The Global Pound Conference Series
"Shaping the Future of Dispute Resolution & Improving Access to Justice"

Opening Address Thursday 29 June 2017 09h00
Edwin Cameron, Constitutional Court of South Africa

Background to the GPC

The Global Pound Conference ("GPC") Series aims to facilitate a modern conversation about what needs to be done to improve access to justice, and the quality of justice, around the world. This it does in locally-centred events – by engaging stakeholders in the dispute prevention and resolution fields.

The events will gather data designed to enable the dispute resolution market and all participants to consider whether to adapt existing services to better suit stakeholders' needs and means.

A seminal event occurred in St Paul, MN, USA in April 1976. The first Pound Conference took place. That led to the birth of modern dispute resolution systems.

The conference was named in honour of Roscoe Pound. He was the reforming Dean of Harvard Law School in the 1920s and 30s.
The first conference's theme was:

Agenda for 2000AD - The Need for Systematic Anticipation".

At the event, Professor Frank E.A. Sander of Harvard Law School advanced a fresh take on traditional litigation systems. They process, he argued, only certain kinds of disputes effectively. The remaining types of disputes might be better addressed through other mechanisms or alternative forms of dispute resolution.[1]
Other mechanisms would be arbitration, mediation, fact-finding, or other mechanisms tailored to the particular dispute.

- It is from this idea that the 'multi-door courthouse' concept was born.

That proposal is credited for the emergence and rise of ADR internationally.

The International Mediation Institute organised a pilot convention in London on October 29, 2014. This suggested that there may be a lack of reliable, comparative and actionable data about users' needs, both locally and transnationally.

This initiative has given rise to a series of events – 29 of them, taking place in 23 countries across the world.

[1] F. Sander, "Varieties of Dispute Processing in The Pound Conference: Perspectives on Justice in the Future (Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice), Levin & Wheeler (eds.), West Publishing Co., St Paul Minnesota (1979), p 86.

A consultative process generated set of core questions across the world.

These core questions are a central part of the GPC Series – they have been posed at each of these events around the world.

This event today in Johannesburg is the second last of the 29. The data gathered both globally and locally will help stakeholders to consider reforms to existing dispute resolution mechanisms to enhance access to justice both locally and globally.

South African successes
Appropriate dispute resolution has a long history in South Africa.

In traditional African communities a sanction was seldom invoked for a breach of customary law. Instead, the primary means of conflict resolution was agreed corrective mechanisms.

In our country, the development of ADR can be attributed in large measure to the establishment of the Independent Mediation Service of South Africa (IMSSA) in 1984.

IMSSA was established to provide mediation and arbitration in employment disputes. Later it expanded to offer mediation in community disputes. I was privileged to be one of the first group of arbitrators that IMSSA trained.

At that time, the statutory institutions of the apartheid state were in question, though widely used by trade unions and employers.

IMSSA was formed as an alternative and in many cases a substitute.

Six or seven years after IMSSA started, the National Peace Accord helped to deliver a democratic South Africa.
This, too, played an important role in recognising the African tradition of consensual dispute resolution during negotiations for political transition.

Mediation became well entrenched in family and divorce disputes and in the environmental area.
By the end of the 1990s many organisations were providing consensual dispute resolution services – in employment, community, family and environmental areas. There has also been an increase in arbitration, as parties prefer great control of the adjudicative process. This reflects a world-wide trend, and is not peculiar to South Africa.

Since 1995 the movement toward consensual dispute settlement has increasingly received statutory support. There are now more than fifty statutes in South Africa that provide for mediation and/or arbitration of one kind or another.

Several tribunals have been established that rely on alternative dispute resolution processes for quicker and cheaper dispute resolution:

- The Commission for Medical Schemes (CMS)
- Rental Housing Tribunal (rental housing disputes)

- National Consumer Commission (consumer disputes)
- Community Schemes Ombud Service (communal living disputes comprising sectional title schemes, retirement villages as well as golfing and gated estates disputes)
- Land Rights Management Facility (labour tenant, farm dweller, communal property institution, restitution claim and other land reform beneficiary disputes)
- Gauteng Consumer Affairs Court (consumer disputes)
- Ombuds for the Cities of Johannesburg and Cape Town (residents' complaints about the municipal services)

In the labour area, the CCMA provides a remarkable degree of access to justice for ordinary employees and employers. The CCMA has established a repute as the largest dispute resolution agency in the world. It has a case referral rate of 2 717 115 over the past 20 years (that is a staggering 745 referrals per day). The annual conciliation settlement rate at the CCMA is currently 74%.

The referrals increased over the last two years in relation to unfair labour practice referrals (discrimination cases). This was because the Employment Equity Act was amended in August 2015. The changes gave CCMA jurisdiction in some areas – thus making it easier to bring these cases.
This has seen 3422 cases come in over the last year. This is a 6% increase over all the previous years where these types of disputes were only 3% of CCMA case load.

The role the CCMA has played in dispute resolution has also been recognized internationally. The CCMA was for instance a lead drafter, in developing guidelines and processes for the running and establishing of similar agencies around the world. Its practices, governance system and success have been touted as leading examples by the ILO.

The same cannot be said for the civil and commercial spheres of life in South Africa.

Challenges in South Africa

A complete contrast lies in our processes and systems in South Africa for resolving civil and commercial disputes, both inside and outside the courts. Here, there has been complete stagnation. South Africa continues to trail global developments – not to mention developments elsewhere on our own continent.

Many of our neighbors are streets ahead of us. They should be congratulated.

Nigeria, Namibia and Mauritius have well-established mediation and arbitration mechanisms, not only for domestic disputes but also for cross-border ones.

They are ahead of South Africa. This serves as their advantage in attracting the growing number of investors interested in doing transactions across borders.

Mauritius has successfully established itself as an international arbitration centre. It is becoming a hub for cross-border transactions.

Dispute resolution through litigation is expensive and time-consuming in South Africa, especially compared to other countries. Here, it can take years to get a first hearing in the High Court.
Other countries have overhauled their pre-action protocols and court proceedings.

But sadly we have not followed world best practice here.

Hence, litigation in our country remains costly, complex and protracted.

This disadvantages everyone.

Multinational companies take their investments elsewhere.

Few medium and small businesses can afford the time and cost of taking their disputes to the courts.

As for the ordinary South African, access to justice is, in most cases, practically impossible.

The average citizen lacks the skills, knowledge and resources to seek redress for the many types of civil disputes that arise from day to day:
neighbourhood and townhouse disputes, shoddy workmanship by service providers from panel beaters to dry cleaners, healthcare disputes, con artists preying on the poor or ill-informed, and the like.

Despite the comparatively slow arrival of ADR in South Africa and in the civil justice system, decisive steps have been taken to establish it.

Judicial support for dispute resolution

In Port Elizabeth Municipality v Various Occupiers the Constitutional Court said that:

> *…one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.*
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> *Compulsory mediation is an increasingly common feature of modern systems. It should be noted, however, that the compulsion lies in participating in the process, not in reaching a settlement. In South Africa, mediation or conciliation are compulsory in many cases before labour disputes are brought before a court. Mediation in family matters, too, though not compulsory, is increasingly common in many jurisdictions.*
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> *… Justice and equity oblige them to rely on this same resourcefulness in seeking a solution to their plight and to explore all reasonable possibilities of securing suitable*

alternative accommodation or land.

Not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and-take, mediators can find ways round sticking-points in a manner that the adversarial judicial process might not be able to do. Money that otherwise might be spent on unpleasant and polarising litigation can better be used to facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society.

In South African conditions, where communities have long been divided and placed in hostile camps, mediation has a particularly significant role to play. The process enables parties to relate to each other in pragmatic and sensible ways, building up prospects of respectful good neighbourliness for the future. …

One of the relevant circumstances in deciding whether an eviction order would be just and equitable would be whether mediation has been tried. In appropriate circumstances, the courts themselves order that mediation be tried.[2]

In 2007, in another eviction case, the Constitutional Court urged the parties to mediate their dispute and endorsed the agreement reached in mediation in its ultimate judgement.

Mediation received further important encouragement in August 2009. Acting Judge Brassey held in the High Court in Johannesburg in *MB v NB*[3] that the court should punish attorneys representing the parties for failing to advise their clients about mediation as something that could be used to resolve their dispute. The dispute was an acrimonious divorce, with a minor daughter involved. The attorneys had simply dismissed the possibility of mediation. They had given it no serious thought.

The court barred the attorneys from recovering their full fees. Instead, it restricted them to fees at a reduced rate.[4]

In reaching this conclusion, Brassey AJ referred to the rules of the High Court. These require that one of the matters that must be considered at a pre-trial conference is *whether a dispute should be referred to mediation*. Rightly, they paid a heavy price in restricted fees for their failure.

A later example of judicial activism took place when the High Court in Johannesburg directed parties to enter mediation regarding all of the issues in dispute between them. The court nominated a mediator, prescribed time limits for the mediation and directed that the parties

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[2] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC)(1 October 2004) paras 39-45.

[3] *MB v NB* 2010 (3) SA 220 (GSJ) (25 August 2009). The attorneys were only allowed to recover fees at the "party and party" rate – not as between "attorney and client".

[4] See Tony Allan's paper referring to the Brownley principle.

should bear equally the costs of the mediation. The matter was a dispute between neighbours.[5] It concerned seven swamp cypress trees along the common boundary between the parties' two properties. The dispute was settled at mediation.

Court rules

At present the High Court rules require only that parties must *consider* mediation at a pre-trial conference.

Although significant reforms are presently being considered, the rules do not yet provide for active case management. This contrasts sadly with a number of comparable jurisdictions that already provide for this.

Our judges are not expressly given the power to *require* pre-hearing mediation.

Following *MB v NB* a senior magistrate in Bellville in the Western Cape took a significant step toward court-directed mediation. On 10 November 2009 she issued a practice direction. This notified parties of *MB v NB*. It informed them that future cases would not automatically be set down for hearing unless the parties filed a certificate from a mediation service proving that they had attended mediation.

In September 2010, the Judge President of the Labour Appeal Court, Judge Zondo (now Deputy Chief Justice), issued a revised Practice Directive. Its specific aim was –

> 'to promote active case management by judges, to improve the efficiency with which disputes referred to the Labour Court are managed, and in particular, to promote access to justice by all those whom the Labour Court serves'.

The Practice Directive came into operation on 18 October 2010. It brought a range of new initiatives directed at active case management. These include the possibility of judges issuing directives regarding the further conduct of a matter that may include directing mediation.

In 2014 the Minister of Justice and Constitutional Development approved the amendment of the Magistrates' Courts Rules. The amendment provided a procedure for voluntarily submitting civil disputes to mediation in selected courts.

The Court-Annexed Mediation Project was officially launched in February 2015 in 12 magisterial districts in Gauteng and North West provinces. These would serve as pilots.

Chairperson of the Mediation Advisory Committee, Acting Judge Cassim Sardiwalla reported in August 2016 that, up to that time, the pilot process saw no fewer than 1280 cases in which parties agreed to mediation.

The ADR Committee of the Rules Board was of the view that the project had to be rolled out throughout the country in phases.

[5] It is not reported.

This has been put to the Department of Justice for consideration and – most importantly, of course – for a budget.

These steps are part of a much broader initiative within the South African court system towards active case management. They clearly signal that judges recognize the value of mediation in the civil justice system – and that court-directed mediation is becoming entrenched.

Corporate governance

Corporate governance directives have been an important source of support for commercial mediation in South Africa.

The Institute of Directors in Southern Africa enacted its updated Code on Corporate Governance in 2010:

> *It is incumbent upon directors and executives, in carrying out their duty of care to a company, to ensure that disputes are resolved effectively, expeditiously and efficiently. This means that the needs, interests and rights of the disputants must be taken into account. Further, dispute resolution should be cost effective and not be a drain on the finances and resources of the company*. (para 81)

The Code goes on to state:

> *External disputes may be referred to arbitration or a court. However these are not always the appropriate or most effective means of resolving such disputes. Mediation is often more appropriate where interests of the disputing parties need to be addressed and where commercial relationships need to be preserved and even enhanced.* (para 84)

This is the first time a code on corporate governance has expressly endorsed ADR in South Africa. This, together with provisions of the new Companies Act, may boost mediation of disputes within companies and between them and other entities.

The Companies Act – 2011 Amendments

A 2011 amendment to the 2008 Companies Act[6] provides that, as an alternative to applying to court or filing a complaint with the Companies Commission, a person may refer a matter either to the Companies Tribunal or to an agency or person for resolution of the dispute by mediation, conciliation or arbitration. The Companies Tribunal is a statutory body the Act created to resolve disputes. The other agencies or persons would be private dispute resolution providers.

These provisions and the Corporate Governance Code, together with the risk of an adverse costs order, will make it difficult for parties to resist alternative dispute resolution in the corporate arena.

International Trade

[6] Companies Amendment Act 3 of 2011, amending the Companies Act 71 of 2008.

The Department of International Relations and Cooperation (DIRCO) is participating in the deliberations of the United Nations Commission on International Trade Law (UNCITRAL). This is seeking to formalise instruments for international cross-border mediation.

The problem is they are trying to put the cart before the horse. A country needs to have a proper *domestic* mediation system before it can effectively participate internationally. This our country still lacks.

On cross-border dispute resolution, the Department of Trade and Industry (DTI) recently cancelled South Africa's bilateral treaties. This has provoked a negative reaction from foreign investors. Through the Promotion of Foreign Investment Bill, the DTI is trying to put in place mediation for party / state disputes. Prospects seem dim. If mediation fails, investors do not want to rely on local courts. They are likely demand international arbitration – which has been removed.

Comments were recently invited on the proposed Regulations under the Protection of Investment Act: Draft Regulations on Mediation Rules.

This is another attempt to offer international investors appropriate dispute resolution mechanisms.

Law Reform

An exciting recent development has taken place. This is the establishment of the Alternative Dispute Resolution (ADR) Advisory Committee of the South African Law Reform Commission. It is scheduled to start its work next week, on 4 July.

The Committee's purpose is to consider developing legislation to promote the optimal use of alternative dispute resolution to enhance access to justice in South Africa.

Way forward

Conflict is costly: in time, resources and human energies.

A 2006 study estimated that conflict in British business cost some £33 billion a year. (Less than 20% of this went to lawyers.)

UK research has also shown that a dispute with the value of £1 million typically burns up more than three years of a line manager's time.

Arbitration, while still adversarial, is frequently preferred to court-litigation. It is generally thought to be quicker and more convenient to arrange.

But arbitration, too, is cumbersome. Research in the US indicates that even arbitration takes an average of over 16 months from the filing of a complaint to an award.

The problem is adversarial litigation. Legal costs and delay are not its only disadvantages.

Many costs are not quantified at all. This is partly because they are difficult to identify clearly or predict. These are costs of management time and focus.

And the cost to a country of providing a court system to deal with adversarial conflict is substantial. Combined, these costs represent an enormous financial drain.

For the parties, adversarial litigation has other significant disadvantages.

Court decisions are often thought unpredictable.

And judges are usually limited to two options – one party is declared the winner and the other the loser.

And litigation is almost always backward-looking.

The contest seeks to bring one party out on top: the winner. Parties must focus on asserting what they feel are their rights, and must do so in public.

And in the course of adversarial litigation, the relationship all too often suffers irreparable harm.

Finally, too many litigants simply cannot afford the ballooning costs. They may be deprived of access to justice.

Contrast mediation.

The most obvious advantage is speed.

In the UK, the majority of commercial disputes are mediated in London. Of these, 70% to 80% are settled within one or two days. A further 10% to 15% are settled within a few weeks of mediation.

This almost always at significantly reduced cost.

In addition, mediation is essentially consensual. It is an extension of a negotiation process – though with the help of a third-party facilitator. So parties retain ultimate control over both the process and its outcomes. This may have a positive impact on rocky relationships.

The nature of mediation also allows parties to explore creative opportunities for solutions. These may address needs beyond those they may hope to achieve through fighting in court.

The negotiation process is inherent in mediation. And the initial phases of arbitration require narrowing the issues. These enable parties to address *causes*, and to manage complex interests behind them.

The process may bring mutual gain.

There is the possibility of resolving mistrust, bridging poor communication, and overcoming lack of skills on either side.

These characteristics make it particularly suitable for disputes where a continuing relationship is important.

And perhaps the most crucial advantage of mediation is its success where it is implemented effectively.

In the right environment, an 80% to 90% settlement rate can realistically be achieved.

The case for mediation in South Africa is as strong or stronger than in other jurisdictions.

The cost of business conflict, and the inherent qualities of adversarial court based litigation or arbitration hang heavily in South Africa.

More acute even is access to justice – more so even than in the UK, where this was a very material factor in driving commercial mediation.

Commercial mediation is growing in the dispute resolution systems of South Africa's major trading and investment partners. So commercial mediation in legal practice in South Africa should provide a strong incentive to foreign investment.

It is crucial, if momentum is to be sustained, that South Africa should maintain the highest possible standards – not only in its financial services and telecommunications infrastructure, but also in its dispute resolution system.

These must be of superior standard, and appropriate to the resolving potentially complex and significant cross-border or multi-jurisdictional disputes.

Commercial mediation will inevitably play a critical role in establishing and developing South Africa's reputation as a reliable business destination.

Government and legal community must give serious consideration to establishing a duty on disputants to pursue ADR as an alternative or as an adjunct to litigation.

In the UK, active judges have played a critical role in growing alternative dispute resolution.
So has the UK government's pledge to consider ADR in resolving all disputes to which it is a party.

The same pledge may be sought from or given by private sector players.

And there has been a strongly positive response to this kind of initiative in the UK and the United States.

Sound corporate governance strongly dictates this approach.
The draft new Companies Bill makes specific provision for ADR as an alternative to applying for relief to a court.

Amending the rules of the High Court and other fora would strongly assist this.

In labour law, the Labour Relations Act, which establishes the Labour Court as a court of equal standing with the High Court, expressly provides that the Court may refuse to determine any dispute, other than an appeal or review, if no attempt has been made to resolve it through mediation.

Most High Court suffers significant backlogs in their roll.

This by itself evidences the need to introduce active case management through the rules.

These could include a provision that entitles Judges to refuse to agree to enrol cases where no attempt has been made to mediate.

Mediation services may be provided by a public institution:

Court-aligned mediation elsewhere offers a good example of how this works.

In addition, private dispute resolution bodies including those already playing a significant role in labour, matrimonial and insurance disputes, will be important in providing commercial mediation.

And all of us need to be educated. Continuing legal education for all sectors of our profession will help.

Mediation advocacy involves a range of skills that have not as yet found their way into law school curricula – or into the practical training for entry into the legal profession.

University business schools and law schools should modify their curricula to take account of this.

Although there is still much to be done, the growth of dispute resolution in South Africa has the potential to offer huge benefits.

And the country has a rich pool of mediation and arbitration experience to build on. Nothing stands in our way.

The meeting today gives an opportunity to share views on how we go ahead, in practical terms. I wish you very well.