consumer after purchasing a product, for example, is attributable to the manufacturer and not them (sellers). Some consumers would not pursue claims against manufactures because they doubt that such claims would succeed. This situation, it is argued, is aggravated by the fact that the amount involved is lower than what the consumer would pay to engage a lawyer in litigation especially when there is no alternative to litigation.<sup>31</sup>

### **1.2.2 Rationale for government intervention**

It is the role of government to intervene in the market in order to protect consumers. The decision to intervene by the government is based on the costs of intervention and

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<sup>24</sup> Ibid. See also Hadfield op cit note 13 at 134.

<sup>25</sup> Reich op cit note 22 at 20.

<sup>26</sup> Ibid at 21.

<sup>27</sup> Ramsay op cit note 16 at 4.

<sup>28</sup> Ibid

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid. See also Donoghue op cit note 14 at 459. See also Rutledge op cit note 1 at 30. See also Woker op cit note 18 at 230.

benefits of intervention, the typical „costs-benefit-analysis“.<sup>32</sup> The costs would include costs of administration, monitoring and enforcement costs for implementation of rules and regulations in place to protect consumers.<sup>33</sup> For example, in order to enforce laws it might be necessary for government to engage new staff and teach them how the system operates or even to set up a new enforcement institution altogether.<sup>34</sup> This issue of costs is secondary compared to the benefit that would be reaped, which is to protect consumers. As noted above, consumers play a vital role in the market and without consumers there is no business and this could have negative impacts on the economy.

There are various ways in which the government intervenes in the market to protect consumers. However, government intervention — as opposed to market solutions — needs to be well planned and appropriate in order to achieve the highest value for money and to avoid unplanned damaging consequences.<sup>35</sup> Reich on one hand looks at government intervention in two ways, which he calls „the cost to the government of enforcement, and the cost to the seller of compliance“.<sup>36</sup> On the other hand Ramsay<sup>37</sup> and Goldreing<sup>38</sup> discuss similar methods of government intervention. However, the former gives a detailed and a clear discussion of these methods and even goes on to talk about reducing enforcement costs and encouraging pre-commitment strategies.<sup>39</sup> These methods of government intervention include: regulation of information, standards, licensing, price controls and the other two mentioned earlier.<sup>40</sup> Regulation of information includes removal of information barriers, prohibiting misleading information and increasing information that comes to the consumers.<sup>41</sup> The argument here is that the government should regulate the information that consumers receive in the market, which would in turn assist consumers to make informed decision before buying the products.

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<sup>32</sup> Ramsay op cit note 16 at 44. See also Rutledge op cit note 1 at 12.

<sup>33</sup> H Luth *Behavioural Economics in Consumer Policy: The Economic Analysis of Standard Terms in Consumer Contracts Revisited* (2010) 24.

<sup>34</sup> Ibid at 25.

<sup>35</sup> Office of Fair Trading op cit note 5 at 4.

<sup>36</sup> Reich op cit note 3 at 31.

<sup>37</sup> Ramsay op cit note 16 at 98-105.

<sup>38</sup> J Goldreing et al *Consumer Protection Law* 5ed (1999) 7.

<sup>39</sup> Ramsay op cit note 16 at 103.

<sup>40</sup> Ibid at 99-105.

<sup>41</sup> Ibid 99. See also Rutledge op cit note 1 at 9.

Government intervention in the form of reduction in enforcement costs takes place where private litigation fails to protect consumers' rights and to improve the market performance.<sup>42</sup> This includes introduction of effective and efficient methods of resolving disputes, allowance of public agencies to represent group of consumers and recover damages suffered by those consumers, enacting clear laws that are relevant for consumers and to connect market actors as main players.<sup>43</sup> Introduction of effective and efficient methods could be the most appropriate way of intervention as other methods have a possibility of not achieving the desired results, because some of the consumers in particular, low-income earners are not able to pursue their claims due to high costs of litigation.

### **1.3 RESEARCH QUESTION**

This research seeks to answer the question that, what is the most appropriate way for Lesotho to resolve consumer disputes? The study investigates and determines an accessible, cost-effective and efficient way of resolving consumer disputes. Further, it explores appropriate options that can be employed to redress the consumers' complaints in Lesotho in an economical, accessible and more flexible way than litigation and make a recommendation for law reform.

### **1.4 Background**

#### **1.4.1 Regulation of consumer law in Lesotho**

Consumer protection in Lesotho is presently regulated through fragmented pieces of legislation<sup>44</sup> and a policy which has just been adopted.<sup>45</sup> However, concern lies with the manner of addressing disputes which arise. The legislation in question only deals with disputes that arise in relation to water and energy to a certain degree through its regulatory body, Lesotho Electricity and Water Authority (LEWA). On the other hand, the policy provides for dispute resolution through the Consumer Protection Commission and the Tribunal which will operate on part-time basis — these do not

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<sup>42</sup> Ramsay op cit note 16 at 103.

<sup>43</sup> Ibid at 103.

<sup>44</sup> The Lesotho Electricity Authority Act no 12 of 2002.

<sup>45</sup> Lesotho Consumer Protection Policy March 2015.

exist at the moment.<sup>46</sup> Consumers of goods and services are currently not protected by any legislation. Most of disputes emanating from consumers' claims end up as civil suits or abandoned. This is more evident with consumers of healthcare services. It is argued that in healthcare services litigation is not an option as a larger portion of the compensation awarded does not go to plaintiff because it takes care of attorney fees and other litigation costs.<sup>47</sup> Hence, this study investigates modalities that can be used to resolve consumers' disputes.

However, this discussion requires a brief background about Lesotho which will give a clearer picture of what level of consumers are found in Lesotho. The Kingdom of Lesotho is a small, mountainous, landlocked country and is completely surrounded by the Republic of South Africa (RSA).<sup>48</sup> Lesotho is just over 30 000 square kilometres in size and the population is estimated at two million. The political system is a constitutional monarchy in which the King is the Head of State and the Prime Minister is the Head of Government.<sup>49</sup> The economy of Lesotho is highly dependent on a textile-based manufacturing sector and on remittances from mineworkers in RSA.<sup>50</sup> The industrial sector has become the main source of economic growth and employment in the country.<sup>51</sup> Most of the workers in these industries are from rural areas and are illiterate<sup>52</sup> and these are clearly low-income earners. The Magistrates Courts are available in the ten districts of Lesotho, but are located in towns, whereas most of the people live in remote areas where mode of travelling can be a problem. The High Court and the Commercial Court are based in Maseru, the capital city of Lesotho. With this background in mind it would be understood why this study and why a particular method of alternative dispute resolution (ADR) will be proposed over other methods as government intervention for consumer protection.

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<sup>46</sup> Section 16 of the Consumer Protection Policy of March 2015.

<sup>47</sup> D Chamisa „The Potential of Alternative Dispute Resolution Mechanisms in Tackling the Increase of Lawsuits Due to Medical Negligence in Public Hospitals (2013) 58-9.

<sup>48</sup> African Development Bank and African Development Fund „Kingdom of Lesotho-Country Governance profile“ 7 February 2006 2 available at <http://www.afdb.org/en/documents/document/2006-lesotho-country-governance-profile-13276/> accessed on the 16 March 2015.

<sup>49</sup> Ibid at 2.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> According to UNDP the illiteracy rate is 5.3 %. See also Donoghue op cit note 14 at 457. She states that most consumers in developing countries with emerging and transitional economies do not live in an ideal world with sufficient resources to educate consumers on their rights.

### 1.4.2 The current system of resolving consumer disputes in Lesotho

There are courts of law where one can have their rights enforced in Lesotho and they range from Small Claims Procedures to a Court of Appeal. They include the Commercial Court<sup>53</sup> and consumer disputes are included in this court's jurisdiction. However, these are not easily accessible, flexible and uncomplicated for consumers. „Ordinary court proceedings are also open for consumers whose rights have been infringed, but the number of consumers that actually find their way to the ordinary courts is very limited.<sup>54</sup>

However, to have access to these courts is expensive as the court cases can take a very long time and litigation is expensive.<sup>55</sup> The Commercial Court caters for all the commercial matters in the land and it has court-annexed mediation. The mediation process is governed by the High Court Mediation Rules published in Gazette No. 48 of May 26, 2011.<sup>56</sup> Court-annexed mediation is not voluntary, whereas traditionally mediation is a voluntary process. It has been argued that, „[t]he principal objection is that mandatory mediation impinges upon the parties' self-determination and voluntariness, thus undermining the very essence of mediation.“<sup>57</sup> The court-annexed mediation in this regard caters for cases filed in court, which means that all civil and commercial cases filed at the court go through the mediation process.<sup>58</sup> With this kind of mediation, the parties cannot avoid cost of litigation. Hence, it is not cost effective as it was anticipated upon its introduction.

The challenges that are involved with court-annexed mediation are that mediation is conducted by the judges' clerks or assistant registrars. All the designated mediators are the court staff, being assistant registrars and judges' clerks

<sup>53</sup> U.S Department of State: „Diplomacy in Action“ June 2014, 6, available at [www.state.gov/document/organisation/227355.pdf](http://www.state.gov/document/organisation/227355.pdf) accessed on the 19 March 2015.

<sup>54</sup> HW Micklitz et al *Cases, Material and Text on Consumer Law* (2010) 503.

<sup>55</sup> A Rycroft „Why is mediation not taking root in South Africa: Africa Centre for Dispute Settlement,“ available at [www.usb.ac.za/disputesettlement/.../pdfs/October\\_Newsletter\\_2009.pdf](http://www.usb.ac.za/disputesettlement/.../pdfs/October_Newsletter_2009.pdf) accessed on 12 March 2015. See also McQuoid-Mason, he argues that consumers are discouraged to resort to litigation as it is expensive especially when their claims are of small amount compared to costs of litigation 307. See T Cohen „The Insurance Ombudsman- an Alternative Dispute Resolution Forum for the Insurance Industry“ (1996) 8 SAMLJ 253.

<sup>56</sup> [www.lesotholii.org](http://www.lesotholii.org)

<sup>57</sup> D Quek „Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program“ (2010) 11 Cardozo JCR479.

<sup>58</sup> Lesotho Legal Information Institute: „the introduction of court annexed mediation in the high court and commercial court of Lesotho,“ available at <http://www.lesotholii.org/content/part-i-introduction-court-annexed-mediation-high-court-and-commercial-court-lesotho>, accessed on 16 March 2015.

who received intensive training on mediation theory and practice.<sup>59</sup> Commercial matters are complex and need expertise. In as much as the mediators involved have been trained to conduct mediation, they do not have expertise in the field of commercial law. As a result, even if a case is referred for mediation, the chances that it will be resolved are slim.

Again, the mediator is a government employee who is paid her or his salary monthly. Although this mediation is mandatory it is upon the mediator as the court officer to decide whether to refer the case for mediation or not. The disputants cannot initiate proceedings for purposes of mediation even when they want mediation without the court being involved. Parties cannot employ the services of this mediator without having filed a suit in court and do not have an opportunity to engage the mediator of their own choice. According to Darrow, „buyers rarely have financial resources to bring or defend a claim“<sup>60</sup> therefore this method of resolving a dispute is not going to be cost effective for consumers.

In addition, the purpose of ADR is to cut litigation costs, but that purpose is not served with court-annexed mediation. Assuming that the matter is finally settled, parties are still bound to pay legal fees, and if the matter involves payment of money, collection commission is still charged by a lawyer. So this system does not really solve the problem. Most of the consumers in Lesotho can hardly afford to pay legal fees. In as much as lawyers’ fees differ, it is estimated that legal fees can be as high as R10 000.00 for a single matter depending on the complexity of the case and the court’s jurisdiction.<sup>61</sup> It is worth noting that court-annexed mediation is the remedy that is available only in the High Court and Commercial Court.

Apart from these, there are magistrates’ courts and it is trite that litigation is seldom an option for resolving disputes that involve consumers. The cases drag for a long time because of the backlog of cases. Some of the disputes do not need the formality that is found in court. However, in the magistrate courts, small claims procedures were introduced as per Legal Notice 30 of 2011, and it is a mechanism

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<sup>59</sup> Court-annexed mediation available at [www.lesotholii.org](http://www.lesotholii.org) op cit.

<sup>60</sup> PH Darrow „Commercial Nuisance: *A Theory of Consumer Protection.*“ (1966) University of Chicago Law Review 590.

<sup>61</sup> M Pholo Lesotho Justice Sector and Rule of law: A review by AfriMap and the Open Society Initiative for Southern Africa 14 March 2013 available at <http://www.afri-map.org/english/images/report/AfriMAP%20Lesotho%20Justice%20Main%20web-FINAL.pdf> accessed on 19 March, 2015.

through which consumers can seek redress to recover financial damages occasioned by obtaining poor quality products and or services; this procedure can also be applied to easily recover loans and the interest thereon, as well as resolve disputes between landlords and tenants.<sup>62</sup> These procedures are not available in some of the magistrate courts in the country because of the lack of resources by government to introduce this system in all the magistrates' courts in the country.

There are also challenges with small claims procedures. Small claims procedures are not only meant for consumer claims, but other claims are catered for notwithstanding the nature of the claim and the plaintiff involved.<sup>63</sup> It deals with all matters which their monetary value is R10 000 or less. In addition, there is no consumer education about the availability of mechanisms like this one in question for consumers to have their disputes settled. It is argued that „[w]here appropriate procedures exist, consumers typically do not have sufficient knowledge and expertise as to how they can exercise their rights.“<sup>64</sup> Another problem with small claims procedures is that more often than not, it is used by business people to recover their monies from the very same consumers whom the law should be protecting against companies.<sup>65</sup>

There is also Legal Aid services to less disadvantaged people.<sup>66</sup> Section 7(2)(a) of Legal Aid No.19 of 1978 provides that in order for an individual to receive the services, the Legal Aid Counsel must be satisfied that the applicant has reasonable grounds to institute or defend an action.<sup>67</sup> Also, Section 10 makes a provision that an applicant may be required to contribute towards the costs of litigation.<sup>68</sup> This creates a difficult situation for consumers because their claims are relatively of small value to satisfy the Legal Aid Counsel to provide them with required services and some of the consumers are low income-earners. Experience suggests that legal aid in Lesotho has a bad reputation of its lawyers overcharging the clients and it fails to pay lawyers who rendered services to Legal Aid clients. Golub argues that legal aid exists in

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<sup>62</sup> Judicial Reforms: „Small Claims Court“ available at <http://www.lesotho.li.org/book/export/html/12055>, accessed on 16 March 2015.

<sup>63</sup> Micklitz op cit note 53 at 504.

<sup>64</sup> Ibid at 499.

<sup>65</sup> D Oughton et al Textbook on consumer Law (1997) 75.

<sup>66</sup> Legal Aid Act No. 19 of 1978.

<sup>67</sup> Legal Aid Act No. 19 of 1978.

<sup>68</sup> Legal Aid Act No. 19 of 1978.

theory but not in practical terms, that is, on paper but not on the ground.<sup>69</sup> It has been stated that lawyers in Lesotho complain that Legal Aid fails to reimburse Lawyers timely if not at all for services rendered by them at the request of Legal Aid.<sup>70</sup> There is a general view in Lesotho that people who approach Legal Aid are those who do not want their cases to proceed in court because of poor services.<sup>71</sup> This is a clear indication that Legal Aid in Lesotho is dysfunctional and cannot be entrusted for consumer disputes.

The office that also deals with disputes resolution is the office of the Ombudsman as established by the Lesotho Constitution of 1993.<sup>72</sup> It investigates government departments, local government authority and statutory corporation.<sup>73</sup> The Ombudsperson makes recommendations after making the findings of a matter before him or her. The problem about this office is that it only deals with the offices herein mentioned; it does not handle private or individuals' claims. Therefore, it is submitted that there are no appropriate mechanisms in Lesotho that can be used to resolve consumers' disputes effectively and affordably. It is against this background that this study is necessary to propose other mechanisms that can better address the complaints of consumers bearing in mind the kind of consumers available in Lesotho.

## **1.5 STRUCTURE OF THE DISSERTATION**

Chapter Two discusses origins of ADR movement and its purpose. This chapter also discusses different types of ADR in particular consumer protection litigation, mediation, arbitration, ombudsman and deals briefly with online dispute resolution. Chapter Three is a comparative study which identifies ADR mechanisms in consumer protection in SA in terms of the Consumer Protection Act of 2008 and other legislation. Chapter Four discusses the OECD Report on ADR and other international instruments on consumer protection that encourage the development of effective consumer dispute resolution and redress mechanisms within its member states. For example, the United Nations Guidelines for Consumer Protection, which

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<sup>69</sup>S Golub The Importance of Legal Aid in Legal Reform: Access to Justice in Africa and Beyond: Making the Rule of Law a Reality-Preface (2007).

<sup>70</sup> A Stapeton Introduction and Overview of Legal Aid in Africa: Access to Justice in Africa and Beyond: Making the Rule of Law a Reality (2007) 14.

<sup>71</sup> Ibid at 14

<sup>72</sup> Section 134.

<sup>73</sup> Section 134 of Lesotho Constitution of 1993.

call on governments to “establish or maintain legal and/or administrative measures to enable consumers or relevant organisations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible.”<sup>74</sup> This is not done in a comparative way but to illustrate that there are other ADR methods available in developed countries and also to indicate that though they are good and convenient for consumers but they may not work in the case of Lesotho. Then, the last chapter discusses conclusions and makes recommendations on the reform of the law in Lesotho.

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<sup>74</sup> OECD Consumer Policy „*Consumer Dispute Resolution and Redress in the Global Market place*”, 8, 2006, available at <http://www.oecd.org/internet/consumer/36456184.pdf>, accessed on March 2015.

## CHAPTER 2

### 2. ALTERNATIVE DISPUTE RESOLUTION

#### 2.1 INTRODUCTION

Access to justice is a fundamental right which is provided by the constitutions of almost all democratic jurisdictions and it is also enshrined in the Universal Declaration of Human Rights. Notwithstanding, it is not everyone who is able to access this right and this is clearly demonstrated in the case of low-income consumers and other disadvantaged groups because the high cost of litigation is a barrier for them to access justice. The introduction of the alternative dispute resolution (ADR) movement should be seen as a way of helping these consumers to have access to justice because justice cannot only be realised through litigious means. In this chapter all formal and informal means that may assist consumers to access justice are discussed and critiques are also levelled against them to show where they are failing.

#### 2.2 THE ADR MOVEMENT

##### 2.2.1 Origins

Alternative Dispute Resolution, also known as ADR, is the fastest growing modern way of resolving disputes apart from the formal adversarial court system.<sup>75</sup> This includes all forms of resolving disputes without resorting to litigation or adjudication through courts.<sup>76</sup> This method of disputes resolution traces as far back from the traditional South African communities.<sup>77</sup> Within these traditional societies disputes were resolved through family, clan or tribal level and the headman or the chief would preside over the matter.<sup>78</sup> In some communities, when there was a conflict between a husband and a wife, the families of both parties involved in a dispute would come together to investigate the problem in an effort to reconcile the disputants, and most

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<sup>75</sup> JA Scimecca „Theory and Alternative Dispute Resolution: A Contradiction in terms?“. DJD Sandole and H van der Merwe Conflict Resolution Theory and Practice: Integration and Application (1993) 211.

<sup>76</sup> P Pretorius et al *Dispute Resolution* 1<sup>st</sup> ed (1993) 1. See also Macklitz op cit note 53 at 511.

<sup>77</sup> RBG Choudree Traditions of Conflict Resolution in South Africa (1999)1 AJCR.

<sup>78</sup> Pretorius op cit note 76 at 124.

of the time it worked very well. This practice still holds in some of the societies to prevent the breaking of marriages.

The purpose of handling dispute resolution in this manner was to reconcile parties in a dispute, as reconciliation needed a detailed investigation of facts complained of and the disputants had all the time to state their complaints in a set up that was more understanding.<sup>79</sup> Choudree states that with the use of traditional courts disputants were more advantaged compared to the current court system as the proceedings were informal, allowing parties to be comfortable to state their claims without fear of „men in black ropes“.<sup>80</sup> This is evident when in a case, either civil or criminal, an individual has to go to court and give evidence; at the mention of the word „court“ the person loses confidence and may even avoid going there. The African dispute settlement method was meant to preserve the relationship between the parties involved in a dispute. This was based on the notion of the spirit of „Ubuntu“, meaning people are people through other people and the underpinning principles were respect, community relationships, acceptance of one another and compassion.<sup>81</sup> The spirit of Ubuntu is about being compassionate to your fellow people.<sup>82</sup> Boule puts it this way, that these processes did not only manage the conflicts but also protected and upheld the moral fibre within the societies.<sup>83</sup>

In addition, this method of conflict resolution was also common within different traditional societies globally and they managed their conflicts in a well arranged manner, even though they did not have formal legal institutions.<sup>84</sup> Though others could still resort to violence or avoidance, this method was the main one for dealing with conflicts and not as an alternative process of resolving disputes for them.<sup>85</sup> It is possible to conclude from this that people are born with and develop some instinct of knowing how to best handle the conflict without anyone having to lose; unfortunately due to some influences or other factors people tend to come to a different decision.

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<sup>79</sup> TW Bennett Human Rights and the African Cultural Tradition. (1993) 22 Transformation 32.

<sup>80</sup>Choudree op cit note 77 at 13.

<sup>81</sup> SC Marks „Watching the wind: Conflict Resolution during South African’s Transition in Democracy (2000) 183.

<sup>82</sup> Ibid.

<sup>83</sup>L Boule Mediation: Principles, Process, Practice 2nd ed (2005) 49.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

Due to modernisation and pressures brought by the introduction of formal legal establishments, the traditional methods of dispute resolution began to fade away but some survived and exist alongside the formal legal structure.<sup>86</sup> Steadman discusses some of these methods that survived.<sup>87</sup> They include customary courts (that operate within certain communities, especially in the rural areas under the supervision of the tribal leader) and informal courts and other observant organisations that coordinate community affairs working closely with community council.<sup>88</sup> In certain instances, some of these traditional methods of dispute resolution were an influence for the establishment of modern dispute resolution structures instituted by governments and agencies.<sup>89</sup>

### 2.2.2 Purpose

The need for effective, cheaper and appropriate dispute mechanisms, and responsiveness against litigation prompted the advancement of the ADR movement.<sup>90</sup> This was influenced by African traditions of managing a conflict in a way that urges the disputants to participate in resolving a dispute and even to preserve the relationships.<sup>91</sup> ADR encompasses non-judicial means of resolving disputes, but quite properly alternative dispute resolution has to include judicial and non-judicial alternatives to litigation like class-action suites.<sup>92</sup> Where consumers attempted to resolve disputes with businesses but failed, the out of court procedures present consumers with affordable, effective and fast remedies without having to undergo financial stress of litigation costs.<sup>93</sup>

The purpose of ADR is not to replace litigation but to provide disputants with alternative processes or other available mechanisms that could be employed to

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<sup>86</sup> Ibid. See also J Brand „Amicable Dispute Resolution in South Africa: ADR in Business Practice and Issues across Countries and Cultures“ (2011) 2 available at [http://www.bowman.co.za/OnlineServices/Documents/ADR%20in%20Business\\_Chapter%2026\\_John%20Brand.pdf](http://www.bowman.co.za/OnlineServices/Documents/ADR%20in%20Business_Chapter%2026_John%20Brand.pdf) accessed on the 10 June .He argues that the traditional system of resolving disputes was messed up by colonialism as it was during that period when adjudication became predominant as introduced by the Western because they favour most procedures that employ win-lose situation in managing the conflict, 592.

<sup>87</sup> Pretorius op cit note 76 at 126.

<sup>88</sup> Ibid.

<sup>89</sup> Boule op cit note 83 at 51.

<sup>90</sup> L Boule et al *Mediation Principles, Process, Practice* (1997) 59.

<sup>91</sup> Boule op cit note 83 at 56.

<sup>92</sup> M Cappelletti „Alternative Dispute Resolution Processes within the Framework of the world –wide access-to-justice Movement“ (1993) 56 *MLR* 282. This article discusses the proper interpretation of ADR which was the intention of upon the introduction of ADR movement.

<sup>93</sup> Micklitz op cit note 54 at 512.

resolve a dispute.<sup>94</sup> The main objects of ADR are to reduce the backlog of cases in court, the unnecessary costs of litigation, and delay in the administration of justice.<sup>95</sup> Cappelletti puts it bluntly on the issue of costs, that the cost involved here is the cost of access to justice which turns out to be democracy.<sup>96</sup> This is so because in a democratic society the expectation is that members of the society cannot struggle to have access to justice, but if they fail as a result of high costs of litigation then that is not democracy. De Vos states that access to justice must be realised by all individuals despite their status, regardless of how formal or informal this could be achieved.<sup>97</sup> Delivery of justice is achieved through judicial processes and through other processes available in the realm of the justice system.<sup>98</sup>

ADR promotes access to justice for low-income consumers to enable them to have their disputes resolved which would otherwise never see court.<sup>99</sup> The distinction between litigation and ADR is that, the idea with the former is to enforce rights, while in the latter rights are not of primary concern but rather the meeting of competing interests which assures access to justice.<sup>100</sup> The interesting thing about ADR is that it potentially produces results that are satisfactory to both parties, unlike the litigious approach that results in a win-lose situation. ADR advocates a joining of ideas to solve the problem together without any party having to suffer a loss. Alternative dispute resolution involves compromise but at the same time produces satisfactory results for the parties involved. It has been widely acknowledged that ADR procedures are valid approaches to resolve even significant legal disputes and are used to resolve a larger number of disputes than disputes settled through litigation.<sup>101</sup> These procedures are not only intended to remedy the insufficiencies presented by litigation but they are also flexible in many aspects.<sup>102</sup> They are a consensus-based approach and thus allow parties to communicate instead of being fighting opponents — this is useful to maintain relationships.<sup>103</sup>

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<sup>94</sup> Pretorius op cit note 76 at 2.

<sup>95</sup> Ibid.

<sup>96</sup> Cappelletti op cit note 92 at 287.

<sup>97</sup> WR De Vos „Alternative Dispute Resolution from an Access-to-justice Perspective (193) *TSAR*156.

<sup>98</sup> NA Welsh „The Place of Court-Connected Mediation in a Democratic Justice System“ (2005) 117.

<sup>99</sup> Micklitz op cit note 53 at 512.

<sup>100</sup> Capelletti op cit note 92 at 287.

<sup>101</sup> LR Lowry „Introduction: Alternative Dispute Resolution 2 *Faulkner Law Rev* (2010-2011) 217.

<sup>102</sup> Micklitz op cit note 54 at 512.

<sup>103</sup> Ibid.

There has been a substantial on-going development of ADR globally — even in the area of consumer protection. Dispute resolution encompasses different processes and in these, decision-making may involve parties to the dispute, adjudication by third parties or adjudication by a public authority.<sup>104</sup> In order to get the desired results, the most appropriate process should be designed for a particular dispute and the parties involved.<sup>105</sup> These are mediation, negotiation, arbitration and litigation respectively, being the primary methods of dispute resolution.<sup>106</sup>

## **2.3 PRIMARY DISPUTE RESOLUTION MECHANISMS**

### **2.3.1 Litigation - consumer protection litigation**

Litigation, like any dispute resolution process, is resorted to invariably by parties in dispute. It is also used to resolve consumer claims which can be done either in the Magistrates' Courts or in the High Courts. In litigation process courts impose binding decisions in the form of court orders on disputants and which attract penalties from the court if they are not complied with by the parties involved in a dispute.<sup>107</sup> Courts procedures are formal and have to be taken seriously by the parties involved. In order for consumers to have access to courts of law they must initiate the proceedings either by themselves or the assistance of lawyers.<sup>108</sup> It is generally assumed that consumers know and understand their rights and can take a case to court to enforce such rights but it is not always the case.<sup>109</sup> Consumers hardly go there because of a number of factors which include high legal fees while their claims may involve small amounts of money compared to the legal fees; the formalities involved is also one of these factors.<sup>110</sup> The concept of a „loser pays“ also deters consumers from approaching courts of law.<sup>111</sup>

According to McQuoid-Mason, this attitude that consumers have towards the courts of law is reflected in the high rate of default judgements or consent to judgements that are being taken against consumers in civil judgements in South

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<sup>104</sup> Pretorius op cit note 76 at 3.

<sup>105</sup> Ibid at 1.

<sup>106</sup> Ibid at 3.

<sup>107</sup> Boule op cit note 83 at 131.

<sup>108</sup> Ought op cit note 65 at 73.

<sup>109</sup> Ibid.

<sup>110</sup> Micklitz op cit note 54 at 503.

<sup>111</sup> Ibid at 504.

Africa involving debts — the failure to defend may not be due to the fact that the consumer is at fault.<sup>112</sup> Despite litigation being expensive and too complex, it is sometimes necessary for consumer protection to bring about a change within the marketplace or to deter the bad practices that might be available amongst the sellers.<sup>113</sup>

In most cases consumers are individuals with little or no money at all and mostly willing to settle the matter for even less than what they may be entitled.<sup>114</sup> But defendants are the big companies with financial resources and do not readily settle the matters.<sup>115</sup> However, there are times when the companies may want to settle the matter — this is with regard to small claims and only when the consumer shows the seriousness about going to court. In the absence of any step taken by the consumer, they ignore consumers as they know that they will not have time, money or even ability to do anything.<sup>116</sup> There have been different methods introduced in different jurisdictions in an effort to remedy harsh litigation costs to enable the consumers to have access to justice. They range from class action, small court procedures to legal aid services.

### **2.3.2 Legal aid**

Legal aid is a form of financial assistance provided by government to litigants with low-income who as a result cannot afford the litigation costs. Legal aid services are available in most jurisdictions and even consumers may qualify for legal aid depending on their income. Legal aid has been established in an effort to assist low-income earners to have access to justice as it was observed that it would be senseless to advocate that all people have equal access to justice when others cannot secure services of a lawyer due to lack of funds.<sup>117</sup> However, before the consumers can get the legal aid services they have to be assessed if they qualify and the application by a consumer for legal aid may still be rejected on the basis that he or she has sufficient funds to pay for litigation costs.<sup>118</sup> In the case where the consumer qualifies for legal aid he or she may still be required to contribute a certain amount of money

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<sup>112</sup> McQuoid-Mason op cit note 21 at 307.

<sup>113</sup> A Morrison „Role of Litigation in consumer protection“ (1970) Vol. 50 *Oregon Law Review*.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Morrison op cit note 113.

<sup>117</sup> Oughton op cit note 65 at 69.

<sup>118</sup> Ibid at 70.

depending on the income he or she receives.<sup>119</sup> In order to ascertain if the consumer should be provided with legal aid, the merit of the claim is also assessed and this includes the significance of the claim, that is, whether the consumer would gain any advantage by bringing proceedings.<sup>120</sup> In this way, the availability of legal aid is very limited for consumers and it is not easy for consumers to get legal aid services because most of the consumers' claims are small.

### 2.3.3 Class actions and public interest actions

These days, products are processed in large quantities, distributed in a like manner and there is mass consumption. There is a possibility of defects in certain products which might injure a large number of people who would have used the products.<sup>121</sup> Consumers may suffer small injuries individually that would not rationalise the expense of a single legal suit if brought by a single person yet the injury is huge collectively.<sup>122</sup> In a situation like that all injured persons are permitted to institute a legal suit as a class of which they would not be granted relief when a claim was pursued by individuals.<sup>123</sup>

It is worth noting that class actions are common in the US, Australia, Canada,<sup>124</sup> South Africa<sup>125</sup> and some of the EU member states.<sup>126</sup> In the absence of class-action suits consumers with smaller injuries would not have access to justice and thus there would be an infringement of their rights. This was indicated in the case of *Gilbert v. Canadian Imperial Banks of Commerce*<sup>127</sup> where the court allowed a class action suit on the basis of the small amount of money that was in dispute. The court stated that the amounts of the individual members to the class action in a dispute was fairly trivial and the class action brought was clearly for the purposes of advancing access to justice and saving judicial costs.<sup>128</sup> The primary purpose of class action is to help the litigant with a small claim and to assist all the affected persons to recover and not only the plaintiff. Class-actions have proved to be effective as an

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<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> LC Kirkpatrick „Consumer Class Litigation“ (1970-1971) 50 *Or. Law Review* 21.

<sup>122</sup> Donoghue op cit note 14 at 460.

<sup>123</sup> Kirkpatrick op cit note 121 at 21.

<sup>124</sup> Micklitz op cit note 54 at 526.

<sup>125</sup> Section of the consumer Protection Act 68 of 2008.

<sup>126</sup> OECD op cit note 74 at 30.

<sup>127</sup> *Gilbert v. Canadian Imperial Banks of Commerce* (2004) 3 *CPC*.

<sup>128</sup> Ramsay op cit note 16 at 271.

appropriate remedy for consumers.<sup>129</sup> In a Canadian case<sup>130</sup> McLachlin CJ identified three advantages of class action namely:

Firstly, combining individual similar actions avoids an unnecessary duplication of assessing the facts and analysing the legal issues and thereby saves court time.<sup>131</sup> Also, this is seen as a way of reducing costs of litigation for plaintiffs who will share the burden of litigation costs and the defendant companies will have to deal with the disputed claims only once as all the affected parties would have been joined.<sup>132</sup>

Secondly, dividing litigation costs amongst a large group of plaintiffs helps to promote access to justice by making the prosecution of the claims less costly which would otherwise be too pricey if prosecuted by individual litigant.<sup>133</sup> Class actions open doors to justice which would otherwise never open for some consumers despite having strong claims against the companies; by distributing the costs of litigation ensures that wrongful conduct is brought to justice.<sup>134</sup>

Lastly, class actions ensure that justice is served and that the companies become responsible and accountable to the public.<sup>135</sup> Thus, it decreases costs of litigation and works as a deterrence to potential defendant companies which they would normally ignore consumers assuming that minor wrongful conducts to individual consumers would not result into litigation.<sup>136</sup>

Class actions may be an ideal approach to consumers' claims — particularly because of the reduction of costs of litigation. Unfortunately, it is not in every situation that they are relevant and necessary, and as a result the poor consumer is left alone to pursue his or her claim but is deterred by costs of litigation, as discussed earlier. There were criticisms levelled against class actions in Europe that the discovery of documents and contingency fees used in class action were regarded as against the due process of law principle.<sup>137</sup> Ramsay states that class actions are not easy to organise administratively by the courts and may even stir unnecessary

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<sup>129</sup> Ibid.

<sup>130</sup> *Western Canadian Shopping Centres Inc. v Dutton* [2001] 2 SCR 534.

<sup>131</sup> *Western Canadian Shopping Centres Inc. v Dutton supra*

<sup>132</sup> *Supra*

<sup>133</sup> *Supra*

<sup>134</sup> *Supra*

<sup>135</sup> *Supra*

<sup>136</sup> *Supra*

<sup>137</sup> Micklitz op cit note 54 at 526.

litigation which can cause bad publicity for companies.<sup>138</sup> As mentioned earlier that class actions are only common in a few jurisdictions, which indicates that they are not easy to establish particularly within developing states. Nevertheless this is an interesting approach to deal with consumer disputes in particular where there are widespread defects, affecting multiple consumers.

### 2.3.4 Small Claims Procedures

Small claims procedures came as a response to the challenges faced by consumers with regard to taking their claims to court.<sup>139</sup> These procedures were meant for consumers too in order to reduce the costs of suit and formalities involved in court legal proceedings.<sup>140</sup> They are specifically meant for disputes that are below a certain threshold and are meant to be quicker and cheaper with less formality compared to litigation, but they are not only for consumers.<sup>141</sup> However, these procedures have been criticised by some scholars on the basis that although they were established to assist consumers, statistics indicate that it is only a small number of consumers that actually take their claims to small claims courts. They are largely used by businesses as a debt collection mechanism against the consumers.<sup>142</sup> Another issue that seemed to be problematic was with regard to the presiding officers; while the system is expected to be informal they are not divorced from the attitude they use in formal courts by insisting on strict rules and formality.<sup>143</sup>

Also, lack of information to consumers on how the procedure works and the enforcement of judgements seemed to be some of the issues that consumers complained about.<sup>144</sup> The problem of spreading information is a hindrance to the success of small claims in some jurisdictions.<sup>145</sup> The only thing that can resolve this hurdle is to print detailed pamphlets about the operations of small claims procedures by government to be placed at public places where most people can have access. However, this problem seems not to be the case in South Africa — the procedures have been welcomed. McQuoid-Mason states that the establishment of small claims

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<sup>138</sup> Ramsay op cit note 16 at 263

<sup>139</sup> Ought op cit note 65 at 73.

<sup>140</sup> Ibid 73

<sup>141</sup> Micklitz op cit note 54 at 503.

<sup>142</sup> Oughton op cit note 65 at 75

<sup>143</sup> Ibid at 76.

<sup>144</sup> Ibid.

<sup>145</sup> Micklitz op cit note 54 at 499.

courts in South Africa have proven to be successful.<sup>146</sup> The most significant aspect of the small claims in South Africa was to prohibit companies from bringing claims against consumers,<sup>147</sup> as this has made the use of the small claims court ineffective in other jurisdictions. Lastly, it appears that legal representation of litigants is not prohibited<sup>148</sup>; lawyers may contribute towards the failure of these procedures. Experience suggests that although lawyers are the core actors in the legal field, there are circumstances where they are not needed because they may cause the procedure or the system in question to fail. Put differently, lawyers can use technical objections even where it is not necessary and cause certain procedures to malfunction or not to yield the anticipated results.

## 2.4 MEDIATION

Traditionally the understanding has been that disputes can be resolved through litigation or pre-trial conferences held by lawyers representing parties.<sup>149</sup> But, there has also been some observation that not all the disputes are resolved through litigation by courts.<sup>150</sup> This is the case with consumer claims which have resulted in a number of procedures being developed in an effort to address the consumers' claims through alternatives to litigation. Mediation is one of the alternatives. It has been defined as an additional dimension of negotiation which employs the services of an impartial third party, acceptable to the disputants to assist them in dealing with their dispute to reach agreement if possible.<sup>151</sup> The decision-making remains with the parties to the dispute and the mediator does not make a decision.<sup>152</sup> Thus it encourages parties to participate to resolve their own issues and decide what suits them and their interests.<sup>153</sup>

Further, mediation is voluntary, that is, the disputants should be willing to enter into mediation in an attempt to reach agreement.<sup>154</sup> The mediator's contribution here is vital to assist the parties to get to the bottom of the problem, to understand the

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<sup>146</sup> McQuoid-Mason op cit note 21 at 310.

<sup>147</sup> Ibid.

<sup>148</sup> Oughton op cit note 65 at 76. See also McQuoid-Mason op cit note 21 at 310.

<sup>149</sup> Oughton op cit note 65 at 76.

<sup>150</sup> EH Steel „Two approaches to Contemporary Dispute Behaviour and consumer problems“ (1976-1977)11 *Law & Society Review* 668.

<sup>151</sup> Pretorius op cit note 76 at 4.

<sup>152</sup> Ibid.

<sup>153</sup> Welsh op cit note 98 at 135.

<sup>154</sup> Pretorius op cit note 76 at 4.

interests of all the parties and to suggest various alternatives available which will assist to end the problem or part thereof.<sup>155</sup> Mediation is intended to engage little time and comparatively low costs for the parties. Parties have resorted to mediation for a number of conflicts including, but not limited, to personal and family matters, industrial disputes, national and international political conflicts, commercial and environmental disputes and has produced good results.<sup>156</sup>

Mediation has been greatly welcomed even by courts to the extent that they encourage parties to mediate cases before they can approach the court.<sup>157</sup> The courts in United Kingdom<sup>158</sup> and South Africa frown upon counsel who fail to advise their clients to consider mediation before resorting to litigation. This was illustrated clearly in the case of *MB v. NB*<sup>159</sup> where the court showed its dissatisfaction with attorneys for having failed to advise their clients to go to mediation. This case involved the annulment of marriage and other ancillary prayers — the court had this to say on the benefits of mediation:

„Mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have been trained in the process. The success of the process lies in its very nature.“<sup>160</sup>

This is one of the cases that would have been disposed-off immediately if it was referred to mediation if parties had been properly advised by their attorneys on benefits of mediation. The reason being that parties had already agreed on the main issues but contesting issues that were not that material which would have been dealt with in mediation.

Also, in the case of *Gluckman v. Chieft & another (unreported)* the South African High Court in Johannesburg ordered the parties to go for mediation concerning the issues that were in dispute.<sup>161</sup> The court went further to appoint a mediator, prescribed the time frame within which the mediation was to be concluded

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<sup>155</sup> AP Ordovery et al *Alternatives to Litigation Mediation, Arbitration and the Art of Dispute Resolution* (1993) 6.

<sup>156</sup> Pretorius op cit note 76 at 40.

<sup>157</sup> Brand op cit note 86 at 596.

<sup>158</sup> G Woodroffe et al *Woodroffe and Lowe's Consumer Law and Practice* (2010) 210.

<sup>159</sup> *MB v. NB* 2010 (3) SA 220.

<sup>160</sup> *Supra*.

<sup>161</sup> Brand op cit note 86 at 596.

and to pronounce itself on the issues of costs of mediation.<sup>162</sup> These two cases demonstrate how highly some courts regard mediation — it is because the courts understand the importance of mediation and the fact that it relieves the workload faced by the courts. Some writers argue that mediation can also be resorted to in health care disputes to heal the emotions of a patient.<sup>163</sup> Boulle and Rycroft have identified different uses of mediation being to define problems or disputes, to settle disputes, to manage conflict, to negotiate contracts, to formulate policy and to prevent conflict, the list is non-exhaustive.<sup>164</sup> These uses will be briefly discussed here and the distinctions will be made between certain uses.

The use of mediation to define problems clarifies the issues that are in dispute and those that are not in dispute, or identifies the extent of the conflict — this is referred to as scoping.<sup>165</sup> This kind of mediation is usually invoked in massive disputes including organisational or environmental issues and the benefit here is that mediation allows parties to outline the problem with the knowledge that there will be not forced to compromise on their rights or interests and be coerced into settlement.<sup>166</sup>

Mediation can also be used to settle the disputes and this one is known as dispute settlement mediation.<sup>167</sup> This is where two or more parties dispute over competing rights, interests, principles or processes, and mediation is invoked to end the dispute by the joint decision that will be arrived at by the parties.<sup>168</sup> This kind of mediation is used commonly in family disputes.

The use of mediation can also be employed to manage the on-going conflict even when it is clear that the conflict will still continue.<sup>169</sup> This kind of mediation helps to bring the conflict under control by introducing some structures that will regulate interaction between the conflicting parties, whilst still exploring other

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<sup>162</sup> Ibid.

<sup>163</sup> M Botes „Mediation: A perfect solution to health care disputes“ April 2015 South African Attorney’s Journal.

<sup>164</sup> Boulle et al op cit note 90 at 11-13.

<sup>165</sup> Boulle op cit note 83 at 18.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Boulle et al op cit note 90 at 11.

<sup>169</sup> Boulle op cit note 83 at 19.

avenues that will have a long term impact in dealing with the conflict.<sup>170</sup> It is known as conflict management mediation or facilitation.<sup>171</sup>

From the above discussed uses of mediation each has its distinguishing factor. Scoping mediation only examines the issues in dispute and the extent of the problem so that when the dispute is referred to other body that will ultimately resolve the dispute it will know exactly where the problem lies and to what level is the problem. Dispute settlement mediation aims at bringing to an end the dispute between conflicting interests by assisting disputants to reach a joint decision to their conflict. Lastly, conflict management mediation contains the conflict and comes up with some structures that will assist the parties in a dispute in their interaction. The distinction is meant to clarify the confusion which exists even to some lawyers — normally mediation to certain individuals means the process that is meant to end a dispute or conflict — they fail to understand that mediation can be used for different purposes.

In negotiating contracts parties can also resort to the use of mediation and here the mediator assists parties in negotiating the contract by ascertaining interests and priorities involved.<sup>172</sup> The mediator also assists to facilitate the whole transaction of negotiating step-by-step until the agreement is reached.<sup>173</sup> This kind of mediation is applied where there is no conflict or dispute but it is used to guide negotiating parties so as to avoid any conflict that might arise during the process of negotiating and it is known as transactional mediation.<sup>174</sup> Mostly it is used when negotiating big business transactions like mergers and acquisitions of companies, it can still feature even in small transactions like pre-nuptial negotiations.<sup>175</sup>

The use of mediation is also applied in the formulation of policy by the public body or regulatory agency in order to conclude standards and procedures into regulations or rules.<sup>176</sup> This process enables affected parties and concerned members of the public in the formulation of the policy to give their input and also deliberate on the matter and this mediation is referred to as policy-making mediation.<sup>177</sup> The last

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<sup>170</sup> Ibid 20.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid

<sup>173</sup> Ibid.

<sup>174</sup> Ibid at 20.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid at 21.

<sup>177</sup> Ibid.

two forms of mediation serve an almost similar purpose; though they are used in different situations — they have a preventive element of the dispute.<sup>178</sup> In general terms such mediation is referred to as preventative mediation and it is used to help the parties to anticipate some challenges so that they can come up with strategies of solving those problems when they arise.<sup>179</sup>

In a dispute it is vital to determine the most appropriate dispute resolution taking into account the nature of the dispute and the parties involved. There are different factors that can help to determine the appropriate method suitable for a particular dispute. The suitability of the dispute resolution process is determined by its techniques and goals that are able to meet the requirements of the parties in a particular situation.<sup>180</sup> For example, before mediation can be resorted to it has to be determined whether it will likely produce the desired results, being to reach settlement and to achieve some of the other goals that it was aimed to achieve. There are different views with regard to the use of mediation, that it will not be suitable if there is inequality between the parties in dispute or where there is only one right issue involved in a dispute.<sup>181</sup> Some of these factors that can assist to determine whether mediation will be appropriate are discussed below.

Where the conflict between the parties is moderate, mediation can be an option because parties are calm and not hostile; therefore they are able to communicate to each other and to make the decision.<sup>182</sup> Also, in order for mediation to work both parties must be committed to achieving a negotiated settlement, that is, they must acknowledge the sincerity of mediation and undertake to contribute to the decision-making.<sup>183</sup> It is argued that the more the parties show their commitment in the whole process of mediation, the more likely it becomes that they will react well to the facilitation of the mediation.<sup>184</sup> The parties' legal advisers must share the same commitment.<sup>185</sup>

It can be argued that, commitment to negotiate settlement from the legal advisers plays a crucial part because legal advisers have a better knowledge and

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<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid at 71.

<sup>181</sup> Boulle et al op cit note 90 at 71.

<sup>182</sup> Ibid at 73.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid.

<sup>185</sup> Ibid.

understanding of how the legal system works. Armed with full facts of their clients' cases, they can give a better advice in relation to the appropriate dispute resolution. There has been an observation that at times lawyers will not recommend mediation even when it is apparent that it would work to resolve the dispute for the simple reason that they would not be able to make money they had anticipated if the dispute is resolved through litigation. Rycroft states that it is a common practice in the US and UK in divorce proceedings for the parties to enter into an agreement with their legal representatives to try to reach a settlement agreement in order to meet the parties' interests, needs and priorities and not to rush to litigation.<sup>186</sup>

Continuity of a relationship between the parties is another factor that is looked at to determine if mediation is appropriate in a given case where the parties will not be only focused on the end result of their claim but also on how it was arrived at.<sup>187</sup> This can be well illustrated with a doctor-patient relationship. The patient will need the doctor's services in future and they have to preserve that relationship.<sup>188</sup> The best way to deal with a dispute between these two parties is mediation. Lastly, where parties to the dispute want confidentiality in handling their dispute mediation is recommended.<sup>189</sup> Here mediation is an option if the parties want to keep their integrity or the integrity of the company. Health care disputes can be well handled by mediation to preserve the doctor's reputation, because if the dispute goes for trial the doctor's integrity and future will be at stake.<sup>190</sup> Mediation should be also encouraged mostly in matrimonial disputes (though integrity is not the issue) but the issues that are normally raised in matrimonial disputes are just too sensitive and deserve a particular treatment to avoid parties washing their dirty linen in public. The list on when mediation is appropriate is not exhaustive but the most important aspect is to cater for the interests and priorities of the parties.

There are also circumstances where mediation is not an option to resolve a dispute and this can be in a situation where the dispute is purely a legal question and parties want the court to interpret either the statute or their contract.<sup>191</sup> Again, where a remedy to the dispute can only be provided by the court then mediation is

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<sup>186</sup> Rycroft op cit note 55 at 3.

<sup>187</sup> Boulle et al op cit note 90 at 73.

<sup>188</sup> Chamisa op cit note 47 at 57.

<sup>189</sup> Boulle et al op cit note 90 at 73

<sup>190</sup> Botes op cit note 155.

<sup>191</sup> Ibid at 74.

appropriate.<sup>192</sup> There are many factors involved in determining the non-suitability of the mediation process, and the list is considerable.

## 2.5 ARBITRATION

Arbitration falls squarely under the category of the dispute resolution where the determination is made by a third party.<sup>193</sup> Arbitration has been defined as an intervention by an impartial third party in a dispute in which the disputing parties consent to be heard by the said third party who will then make a determination with the purpose of resolving the dispute.<sup>194</sup> Arbitration can either be voluntary or compulsory and the parties may not have an option of choosing the arbitrator and how the arbitration process should be conducted in compulsory arbitration.<sup>195</sup> Voluntary arbitration takes place where the parties agree to use arbitration to resolve their dispute and may even agree on the qualifications or expertise of the arbitrator.<sup>196</sup> On the other hand compulsory arbitration takes place where the law or a prior agreement entered into by the parties exclusively provides for arbitration with regard to certain issues.<sup>197</sup> This is evident in most commercial contracts which contain a clause to the effect that the dispute that arises from the agreement in question be referred to arbitration. The same thing applies with the consumer contracts that are concluded nowadays between the consumers and the companies for the sale of goods and services as they include an arbitration clause.<sup>198</sup>

This clause is to the effect that parties to the contract surrender their rights to litigate rather to arbitrate when the dispute arises in their contract, it is known as arbitration clause<sup>199</sup> or “*Scott v Avery*” clause.<sup>200</sup> In addition, arbitration has been largely used to resolve labour disputes for a very long time and it is being resorted to increasingly to resolve business transactions disputes.<sup>201</sup> In commercial disputes, arbitration is widely used to resolve disputes including construction industry

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<sup>192</sup> Ibid.

<sup>193</sup> Pretorius op cit note 76 at 3.

<sup>194</sup> Ibid 76 at 93-94.

<sup>195</sup> Ibid 76 at 94.

<sup>196</sup> P Ramsdem *The Law of Arbitration: South African and International Arbitration* (2009) 7.

<sup>197</sup> Pretorius op cit note 76 at 5.

<sup>198</sup> JA Scarpino ‘Mandatory Arbitration of Consumer Disputes: A Proposal to Ease the Financial Burden on Low-Income Consumers’ (2002) 10 *Journal of Gender, Social Policy & the Law* 680.

<sup>199</sup> Ibid at 680.

<sup>200</sup> Woodroffe op cit note 158 at 210.

<sup>201</sup> Ordover op cit note 155 at 106.

disputes, consumer disputes, securities disputes and attorneys' fee disputes.<sup>202</sup> It is also used mostly to resolve international commercial disputes.<sup>203</sup>

There is a clear distinction between the mediator on the one hand and the arbitrator on the other hand. As opposed to the mediator, the arbitrator has the power to make a final and binding decision on the parties, though there are still some forms of arbitration where the decision of the arbitrator is just a recommendation or advisory which non-binding on the parties.<sup>204</sup> Ordover makes clear distinction between the functions of the mediator and the arbitrator; the latter listens with the intention of determining who is right and who is wrong between the parties and of course can ask clarifying questions.<sup>205</sup> The mediator's main purpose is to assist the parties to reconcile and reach agreement without considering who is right or wrong.<sup>206</sup>

As in court adjudication, in arbitration parties have to produce evidence and make their submissions to the arbitrator in order for her or him to make a determination.<sup>207</sup> However, there is still a differentiation between arbitration and court adjudication in that with the former there is more flexibility in the application of rules than in litigation.<sup>208</sup> Again, in commercial arbitration awards, by agreement with the parties, the arbitrator does not have to provide reasons on how the award was reached; however, this practice does not obtain in labour arbitration and international commercial arbitration where reasons for decisions are given.<sup>209</sup>

Furthermore, in private arbitration which is voluntary, parties jointly contribute to the payment of the arbitrator.<sup>210</sup> There are some theoretical advantages of arbitration that override the use litigation which are discussed below. They are said to be theoretical because in practical terms these advantages are not always completely realised and this will also be discussed later.<sup>211</sup> Arguably, arbitration is

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<sup>202</sup> SB Goldberg et al *Dispute Resolution Negotiation, Mediation and other processes* 2 ed (1992) 199.

<sup>203</sup> Ramsden op cit note 196 at 5.

<sup>204</sup> Pretorius op cit note 76 at 94. Mandatory or court-annexed arbitration is non-binding and parties are referred to this arbitration for certain types of cases. See Goldberg op cit note 202 at 199.

<sup>205</sup> Ordover op cit note 155 at 105.

<sup>206</sup> Ibid

<sup>207</sup> Goldberg op cit note 202 at 199.

<sup>208</sup> Ibid at 200.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

considered to resolve the dispute with more speed than court adjudication as arbitration can take as little as two to three months to resolve the dispute.<sup>212</sup>

Again, the arbitrator chosen must be the person with expertise in the area of the dispute involved and this can be an advantage as opposed to litigation where the judge has to rely on expert opinion for technical matters.<sup>213</sup> As a result of the expertise that the arbitrator has, there is some certainty that the arbitrator will make a well informed decision and this saves time and costs that may be incurred on the expert witness.<sup>214</sup> Finality, confidentiality and low costs are some of the advantages of arbitration — especially confidentiality as the hearings are conducted mostly in private away from public scrutiny.<sup>215</sup> Arbitration is not appealable unless the arbitration agreement by the parties provides otherwise<sup>216</sup> but the review power of the court remains to ensure procedural fairness.<sup>217</sup> The finality of the arbitral decision may be a disadvantage because it prevents the party who is not satisfied with the outcome from appealing the decision. It cannot be an advantage when the other party in a dispute feels that justice has not been done on his or her side and is denied an opportunity to proceed further to the superior courts. It is also argued that the parties' ability to choose the arbitrator has the potential of encouraging the arbitrators to reach for compromised decisions in an effort to please both parties with the hope that they will select them in a future case.<sup>218</sup>

Moreover, it is anticipated that arbitration should not consume as much time as court adjudication, but there is an argument that depending on the rules adopted and the kind of the arbitrator handling the matter, lawyers can still get their way with delaying tactics which will prolong the arbitration.<sup>219</sup> Stated otherwise, in the absence of appropriate rules and where the arbitrator is weak, lawyers can abuse the process with the delaying tactics. Pretorius asserts that in order for the arbitration process to be a success the most vital aspect that has to be taken care of is to select

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<sup>212</sup> Pretorius op cit note at 178.

<sup>213</sup> Ibid at 179.

<sup>214</sup> Ibid.

<sup>215</sup> Pretorius op cit note 76 at 179-200.

<sup>216</sup> Ibid at 200.

<sup>217</sup> Ramsden op cit note 196 at 5.

<sup>218</sup> Goldberg op cit note 202 at 201.

<sup>219</sup> Pretorius op cit note 76 at 178.

the arbitrator who is well conversant with the procedure and firm enough to be able to give directions in terms of the procedures to the parties.<sup>220</sup>

Lastly, the issue of the cost involved in arbitration has seen a lot of criticism in particular with consumer disputes. Consumers' contracts insert a pre-dispute arbitration clause of which some of the consumers may not be aware of or understand the meaning of the clause in question or its consequences.<sup>221</sup> In this kind of arbitration consumers have to contribute towards the costs of arbitration which may even be more than litigation costs, thus prohibiting consumers from pursuing their claims against companies.<sup>222</sup>

The good example could be the U.S case of *North American Vans Lines v. Collyer* which involved a consumer who had signed a contract with the moving appellant company and the consumer was not aware of the pre-arbitration clause.<sup>223</sup> The U.S Appeal Court dismissed the claims by the consumer that they could not afford arbitration costs and held that their defence was invalid to mandatory arbitration.<sup>224</sup> The consumer in this case had two options — either to pursue the claim and go to arbitration — which they could not afford or abandon the claim altogether, meaning a loss on their part.

Those who argue that arbitration interferes with the civil rights of consumers with low income and the less disadvantaged may well be justified.<sup>225</sup> Pre-dispute arbitration defeats the very purpose for which arbitration was introduced by merchants - being to engage the process that is cost effective and resolves disputes efficiently which suited their industry.<sup>226</sup> Another issue relates to the courts upholding the pre-arbitration clauses which force consumers to arbitrate even when circumstances are not conducive for consumers.<sup>227</sup> The critics of arbitration in consumer disputes rightfully pointed out that its application to consumers is beyond

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<sup>220</sup> Ibid at 181.

<sup>221</sup> Scarpino op cit note 198 at 681.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid at 692.

<sup>224</sup> Ibid at 693.

<sup>225</sup> Ibid at 688.

<sup>226</sup> Welsh op cit note 98 at 129.

<sup>227</sup> Scarpino op cit note 198 at 685.

the scope of what it was intended for being business contracts for companies as against companies.<sup>228</sup>

It is also argued that the fact that arbitrators are not duty bound to follow court precedent in their decisions poses a danger to consumers of losing cases to businesses because the arbitrator relies on her or his own opinion and experience.<sup>229</sup> In the light of this discussion this suggests that the justice system fails consumers in that it gives the arbitrator too much discretionary power to the prejudice of the disputing parties. The fact that the arbitrator is not bound to follow the court precedents is flawed, especially when that decision is not subject to appeal.

Judgements delivered by competent courts of law are appealable because there is an understanding that presiding officers can err on certain issues of law and this applies equally to arbitrators. Judicial systems may have to revisit arbitration law and procedures in order to ensure decisions which comply with existing legal principles. There may also be a need to deal with standard arbitration clauses as far as they relate to consumers because it inhibits the delivery of justice. The same observation was made by the Supreme Court of the US in the early case of *Wilko v. Swan* 346 U.S 427 (1953).<sup>230</sup> The court held that the parties should not go for arbitration after noting the problems that are inherent with arbitration.<sup>231</sup> The court showed its apprehension on the issues that in statutory arbitration arbitrators have powers to make legal findings without legal training and that the arbitrators are not mandated to make a proper record of proceedings and even to give reasons for their decisions.<sup>232</sup> On this issue, Scarpino notes with concern that many consumers may be vulnerable as some arbitrators only have background in business and not legal training, making it difficult for them to make informed decisions on complex legal matters.<sup>233</sup>

However, the Supreme Court in the much later U.S case of *Mitsubishi MotorsIncorp v.Soler Chrysler-Plumouth* 473 U.S 614 (1985) reached a different decision, and upheld the arbitration agreement on antitrust disputes.<sup>234</sup> This was confirmed by the court in the U.S case of *Rodriguez De Quijas v. Shearson/American*

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<sup>228</sup> Ibid.

<sup>229</sup> Ibid at 686.

<sup>230</sup> Goldberg op cit note 202 at 210.

<sup>231</sup> Ibid.

<sup>232</sup> Ibid.

<sup>233</sup> Scarpino op cit note 198 at 686.

<sup>234</sup> Golberg op cit note 202 at 211.

*Express, Inc.*, 490 U.S 477 (1989) overruling *Wilko*.<sup>235</sup> In essence the court was overlooking potential prejudice consumers were suffering as a result of the arbitration clauses in their transactions with businesses. In fact the court observed that despite arbitrators having not been trained in law they are able to deliver desired results of dealing with legal problems in commercial practices.<sup>236</sup> There is a trade-off between a costly and time-consuming litigation system and a cheaper, quicker, more robust system of arbitration. Neither system is perfect, but litigation is certainly not the answer for small consumer claims.

## 2.6 ONLINE DISPUTE RESOLUTION

It was mentioned in Chapter one that one of the purposes of this study is to investigate the appropriate dispute resolution mechanisms for consumers that can be recommended for Lesotho bearing in mind the nature of consumers in that country. Online dispute resolution (ODR) is probably not one of them; however, it is one of the dispute resolution processes that are available for consumers and it will be discussed briefly here. With the modern trend consumers are able to make purchases from the use of internet,<sup>237</sup> and they can still encounter challenges with shoddy sellers. Consumer disputes over internet purchases have grown at a high rate and consumers try to find ways in which those disputes can be resolved with speed, efficiency and convenience.<sup>238</sup> As a result experts came up with the idea of ODR as the ideal way of handling consumer online disputes.<sup>239</sup> It has been defined as a mechanism designed to provide for accessible redress for consumers in relation to online disputes as well as offline disputes.<sup>240</sup>

The ODR services are provided by both private organisations, including consumer associations and government agencies especially for B2C.<sup>241</sup> They offer full-fledged ADR mechanisms ranging from online negotiation, mediation and

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<sup>235</sup> Goldberg op cit note 202 at 211.

<sup>236</sup> Ibid.

<sup>237</sup> J Sackin Online Dispute Resolution with China: Advantageous, But at What Cost? 12 (2010) *Cardozo J. of Conflict Resolution* 246.

<sup>238</sup> LM Ponte „Throwing Bad Money after Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper“ (2001) 3 *Tul. J. Tech & Intell. Prop.* 56.

<sup>239</sup> Ibid.

<sup>240</sup> Ramsay op cit note 16 at 124.

<sup>241</sup> MM Shannon „keep it online: The Hague Convention and the Need for online Alternative Dispute Resolution in International Business-to- Consumer E-Commerce“ (2002) *B.U. Int'l L.J* 151.

arbitration to resolve disputes arising from online transactions.<sup>242</sup> As is the case with ADR, ODR stressed the inefficiency or unavailability of traditional dispute resolution processes.<sup>243</sup> Experience suggests that the use of technology can be complicated which might be the same with the use of ODR for consumers. Notwithstanding, some scholars assert that there are success stories on the issue of online dispute resolution and these have been accepted by the World Intellectual Property Organisation (WIPO) arbitration and mediation centre and SquareTrade which have resolved a substantial number of consumer online disputes through different forums.<sup>244</sup> It is worth noting that ODR is prevalent in most developed jurisdictions such as Australia and the US and some parts of the European community. The challenges that have been observed with ODR are that these systems are localised, that is, they do not work with cross-border transactions because of different legal systems involved in different jurisdictions.<sup>245</sup>

Ponte argues that ODR cannot help to achieve dispute resolution fast, efficiently, fairly and effectively unless certain hurdles have been dealt with.<sup>246</sup> As it stands, there are no set standards and consistent practices that are used for online dispute resolution and therefore consumers do not have the assurance that they will get a good standard of conflict resolution that they would otherwise expect.<sup>247</sup> Another issue is with regard to enforcement of the resolutions arrived at online, which potentially will cost consumers a lot of money.<sup>248</sup> Enforcement may not be possible because the decision is made online and to enforce the decision is another issue which would need certain steps to be taken to ensure compliance; to enforce the decision will need the backing of a judicial system. It is argued that the solution to the problem of enforcement solely lies in the hands of the international community through their state agencies charged with the mandate of cross-border transactions on

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<sup>242</sup> Ibid.

<sup>243</sup> C Hodges at el Consumer ADR in Europe: Civil Justice System note (2012) 359.

<sup>244</sup> GP Callies „Online Dispute Resolution: Consumer Redress in a Global Market Place“ (2006) 651-653. See also, Ramsay about statistics of online dispute resolutions made, 125; See also Hodges op cit note 234 at 360-361

<sup>245</sup> Callies op cit note 244 at 659.

<sup>246</sup> Ponte op cit note 238 at 86.

<sup>247</sup> Ibid at 87. See K Alboukrek „Adapting to a New World of E-Commerce: The Need for Uniform Consumer Protection in the International Electronic Marketplace (2003) 35 Geo. Wash. Int'l L. Rev. 425.

<sup>248</sup> Ibid at 88. See also Alboukrek op cit note 247 at 439-40.

international trade.<sup>249</sup> This method of dispute resolution seems to be very appealing for consumers so that they are at liberty to do purchases wherever they desire without any limitations. In effect most of the consumers are already engaged in e-commerce though they do not have opportunities presented by the online dispute resolution but just hope that the transactions they engage into will succeed.<sup>250</sup>

## 2.7 OMBUDSMAN

As indicated earlier that some of the consumers are individuals with a low-income and yet cannot be marginalised from justice because of their financial status. Some of the ADR processes discussed above seem to be appealing because of the qualities they possess. These qualities include the speed within which disputes are settled and effectiveness but cannot be ideal dispute resolutions for consumers because of the high costs they carry. An ombudsman is another form of dispute resolution and can work well for consumers if are properly implemented. The services of ombudsmen are available in most jurisdictions including in the least developed jurisdictions and are established by government. Ombudsmen have produced tremendous results to redress consumer grievances in different sectors.<sup>251</sup>

The roles of ombudsman differ from jurisdiction to jurisdiction; in some jurisdictions their role is to identify a neutral third party to handle the disputes between consumers and businesses under the auspices of ombudsman schemes.<sup>252</sup> The Ombudsmen schemes range from financial Ombudsman services, communication Ombudsman, energy Ombudsman, pension Ombudsman, Consumer Goods Services Ombudsman and others. The Consumer Goods and Services Ombudsman is available in South Africa. This Scheme operates in terms of the Consumer Protection Act 68 of 2008 as an accredited ADR scheme.<sup>253</sup> The functions and powers of the Consumer Goods and Services Ombudsman are provided for in the Consumer Goods and Services Industry Code of Conduct of 2015, and they will be discussed in detail in the next chapter.

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<sup>249</sup> Ibid.

<sup>250</sup> McGregor op cit note 7 at 173.

<sup>251</sup> Ramsay op cit note 16 at 448.

<sup>252</sup> Macklitz op cit note 54 at 513.

<sup>253</sup> Government Gazette No. 38637 The Consumer Goods and Services Ombud (March 2015).

Moreover, a great number of disputes are resolved at an early stage between the disputing parties.<sup>254</sup> The services of ombudsman are usually free and the decisions are binding on businesses.<sup>255</sup> Again, in developed jurisdictions consumers are not bound to go physically to lay a complaint, any mode of communication is welcome and this includes telephone calls.<sup>256</sup> The purpose is to cut costs as much as possible - which could be travelling costs for consumers to the ombudsman offices. This also gives consumers confidence to know that their rights cannot just be trampled by businesses and even by the judicial system when they want to access justice. Ombudsman decisions are made on the basis of fairness which is the underlying character in order to deliver justice.<sup>257</sup> The ombudsmen possess discretionary powers in the exercise of their functions which are based on transparent principles in order to cater for the inequality of bargaining powers between the parties.<sup>258</sup> The purpose of the services of the ombudsman is to deal with consumer complaints with simplicity in order to achieve the desired results speedily and appropriately.<sup>259</sup>

Further, an ombudsman encourages businesses and consumers to exhaust internal remedies that are available within individual businesses before the office of the ombudsman could step in to resolve the complaint.<sup>260</sup> This makes sense otherwise the office would be flooded with claims against businesses even where the claim could have been dealt with in less than an hour internally. Generally, ombudsmen do not receive a complaint where legal proceedings are already instituted or pending.<sup>261</sup> Where an ombudsman finds that there is a substance in a consumer's claim the ombudsman's powers are not only limited to providing a remedy to the aggrieved consumer. The ombudsman is also mandated to make a follow up to ensure that the services in the sector involved are improved basically by making recommendations on how to enhance the business practice.<sup>262</sup> Ombudsman's findings must be written and well-reasoned, considering all relevant factors that would help to make informed

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<sup>254</sup> Hodges op cit note 243 at 448.

<sup>255</sup> Macklitz op cit note 54 at 488.

<sup>256</sup> Hodges op cit note 243 at 270.

<sup>257</sup> Ramsay op cit note 16 at 450.

<sup>258</sup> Ibid.

<sup>259</sup> Hodges op cit note 243 at 270.

<sup>260</sup> Oughton op cit note 65 at 48.

<sup>261</sup> Ibid.

<sup>262</sup> Ibid.

decisions within a certain time frame.<sup>263</sup> These may include the codes of good practice of the industry involved, the relevant law and any other factor based on fairness and reasonableness.<sup>264</sup>

The powers of the ombudsman include, amongst others, to order compensation in the form of money where necessary to the complainant.<sup>265</sup> But this is not always the case with some of the ombudsmen as they do not provide for enforcement mechanisms of their decisions.<sup>266</sup> With the needs of some consumers in mind, there is a possibility that they might want to take some advantage of companies with the hope that they would be compensated. Some of the businesses are notorious with bad service and the supply of defective goods, and may only survive depending on the reasonableness of the ombudsman when they have not defaulted. The reason for the unavailability of enforcement mechanisms is that ombudsmen do not hold the same position as arbitrators whose decisions are binding on parties.<sup>267</sup> In practice many businesses do comply with the ombudsman's decision in order to keep a good name for the business because the ombudsman's annual report usually indicates that certain businesses failed to comply with the ruling made against them.<sup>268</sup>

Again, an ombudsman does not have to follow the formal rules of evidence as in the court system.<sup>269</sup> Some ombudsmen develop informal precedents for consistency in their findings.<sup>270</sup> This is a good practice which could be followed by other ombudsmen which could assist businesses to know what is consistently required of them in dealing with consumers. Though the enforcement mechanism here seems to be somehow lacking, generally the ombudsman scheme seems to be an interesting procedure. The fact that it is freely available can deter businesses from harassing consumers as they would not want any trouble or bad publicity.

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<sup>263</sup> Ramsay op cit note 16 at 450. See also Hodges op cit note 243 at 271.

<sup>264</sup> Ramsay op cit note 16 at 450.

<sup>265</sup> Ibid.

<sup>266</sup> Oughton op cit note 65 at 49.

<sup>267</sup> Ibid.

<sup>268</sup> Ibid.

<sup>269</sup> Ramsay op cit note 16 at 450.

<sup>270</sup> Ibid.

## 2.8 CRITICISM OF ADR.

A critique has been levelled against ADR processes in general that although disputants give consent to these processes they have the potential of undermining fundamental rights and encouraging people to compromise public standards.<sup>271</sup> It is argued that the parties whose dispute is resolved through mediation cannot be regarded as having received justice but as having achieved a private, confidential settlement of their dispute.<sup>272</sup> There is substance in this argument, *strict sensu*, in order for justice to have been delivered the wronged party should not have compromised anything but to receive what rightly belongs to him or her. However, the position is different with ADR as it seeks to reach compromise between the disputants without concluding that one party is wrong and the other is right.

Some of the critics of ADR argue that due to the confidential nature of these processes there is a potential of information loss because all the proceedings are kept private and even to track the information in question is not easy; the information is not stored and this is to the detriment of the public.<sup>273</sup> They argue that if ADR proceedings were not made in private this could help members of the public to get information relating to some of the crucial things that would not have been publicly known until they became a dispute.<sup>274</sup> It is also said that this hurdle causes a great prejudice to researchers as it deprives them of access to information in relation to legal procedures.<sup>275</sup> This can also be viewed as a hindrance to the development of both substantive law and procedural law relating to the court systems and ADR. If ADR is not done privately scholars would be able to make commentary on the application of the law by the presiding officers and make observation on what is lacking that would need to be improved.

Further, it is argued that, unlike litigation where judges would normally assist the legal representatives to structure their questions in the appropriate way, parties in private ADR are not assisted by the third party facilitating or presiding over their matter.<sup>276</sup> The argument here is that in legal proceedings there is always a party who

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<sup>271</sup> Pretorius op cit note 76 at 97.

<sup>272</sup> Ibid at 2.

<sup>273</sup> CA Carr & MR Jencks The Privatisation of Business and Commercial Dispute Resolution: A misguided Policy Decision (1999-2000) 88 *KY.L.J* 183

<sup>274</sup> Ibid.

<sup>275</sup> Ibid.

<sup>276</sup> Ibid.

possesses more knowledge or experience than the other and it is in that situation where judges would intervene on behalf of the other party to level the play field. Another argument advanced by some writers is that businesses resort to ADR as a substitute for litigation and this weakens the court system while these processes at the same time do not deliver the real justice.<sup>277</sup> While they acknowledge that other means are necessary to dispose of some disputes, at the same time they do not want to believe that that ADR is one those means they contemplate. With due respect this argument is one-sided as it fails to appreciate that it is not all people that are able to get to the court system because of the high costs of litigation and that it is not every dispute that can be resolved best through litigation.

Again, the nature of ADR proceedings and even the decisions made are unique and tailor-made such that they do not create useful precedent like courts' decisions which can be used time and again. The nature of ADR can be seen as a hindrance to the development of law because of the absence of precedents for the resolved disputes. Precedents are established as a result of different cases that come before court on different issues of law. Disputes resolved through ADR processes are consensus-based and in other disputes resolved there are no reasons advanced for the decision made. Lastly, it is argued that though ADR is said to be voluntary (in particular mediation), this suggests that the parties willingly come to negotiation to resolve their disputes and this is often not the case.<sup>278</sup> In certain cases where there is a dispute things can become ugly without disputants talking to each other and to make them to come to the „table“ may not be an easy task.

## **2.9 CONCLUSION**

Notwithstanding all these arguments, it must always be remembered that access to justice is of paramount importance and it is the reason ADR is in existence - to help low-income earners and the less disadvantaged groups to have access to some form of justice rather than being denied justice altogether.<sup>279</sup> ADR mechanisms should be seen as potentially effective means that enable people to have access to justice. The

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<sup>277</sup> Ibid.

<sup>278</sup> RK Richardson „Alternative Dispute Resolution in Intellectual Property“ (2013) 44.

<sup>279</sup> Pretorius op cit note 76 at 97.

concept of access to justice is not based solely on making the court systems function properly but on broad based innovations that include alternatives to litigation.<sup>280</sup>

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<sup>280</sup> De Vos op cit note 97 at 158.

## CHAPTER THREE

### 3. ADR MECHANISMS IN CONSUMER PROTECTION IN SOUTH AFRICA

#### 3.1 INTRODUCTION

The Consumer Protection Act 68 of 2008<sup>281</sup> (CPA) is the main legislation in South Africa that offers protection for the rights of consumers. This piece of legislation also provides for different enforcement mechanisms for consumers to get redress for infringement of their rights. In this chapter a comparative study is made to investigate consumer protection in South Africa particularly ADR mechanisms in consumer disputes. This chapter briefly discusses consumer protection in South Africa as provided by the Consumer Protection Act. Consumer protection will also be looked at in terms of common law and other legislation that existed prior to the enactment of the CPA. However, the main focus of this chapter is to discuss the dispute resolution processes provided for in the CPA and other pieces of legislation that offer protection to consumers.

#### 3.2 SHORTCOMINGS OF COMPARATIVE LAW

As a methodology the comparison of laws is mainly functionalist in that it seeks to identify problems / causes of legal change and to replace an existing law or search for a „better“ law.<sup>282</sup> Comparative law attempts to assess which law offers the best solution to the problem. The method has a traditional deficiency in that, while comparing legal approaches, it neglects empirical factors which might explain the failure of a law in a particular setting, such as bad judges, slow courts, poor procedural law (factors acknowledged by the candidate).<sup>283</sup>

Legal transplants can also be cumbersome looking at the history and cultural baggage between the two legal systems.<sup>284</sup> To assume „functional equivalence“ is to suggest that problems should be solved in the same way in all jurisdictions, or to

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<sup>281</sup> Herein after referred to as CPA.

<sup>282</sup> OK Freund „On uses and misuses of comparative law“ (1974) 37 Mod LR 2.

<sup>283</sup> P Legrand „The Impossibility of “Legal Transplants”“ (1997) 4 *Maastricht J of European & Comp L* 117-18.

<sup>284</sup> *Ibid* at 114.

assume that one jurisdiction's solution will achieve a better result elsewhere. One of the acknowledged difficulties of comparative law is that all too often there is the assumption that all societies have the same problems and assume that domestic legislation was enacted to deal with assumed shared problems.<sup>285</sup>

The aim of comparative study should be „to identify and define the individuality of each development, the characteristics which made the one conclude in a manner so different from that of the other“.<sup>286</sup> A mechanistic conception of function cannot explain the persistence of institutions that are either dysfunctional or serve no apparent function. Political will is a neglected aspect of comparative law.<sup>287</sup> Legislation that has been passed does not necessarily mean that it is enforced or effective.

### 3.3 OVERVIEW OF CONSUMER PROTECTION IN SOUTH AFRICA

#### 3.3.1 Common Law

Prior to the enactment of the CPA there was already law in place to give protection to consumers and this was done in terms of the common law and other pieces of legislation.<sup>288</sup> Some of the rights provided for in the CPA were already enforceable before the promulgation of CPA, including the right to return faulty products to the dealer and entitlement to the purchase price or part of it.<sup>289</sup> These were known as *aedilitian* remedies under common law.<sup>290</sup> Also, a number of common law principles were developed by courts with the intention of protecting consumers.

One of the principles is that when concluding a contract the terms must be in a contractual form<sup>291</sup> and this was enunciated in the British case of *Chapelton v. Barry Urban District Council*.<sup>292</sup> Another principle which was illustrated in the British case of *Olley v Marlborough Court Ltd*<sup>293</sup> is that the terms should be made prior to

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<sup>285</sup> Ibid at 118

<sup>286</sup> Ibid at 111.

<sup>287</sup> Freund op cit note 282 at 8 and 27.

<sup>288</sup> E De Stadler *Consumer Law Unlocked* (2013) 1.

<sup>289</sup> McQuoid-Mason note 21 at 51.

<sup>290</sup> Ibid. See also Tjachie Naude *The Consumer's Right to Safe, Good Quality Goods and the Implied Warranty of Quality Under Sections 55 and 56 of the Consumer Protection Act 68 of 2008* (2011) 23 SA Merc LJ 339.

<sup>291</sup> Ibid at 40.

<sup>292</sup> [1940] 1 All ER 356 (CA).

<sup>293</sup> [1949] 1 All ER 127 (CA).

concluding the contract or at the time of contracting.<sup>294</sup> The last principle is to the effect that these terms must sufficiently be brought to the attention of the other party to the contract and this was illustrated in the case of *BokClothing Manufacturers (Pty) Ltd v Lady Land (Pty) Ltd*.<sup>295</sup> The first two cases were English decisions which were adopted in South African law in *BokClothing Manufacturers (Pty) Ltd v Lady Land (Pty) Ltd supra*.<sup>296</sup>

Further, the purpose of developing these principles was to protect consumers when entering into contracts with the suppliers because the courts noticed that consumers were weaker parties during the bargaining process.<sup>297</sup> These principles formulated through case law provided for the requirements that suppliers had to follow when contracting with suppliers.<sup>298</sup> Courts had noticed that while contracting with consumers, suppliers would impose some provisions in the contract that were oppressive to consumers and the parties were left on their own without any control of the situation.<sup>299</sup> Aronstam discusses these principles and the case law in which these principles were developed.<sup>300</sup> However, consumers were not sufficiently protected under common law which led to the promulgation of various statutes to protect consumers.<sup>301</sup>

### 3.3.2 Legislation

Alongside common law, there existed pieces of legislation which had aimed at protecting consumers. Amongst others was legislation that regulated the credit transactions made by consumers<sup>302</sup> and many other pieces of legislation which included Trade Practices Act 76 of 1976, Price Control Act 25 of 1964, and Dairy Industry Act of 1961.<sup>303</sup> Trade Practices Act and Price Control Act have been repealed by the CPA. The notable credit legislation include Hire-Purchase Act 36 of 1942 which was replaced by the Credit Agreements Act 75 of 1980, their purpose

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<sup>294</sup> McQuoid-Mason op cit note 21 at 41.

<sup>295</sup> 1982 (2) SA 565 (C).

<sup>296</sup> McQuoid-Mason op cit note 21 at 40.

<sup>297</sup> P Aronstam Consumer Protection, Freedom of Contract and the Law (1979) 26.

<sup>298</sup> Ibid.

<sup>299</sup> Ibid at 23.

<sup>300</sup> Ibid at 26.

<sup>301</sup> Ibid at 47.

<sup>302</sup> JM Otto *The National Credit Act Explained* (2006) 2.

<sup>303</sup> Aronstam op cit note 297 at 47.

was to protect consumers who entered into hire-purchase agreements.<sup>304</sup> They covered a few credit transactions and as trade developed, the legislation failed to address some of the issues that emerged.<sup>305</sup> As result, the National Credit Act<sup>306</sup> was promulgated to replace the above discussed piece of legislation and it is also aims to protect consumers.<sup>307</sup> This piece of legislation is very detailed and brought about new methods and procedures of protecting consumers who buy on credit.<sup>308</sup> Amongst others it has established and provided for different administrative bodies and quasi-judicial institutions such as National Credit Regulator,<sup>309</sup> National Consumer Tribunal<sup>310</sup>, Debt Counsellors and ADR agents. This Act empowers the Credit Regulator amongst others to promote informal dispute resolution between consumers and credit providers.<sup>311</sup> These other establishments will be discussed in the next paragraphs The National Credit Act is still operative today alongside the new consumer law.

Although South Africa did not have comprehensive legislation on consumer protection except for credit legislation, with the few pieces of legislation this indicates that the government was making some efforts of protecting consumers. The legislation that was in place offered some protection to consumers though it fell short of providing for the sufficient protection, however, the initiatives by government were there.<sup>312</sup> In protecting consumers the National Credit Act aims to prevent consumers from over-burdening themselves with debts while they had other commitments.<sup>313</sup> In order to provide for effective protection to consumers, the National Credit Act established different regulatory bodies and National Consumer Tribunal.<sup>314</sup> This point will be elaborated under the topic of dispute resolution hereunder.

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<sup>304</sup> Ottom op cit note 302 at 2.

<sup>305</sup> Ibid

<sup>306</sup> 34 of 2005.

<sup>307</sup> Ottom op cit note 302 at 2.

<sup>308</sup> Ibid.

<sup>309</sup> Section 12 of National Credit Act 34 of 2005.

<sup>310</sup> Section 26 of National Credit Act 34 of 2005.

<sup>311</sup> Section 15 of National Credit Act 34 of 2005.

<sup>312</sup> R Michel „Consumer Law Protection: A Development Guide“ May (2011) Media document available at [www.consumersinternational.org/media/709938/robert-michel.pptx](http://www.consumersinternational.org/media/709938/robert-michel.pptx) accessed on the 16 March 2015. This article states that among the African states South Africa is the most country which has progressed in consumer laws.

<sup>313</sup> Ottom op cit note 302 at 3.

<sup>314</sup> Ibid at 3.

### 3.3.3 Consumer Protection Act

The Consumer Protection Act (CPA) regulates the industry of consumer goods and services as other industries are already being regulated by their various legislation.<sup>315</sup> These are banking industry, pension fund, motor industry and insurance industry. The provisions of the Act also apply to the healthcare services.<sup>316</sup> The CPA is a very detailed piece of legislation providing for consumer protection and also provides for effective dispute mechanisms to redress consumers' claims. De Stadler correctly points out that CPA is like the constitution of consumer law because it also applies where the legislation for other industries provides for less protection to consumers.<sup>317</sup> The CPA aims to provide for consumers' disputes with a remedial system that is accessible, effective and efficient system of.<sup>318</sup>

The availability of efficient and effective systems for redress of consumers' claims provides for a practical protection to consumers because there may be good laws in place but if those laws cannot be enforced then it is futile to have them. It can be argued that the lack of adequate enforcement systems under common law resulted in having the consumers being subjected to abuse by suppliers.<sup>319</sup> Though there were good principles developed to protect consumers, the protection was not effective because consumers could not access the courts due to high costs as these were the only dispute resolution mechanisms in place then.

## 3.4. DISPUTE RESOLUTION

### 3.4.1 National Consumer Commission

The National Consumer Commission (NCC) is established in terms of section 85 of the Consumer Protection Act (herein after referred to as the Act).<sup>320</sup> The NCC is mandated to carry its functions in the most operative way, minimising costs of operation and aligning its operations with the principles as enshrined in section 195

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<sup>315</sup> De Stadler op cit note 288 at 2.

<sup>316</sup> P van den Heever „Impact of the Consumer Protection Act in the Health Care Context“ March 2012 De Rebus 22.

<sup>317</sup> De Stadler op cit note 288 at 2.

<sup>318</sup> Section 3(1) of Consumer Protection Act of 2008.

<sup>319</sup> Woker op cit note 18 at 229.

<sup>320</sup> No 68 of 2008.

of the Constitution.<sup>321</sup> These principles include the promotion and maintenance of a high standard of professional ethics and provision of services must be impartial, fair and equitable — the list is non- exhaustive.<sup>322</sup> As an enforcement body, the Commission’s functions entail promoting dispute resolution informally between the consumers and the suppliers and the receiving of complaints in relation to contraventions of the Act.<sup>323</sup> Upon receipt of the complaint the Commission investigates the alleged offence.<sup>324</sup> However, the Commission is not required to get involved in a dispute or to directly resolve the dispute.<sup>325</sup> The Commission may also refer the dispute to the ombudsman, consumer court, or provincial consumer authority to help the parties to resolve the dispute or to another regulatory body with jurisdiction over the matter to investigate the matter.<sup>326</sup>

The Act gives the Commission very broad powers in making the investigations of the alleged or prohibited conduct and dealing with the complaints at large to protect consumers. When the investigations are completed there are various steps that can be taken by the Commission depending on the outcome of the investigation and the response of the respondent.<sup>327</sup> The Commission may suggest a consent order to the National Consumer Tribunal or the court after agreeing with the respondent on the proposed terms of the appropriate order without evidence being adduced.<sup>328</sup> Then the Tribunal or the court in granting the consent order may award damages to the complainant and the complainant has to give consent.<sup>329</sup>

### 3.4.2 National Consumer Tribunal

The National Consumer Tribunal was established in terms of Section 26 of the National Credit Act<sup>330</sup> and is still operative under the Act.<sup>331</sup> Stadler summarises the functions of the Tribunal briefly<sup>332</sup> to include hearing of objections to the findings of

<sup>321</sup> Section 85(2) (c) of the Consumer Protection Act 68 of 2008.

<sup>322</sup> Section 195 of the Constitution of the Republic of South Africa Act No. 108 of 1996.

<sup>323</sup> Section 99 of Consumer Protection Act 68 of 2008.

<sup>324</sup> Section 99 of Consumer Protection Act 68 of 2008.

<sup>325</sup> Section 99 of Consumer Protection Act 68 of 2008.

<sup>326</sup> Section 72(1) of the Consumer Protection Act 68 of 2008.

<sup>327</sup> Y Mupangavanhu „An Analysis of the Dispute Settlement Mechanism under the Consumer Protection Act 68 of 2008“ (2012) *PER / PELJ* (15)5 323/638.

<sup>328</sup> Mupangavanhu op cit note 327 at 323.

<sup>329</sup> Section 74(3) of the Consumer Protection Act 68 of 2008.

<sup>330</sup> Section 26 of National Credit Act 34 of 2005.

<sup>331</sup> Section 1 of Consumer Protection Act 68 of 2008.

<sup>332</sup> De Stadler op cit note 288 at 173.

the NCC which are described as objection to notices made by NCC; granting of consent orders; imposing administrative fines and making of orders as stipulated in the Act or any order that advances consumer rights.<sup>333</sup> Any other order that the Tribunal is permitted to make is provided for in section 4(2)(b).<sup>334</sup> The National Consumer Tribunal does not make an order for damages where there is no agreement reached by the Commission and the supplier, but issues a certificate of prohibited conduct after it has made a finding that such conduct took place.<sup>335</sup>

These functions were discussed in the case of *Audi SA (Pty) Ltd v National Consumer Commission*<sup>336</sup> where it was stated that these powers do not include the awarding of damages by the Tribunal. They are to impose an administrative penalty, to make an order to refund consumers where applicable and to issue a certificate of prohibited conduct which would enable the consumer to claim damages from the high court.<sup>337</sup> The action for damages can be suspended upon the supplier making an application for review or taking an appeal against the decision of the Tribunal.<sup>338</sup> According to the annual report, the statistics indicate that the cases that were heard increased from 53 in 2012/2013 to 83 in 2013/2014.<sup>339</sup> Also, the judgements delivered in the year of reporting increased from 54 to 67.<sup>340</sup> This is an indication that the Tribunal is effective.

### 3.4.3 Consumer Courts

Section 70(1) provides for alternative dispute resolution mechanisms through which consumers can resort to for disputes settlement which are easily accessible.<sup>341</sup> These include an Ombud with jurisdiction; an industry Ombud accredited in terms of the Act; a person or entity providing conciliation, mediation or arbitration services; or the consumer court.<sup>342</sup> These processes will be discussed in detail in the next paragraphs.

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<sup>333</sup> Ibid.

<sup>334</sup> Consumer Protection Act 68 of 2008.

<sup>335</sup> De Stadler op cit note 288 at 173.

<sup>336</sup> *(NCT/4058/2012/101(1) (P)CPA) [2013] ZANCT 4 (21 January 2013).*

<sup>337</sup> *Supra.*

<sup>338</sup> De Stadler op cit note 288 at 175.

<sup>339</sup> National Consumer Tribunal Annual Report 2013-14.

<sup>340</sup> Ibid.

<sup>341</sup> Consumer Protection Act 68 of 2008.

<sup>342</sup> Consumer Protection Act 68 of 2008.

Consumer courts are established by provincial legislation and are still operational. These courts were established under Consumer Affairs (Unfair Business Practices) Act 7 of 1996, which was first passed by the Gauteng legislature and other provinces followed-suit.<sup>343</sup> Consumer Courts continue to apply alongside the CPA for enforcement of rights. Section 69(c) provides that a consumer can enforce rights in terms of the Act by referring the dispute to the consumer court of the province with jurisdiction over the matter.<sup>344</sup> The Consumer court is not classified as a court *strict sensu* but as a tribunal.<sup>345</sup> Though the orders granted by it have the same force and effect as a normal court, certain powers to enforce consumer rights which have been bestowed with the courts do not apply to the consumer court.<sup>346</sup>

In terms of the Gauteng legislation, the office for the Investigation of Unfair Practice which is established by the said legislation may initiate investigations where there is a suspicion of unfair business practices or if there are complaints to that effect.<sup>347</sup> When investigations are completed the office can approach the consumer court and issue summons against the perpetrator.<sup>348</sup> This is also sanctioned by the CPA which authorises the office of unfair business practice to bring up the dispute to the consumer court.<sup>349</sup> Though there are no current and tangible statistics available about the cases handled by the consumer courts in the country, Reeva Welman, stated that in Gauteng Consumer Affairs office received about 150 to 180 complaints per month on average.<sup>350</sup> She stated further that they make attempts to finish all the cases in 60 days.<sup>351</sup> On the other hand, it has been stated recently that this office in question has been re-activated after been inactive for few years.<sup>352</sup> This indicates that this consumer court was not operating for some time.

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<sup>343</sup> McQuoid-Mason op cit note 21 at 311.

<sup>344</sup> Consumer Protection Act 86 of 2008.

<sup>345</sup> MA Du Plessis „Enforcement and Execution Shortcomings of Consumer Courts“ (2010) *SAMLJ* 518.

<sup>346</sup> *Ibid* at 518.

<sup>347</sup> *Ibid* at 519.

<sup>348</sup> *Ibid*.

<sup>349</sup> Section 84 (c) of the Act 68 of 2008.

<sup>350</sup> N Moodley-Isaacs „How the consumer law will be enforced“: Personal Finance 24 January 2011 available at [http://www.iol.co.za/business/personal-finance/how-the-consumer-law-will-be-enforced-1\\_1016167#.VdzY3aCqqko](http://www.iol.co.za/business/personal-finance/how-the-consumer-law-will-be-enforced-1_1016167#.VdzY3aCqqko) accessed on the 25 August 2015.

<sup>351</sup> *Ibid*.

<sup>352</sup> M Schwankhart „Now disgruntled Gauteng consumers have another weapon in their arsenals - and, like the Small Claims Court, it's free.“ Sunday Times 15 March 2015 available at <http://www.timeslive.co.za/sundaytimes/stnews/powerreport/2015/03/15/power-report-new-weapon-for-disgruntled-consumers> accessed on the 25 August 2015.

However, prior to approaching the consumer court the CPA provides that the office may facilitate the mediation or conciliation of the dispute between the parties to the dispute.<sup>353</sup> Where the office does not initiate proceedings then it can make a request to the Commission to initiate a complaint with regard to the alleged offence that arises in terms of the Act.<sup>354</sup> Therefore, it means a claim can either be brought to the consumer court by the office or the Commission.

Although the Act offers protection to consumers there is a likelihood of duplication of work, which might end up confusing the very people it aims to protect.<sup>355</sup> A criticism that has been levelled against the consumer courts is that despite having powers to grant wide orders it has not addressed as to how to enforce and execute the orders of these courts.<sup>356</sup> As a result this does not solve consumers' problems or disputes because the law does not provide for enforcement or execution of the orders in their hands.

### **3.4.4. Ombudsman**

An ombudsman is a public functionary who investigates or receives complaints from the members of the public in relation to the abuse of power or improper conduct by the government entities.<sup>357</sup> Within the South African context this office received a comprehensive meaning to include the third person performing the same function in the private sector.<sup>358</sup> As a result, there are different ombudsman schemes which include banking industry, insurance industry, pension fund and Consumer goods and services ombudsman who have been appointed to act as mediators in those industries between consumers and the suppliers.<sup>359</sup>

The ombudsman schemes are established in different ways, it is the ombudsman with jurisdiction and the industry Ombud accredited in terms of Section 82(6) of the Act.<sup>360</sup> The first one is the statutory Ombud established under the relevant industry legislation and the second one is established by accreditation through the industry

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<sup>353</sup> Section 84 of Consumer Protection Act 68 of 2008.

<sup>354</sup> Section 84(d) of Consumer Protection Act of 2008.

<sup>355</sup> T Naude „Enforcement Procedures in Respect of the Consumer's Right to Fair, Reasonable and Just Contract Terms Under the Consumer Protection Act in Comparative Perspective“ (2010 ) SALJ 525 note 58. See also 526.

<sup>356</sup> Du Plessis op cit note 345 at 517.

<sup>357</sup> Ottom op cit note 302 at 36.

<sup>358</sup> Ibid.

<sup>359</sup> Ibid.

<sup>360</sup> Section 70(1) of the Consumer Protection Act of 68 of 2008.

code. The good examples are the Financial Services Ombud established in terms of Financial Services ombud Schemes Act<sup>361</sup> and the Consumer Goods and Services Ombudsman.<sup>362</sup>

Where a consumer makes a claim against a financial institution, the matter will be dealt with by the ombud scheme under the Financial Services Ombud Schemes.<sup>363</sup> Complaints against a supplier belonging to the Ombud established in terms of the industry code will be referred to that Ombud in question. A further discussion of Ombudsman schemes will be made herein under to demonstrate how they function and how they differ.

### **3.4.5 Insurance Ombudsman**

South African Insurance Ombudsman is the replica of United Kingdom Insurance Ombudsman Bureau.<sup>364</sup> This institution was established to resolve disputes between insurance company members and consumers in a cost-effective, flexible and fairly.<sup>365</sup> The South African insurance Ombudsman is divided into two types namely, the Ombudsman for Life Assurance and the Ombudsman for Short-Term Insurance.<sup>366</sup> These are financed by Life Assurance Association and South African Insurance Association respectively.<sup>367</sup> This goes to show how committed the insurance companies are towards their clients who contribute towards their businesses. It can be argued that South Africa is a leading country in consumer protection within African countries.

Further, in both ombudsmen consumers submit their complaints in a written form which states in detail all the particulars of a claim.<sup>368</sup> On receiving the claim by the office of the ombudsman, it is referred to the affected company to give the side of their story and thereafter to the complainant to reply to the company's version.<sup>369</sup> The ombudsman makes a thorough investigation of the claim by consulting the

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<sup>361</sup> 37 of 2004.

<sup>362</sup> Government Notice No. 38637 The Consumer Goods and Services Industry Code of Conduct (2015).

<sup>363</sup> C Van Heerden et al Redress for Consumers in terms of the Consumer Protection Act 68 of 2008: A Comparative Discussion (2011) 6 *JICLT* 134.

<sup>364</sup> Cohen op cit note 55 at 252.

<sup>365</sup> Ibid at 254.

<sup>366</sup> Ibid at 258.

<sup>367</sup> Ibid.

<sup>368</sup> Ibid.

<sup>369</sup> Ibid.

involved parties and consulting relevant documents.<sup>370</sup> It should be noted at this point that both ombudsmen are not supposed to entertain any claim until the claim has been dealt with by the involved insurance company and failed.<sup>371</sup> As mentioned in the previous chapter that this is commendable because some of the claims arise out of a simple misunderstanding which can be resolved with ease by the company.

In addition, when the investigations are over the ombudsman makes recommendations on the bases of fairness and also applying common law.<sup>372</sup> The ombudsman advises both parties to the dispute and it is upon them to take the advice, otherwise they can proceed with litigation.<sup>373</sup> As far as this submission is concerned I am of the view that it is no longer the position since the promulgation of the CPA. This is because section 69 (d) provides that the court with jurisdiction can be approached when all other remedies available in terms of this legislation have been exhausted.<sup>374</sup> Also, Section 115(2) provides that a consumer who is entitled to bring an action to the court of law has to file a notice from the Tribunal confirming that the conduct upon which the action is instituted has be found to be prohibited by the Act.<sup>375</sup> Therefore, this goes to show that parties to the dispute cannot go straight to litigate from the ombudsman without exhausting all remedies.

### **3.4.6 Pension Fund Ombudsman**

The office of Pension Fund Ombudsman known as Pension Fund Adjudicator was established in terms Pension Fund Act 24 of 1956 as amended. The purpose of the amendment was to create the mechanism of resolving pension disputes which is cost-effective, fair and fast.<sup>376</sup> In the same vein the establishment of this office has borrowed largely from the Pension Ombudsman office in the United Kingdom - this also includes the functions of these offices and even the way they are operated.<sup>377</sup> Although this office resembles the office of the ombudsman, its decisions are binding

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<sup>370</sup> Ibid at 259.

<sup>371</sup> Ibid at 258

<sup>372</sup> Ibid at 259.

<sup>373</sup> Ibid.

<sup>374</sup> Consumer Protection Act 68 of 2008.

<sup>375</sup> Consumer Protection Act 68 of 2008.

<sup>376</sup> J Murphy „Alternative dispute resolution in the South African pension funds industry: An Ombudsman or a Tribunal?“ Speech to the IPEBLA Conference in Bordeaux 13 June 2001 28 available at <http://www.palgrave-journals.com/pm/journal/v7/n1/pdf/5940180a.pdf> accessed on the 15 July 2015.

<sup>377</sup> Ibid.

and has the same powers like a court of law even though it falls short of being a court of law.<sup>378</sup>

Furthermore, in order for the office to determine the issue, parties have to submit a written motivation of the claim together with relevant documents as evidence and also make written submissions.<sup>379</sup> When the office has made a determination it issues the preliminary findings calling upon the parties to show cause why the order cannot be made final.<sup>380</sup> As a result, parties to the dispute are motivated to bring all relevant documentations and to consider the seriousness of this process. A substantial number of disputes are settled through negotiation and mediation after the issuing of preliminary findings.<sup>381</sup> It is interesting how this office handles the dispute because the issuing of preliminary findings gives the parties opportunity to negotiate and even compels them to consider negotiating rather than going to the court of law.

In terms of Section 30P(1) of the Pension Funds<sup>382</sup> a party to a dispute can within six weeks of the determination the party that is not satisfied by the adjudicator's decision may apply to the High Court for relief, otherwise the decision has to be complied with. It can therefore be argued that section 69(d) of the Act<sup>383</sup> does not apply because the Adjudicator unlike other ombudsmen makes binding and final decisions. As a result the party that feels aggrieved by the decision made is permitted to appeal or apply for review straight to the High Court.

### **3.4.7 Consumer Goods and Services Ombudsman**

The Consumer Goods and Services Ombudsman (CGSO) is established through the industry code of conduct as provided in terms of Section 82 of the CPA.<sup>384</sup> The industry code regulates the relations amongst the companies within a certain industry and also regulates the provision of alternative dispute resolution between the companies within the industry and the consumers.<sup>385</sup> The industry code for CGSO was prescribed in the Government Notice and provides for terms of reference for the

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<sup>378</sup> Ibid at 29.

<sup>379</sup> Ibid.

<sup>380</sup> Ibid

<sup>381</sup> Ibid.

<sup>382</sup> Pension Funds act 24 of 1956.

<sup>383</sup> Consumer Protection Act 68 of 2008.

<sup>384</sup> Act 68 of 2008.

<sup>385</sup> Section 82(1) of Consumer Protection Act of 2008.

Ombudsman in question.<sup>386</sup> In brief the functions of the CGSO are to receive the complaints, investigate and assess the purported contraventions of the code in an attempt to assist parties to reach a settlement.<sup>387</sup> Then the office of the ombudsman makes recommendations to the parties as to how to settle the dispute.<sup>388</sup> Unlike other ombudsman schemes which deal with disputes for particular industries CGSO can be a good starting point for countries that are still behind with alternative dispute resolution in relation to consumers' claims. This is because it deals with disputes from various industries that sell goods and provide services. The functions and procedures of this ombudsperson will be elaborated in Chapter 5.

### **3.4.8 Alternative Dispute Resolution**

Apart from using the Ombud's services to facilitate as ADR agents, consumers are entitled to enforce their rights through other private entities providing ADR services to have their disputes resolved.<sup>389</sup> After resolving the dispute the agent has to record the settlement, award damages with the consent of the complainant and with the parties consenting to the order, the order can be submitted to the Tribunal or to the high court to be made the consent order.<sup>390</sup> Where the agents finds that there is no possibility of resolving the dispute through the process offered by that them, the process can be terminated and the complaint be referred to the commission by the complainant.

### **3.4.9 Ordinary courts**

The CPA provides that the consumers can enforce their rights also by approaching the courts of law which have jurisdiction over the matter in question; however, this must be done when all remedies available have been exhausted.<sup>391</sup> The courts enforce rights both in terms of the common law and the CPA. This is confirmed by section 4(a) which states that the court is mandated to develop common law where necessary

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<sup>386</sup> Government Notice No. 38637 The Consumer Goods and Services Industry Code of Conduct (2015).

<sup>387</sup> Government Notice No. 38637 The Consumer Goods and Services Industry Code of Conduct (2015).

<sup>388</sup> Government Notice No. 38637 The Consumer Goods and Services Industry Code of Conduct (2015).

<sup>389</sup> Van Heerden op cit note 363 at 134.

<sup>390</sup> Ibid at 135.

<sup>391</sup> Section 69(d) of the Consumer Protection Act 68 of 2008. See also Naude op cit note 355 at 340.

to enhance the enjoyment of consumer rights.<sup>392</sup> This demonstrates that common law has not been abandoned and it still exists alongside the consumer legislation. Again, the Act also provides for class actions<sup>393</sup> which is highly beneficial for consumers to bring claims to courts with low costs of litigation. Section 115 (2) (b) provides that a consumer entitled to bring an action to the court of law has to file a notice from the Tribunal confirming that the conduct upon which the action is instituted has been found to be prohibited by the Act.<sup>394</sup>

Consumer rights can also be enforced through the Small Claims courts which continue to function effectively. These were established in terms of Small Claims Court Act 61 of 198.<sup>395</sup> The interpretation section of the CPA provides that court does not include the consumer court,<sup>396</sup> which implies that the Small Claims courts are included in the interpretation. Mupangavanhu states that the procedure involved in these courts is flexible and costs are less, therefore, consumers will prefer them compared other courts.<sup>397</sup> These courts are accessible and affordable which afford consumers with access to justice.

### **3.4.10 Conclusion**

South Africa has various dispute resolution mechanisms for consumers in place and as noted earlier there is a possibility of overlapping of functions by both the regulatory bodies and other institutions that provide for dispute settlement. This might well confuse consumers as some might understand the difference between these institutions and even how they operate. Of paramount importance is to offer protection to consumers and not confuse them which might not have been anticipated by the legislature. As discussed earlier, South Africa has done so much for the protection of consumers in almost all industries as they are catered for with the alternative dispute resolution mechanisms.

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<sup>392</sup> Consumer Protection Act 68 of 2008.

<sup>393</sup> Section 4(1) of Consumer Protection Act 68 of 2008.

<sup>394</sup> Act 68 of 2008.

<sup>395</sup> McQuoid-Mason op cit note 21 at 308.

<sup>396</sup> Section 1 of Consumer Protection Act 68 of 2008.

<sup>397</sup> Mupangavanhu op cit note 327 at 331/ 638. Also see McQuoid-Mason op cit note 21 at 310.

## CHAPTER 4

### 4. INTERNATIONAL INITIATIVES

#### 4.1 INTRODUCTION

Consumer Protection does not only concern the authorities at the national level, but it is also a concern at the international and regional levels. As a result, there are various instruments concluded at both levels to encourage member states to initiate dispute resolution mechanisms within their jurisdictions that are cost effective, efficient and appropriate to resolve consumer disputes. However, at the moment there are no legally binding principles set at the international level governing the ADR mechanisms for consumer disputes.<sup>398</sup> Nonetheless, there have been some developments made in a form of soft-law and are voluntarily implemented by member states.

Accordingly, these international developments have been detailed within the OECD report and are discussed in this chapter as they illustrate different dispute resolution processes available for consumer disputes. This report also explains how these mechanisms operate to give consumers ability to assert their rights without having to incur heavy costs or no costs at all. Again, in this chapter United Nations agreements and regional agreements on consumers' disputes resolution also are discussed.

#### 4.2 ORGANISATION OF ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) REPORT

In 1999 the OECD issued its Guidelines for Consumer Protection in the Context of Electronic Commerce, setting out that businesses together with consumer groups and governments from member states should work in one accord towards developing alternative dispute resolution processes.<sup>399</sup> The purpose is to resolve consumer disputes between businesses and consumers especially for disputes that arise from cross-border transactions from e-commerce.<sup>400</sup> OECD released a report

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<sup>398</sup> Ramsay op cit note 16 at 124. See also Sackin op cit note 237 at 257.

<sup>399</sup> Calliess op cit note 235 at 654. See also Alboukrek op cit note 244 at 440.

<sup>400</sup> Ibid.

stating the developments made within its member states in which most of them adopted policies identifying a possible role for ADR within their national borders.<sup>401</sup> The purpose of the said policies adopted within the member states is to bring to the attention of consumers the existence of effective, timely and cheap dispute resolution processes as an alternative to litigation.<sup>402</sup>

It is worth noting that there is no single identified or designated institution(s) for alternative dispute resolution processes operated by OECD at the international level. The OECD Secretariat only oversees that within the member states national borders these ADR processes are established in order to cater for local consumers and even for consumers in cross-border transactions. So far there are promising alternative dispute resolution mechanisms within OECD member countries as opposed to other countries. It is of concern that most of the OECD member states are European countries and none of the African countries is a member.<sup>403</sup> The development of the ADR processes for consumers' disputes was to provide consumers with dispute resolution processes that will not delay the resolution of disputes, not costly and that are proportionate to the value of the claim in question.<sup>404</sup> This is more so for consumers in cross-border transactions as they struggle to have their disputes resolved swiftly and without incurring huge costs.<sup>405</sup> The costs involved are costs of pursuing a claim against a seller in a foreign jurisdiction where the product was purchased, a different legal system and a foreign language to the consumer especially if the dispute involves online transactions.<sup>406</sup> These mechanisms for consumer dispute resolution and redress were introduced to deal with local cases within OECD member states but were found not adequate to provide consumers with remedies across borders.<sup>407</sup>

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<sup>401</sup> OECD op cit note 74 at 22.

<sup>402</sup> Ibid.

<sup>403</sup> Nangela, Deo John „The Adequacy of the Tanzanian Law on e-commerce and e-contracting: Possible Solutions to be Found in International Models and South African Legislation“ (2011) 223.

<sup>404</sup> OECD op cit note 74 at 8. See also Sackin op cit note 237 at 253.

<sup>405</sup> Ibid at 8

<sup>406</sup> P Cortes et al „Consumer Dispute Resolution Goes Online : Reflections on the Evolution of European Law for Out-of-Court Redress“ 21 *MJ* 1 (2014) 21 MJ 34. See also Ponte op cit note 229 at 237. See Alboukrek op cit note 247 at 434-36.

<sup>407</sup> OECD op cit note 74 at 8.

### 4.2.1 Internal Complaints Handling

When disputes arise between businesses and consumers, disputes are handled by businesses internally and this helps to reduce the need to lodge a claim with dispute resolution mechanisms that are provided by private entities. This does not cost the parties money and even saves their time.<sup>408</sup> This method of resolving disputes has been greatly appreciated at the international level in the consumer protection instruments.<sup>409</sup> The OECD E-commerce Guidelines recommend companies and consumer representatives to institute effective and transparent means of addressing consumer disputes and to react to consumer complaints timeously within the business set-up without burdening them.<sup>410</sup> Also, the Asian Pacific Economic Co-operation (APEC) Voluntary Online Consumer Protection Guidelines encourage that consumers should be provided with impartial, free of charge and timely means of having their complaints addressed within the business set-up.<sup>411</sup>

This method of handling consumer complaints internally promotes consumer satisfaction and loyalty, at the same time it saves the company money and time for attending dispute resolution forums which they can easily avoid.<sup>412</sup> It is argued that more often consumers are interested in having their concerns attended to either by replacing the product, giving them a refund or acting accordingly by the company than in asserting their legal rights.<sup>413</sup> This is true because apart from the costs that can be incurred in an attempt to resolve the disputes, some feel they are wasting time by running up and down looking for a neutral. Also the hassle of getting out of their way looking for a third party to resolve their disputes can be problematic. Some of the third parties that provide for ADR processes make it mandatory for parties to endeavour to resolve their disputes directly before they can even make use of ADR mechanisms.<sup>414</sup> However, this is not the case where consumers have encountered fraud or illegal business dealers as internal complaints method will not work.<sup>415</sup>

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<sup>408</sup> Ibid. 10

<sup>409</sup> Ibid. 10

<sup>410</sup> OECD „Guidelines for Consumer Protection in the Context of Electronic Commerce“ (2000) 18 accessed at <http://www.oecd.org/sti/consumer/34023811.pdf> accessed on the 28 July 2015.

<sup>411</sup> APEC „Report to Senior Officials: Electronic Commerce Steering Group“ 16-17 August (2002) 6 available at [www.adb.apec.org/Documents/2002/ECSG/ECSG2/02\\_ecsg2\\_summary.doc](http://www.adb.apec.org/Documents/2002/ECSG/ECSG2/02_ecsg2_summary.doc) accessed on the 28 July 2015.

<sup>412</sup> Donoghue et al op cit note 14 at 457.

<sup>413</sup> OECD op cit note 74 at 10.

<sup>414</sup> Ibid at 11.

<sup>415</sup> Ibid.

#### 4.2.2 Payment cardholder protections

Payment cardholders' protections, also known as charge backs, are not necessarily dispute resolution mechanisms but are protections offered by issuers of payment cards to consumers for unclear charges on their cards.<sup>416</sup> These remedies differ from country to country within the OECD member states, but they are not available in some of the member countries. They are offered where there have been unauthorised uses of a payment card/ fraud, non-delivery of purchased goods or non-conformity of the delivered goods with the purchased ones.<sup>417</sup> Among others when there are disputed charges, billing inaccuracies can be rectified, compensation for goods not delivered or wrong goods delivered can be made or even limit the cardholders' liability.<sup>418</sup> In determining whether a consumer should be compensated for unauthorised use of the payment card, the card issuers first have to establish if there was negligent on the part of the consumer in handling the card.<sup>419</sup>

In addition, in certain cases these protections are provided in the national law but with other countries they are given on voluntary basis by industry codes or platforms provided by card issuers.<sup>420</sup> It is argued that provision of payment cardholder protection can promote consumer assurance when using the payment cards in purchases generally if the protection is transparent and effective.<sup>421</sup> The use of payment cards is prevalent in these days both in the developed and the developing countries.<sup>422</sup> In my view this method of redress is commendable especially because cards are used almost in every transaction and there are many problems involved in the use of card payments.

The OECD Cross-Border Fraud Guidelines have appreciated the significance of protections offered to payment cardholders with regard to unauthorised payments in cross-border transactions.<sup>423</sup> Therefore, they have called for member states to join forces to develop other measures that can be employed to safeguard against the misuse of payment systems and how to provide for redress for victims of such

<sup>416</sup> Ibid. See also NM Peretz „Single Euro Payment Area: A New Opportunity for Consumer Alternative Dispute Resolution in the European Union“ (2008) 16 Michi. St. J.575.

<sup>417</sup> Ibid. See Alboukrek op cit note 247 at 437. See also Peretz op cit note 416 at 581.

<sup>418</sup> Ibid. See Alboukrek op cit note 247 at 437.

<sup>419</sup> Ibid.

<sup>420</sup> Ibid. See also Peretz op cit note 416 at 581.

<sup>421</sup> Ibid at 12.

<sup>422</sup> McGregor op cit note 7 at 171. See also Peretz op cit note 416 at 575.

<sup>423</sup> OECD „Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders“ (2003) 11 available at <http://www.oecd.org/sti/ieconomy/37125909.pdf> accessed on the 28 July, 2015.

misuse.<sup>424</sup> Also, at the regional level the European Union has issued directives providing that where there has been a fraudulent use of a consumer's card the consumer should be compensated.<sup>425</sup> Again, article 8 of the 2002 Directive on the Distance Marketing of Consumer Financial Services makes a provision that member states should make available appropriate measures that allow consumers to cancel payment where fraud has been perpetrated with their payment cards.<sup>426</sup> Lastly, Article 11 of the 1987 Consumer Credit Directive provides that consumers have the legal right to claim from credit issuers in cases of disputes with the suppliers of goods and services.<sup>427</sup> This could be done when goods purchased on credit card are not delivered or they do not conform with what have been purchased and as a result that cannot be resolved amicably.<sup>428</sup> However, these are not legally binding on member states, but the Recommendation is to be complied with fully within all EU member states.<sup>429</sup>

### 4.3.3 Alternative Dispute Resolution

Where there have been attempts made to resolve disputes directly with businesses and failed, consumers are at liberty to approach alternative dispute resolution providers which offer consumers redress fast, effectively and cheaply.<sup>430</sup> OECD E-Commerce Guidelines provide for ADR mechanisms for resolution of consumer disputes that are effective, fair, saves time and cost effective.<sup>431</sup> As a result, OECD member countries have established some principles that govern ADR processes in different industries.<sup>432</sup> The Australian government is a good example which issued what is known as „Benchmarks for Industry-Based Customer Dispute Resolution Schemes“ and this was a joint work between the government through its regulatory authorities, consumer groups and dispute resolution schemes.<sup>433</sup> This document sets

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<sup>424</sup> Ibid.

<sup>425</sup> Article 8 of the Distance Selling Directive 97/7/EC of 1997

<sup>426</sup> European Union Directive 2002/65/EC of 23 September 2002.

<sup>427</sup> Article 11 of Consumer Credit Directive 87/ 102/EEC.

<sup>428</sup> Ibid.

<sup>429</sup> OECD op cit note 74 at 13.

<sup>430</sup> Ibid.

<sup>431</sup> Ibid at 18. See Alboukrek op cit 247 at 446.

<sup>432</sup> Ibid at 17.

<sup>433</sup> Ibid.

out principles that are to be used as a guide for the industries to develop and promote ADR structures.<sup>434</sup>

In other OECD countries there are also laws that regulate ADR procedures which include rules on confidentiality of the process, the qualifications and impartiality of the ADR practitioners. However, there are no all-encompassing statutes regulating all procedural aspects of ADR services in consumer cases.<sup>435</sup> The observation is that this is the position in most of the countries even those which are not OECD members but have progressed with provision of ADR mechanisms on consumer protection. As discussed in Chapter 3, South Africa is one of such countries which have different pieces of legislation that regulate ADR structures though the Consumer Protection Act of 2008 is the main one. Since consumer protection is still a new concept in some of the developing countries and has not taken root, perhaps it is too early to talk about ADR in consumer protection in such countries. However, within OECD member states there is a great development in ADR in consumer disputes especially in Europe.

The European Commission released two recommendations in 1998 and 2001 which offer a guide on how to implement ADR schemes in consumer claims.<sup>436</sup> The first recommendation regulates the criteria for out of court settlement procedures employed by the third party in resolving disputes and also includes the principles on ADR.<sup>437</sup> The second recommendation relates to the administration of out of court settlement procedures engaged by two parties in resolving their disputes by consent, and it lays down the relevant principles involved.<sup>438</sup> There are certain ADR processes that are deemed to be in conformity with the said recommendations and are brought to the attention of the Commission by member states so that they can be included in the centralised records.<sup>439</sup>

Apart from initiatives adopted by international governmental bodies there are other international private sectors which have contributed towards development of

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<sup>434</sup> Ibid.

<sup>435</sup> Ibid.

<sup>436</sup> Ibid at 18. See Alboukrek op cit 247 at 440.

<sup>437</sup> Commission Recommendation (98/257/EC on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes of 30 March 1998. See also I Benöhr *Alternative Dispute Resolution for Consumers in the Financial Services Sector: A Comparative Perspective* (2013) 2.

<sup>438</sup> Commission Recommendation (2001/310/EC on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes of 4 April 2001. See also Benöhr op cit note 425 at 2.

<sup>439</sup> OECD op cit note 74 at 18.

ADR platforms in the global market.<sup>440</sup> In 2003 there were guidelines adopted on ADR in consumer disputes with businesses by the Global Business Dialogue on Electronic Commerce (GBD-e).<sup>441</sup> These guidelines are an agreement between Consumers International and GBD-e which recommend requirements for qualification of ADR providers and rules of procedure in conducting the processes.<sup>442</sup> Further, these recommendations call on government to address international procedures on jurisdictional issues and law applicable in resolving consumers' disputes in international transactions including agreement on measures promoting the use of ADR.<sup>443</sup>

Moreover, International Commerce issued ODR best practices providing for guidance to online dispute resolution providers and to businesses on how to transact with consumers online.<sup>444</sup> The best practices also make recommendations to businesses to make use of ODR when the internal complaints handling has failed and also set out some rules for ODR providers.<sup>445</sup> Also, there is the American Bar Association Taskforce on Ecommerce and ADR which issued some recommendations on best practices for ADR providers.<sup>446</sup> One of the goals of the American Bar Association best practices is to focus on ADR providers to make available information about the services they offer, their policies and procedures.<sup>447</sup> On the other hand Trans-Atlantic Consumer Dialogue has recommended that ADR procedures should be accessible for consumers, appropriate, free of charge and be equipped with knowledgeable staff of legal concepts and skills on mediation.<sup>448</sup> Lastly, they make a recommendation that structures and operating standards for ADR be established in the legal framework.<sup>449</sup>

Within the OECD member states the principles that regulate ADR procedures also include the rules that pertain to pre-dispute contracts that bind consumers to

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<sup>440</sup> OECD op cit note 74 at 18.

<sup>441</sup> Global Business Dialogue on Ecommerce „Alternative Dispute Resolution Guidelines“ 2003 available at [http://www.gbd-e.org/ig/cc/Alternative\\_Dispute\\_Resolution\\_Nov03.pdf](http://www.gbd-e.org/ig/cc/Alternative_Dispute_Resolution_Nov03.pdf) accessed on the 29 July 2015.

<sup>442</sup> Ibid.

<sup>443</sup> Ibid.

<sup>444</sup> OECD op cit note 74 at 18.

<sup>445</sup> Ibid.

<sup>446</sup> Ibid.

<sup>447</sup> Ibid.

<sup>448</sup> Ibid.

<sup>449</sup> Ibid.

resort to ADR methods before engaging in litigation.<sup>450</sup> At the international level there are no recommendations of any kind to that effect, but regionally the EU Directive on Unfair Terms Contracts provides that terms of a contract in which there were no mutual agreement between the parties is unfair.<sup>451</sup> This is because this lacks good faith and also brings about inequality between parties' rights and obligations in a contract which is prejudicial to the consumers.<sup>452</sup> These contractual terms are the clauses that prohibit consumers from exercising their rights of litigation or to resort to other remedies.<sup>453</sup>

In addition, the European Commission Recommendations on out-of-court settlements processes in consumer cases, state that ADR procedures should not be used in a way that would deprive consumers of their right to litigate.<sup>454</sup> This should only be done if they give express consent, being fully aware of all the involved facts in the dispute which has arisen.<sup>455</sup> Many of the EU countries do not have provisions in their national laws that protect consumers from pre-dispute agreements and most of the contracts contain such clauses.<sup>456</sup> It has been noted earlier that pre-dispute agreement are not favourable for consumer disputes because they may be too costly.<sup>457</sup>

Some of the major international initiatives identified which assist consumers to resolve cross-border disputes through the use of ADR are econsumer.gov and Global Trustmark Alliance (GTA).<sup>458</sup> Econsumer.gov is a project run by consumer protection agencies from thirty countries and OECD countries; they investigate and share cross-border disputes with the aim of simplifying enforcement measures against fraud.<sup>459</sup> The GTA is made up of self-regulating institutions from eight countries of Asia, Europe, America and other e-commerce organisations from these regions working together to handle cross-border disputes.<sup>460</sup>

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<sup>450</sup> OECD op cit note 74 at 18.

<sup>451</sup> Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts of 5 April 1993.

<sup>452</sup> Ibid.

<sup>453</sup> Ibid.

<sup>454</sup> Commission Recommendations op cit note 438.

<sup>455</sup> Commission Recommendations op cit note 438.

<sup>456</sup> Ibid.

<sup>457</sup> See discussion on arbitration in Chapter 2.

<sup>458</sup> OECD op cit note 74.

<sup>459</sup> Econsumer.gov available at <http://www.econsumer.gov/english/about/overview.shtm> accessed on 28 July, 2015.

<sup>460</sup> Calliess op cit note 244 at 657.

The benefit that consumers gain from these projects is that on filing of a complaint, the consumer is given an opportunity to choose from a list of international ADR practitioners who will assist with dispute resolution from the country of the trader.<sup>461</sup> The question that comes into mind is what causes African countries to remain behind while other regions seem to be concerned about pressing issues that affect negatively the interests their nationalities. It could be argued that this is caused by the fact that most of the African countries have weak economies which hinder many developments.<sup>462</sup> While this is true, there are still countries from Asia and from other parts of the world which are struggling economically but have not allowed their short falls to hinder them from doing what is deemed beneficial to their people.

#### **4.2.4 Small Claims Procedures**

As low-income consumers do not easily have access to normal court systems, a considerable number of OECD member states instituted simplified court procedures for small value claims.<sup>463</sup> These procedures were meant for consumers to have informal alternatives to court system dispute resolution processes offering redress at a low cost and proportionate to the amount of their claims.<sup>464</sup> Small Claims Procedures are available for claims that are under a certain threshold in most of the participating member countries and they vary between countries or regions within the same state.<sup>465</sup> The variations include the type of procedure, type of a dispute, monetary threshold and the costs involved which are paid by the parties.<sup>466</sup> The procedures can be in the form of separation of courts or tribunals with limited jurisdiction, modified procedures in ordinary courts and other simplified procedures.<sup>467</sup> What is distinctive about all these procedures notwithstanding the procedures in various countries is that they resolve disputes of relatively small legal issues, usually with no actual records and less formality involved.<sup>468</sup>

In most of the OECD member states, Small Claims Procedures are intended to be simple in order to accommodate individuals so that they would not need legal

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<sup>461</sup> Econsumer.gov op cit note 459.

<sup>462</sup> Nangela op cit note 403 at 223.

<sup>463</sup> OECD op cit note 74 at 24.

<sup>464</sup> Rutledge op cit note 1 at 30.

<sup>465</sup> Cortes op cit note 406 at 33.

<sup>466</sup> OECD op cit note 74 at 24.

<sup>467</sup> Ibid.

<sup>468</sup> Ibid at 24.

representation.<sup>469</sup> In this case the parties are offered assistance which is in the form of information booklets and directions or assistance with filling out forms, explaining rules of procedure and submitting evidence.<sup>470</sup> This is how these procedures are supposed to operate in order to be effective for consumers, which is simply, the provision of sufficient information to consumers. World Bank has defined small claims courts as a middle ground between litigation and ADR.<sup>471</sup> This is confirmed by the reports from the OECD countries which incorporate different forms of ADR during small claims proceedings.<sup>472</sup> A small claim procedures are easy to approach but in some of the countries are flooded by other claims other consumer disputes.

#### **4.2.5 Private Collective Action Lawsuits**

These are mechanisms available for legal action which is filed by private groups or individuals who have suffered the similar harm as a result of the wrong doing of one defendant.<sup>473</sup> This type of action became famous within the OECD countries as form of consumer protection mechanism.<sup>474</sup> Collective action appeared to be useful in cases where large group of consumers have each suffered damages of small amount and this type of lawsuits differ from place to place according to the way they are named.<sup>475</sup> In the OECD report they were termed private collective action broadly speaking which incorporates all forms of lawsuits involving groups.<sup>476</sup>

Collective actions lawsuits are only available in a couple of the OECD member states while some are still considering them. In other states group actions are present but they are known as consumer organisations, where a consumer organisation files a lawsuit on behalf of consumers.<sup>477</sup> The distinction between these two actions is that, with the former the lawsuit is filed by private individuals who suffered harm, but with the latter the action is taken by an established organisation representing consumers.

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<sup>469</sup> Ibid at 27.

<sup>470</sup> Ibid.

<sup>471</sup> Ibid.

<sup>472</sup> Ibid at 28.

<sup>473</sup> Ibid at 30.

<sup>474</sup> Ibid.

<sup>475</sup> Ibid.

<sup>476</sup> Ibid.

<sup>477</sup> Ibid.

### 4.3 UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

The UN Guidelines also express concern for the needs of all the consumers globally, especially those in the developing countries.<sup>478</sup> As a result, the UN Guidelines provide for some guiding principles to the member states in dealing with consumers' disputes. These Guidelines encourage governments to institute and uphold legal structures or administrative bodies that are impartial, cheap and accessible for consumers to have their disputes resolved formally or informally.<sup>479</sup> Considering low-income consumers governments should encourage private entities to adopt the same approach including the voluntary establishment of informal complaints procedures within their business set-up.<sup>480</sup> Also, information as an important tool should be available to consumers on the existence of the dispute resolution procedures.<sup>481</sup>

With regard to cross-border trade the UN has also acknowledged the need to promote the use of ADR to enhance confidence and UNCITRAL has taken steps to develop rules that regulate cross-border disputes that arise from e-commerce.<sup>482</sup> The UN Guidelines have recently been updated though a final document and has not been published yet.<sup>483</sup> At the regional level there is a treaty signed by SADC and East African Community Treaty on consumer protection.<sup>484</sup> However, it only covers certain principles of consumer protection and does not deal with the resolution of consumer disputes.<sup>485</sup>

### 4.3 CONCLUSION

The initiatives taken both at international level and regional level indicate that there are internationally recognised challenges facing consumers involved in cross-border

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<sup>478</sup> UN „United Nations guidelines for consumer protection 1999“ available at [http://www.un.org/esa/sustdev/publications/consumption\\_en.pdf](http://www.un.org/esa/sustdev/publications/consumption_en.pdf) accessed on the 26 July 2015.

<sup>479</sup> Du Plessis op cit note 345 at 530.

<sup>480</sup> Ibid.

<sup>481</sup> Ibid.

<sup>482</sup> Cortes op cit note 406 at 27.

<sup>483</sup> Consumers International, Summary of ci's Comments on the Final Draft of the UN Guidelines Resolution 9 July 2015 available at [http://www.consumersinternational.org/media/1593283/summary-of-ci-comments\\_final-draft-of-ungecp\\_july-2015\\_v2.pdf](http://www.consumersinternational.org/media/1593283/summary-of-ci-comments_final-draft-of-ungecp_july-2015_v2.pdf) accessed on the 28 July 2015.

<sup>484</sup> Consumer International „A guide to developing consumer protection law“ 13 May 2011 available at <http://www.consumersinternational.org/media/715456/a-guide-to-developing-consumer-protection-law.pdf> accessed on the 26 March 2015.

<sup>485</sup> Ibid.

transactions and low-income earners.<sup>486</sup> These developments should be appreciated by the member states of the concerned organisations and should implement them within their domestic jurisdictions. The countries that have not considered adopting these procedures in particular African countries should learn and consider codifying them within their national borders. However, some of these procedures are too advanced and cannot work well within countries with young economy but other ADR processes are easy to establish.

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<sup>486</sup> Donoghue note 14 at 457.

## CHAPTER 5

### 5. A PROPOSAL FOR REFORM OF THE LAW IN CONSUMER DISPUTES RESOLUTION

#### 5.1 INTRODUCTION

This chapter seeks to reach conclusions based on the study carried out, and to make a proposal for reform of the law based on the findings of this study. The main aim of this study was to find out if there are dispute resolution processes that are cost effective, efficient and fast that can be used in consumer disputes and whether these methods are available for consumers in Lesotho. This study will propose the introduction of an Ombudsman, in particular one similar to the Consumer Goods and Services Ombudsman<sup>487</sup> because this office possesses the features that specifically cater for consumers in the low-income bracket as well as applying to a range of types of consumers.

#### 5.2 FINDINGS

From this study it has been concluded that litigation as a dispute resolution process fails to effectively resolve consumers' disputes because it is expensive, too formal for consumers and cases can drag for a long time in court.<sup>488</sup> Many consumers are low-income earners who cannot afford litigation and sometimes their claims are of small value compared to cost of litigation.<sup>489</sup> The options available for litigation — such as class-action suits — can assist to reduce the costs of litigation but they can only work in certain cases. Likewise, with legal aid it is difficult for consumers to qualify for legal aid services because of the method used to assess if a consumer meets the requirements to get the services.<sup>490</sup> Arbitration has a potential of resolving consumers' disputes effectively but the main problem is that it can be very expensive

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<sup>487</sup> Section 82 of the Consumer Protection Act 68 of 2008.

<sup>488</sup> Naude op cit note 355 at 517.

<sup>489</sup> Chapter 2.

<sup>490</sup> Chapter 2. See Cohen op cit note 55 at 253.

because parties have to contribute towards costs of arbitration.<sup>491</sup> Mediation is another simple method of dealing with disputes though it too has cost implications and may not be appropriate in some which require a binding fact-finding outcome. Most of the established consumer dispute mechanisms engage mediation as a preliminary method of resolving consumer disputes and they often succeed.

The South African system of dispute resolution, which this dissertation used as its main comparator to Lesotho, presents a number of processes for resolving consumer“ claims. The National Consumer Commission plays the vital role of the prosecuting consumer cases at the National Consumer Tribunal and it can investigate cases of malpractice by the sellers. The Consumer Commission can engage different methods of alternative dispute resolution with the intention of resolving the dispute amicably. There are also Provincial Consumer Courts and they coordinate with these other bodies to resolve consumer disputes. The CPA also makes a provision that consumers can approach an entity that provides for conciliation, mediation and arbitration for dispute resolution. The Ombudsman is one of the ADR processes in South Africa and it is available in almost all the sectors.

The OECD report discusses ADR processes which are almost the same as the ones contained in South African legislation. Those which were highlighted are online dispute resolution and payment cardholder protection. These are discussed in the dissertation and are also provided for under the EC Directives. They are effective and highly recommended because of the extent of e-commerce which is prevalent today. These processes can only work well in the developed countries like European countries and even South Africa. They are modernised and demand a very high level of technology. Therefore, they cannot be appropriate for a country like Lesotho, bearing in mind the people found there and how scarcely people use the internet.

## **5.3 RECOMMENDATIONS**

### **5.3.1 Promulgation of consumer law**

Lesotho has just adopted a policy on consumer protection in March 2015 and this is a clear intention on the part of the government to protect consumers“ interests. Though

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<sup>491</sup> Chapter 2.

consumer protection is a pressing issue as far as consumers are concerned, it would be too soon to expect the government to enact an Act on consumer protection especially when it has just taken the first step in the policy towards protecting consumers. However, this should not prevent a recommendation for the government to enact a law protecting consumers, and which will be more helpful to consumers because, unlike the policy, a statute will be enforceable and consumers will have a legal basis to enforce their rights.

### **5.3.2 The amendment of the Consumer Policy**

It is recommended that the Ministry of Trade and Industry in Lesotho should revise the policy on consumer protection in relation to dispute resolution. It is recommended that the policy should include the role of the Consumer Protection Department in investigating the complaints other than only mediating between the parties. The policy should also state how the consumer disputes at the tribunal will be handled. As it stands it suggests that consumers will represent themselves at the tribunal against businesses. Lastly, the policy should include the services of an ombudsman as a process of dispute resolution for consumers.

### **5.3.3 Introduction of Ombudsman**

#### **5.3.3.1 Jurisdiction and Power**

In proposing the introduction of an Ombud in Lesotho for consumer disputes, it is necessary to briefly summarise and map out how this method works in order to gain a clearer picture.<sup>492</sup> As has been noted, in South Africa there are different ombudsmen schemes for various sectors and they are established in accordance with the relevant legislation for the sector or under the industry code. These sectors range from insurance, financial services, motor industry and there is also Consumer Goods and Services Ombudsman (CGSO).<sup>493</sup>

The CGSO is established through the industry code of conduct as provided in terms of Section 82 of the CPA.<sup>494</sup> The industry code regulates the relations amongst the companies within a certain industry and also regulates the provision of alternative

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<sup>492</sup> WL Ury et al *Getting Disputes Resolved: Designing Systems to Cut the Costs of the Conflict* (1988) 27.

<sup>493</sup> Government Notice No. 38637 The Consumer Goods and Services Industry Code of Conduct (2015) .

<sup>494</sup> Consumer Protection Act 68 of 2008.

dispute resolution between the companies within the industry and the consumers.<sup>495</sup> Ombudsman schemes all derive powers from the Public Protector through delegation. The Ombudsmen possess discretionary powers in the exercise of their functions which are based on transparent principles in order to cater for the inequality of bargaining powers between the parties.<sup>496</sup> It must be noted that Ombudsmen are available in most jurisdictions, including the most developed countries.

### 5.3.3.2 Procedures

Ombudsmen schemes adopt the same procedures to resolve disputes regardless of their sectors. In South Africa consumers are required to initiate their complaints with the Ombudsman before they can approach other forums of dispute resolution if they have failed to have them resolved with businesses. Ombudsman schemes are fast, informal and offer services free of charge. Complainant may refer a claim to the Ombudsperson by filing a form and may hand deliver, fax, email or post it to the Ombud's offices.<sup>497</sup> The preferred method for Lesotho would be hand delivery or by a phone call. The claim should be referred within a reasonable time and a claim that has exceeded three years cannot be accepted as it has prescribed.<sup>498</sup> Upon receiving a complaint CGSO investigates and assesses the purported contraventions of the code in attempt to assist parties to reach a settlement.<sup>499</sup> Again, Ombudsmen may facilitate or mediate where possible to resolve disputes, which make the procedure more effective and efficient.<sup>500</sup> Also, in determining the cases, the Ombudsmen apply the rules of fairness rather other than strict rules of evidence.<sup>501</sup> The CGSO will attempt to resolve the dispute within working days sixty days.<sup>502</sup>

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<sup>495</sup>Section 82 (1) of Consumer Protection Act of 2008.

<sup>496</sup> Ramsay op cit note 16 at 450.

<sup>497</sup>Government Notice No. 38637 The Consumer Goods and Services Industry Code of Conduct (2015) 11. See also Rutledge op cit note 1 at 28.

<sup>498</sup>Government Notice No. 38637 The Consumer Goods and Services Industry Code of Conduct (2015) 11.

<sup>499</sup>Government Notice No. 38637 The Consumer Goods and Services Industry Code of Conduct (2015) 11.

<sup>500</sup>Government Notice No. 38637 The Consumer Goods and Services Industry Code of Conduct (2015) 13.

<sup>501</sup> Woodroffe op cit note 158 at 207.

<sup>502</sup>Government Notice No. 38637 The Consumer Goods and Services Industry Code of Conduct (2015) 11. See also Benohr op cit note 437 at 6.

### 5.3.3.3 Remedies

The ombudsman's decisions are just recommendations to the parties on to how to settle the dispute.<sup>503</sup> Traditionally, the Ombud may recommend the business — if it is at fault — to improve the ways in which it conducts its business.<sup>504</sup> In SA the CGSO may record the resolution of a dispute in the form of an order as provided in terms of section 70(3) which is submitted to the Tribunal or High Court to be made a court order.<sup>505</sup> This is done at the request of the parties to the dispute if they consent to the settlement and also consent to the award of damages to the aggrieved party.<sup>506</sup> The office may discontinue the process if the complainant is not cooperative with the office by failing to provide the necessary information within a specified time or if the claim is insignificant.<sup>507</sup> Also, the office can refer the disputes to another body that is more appropriate to handle the dispute.<sup>508</sup>

### 5.3.3.4 Sanctions

In certain jurisdictions business have complied with the recommendations for the fear of bad publicity which emanates from the annual report compiled by the Ombudsman about disputes handled by the office within a given year.<sup>509</sup> Apart from the reputational risks caused by „naming and shaming“, where the businesses do not comply with the recommendations it can be difficult to enforce such recommendations as they are not legally binding. Therefore, it is necessary to have a way of how this can be dealt with without exposing consumers to costs of litigation.

Having provided with a scenario of how Ombudsmen work especially in South Africa, it is recommended that the Ombudsman Act 9 of 1996 be amended to delegate and appoint an individual within the government set up to deal with consumer“ disputes. This should include both consumers of goods and services. This

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<sup>503</sup>Government Notice No. 38637 The Consumer Goods and Services Industry Code of Conduct (2015).

<sup>504</sup>Woodroffe op cit note 158 at 208.

<sup>505</sup>Consumer Protection Act 68 of 2008.

<sup>506</sup>Section 70(4) Consumer Protection Act 68 of 2008.

<sup>507</sup>Government Notice No. 38637 The Consumer Goods and Services Industry Code of Conduct (2015) 8.

<sup>508</sup>Government Notice No. 38637 The Consumer Goods and Services Industry Code of Conduct (2015) 13.

<sup>509</sup>Woodroffe op cit note 158 at 208.

process should also accommodate consumers of healthcare services because they form part of consumer services and currently they are handled by courts.<sup>510</sup> Patients in health care disputes are emotional, frustrated and hurting and the Ombudsman is an appropriate process to mediate between the parties.<sup>511</sup> Their disputes need to be dealt with through mediation which can focus on the human side of the dispute.<sup>512</sup> The operations of this new establishment can be sponsored by businesses in Lesotho. In South Africa the businesses contribute annually to fund CGSO and the payment is calculated on the basis of the business's total annual turnover.<sup>513</sup> The fees are charged depending on the size of an individual business and they are affordable.<sup>514</sup> It should be noted that the Ombudsman should be restricted to consumers and street vendors considering their income and not any juristic person. Section 6 of CPA allows companies of a certain threshold to lodge their claims with CGSO.<sup>515</sup>

It is not known when the Consumer Act will be promulgated to establish the consumer protection department and the tribunal; to wait for the Act to be enacted will be unfair to consumers because they already have problems with dispute resolution. Therefore, it is imperative to attend to that problem as soon as possible by introducing the office operating under the umbrella of the Ombudsman to handle consumer's disputes. This method of dispute resolution can operate very well for consumers in Lesotho because it will not be costly for government to introduce and to operate. This process can work well in Lesotho if consumers state their complaints without filing any particular form. This is to avoid an excuse that the office has run out of forms. Lastly, upon the introduction of this office consumers should be educated and sensitised about its operations. The availability of the office without people utilising its services will be a futile exercise.

#### **5.3.4 Small Claims Procedures**

As indicated above there are times when businesses will not comply with the recommendations. It is therefore necessary to propose a mechanism that will be

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<sup>510</sup>Chamisa op cit note 47 at 96. See also van der Heever op cit note 316 at 22.

<sup>511</sup>Botes op cit note 163.

<sup>512</sup>Chamisa op cit note 47 at 57.

<sup>513</sup> CGSO „Participant Obligation“ available at <http://www.cgso.org.za/participant-obligations/> accessed on the 01 September 2015.

<sup>514</sup> CGSO „Participants“ available at <http://www.cgso.org.za/participation/> accessed on the 01 September 2015.

<sup>515</sup> Consumer Protection Act 68 of 2008.

suitable in that situation. Small Claims Courts are operational in Lesotho although available only at the few of the magistrates' courts. It is recommended that the small claims procedures be made available at all the magistrates' courts in the country. Small claims are relatively inexpensive and informal. In South Africa, businesses did not fall under the category of the groups that can use small claims and as a result they have worked successfully.<sup>516</sup> It is highly recommended that this should be considered to allow only certain businesses and not all the businesses even if their claims are under the value of the prescribed threshold to make use of small claims court. This is to reduce flooding of small claims Court with all the cases that are under or equal to the prescribed threshold. Small Claims Courts grant orders that are enforceable<sup>517</sup> and consumers can prefer them compared to other courts.<sup>518</sup>

Consumers should also be given enough information about the availability of small claims procedures and how they operate, preferably in information booklets.<sup>519</sup> This information can always be readily available for consumers to read. Consumers should be sensitized that they should only make use of the small claims procedures after referring their cases to the Ombudsman to avoid confusion.

Effective and efficient methods of dispute resolution for consumers' disputes are at the heart of consumer protection in particular low-income earners. „In large measure ... the successful resolution of consumer disputes presents the need for a particular kind of approach in terms of decision making. ...The resolution of consumer disputes requires a different understanding of the standards to be applied and the method of adjudication to be used in their achievement.“<sup>520</sup>

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<sup>516</sup> McQuoid-Mason op cit 21 at 310.

<sup>517</sup> Consumer Futures op cit 3 at 82.

<sup>518</sup> Mupangavanhu op cit note 327 at 331/ 638.

<sup>519</sup> See OECD note 74 at 27.

<sup>520</sup> P O'Shea et al „In Defence of Consumer Law: The Resolution of Consumer Disputes“ (2009) 28 Sydney Law Review 140.

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