



BOWMANS

THE VALUE OF KNOWING

INTEREST ARBITRATION – POTENTIAL FOR SOUTH AFRICA

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INTRODUCTION



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DEFINITION OF INTEREST ARBITRATION

- Interest arbitration is a process in which a third party hears the disputing parties respective cases and then determines an interest dispute between them
- An interest dispute is a dispute about the creation of future rights
- A rights dispute is a dispute about the interpretation and application of existing rights

VOLUNTARY VS COMPULSORY INTEREST ARBITRATION

- Voluntary interest arbitration is a process agreed to by the parties in which the arbitrator is a mutually acceptable third party
- Compulsory interest arbitration is a process in which an arbitrator is imposed on the parties by an authority and the arbitrator is required to determine an interest dispute between them

AUTOMATIC VS COMPULSORY INTEREST ARBITRATION

- Automatic arbitration is a form of arbitration in which parties agree that in future all disputes of a particular kind will be referred to arbitration
- Ad hoc arbitration is a form of arbitration in which the parties agree that an existing dispute be referred to mediation

COMPULSORY INTEREST ARBITRATION IN ESSENTIAL SERVICES

- Interest arbitration is the alternative to the right to strike in essential services
- The arbitrator is required to determine the dispute as it would have been determined if a strike were permissible
- Without an alternative to the right to strike there would be no leverage and equilibrium in collective bargaining

COMPULSORY INTEREST ARBITRATION IN ESSENTIAL SERVICES

- The LRA and Bargaining Council Constitutions require interest arbitration in essential services
- An award only becomes binding if parliament approves or the CCMA determines
- It would be a breach of ILO Conventions 87 and 92 to compel interest arbitration beyond essential services or other than:
 - In the event of an acute national emergency
 - In the event of substantial violence

ARGUMENTS AGAINST COMPULSORY INTEREST ARBITRATION

- Should be no intervention by Government or outside third party in collective bargaining
 - See: Taylor, George W., Government regulation of industrial relations. New York: Prentice Hall, 1948 and Phelps, Orne, "Compulsory Arbitration: Some Perspectives," Industrial and Labour Relations Review, Vol.18, 1964, 81-91. Both cited in Kochan, Thomas A.: Lipsky, David B. : Newhart, Mary : and Benson, Alan, "The Long-Haul Effects of Interest arbitration : The case of New York States Taylor Law" (2009). Working Papers. Paper 90.
- Conflict or the threat of conflict is essential to effective collective bargaining
 - See: for example Task Force on Labour Relations, Ottawa, Privy Council, 1968.
- The chill or narcotic effect – parties become dependent on interest arbitration and reach agreement less in collective bargaining
 - See: Northrup, "Compulsory Arbitration and Government Intervention in Labor Disputes", 1966

ARGUMENTS AGAINST COMPULSORY INTEREST ARBITRATION

- It encourages the parties to take and hold extreme positions in the hope that the arbitrator will split the difference
- It has a corrosive effect on leadership – passing difficult decisions onto the arbitrator
 - See: Task Force on Labour Relations, ob cite paragraphs 396 – 398. Cited in George W. Adams “The Ontario Experience with Interest Arbitration – Problems in detecting
- There is a lack of arbitration criteria
 - See: The Ontario Experience with Interest Arbitration – Problems in Detecting Policy op cite
- It is time consuming
 - See: The Ontario Experience with Interest Arbitration – Problems in Detecting Policy op cite

ARGUMENTS AGAINST COMPULSORY INTEREST ARBITRATION

- However modern research indicates that there is little substance to these criticisms
 - See: for example Loewenberg, J. Joseph, “Compulsory Arbitration for Police and Firefighters in Pennsylvania in 1968,” *Industrial and Labour Relations Review*, Vol.23, PP.267 – 379, April, 1970, Stern, James L., Charles M. Rehmus, J. Joseph Loewenberg, Hirschel Casper, and Barbara D. Dennis, “Final – Offer Arbitration”. Lexington, Mass.: D.C. Heath 1975. Lipsky, David B. and John E. Drotning, “The relation between teacher salaries and the use of impasse procedures under New York’s Taylor Laws: 1968 – 1972,” *Journal of Collective Negotiations in the Public Sector*, Vol.6, No.3, 1977, 229 – 44, Thompson, Mark and James Cairne, “Compulsory Arbitration: The Case of British Columbia Teachers,” *Industrial and Labour Relations Review*, Vol.27, No.1, October 1973, 3 – 17.”, Lester, Richard A., “Labour Arbitration in State and Local Government: An Examination of Experience in Eight States and New York City.” Princeton NJ: Princeton University, 1984

ARGUMENTS AGAINST COMPULSORY INTEREST ARBITRATION

- One recent example of research concluded that:

“...rates of dependence on arbitration declined considerably, the effectiveness of mediation prior to and during arbitration remained high, the tri-partite arbitration structure continued to foster discussion of options for resolution among members of the arbitration panels, and wage increases awarded under arbitration matched those negotiated voluntarily by the parties. Econometric estimates of the effects of interest arbitration on wage changes in a national sample suggest wage increases between 1990 and 2000 in States with arbitration did not differ significantly from those in States with non-binding mediation and fact finding or States without a collective bargaining statute.” – The Long-Haul Effect of Interest Arbitration: A case of New York States Taylor Law

ADVANTAGES OF INTEREST ARBITRATION

- It is seen by some unions as a powerful substitute
 - see: the Ontario Experience with interest arbitration – Problems in Detecting Policy op cite P.227
- Outcomes become predictable which discourages unreasonable positions in negotiation
- It actually encourages settlements
- It saves the parties loss

KINDS OF INTEREST ARBITRATION

- At least five varieties of interest arbitration are identified by writers:
 - *“conventional arbitration of all unsettled claims*
 - *Selection of the last offer of the employer or of the union on an issue by issue basis*
 - *Selection of the last offer of the employer or of the union or the fact finder’s report on a single package*
 - *Selection of the last offer of the employer or of the union or the fact finder’s report on an issue by issue basis*
 - *Separation of the dispute into economic and non-economic issues and employing one of the selection procedures outlines above.”* – Christopher A Barreca et al
 - See: Christopher A Barreca, Ann Harmon Miller and Max Zimny – Labor Arbitrator Development A Handbook P.98
- Final offer arbitration often encourages settlement
 - See: Stevens, Carl, “Is Compulsory Arbitration Compatible with Collective Bargaining” Industrial Relations, Vol.5, 1966, 38-52

CRITERIA IN INTEREST ARBITRATION

- The common law of arbitration has developed the following principles:
 - an interest arbitrator should not “play God” or usurp the role of Government to make radical economic and structural alterations
 - the arbitrator must seek to replicate a negotiated outcome accepting the relative power positions of the parties
 - there must be a demonstrated need for the change proposed
 - total compensation – the overall cost to the employer of the deal must be considered; and
 - an appropriate comparison must be made with similarly situated employees doing similar work in similar sectors
 - For a detailed analysis of the criteria used by interest arbitrators see “Elkouri and Elkouri – How Arbitration Works” 5th Edition pg. 1347 – 1444

CRITERIA IN INTEREST ARBITRATION

- Some countries have codified this common law of interest arbitration into a statute
 - See: for example the Hospital Labour Disputes Arbitration Act in Ontario, Canada which codifies the criteria to be taken into consideration as: 1. The employer's ability to pay in light of its fiscal situation; 2. The extent to which services may have to be reduced, in light of the decision or award if current funding and taxation levels are not increased; 3. The economic situation in Ontario and in the municipality where the hospital is located; 4. A comparison as between the employees and the other comparable employees in the public and private sectors of the terms and conditions of employment and the nature of the work performed; 5. The employer's ability to attract and retain qualified employees

CRITERIA IN INTEREST ARBITRATION

- An important subsidiary principle is:
 - workers should not have to subsidise public services
- Therefore interest arbitration must supplement the collective bargaining process by striking a fair and equitable deal which the parties were unable to achieve for themselves
- Typical considerations in interest arbitration are:
 - ability to pay
 - prevailing practice in industry
 - cost of living indices
 - previous practice
 - competition

CRITERIA IN INTEREST ARBITRATION

- Typical arguments
 - productivity
 - public interest
 - supply and demand
 - internal and external comparisons and equity
- No single criterion applies
- A combination applies
- Interest arbitration outcomes tend to track strike outcomes

OUTCOMES IN COLLECTIVE BARGAINING IN SOUTH AFRICA

Outcomes in Recent Public Sector Bargaining

Public Sector Strike 2010

Duration
of strike

Wages lost – No work
no pay [2% per week]

21
days

6%
ANNUAL SALARY LOST

Apparent gain/loss suffered
[difference between employer offer at start of strike and settlement]

(7.5 – 6.5) = 1% "GAINED"

Actual gain/loss [difference of wages lost and apparent gain]

(1 – 6) = 5% LOST

Municipal Strike 2011

Duration
of strike

Wages lost – No work
no pay [2% per week]

16
days

4.2%
ANNUAL SALARY LOST

0.0%

(0 – 4.2) = 4.2% LOST

Public Sector Strike 2010

Number of weeks for workers to recover actual loss using apparent gain

156 weeks

Municipal Strike 2011

Number of weeks for workers to recover actual loss using apparent gain

Never

OUTCOMES IN COLLECTIVE BARGAINING IN SOUTH AFRICA

Outcomes in 2013 Private Sector Bargaining

	Automobile Industry	Motor	Gold Mining	Construction	SAA	Bus Strike	SAB
Duration of strikes	15 Days	20 Days	3 Days	15 Days	15 Days	15 Days	30 Days
% Wages lost +- [no work no pay]	- 6%	- 8%	-1.6%	- 6%	- 6%	-6%	-12%

	Automobile Industry	Motor	Gold Mining	Construction	SAA	Bus Strike	SAB
Apparent gain % [difference between employer offer at start of strike and settlement]	+1.5	+0.5	+1.5	+6	0%	+3%	0%
Actual gain/loss % [difference of wages lost and apparent gain]	- 4.5%	- 7.5%	- 1%	0%	- 6%	- 3%	- 12%

2014 PLATINUM STRIKE

2014 PLATINUM STRIKE

- Deadlock at approximately 300% apart
- AMCU's first move in the negotiation 2 months into the strike
- 23 weeks of strike action
- Extensive violence
- 46% of annual wages lost by each striker
- Total wages lost by workers R10 billion
- Employees have lost R23 billion in revenue
- Those workers still employed in 3 years time will only begin to benefit then

2014 NUMSA STRIKE

- Workers lost just more than 8% of their annual wages in the strike
- At best workers gained 2% due to the strike
- The strike was marred by severe violence

WAGE SETTLEMENTS CONCLUDED WITH STRIKES IN VARIOUS INDUSTRIES - 2014

DISTRIBUTION OF WAGE SETTLEMENT IN VARIOUS INDUSTRIES

Industry	Sector / Employer	Agreement Date	Initial Request	Employer's Offer	Settlement	Protected	Unprotected
Manufacturing	Footwear industry	June	7.5%	7.5%	7.5%	Protected	
	Clothing industry	July	10%	4.5%	7.5%	Protected	
	Unilever's Tea Factory	January	10%	7.5%	7.25%	Protected	
	Imsofer Manufacturing	April	100% (R3026 to R6000)	11.5%, 8.75%, 10% over a period of three years	11.5%, 8.75%, 10% over a period of three years	Protected	
	Rooibos Ltd	February	10%	7.5%	7.5%	Protected	
	Steel & Engineering industry	July	12%	8%	10%	Protected	
	ILOVO Sugar Manufacturing	June	11%	8%	9% for the lowest paid, 9% middle band and 8.75% for high band employees	Protected	
	Carpet Sector	June	8%	N/A	7.5%	Protected	
	Coca-Cola (ABI)	August	10%	7% to 8%	8%	Protected	

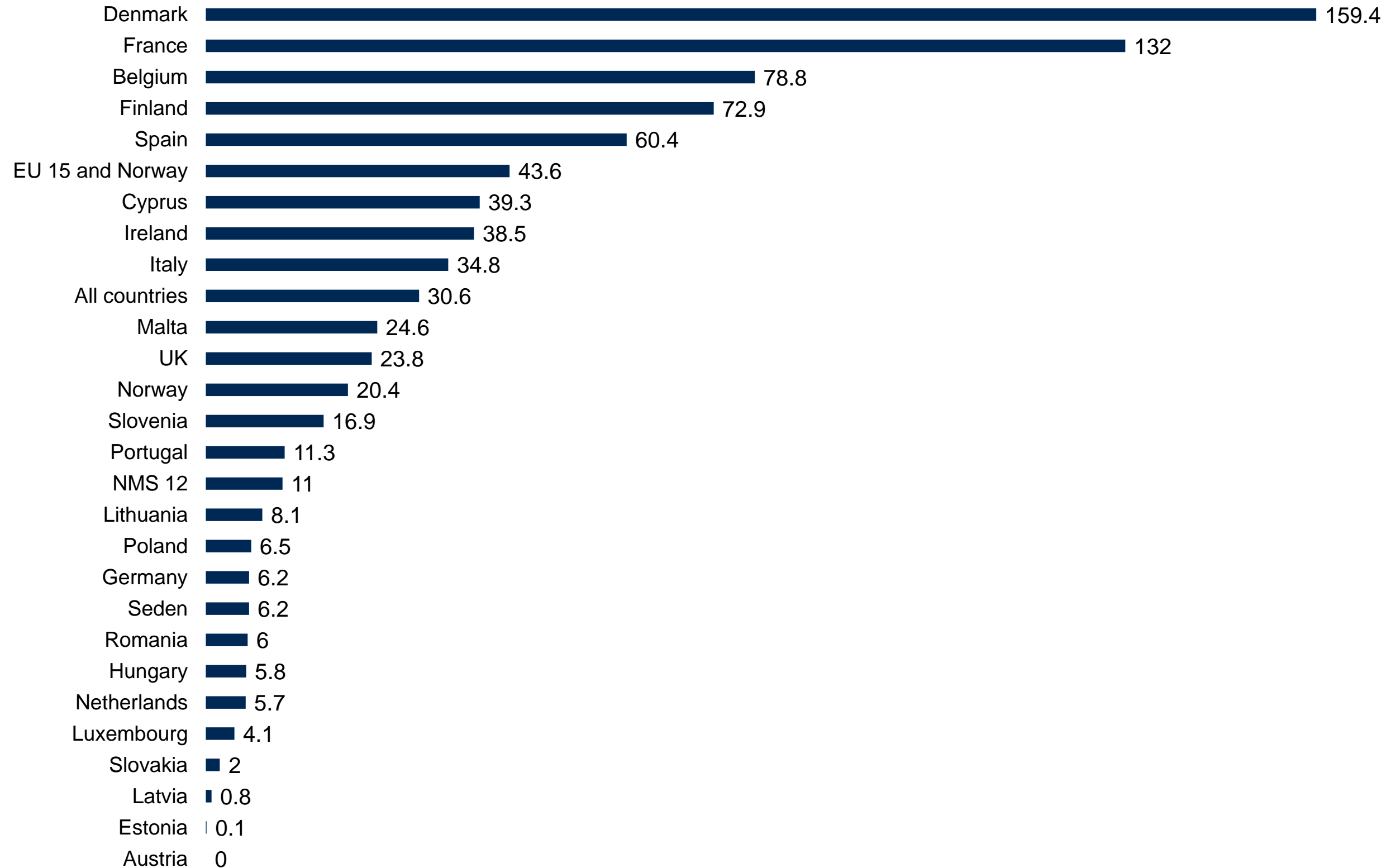
WAGE SETTLEMENTS CONCLUDED WITH STRIKES IN VARIOUS INDUSTRIES - 2014

DISTRIBUTION OF WAGE SETTLEMENT IN VARIOUS INDUSTRIES

Industry	Sector / Employer	Agreement Date	Initial Request	Employer's Offer	Settlement	Protected	Unprotected
Finance Intermediation	Steenberg Golf Estate	October	10%	8%	8%		Unprotected
Transport	Bombela Operating Company	August	15%	8%	8% for workers earning R130,000 per annum and 8.5% to those earning R130,000 and above	Protected	
Community	Life Mount Edgecombe	February	8%	7%	7%	Protected	
Agriculture	Douglas Green Bellingham	August	10%	7%	7%	Protected	
Mining	Lonmin Platinum Mines	July	R12 500		8%, 7.5% and 7.5% over a period of three years	Protected	
	Northam Platinum	January	22% to 43%	n/a	8.5% to 9.5%	Protected	
	Rand Refinery	August	10%	9%	9%	Protected	

THE FREQUENCY AND EXTENT OF STRIKE ACTION IN EUROPE

DISTRIBUTION OF WAGE SETTLEMENT IN VARIOUS INDUSTRIES



All European countries 2005-2009

South Africa
2006 - 2011

South Africa
2010 - 2014

Average working days lost per 1 000 employees

30.6

507

569

Maximum

159.4

1 593

1 593

Minimum

0

36

131

South Africa 2006-2011

International comparison of working days lost

**AMONG THE HIGHEST IN
THE WORLD**

**AMONG THE MOST
VIOLENT
IN THE WORLD**

POTENTIAL FOR SOUTH AFRICA

- With the judicious use of voluntary interest arbitration would parties gain more and lose less than they are currently gaining and losing by resorting to industrial action?
- If parties are to be encouraged to use interest arbitration, South Africa would need:
 - An arbitration division in the Labour Court to handle compulsory arbitration in essential services
 - A body of highly qualified and independent interest arbitrators
 - Education of parties about the potential benefits of interest arbitration

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