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**An evaluation of Alternative Dispute Resolution in the South African
agricultural environment**

By

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SUMMARY

The objective of this study was firstly to evaluate the current position of ADR within the legislative and policy framework specific to the agricultural industry in South Africa and, thereafter, to recommend ways to improve such framework. It is evident from research that the recognition and advocacy of ADR can better realise the constitutional right of access to justice as a dispute resolution method in the agricultural environment. Research further shows that national legislation and policy are insufficient to address the agricultural supply chain in addressing disputes by ADR. This practice allows for a speedier and more cost-effective dispute resolution. In the strive towards sustainable practices in the agricultural supply chain, the intervention of third-party audits and international business standards provide an ideal opportunity to enforce ADR as an accessible dispute resolution method where power imbalances and access to resources limit less powerful parties to a dispute, in solving the dispute in a fair and effective manner. Considering the current regulatory framework, recommendations to improve the use of ADR in the agricultural environment include the need for more robust research, involvement of DALRRD and state intervention on matters of ADR in agriculture, adding ADR as a preferred method of dispute resolution to industry standards, educating stakeholders in the supply chain on the benefits of using ADR, and more specific legislative changes.

Keywords: Alternative dispute resolution; arbitration; mediation; agriculture; regulatory framework.

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Chapter 1 – Introduction

1.1 Introduction

There seems to be a global shift from traditional litigation to Alternative Dispute Resolution (hereafter “ADR”).¹ Many countries, industries and individuals embrace ADR due to its perceived benefits, such as timeliness, cost-effectiveness and flexibility. ADR is not a new concept, with a history of being practised in different cultures and being part of the ethnography of many ethnic groups globally.² This history and shared advantages lead to a need to research the application of ADR in resolving conflict situations, how policy supports such conflict resolution, and when its use will be appropriate. To some scholars, ADR is perceived as an essential way of resolving disputes, so much so that they contend it should be re-named as ‘appropriate dispute resolution’.³

According to the United States Agency for International Development (hereafter “USAID”), agriculture is ‘central to fostering economic growth, reducing poverty, and improving food security in the Southern African region’.⁴ It is common cause that research is needed to improve technology and create awareness of challenges and solutions in various disciplines. Agriculture stands out as an essential research field due to the fact that it fosters both economic growth and a focus on improved food security, contributing to addressing the high levels of poverty in developing areas, such as Southern Africa.⁵ Any challenge contributing to a decline in agricultural production or the disruption of the food supply chain must be identified, and solutions must be found to address the problem for a positive outcome. Conflict in any form, if not

¹ N Vidmar 'Procedural justice and alternative dispute resolution' in *Procedural Justice* (2019) 121 at 122.

² C Menkel-Meadow, 'Mediation, arbitration, and alternative dispute resolution (ADR)' (2015) *International Encyclopedia of the Social and Behavioral Sciences*, Elsevier Ltd at 7.

³ JS Wolfe, 'Across the Ripple of Time: The Future of Alternative (Or, Is It Appropriate) Dispute Resolution' (2000) 36 *Tulsa Law Journal* 785 at 795.

⁴ USAID 2023 'Agriculture and food security' <https://www.usaid.gov/southern-africa-regional/agriculture-and-food-security> (accessed 15 November 2023).

⁵ GCIS 'South Africa Yearbook 2021/2022: Agriculture, Land Reform and Rural Development' <https://www.gcis.gov.za/sites/default/files/docs/gcis/3.Agriculture%20and%20Rural%20Development.pdf> (accessed 19 September 2023).

successfully dealt with, leads to the destruction of relationships, resources, business structures and even economic and social systems.⁶

Although ADR cannot be accepted as the perfect conflict resolution method and needs to stand aside in some circumstances for traditional litigation⁷, a thorough investigation is required into its use and existing policy support to benefit all stakeholders in the agricultural environment. This chapter will give a broad introduction to the study. A background to the most essential concepts will shortly be discussed, followed by the research statement, questions, and objectives. The research methodology and limitations will conclude this chapter.

1.2 Background to the study

ADR refers to methods of dispute resolution that are different from traditional litigation.⁸ It implies a third party acting as a facilitator or decision-maker in dealing with the matter in dispute and assisting in a required outcome. ADR thus refers to various forms of dispute resolution, including negotiation, conciliation, mediation, and arbitration.⁹ These concepts are not new to the South African understanding of resolving conflict but have been largely ignored in the context of research and agriculture, as attested by a lack of publications specific to the South African context. Although arbitration is well-known by role-players in South African agriculture¹⁰, few examples of mediation can be found. Relevant legislation and policies regulating ADR will be discussed in this study to determine the possible applicability and practicality of using ADR in agriculture.

Ravis and Turku¹¹ link ADR to access to justice and the rule of law. Access to justice also forms part of the Sustainable Development Goals (hereafter “SDG”), which is

⁶ X Fang, S Kothari *et al*, 'The economic consequences of conflict in Sub-Saharan Africa' (2020) at 3, 4, 22, 25.

⁷ Vidmar (n 1) at 122.

⁸ E Patelia and MA Chicktay *Appropriate dispute resolution: a practical guide to negotiation, mediation and arbitration* (2015) at 78.

⁹ As above.

¹⁰ DP Rantsane, 'The origin of arbitration law in South Africa' (2020) 23(1) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* at 19.

¹¹ WT Davis, Helga, 'Access to Justice and Alternative Dispute Resolution Symposium' (2011) 2011 *J. Disp. Resol.* 47 at 47.

universally accepted and was set as part of Agenda 2030.¹² These goals were adopted by all UN Member States, including South Africa, in 2015. The Constitution of the Republic of South Africa, 1996,¹³ also confirms the right of access to justice.¹⁴ Nyenti¹⁵ argues that this right, in a South African context, should be focused on empowering people relying on a system of dispute resolution. This must be done by eliminating barriers to such dispute resolution mechanisms, especially with reference to the poor and disadvantaged. These mechanisms include ADR processes.¹⁶ It must be mentioned that workers in the agricultural supply chain¹⁷ are viewed as vulnerable and reliant on cost-effective access to justice.¹⁸

It is evident that the concepts of sustainable development, access to justice and ADR are interlinked. Understanding this nexus and ways to achieve positive development about these would contribute to improving the lives of participants in the agricultural supply chain, from rich to poor.

1.3 Problem statement

Agriculture is vital for providing food and economic stability while acknowledging the cultural heritage and ensuring environmental sustainability. Its significance impacts both local and global communities. As such, resolving conflict in such a manner that land and resources are maintained and protected is essential for all stakeholders in the agricultural environment. It is clear from the above that ADR, as it complements the path to sustainability, may have a role to play in resolving conflict in agriculture. Research shows that collaboration with regard to agriculture themes in South Africa resulted in substantiated knowledge transfer after 1994 but was not maintained and slowed down in the late 2000s.¹⁹ This led to a lack of publications and reliable

¹² KR Hope Sr, 'Peace, justice and inclusive institutions: overcoming challenges to the implementation of Sustainable Development Goal 16' (2020) 32(1) *Global Change, Peace & Security* 57 at 58.

¹³ The Constitution of the Republic of South Africa, 1996.

¹⁴ Sec 34.

¹⁵ M Nyenti, 'Access to justice in the South African social security system: Towards a conceptual approach' (2013) 46(4) *De Jure* 901 at 908.

¹⁶ As above.

¹⁷ A supply chain is also called a value chain, two terms that are interchangeably used in this study.

¹⁸ ETI 'Addressing worker vulnerability in agricultural and food supply chains' September 2016 https://www.ethicaltrade.org/sites/default/files/shared_resources/vulnerable_workers_toolkit.pdf (accessed 30 September 2023).

¹⁹ N Vink, B Conradie *et al*, 'The economics of agricultural productivity in South Africa' (2022) 14 *Annual Review of Resource Economics* 131 at 142.

information. Understanding the current regulatory framework supporting ADR in agricultural environments is imperative to establish knowledge centres and create awareness of this form of dispute resolution. Identifying the current regulatory framework will make evident innovation and other initiatives necessary to increase effective conflict resolution.

1.4 Research Statement

This study examines the current regulatory framework supporting the use of ADR in the agricultural environment in South Africa, using a sustainability theory approach as the theoretical framework.

1.5 Research Question

Considering the current development of ADR in South Africa, the following research questions are posed:

1.5.1 Primary research question:

How can the regulatory framework be adapted to enhance alternative dispute resolution and contribute to the sustainability of the South African agricultural environment?

1.5.2 Secondary research questions:

- i. How does ADR in agriculture contribute to sustainability as envisioned by national policy?
- ii. What is the regulatory framework for ADR in South African agriculture?
- iii. How are other countries applying ADR in agricultural conflict?

1.6 Research Objectives

This study aims to evaluate the current position of ADR within the legislative and policy framework specific to the agricultural industry in South Africa and identify ways to improve such a framework. A sustainability approach is taken to understand the context and importance of ADR in an industry that is prominent to the survival of communities in South Africa.

1.7 Research methodology and approach

The research methodology will follow a research design focussed on ensuring the validity, reliability, and credibility of the answers to the research question. To provide context to the chosen topic, a literature study will provide the background to sustainability and ADR in the agricultural environment. This discussion will provide clear definitions and links between concepts and constructs. Following the understanding of context, a content analysis will follow. This qualitative analysis will address current policy and legislation that form the framework for action taken in the agricultural environment to ensure sustainable practices and resolve conflict between role players. A legal comparison will follow, with discussions of Nigeria and Australia, to determine how other countries deal with ADR and agriculture. Doing so will make it feasible to discover potential areas for development within the context of South Africa.

Although there are many differences between South Africa and Nigeria, including population size, infrastructure, and social demographic factors, these countries fall under the top three African countries with the highest Gross Domestic Product (hereafter “GDP”), indicating their economic strength and importance to Africa.²⁰ Nigeria’s legal system, similar to South Africa’s, also acknowledges the common law²¹, legislation, and indigenous practices²². However, as Nigeria is a developing African country riddled with conflict, ADR has been advocated as an essential dispute resolution mechanism.²³ Investigating Nigerian initiatives to encourage ADR may suggest possible interventions in the South African agricultural environment.

Additionally, 50 percent of Australian land is used for agricultural activities, and 72 percent of production is exported.²⁴ The importance of agriculture, together with a diverse social demographic and a well-developed ADR system, makes Australia

²⁰ Statista ‘African countries with the highest Gross Domestic Product (GDP) in 2022’ April 2023 <https://www.statista.com/statistics/1120999/gdp-of-african-countries-by-country/> (accessed 5 November 2023).

²¹ Nigeria’s common law is based on English common law.

²² Herbert Smith Freehills ‘Dispute resolution in Africa: A multijurisdictional guide’ (Legal Guide Third Edition March 2022) at 244.

²³ K Iseh, ‘Alternative Dispute Resolution: Revisiting the Approaches for Conflict Settlement in Nigeria’ (2020) Available at SSRN 3544150 at 1.

²⁴ DAFF ‘Snapshot of Australian Agriculture 2023’ [https://www.agriculture.gov.au/abares/products/insights/snapshot-of-australian-agriculture#:~:text=Agriculture%20accounts%20for%20over%20half,Australian%20farmers%20\(Coelli%202021\)](https://www.agriculture.gov.au/abares/products/insights/snapshot-of-australian-agriculture#:~:text=Agriculture%20accounts%20for%20over%20half,Australian%20farmers%20(Coelli%202021)) (accessed 13 December 2023).

another good example to compare and learn from, specifically as it is a developed country with different historical and climate challenges from Africa.

1.8 Overview of chapters

Chapter 1 – Introduction

The first chapter provides a broad introduction to the dissertation. It discusses the background of the most important concepts, followed by the research statement, question, and objectives. The research methodology and limitations conclude this chapter.

Chapter 2 – Sustainability and Alternative Dispute Resolution in Agriculture

Sustainable Development Goals (hereafter “SDG”) aim to transform the world by providing equality, progress, and environmental prosperity. This chapter will address the importance of sustainability on a global level and its links to agriculture. This chapter will set out ADR as the chosen conflict resolution method and how this can contribute to sustainability in general and sustainable governance in the agricultural sector.

Chapter 3 – Legal framework for ADR in agricultural disputes

This chapter will report on legislation and policies currently addressing ADR in South Africa and the possible application of ADR in agriculture.

Chapter 4 – A Comparative Study

Comparing legal systems and specific legal phenomena has various benefits. It broadens the possibility of understanding legal challenges and possible solutions that differ from a country’s legal system.²⁵ For this reason, ADR and its application in two other countries will be evaluated. As stated above, one African country, Nigeria, will be discussed due to its African history and challenges with conflict and agriculture. Australia will also be addressed due to the importance of agriculture and its progressive ADR system.

²⁵ U Kischel *Comparative law* (2019) at 3.

Chapter 5 – Conclusion

The problem statement indicated a lack of research concerning ADR's possible role in achieving sustainability in the agricultural industry. While issues for further research are mentioned, chapters two through four attempt to provide context and clarity to the current institutions and policies promoting ADR use in agriculture. The conclusion highlights the most important issues raised and concludes with some recommendations to improve the use of ADR in the agricultural environment. Recommendations address the challenges identified and include 1) the need for more robust research; 2) the involvement of the Department of Agriculture, Land Reform and Rural Development (hereafter “DALRRD”) and state intervention on matters of ADR in agriculture; 3) adding ADR as the preferred method of dispute resolution to industry standards; 4) educating stakeholders in the supply chain on the benefits of using ADR; and 5) implementing more specific legislative changes which encourage ADR in agricultural disputes.

1.9 Conclusion

This chapter provided a guide to the study by clarifying the research question, problem statement and methodology. It emphasised the importance of agriculture and the need for reliable research on the links between ADR and agriculture. There is an existing research gap and limited publications concerning the use of ADR in the South African agricultural environment.

Chapter 2 – Sustainability and alternative dispute resolution in agriculture

2.1 Introduction

Rantsane²⁶ states that ADR was practised in South Africa long before colonisation. With colonisation, Roman-Dutch and English laws were introduced, together with litigation practices rife with strict procedures and rigid rules. This led to litigation being the most obvious choice for resolving conflict between disputing parties, a method to combat conflict. However, that came with challenges such as long waiting periods, high costs, and often ruined relationships due to the win-lose nature of court cases.

This chapter endeavours to clarify the concepts relevant to ADR, sustainability, and agriculture and the links between them to focus on the importance of these practices in empowering individuals, communities, and businesses in the agricultural environment. A sustainability approach is followed as a theoretical framework to connect concepts with existing knowledge.

2.2 Regulatory framework

A legal framework delineates the regulations, rights, and responsibilities of companies and other business enterprises, governmental bodies, and individuals, as outlined in a collection of legal documents.²⁷ A legal framework can exist on various regional, national, or international levels. A legislative framework is a component of the broader legal framework, which refers only to formal legislation and policy²⁸ enacted by the legislature. This study is not only concerned with determining the legal framework of ADR in South Africa but also with identifying the regulatory framework of the specific industry focused on ADR. The terms "legal framework" and "regulatory framework" are related but have distinct meanings. A regulatory framework is not only concerned with the body of laws but includes laws, regulations, industry standards, codes of practice

²⁶ Rantsane (n 10) at 3.

²⁷ NRG I https://resourcegovernance.org/sites/default/files/nrgi_Legal-Framework.pdf (accessed 9 December 2023); IGI GLOBAL 'What is a legal framework' <https://www.igi-global.com/dictionary/legal-framework/73647> (accessed 9 December 2023).

²⁸ Law Insider 'Legislative framework definition' <https://www.lawinsider.com/dictionary/legislative-framework#:~:text=Legislative%20Framework%20means%20the%20framework,implementation%20of%20performance%20management%20systems> (accessed 9 December 2023).

and procedures to govern a specific industry or sector.²⁹ This implies that stakeholder engagement plays a role in setting and enforcing regulatory standards, as supply chain stakeholders may contribute to establishing and implementing industry standards and policies.

2.3 Agriculture in a South African context

Awokuse and Xie³⁰ found that the debate on agriculture and its contribution to economic growth is country-specific. According to them, an active aggregate economy is essential to some countries to ensure agricultural progress. In a global understanding, the concept of agriculture includes the science of producing, growing, and nurturing crops, livestock, fisheries, and forestry. Understanding the context of agriculture and ADR, understanding South African agriculture is thus necessary.

Food security, positive economic growth, and poverty reduction are recurring themes in debates in developing countries.³¹ Central to this is the role of agriculture in ensuring these goals.³² In 2021, agriculture contributed 2,5% to South Africa's national gross domestic product (hereafter "GDP"), and in 2022, it increased by a percentage point to 2.6%.³³ Agricultural exports were of the highest export products in 2022.³⁴ The main export markets are African and secondary European, followed by Asia and then America.³⁵ As shown above, South Africa has a thriving agricultural industry in all nine provinces, focusing on local production and export. Intensive crop production is the dominant activity, with sheep husbandry in arid regions, cattle farming in the bushveld and mixed farming in areas with high rainfall.³⁶ Commercial farmers are estimated to

²⁹ DCAF 'Geneve Centre for Security Sector Governance: Regulatory Frameworks' <https://securitysectorintegrity.com/standards-and-regulations/procurement-monitoring-evaluation/#:~:text=Regulatory%20frameworks%20are%20legal%20mechanisms,conduct%2C%20arms%20control%20agreements> (accessed 9 December 2023).

³⁰ TO Awokuse and R Xie, 'Does agriculture really matter for economic growth in developing countries?' (2015) 63(1) *Canadian Journal of Agricultural Economics/Revue canadienne d'agroeconomie* 77 at 78.

³¹ K Pawlak and M Kołodziejczak, 'The role of agriculture in ensuring food security in developing countries: Considerations in the context of the problem of sustainable food production' (2020) 12(13) *Sustainability* 5488 at 5501.

³² Awokuse & Xie (n 30) at 78.

³³ World Bank 'South African Overview: Development news, research, data' 14 September 2023 <https://www.worldbank.org/en/country/southafrica> (accessed 29 July 2023).

³⁴ NAMC 'South Africa's Agricultural Export Performance: Quarter One, 2023' <https://www.namc.co.za/wp-content/uploads/2023/09/South-Africa-Agricultural-Trade-Performance-Q1-Communication.pdf> (accessed 15 October 2023).

³⁵ As above.

³⁶ F Waldner, MC Hansen *et al*, 'National-scale cropland mapping based on spectral-temporal features and outdated land cover information' (2017) 12(8) *PLoS one* e0181911.

be around 32 000, with between 5000 to 7000 producing 80% of agricultural output.³⁷ The most current statistics indicate that in 2017, 2610 large farms (annual income of more than 22,5 million) were in operation.³⁸ Statistics further show that 18 710 micro farms (with an annual income below R1 million) represented almost 50% of the total number of farms. At the same time, around 2.3 million households are engaged in different forms of agricultural activity.³⁹ These numbers only show direct farming contributions to the economy and do not depict the contribution from supply chain partners. However, it shows the importance of agriculture to the survival of communities and the potential financial benefits to actors in the industry. To stay globally competitive, private sector investors invest around R150 million per annum in research and development linked to technology and cultivars.⁴⁰ This investment is specific to operational research in cultivar development and technology, and information on funding for social and legal research activities relevant to the industry was not available.

The above statistics clearly show that although big commercial farmers form an essential part of the South African economy, a significant number of smaller households depend on income from their produce. Supply chains can thus include international stakeholders, whereas domestic supply chains may only include local stakeholders. Stakeholders are connected by their function in the chain, usually through contractual agreements, legislative requirements, or industry policies.

The South African agricultural economy is a dual market, with subsistence-based farming in rural areas and well-developed commercial operations found in most provinces of South Africa.⁴¹ Interestingly, this description of a dual market can be found in published articles and websites from the 1970s⁴² to recent publications⁴³. This dual market implies income disparities, as subsistence-based and small household

³⁷ ITA 'South Africa Country Commercial Guide – Agricultural sector' <https://www.trade.gov/country-commercial-guides/south-africa-agricultural-secto> (accessed 16 November 2023).

³⁸ Stats SA, 2020. Census of Commercial Farming. Financial and Production Statistics 2017.

³⁹ As above.

⁴⁰ BFAP 'Baseline Agricultural Outlook for 2023 until 2032' [BFAP-BASELINE-2022-ONLINE-Final.pdf](#) (accessed 15 October 2023).

⁴¹ Vink and others (n 19) at 132.

⁴² CE Madavo, 'Government policy and economic dualism in South Africa' (1971) 5(1) *Canadian Journal of African Studies/La Revue canadienne des études africaines* 19 at 19.

⁴³ Vink and others (n 19) at 132.

farmers will have different incomes from commercial operations and, therefore, have other access to resources and markets. Research has shown that the dependence of small household actors on market actors creates an imbalance in power that holds these small suppliers 'captive'.⁴⁴ Power imbalances and subsequent abuse in the agricultural supply chain extend to suppliers and the employer-employee relationship on farms.⁴⁵

Agriculture in Africa has been linked to human rights abuses in the past⁴⁶, and legislation was introduced in South Africa to rectify some imbalances in the sector.⁴⁷ Human rights abuses included a system of enforcing racial and class inequalities, as well as a preference for the white minority concerning land access and ownership.⁴⁸ Labour conditions for farm workers were widely held as exploitive and abusive.⁴⁹ Thus, legislation addresses widely held concerns regarding labour dispute resolution⁵⁰ and social justice⁵¹. Topics, such as farm evictions and security of tenure disputes, remain relevant themes in South African agriculture.⁵²

Policy regulation of agriculture in South Africa is designed, monitored, and enforced by the DALRRD. The vision of DALRRD is 'to have equitable access to land, integrated rural development, sustainable agriculture and food security for all'.⁵³ In their strategic planning document, no mention is made of conflict or dispute resolution other than addressing conflict between beneficiaries in the land reform landscape.⁵⁴ A focus on

⁴⁴ R Glavee-Geo, P Engelseth *et al*, 'Power imbalance and the dark side of the captive agri-food supplier-buyer relationship' (2022) 178(3) *Journal of Business Ethics* 609 at 610; A Cox, G Watson *et al*, 'Managing appropriately in power regimes: relationship and performance management in 12 supply chain cases' (2004) 9(5) *Supply chain management: An international journal* 357 at 369.

⁴⁵ S Devereux, 'Violations of farm workers' labour rights in post-apartheid South Africa' (2020) 37(3) *Development Southern Africa* 382 at 400.

⁴⁶ S Otieno, 'Agricultural investments: The new frontier of human rights abuse and the place of development agencies' (2016) 12 *J. Food L. & Pol'y* 141 at 17.

⁴⁷ Notably the Constitution of the Republic of South Africa of 1996; as well as legislation including the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000; The Employment Equity Act, 1998; The Land Restitution Act, 1994; The South African Human Rights Commission Act, 1994.

⁴⁸ AO Akinola, 'Human rights, civil society and the contradictions of land reform in South Africa' (2016) 35(2) *Politeia (02568845)* at 52.

⁴⁹ Devereux (n 45) at 400.

⁵⁰ Labour Relation Act 66 of 1995.

⁵¹ See above (n 47).

⁵² N Roode and N Stander 'Developing a framework for mediating farm evictions and security of tenure related disputes in South Africa' PhD thesis, Stellenbosch: Stellenbosch University, 2022 .

⁵³ DALRRD 'Strategic Plan 2020-2025' <https://www.dalrrd.gov.za/index.php/publications/46-strategic-plan> (accessed 9 December 2023).

⁵⁴ As above.

land reform as a priority is clear, and the concept of sustainable agriculture is linked to this priority.⁵⁵ Several policies have been implemented in the past 25 years to address land reform, with the government providing an example of using ADR by mediating agreements between land owners and identified beneficiaries.⁵⁶

The provincial departments of agriculture are responsible for the implementation of agricultural policies and the effective use of land.⁵⁷ Each provincial department has its mission statement and objectives. The Gauteng Department of Agriculture and Rural Development is very clear in its mission statement that it aims to 'radically modernise and transform agri-food value chain, ensure sustainable environment and development of urban and rural communities by ensuring sustainable environment management; providing access to and inclusive participation in commercial agri-food value chain'. The Limpopo, Mpumalanga and Northwest Provincial Departments share the focus on food security and sustainable agriculture. The Northern Cape mentions working towards a sustainable environment, and the Eastern Cape and Free State focus on sustainable rural communities. The Western Cape mentions sustainable practices concerning the creation of job opportunities. Access to justice is included in the mission of the Gauteng Department of Justice, but ADR is not mentioned as a method to address access to justice. ADR is also not discussed in any other Provincial Department or linked to sustainability or access to justice.

2.4 Alternative Dispute Resolution in South Africa

2.4.1 Alternative dispute resolution as a concept

The term alternative dispute resolution encompasses different forms of solving conflict outside of the courtroom.⁵⁸ Courtroom practices imply litigation with court rules and legislation guiding the process and the outcome. Alternative forms of dispute resolution include negotiation, mediation, conciliation, and arbitration.⁵⁹ Notably,

⁵⁵ DALRRD 'Project implementation and support' 2023 <https://www.dalrrd.gov.za/index.php/component/content/article/246-project-implementation-and-support?catid=19&Itemid=437> (accessed 9 December 2023)

⁵⁶ DALRRD (n 53).

⁵⁷ SA 'Agriculture and land' <https://www.treasury.gov.za/publications/igfr/2003/chp07.pdf> (accessed 14 November 2023).

⁵⁸ RE Wells Jr, 'Alternative Dispute Resolution-What Is It-Where Is It Now' (2003) 28 S. III. U LJ 651 at 652.

⁵⁹ As above.

negotiation is set apart from the other forms as it does not involve third-party interference.⁶⁰

ADR is accepted to have benefits, including the fact that it is less costly than litigation, disputes can be resolved quicker, it is flexible, and parties have more control over the process than in litigation. The process is private and confidential, and relationships can be preserved.⁶¹ Menkel-Meadow⁶² refers to critique suggesting that ADR may disadvantage a less powerful party to a dispute since there are no judges or legal processes to protect them. However, Menkel-Meadow reiterates that no empirical evidence supports this view.

2.4.2 Negotiation

Dias⁶³ published an analysis of 30 definitions of negotiation to determine the most apt and acceptable definition. This led to the following definition: 'Negotiation is a process that involves decision making, communication, exchange, social interaction, by which people seek to advance their interests and substances, tangible or not, through joint agreement'⁶⁴. This definition presupposes a dispute and emphasises the process of parties interacting without the help of a third party to reach a place of agreement.

Different scholars address the issue of negotiation and land reform in South Africa.⁶⁵ Land reform impacts all supply chain actors, as a transition in ownership has implications for all operations and parties. Although trade unions active in the agricultural environment are fragmented and struggle to organise formally, negotiation is also used to resolve conflict and determine working conditions on farms.⁶⁶

⁶⁰ M de Oliveira Dias, 'People, Process, and Substance: Current Definitions on Negotiation' (2019) 1(4) *People* at 1.

⁶¹ TG Wiese *Alternative dispute resolution in South Africa: Negotiation, mediation, arbitration and ombudsmen* (2016) at 2.

⁶² Menkel-Meadow (n 2) at 7.

⁶³ De Oliveira Dias (n 60) at 6.

⁶⁴ As above.

⁶⁵ M Anstey, 'Prospects for Negotiation as a Means of Undoing the Gordian Knot of Just Land Reform in South Africa' (2022) 1(aop) *International Negotiation* 1; G Bradshaw, R Haines *et al*, 'Reconciliation and the Land Question in South Africa: A Case for Negotiation?' (2017) *Negotiating Reconciliation in Peacemaking: Quandaries of Relationship Building* 231; R Hall, 'The next Great Trek? South African commercial farmers move north' (2012) 39(3-4) *The Journal of peasant studies* 823.

⁶⁶ C Webb, 'Between precarity and paternalism: Farm workers and trade unions in South Africa's Western Cape province' (2017) 8(1) *Global labour journal* at 50.

Negotiation is not structured by policy but entered by willing parties according to their own rules, underlying the principle of acting in good faith.⁶⁷

2.4.3 Conciliation

The term conciliation is advocated by some, as an interchangeable term for mediation.⁶⁸ In 1980, the United Nations Commission on International Trade Law (hereafter “UNCITRAL”) Conciliation Rules were adopted and then amended in 2021 to the UNCITRAL Mediation Rules, confirming that the two terms can be used as substitutes in some conversations.⁶⁹

Mbengu and Zouapet⁷⁰ describe conciliation as a ‘hybrid method of dispute resolution, close to inquiry and mediation while displaying some of the characteristics of arbitration’. In South Africa, conciliation is significant due to its importance in labour disputes. Conciliation is defined by the Commission for Conciliation, Mediation and Arbitration (hereafter “CCMA”) as a process where a third party consults with disputing parties jointly, allowing the sharing of information to resolve the dispute. The conciliator has no decision-making powers and may only make suggestions to assist them in finding a solution.⁷¹ According to the rules of the CCMA, the conciliation agreement can be made an arbitration award and thus an order of the court, should one of the parties default on the agreement. Conciliation is an essential form of dispute resolution method in South Africa, as the CCMA is a body created by the Labour Relations Act (hereafter “LRA”).⁷² In this context, its function is specific to labour matters and dispute resolution,⁷³ and statistics show that farm labourers and employers use this ADR opportunity to settle disputes.⁷⁴

⁶⁷ De Oliveira Dias (n 60) at 6.

⁶⁸ UN ‘International Commercial Mediation’ <https://uncitral.un.org/> (accessed 16 June 2022).

⁶⁹ As above.

⁷⁰ MM Mbengue and AK Zouapet ‘Africa and International Conciliation’ in *Flexibility in International Dispute Settlement* (2020) 113 at 155.

⁷¹ CCMA ‘Conciliation’ <https://ccma.org.za/wp-content/uploads/2022/02/Conciliation-Information-Sheet-2020-01.pdf> (Accessed 15 November 2023).

⁷² Act 66 of 1995.

⁷³ Sec 115.

⁷⁴ Para 2.6.1

As mentioned,⁷⁵ a power imbalance exists between employers and employees in farming. Despite evidence of labour disputes on farms being conciliated or arbitrated in South Africa, research indicates that conciliation is ideal if the disputing parties are considered 'peers' on some level.⁷⁶ Some scholars see conciliation as a 'first step'⁷⁷ that must be followed by arbitration or litigation if it fails to resolve the dispute. This aligns with the dispute resolution process set out in the LRA and the CCMA Rules.

2.4.4 Mediation

Although the term conciliation is primarily used in the context of labour relations in South Africa, mediation is well known. It is developing into a preferred way of resolving disputes in other civil and commercial fields. Within the South African context, some even refer to mediation as 'the standard method of dispute resolution'⁷⁸. According to the South African Department of Justice, mediation is defined as 'a process by which a mediator assists the parties in a dispute by facilitating discussions between parties, assisting them in identifying issues, exploring areas of compromise and generating options in an attempt to resolve the dispute'⁷⁹. The mediator should be an independent third party with no right to prescribe or instruct the parties on which solution to take. Mediation has a clear role in African culture and can successfully be used in circumstances where parties perceive themselves as adversaries.⁸⁰ Undertaking negotiation might be complex in conflict situations with a high level of mistrust. Thus, mediation, where a third party facilitates possible solutions to identified issues, may be an essential tool for peacefully resolving conflict.

2.4.5 Arbitration

Fifty-four jurisdictions in Africa provide a framework for commercial arbitration.⁸¹ Arbitration rules in African countries seem to reflect international standards, and policy is more often aligned with international rules and regulations such as the UNCITRAL Model Law and the New York Convention. Through arbitration, opposing parties can

⁷⁵ Para 2.3.

⁷⁶ As above.

⁷⁷ LC Reif, 'The use of conciliation or mediation for the resolution of international commercial disputes' (2007) 45 *Can. Bus. LJ* 20 at 23.

⁷⁸ CG Marnewick *Mediation Practice in the Magistrates' Courts* (2015) at 11.

⁷⁹ DOJCD <https://www.justice.gov.za/mediation/mediation.html> (accessed 13 November 2023).

⁸⁰ D Mutanda, 'The art of mediation in resolving African conflicts: lessons for Zimbabwe and Africa' (2013) 5(3) *Journal of Aggression, Conflict and Peace Research* 130 at 132.

⁸¹ Herbert Smith Freehills (n 22) at 9.

present evidence and have their case heard in front of an impartial third party, the arbitrator. The chosen arbitrator will then make a final, binding, and enforceable decision. International arbitration would be where the dispute and process have a foreign element.⁸² International commercial arbitration is not necessarily relevant in a study investigating agricultural disputes. However, agriculture, in its nature, does not only refer to the growing of crops or the raising of cattle but to secondary and tertiary markets found in the supply chain from ‘farm to fork’⁸³ and, in this way, may necessitate international conflict resolution such as arbitration.

An advantage of arbitration is that parties are entitled to choose the appointed arbitrator(s) and agree to their own rules before the process commences. Some scholars⁸⁴ have expressed concerns that less powerful parties may not be as protected in an ADR process as they may be in court proceedings, disregarding the fact that experienced arbitrators are available for parties to choose from.⁸⁵ As the arbitrator has a final and binding award, the choice of arbitrator is a crucial decision to make by the parties. In an agricultural dispute, the ideal would be an expert on technical agriculture, as well as in alternative dispute and legal procedural matters.

2.5 Sustainable Development

2.5.1 Sustainable development as understood in a global context

The importance of addressing sustainable development when discussing any scholarly theme related to agriculture and governance cannot be over-emphasised. The United Nations (hereafter “UN”) has recognised the concept of sustainable development from the conception of the term, as defined in the Brundtland Commission report. In the 1987 report, created by instruction from the UN in 1983⁸⁶, sustainable development is described as ‘development that meets the needs of the

⁸² GB Born, 'The law governing international arbitration agreements: An international perspective' (2014) 26 *Singapore Academy of Law Journal* 815 at 815.

⁸³ F Julien-Javaux, C Gérard *et al*, 'Strategies for the safety management of fresh produce from farm to fork' (2019) 27 *Current Opinion in Food Science* 145 at 147.

⁸⁴ Menkel-Meadow (n 2) at 12.

⁸⁵ In South Africa various ADR bodies such as Conflict Dynamics and Social Justice, provide name lists with short CV's of qualified accredited chairpersons, in order to assist parties in choosing the best person to facilitate their specific dispute resolution process.

⁸⁶ UN 'Report of the World Commission on Environment and Development: Our Common Future' <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> (accessed 11 November 2023).

present without compromising the ability of future generations to meet their own needs'⁸⁷. Although the focus, at the start of the discussion of this definition, was on preserving the environment, various scholars advocated that the concept should include a social and economic dimension.⁸⁸ This assumes business activities that ensure positive social, economic and environmental outcomes. Notable scholars started referring to the PPP (People, Planet, Profit) principle of sustainable development.⁸⁹

In South African agriculture, the social or people aspect of the sustainability concept is emphasised in scholarly articles.⁹⁰ This is not due to a single factor, but the history of South Africa and the conditions of farm workers during the apartheid era contribute to conflict and research in this regard. Social sustainability tends to take a lower priority than the environmental and economic focus.⁹¹ Vallance⁹² argues that a lack of understanding of the term 'social sustainability' contributes to the value of its utility. In an article by Kusnander and Brazier⁹³, research findings of 49 sustainable agricultural development programs showed that social factors of engagement and empowerment are not emphasised enough in practice when evaluating sustainability over time.

In 2015, 17 Goals were adopted by UN Member States. These goals were included in the 2030 Agenda for Sustainable Development, which aimed to improve the lives of people, the erosion of the planet, and overall progress. Although the Goals are interactive and should be understood together, the identified goals are linked to agriculture in various ways. It speaks of supporting local farmers (Goal 2), education in communities (Goal 4), gender equality (Goal 5), effective use of water resources

⁸⁷ GH Brundtland, 'Our Common Future World Commission On Environment And Development' (1987)

⁸⁸ M Hajian and SJ Kashani 'Evolution of the concept of sustainability. From Brundtland Report to sustainable development goals' in *Sustainable resource management* (2021) 1at 3.

⁸⁹ J Elkington, 'The triple bottom line' (1997) 2 *Environmental management: Readings and cases* 49; A Molina and Rajagopal 'People, Planet, and Profit: Crossing the Triple Bottom Line' in *Challenge-Based Learning, Research, and Innovation: Leveraging Industry, Government, and Society* (2023) 35.

⁹⁰ O Gbejewoh, S Keesstra *et al*, 'The 3Ps (profit, planet, and people) of sustainability amidst climate change: A South African grape and wine perspective' (2021) 13(5) *Sustainability* 2910; E Kloppers and L Fourie, 'Defining corporate social responsibility in the South African agricultural sector' (2014) 9(46) *African Journal of Agricultural Research* 3418.

⁹¹ S Vallance, HC Perkins *et al*, 'What is social sustainability? A clarification of concepts' (2011) 42(3) *Geoforum* 342 at 343.

⁹² As above.

⁹³ K Kusnandar, F Brazier *et al*, 'Empowering change for sustainable agriculture: the need for participation' (2019) 17(4) *International Journal of Agricultural Sustainability* 271 at 273.

(Goal 6), using affordable and clean energy (Goal 7), creating job opportunities (Goal 8), reducing inequalities (Goal 10), climate action (Goal 13), protecting life in water and on land (Goal 14 and 15), respecting human rights (Goal 16) and lobbying for partnerships with amongst others, government (Goal 17).⁹⁴ It is clear that the Goals speak in many ways about sustainable agriculture and good governance. Finding a link between ADR and sustainability is implied in literature⁹⁵, but scholars have not given this link a great deal of attention.

2.5.2 Public and private standards in sustainable agriculture

Sustainable production practices have become more critical as consumers require produce that complies with socially accepted practices.⁹⁶ Society's understanding of governance and regulation tends to be focused on public initiatives. This assumes formal public standards, referring most commonly to public policy and legislation. However, global sustainable development frameworks provide a good example of effective public/private governance initiatives.

The sustainability debate in agriculture is closely linked to the history and discussion on traditional versus organic produce. The organic agriculture sector is experiencing rapid growth within the food industry due to perceptions of health benefits⁹⁷ and environmental advantages.⁹⁸ Concerns over sustainability practices in agriculture lead to role-players in the supply chain taking over some governance functions and developing private standards. Such private standards, also called business standards, are market-driven.⁹⁹ To ensure sustainable agricultural produce, formal standards

⁹⁴ UN 'Sustainable development Goals' <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> (accessed 11 November 2023).

⁹⁵ N Kaminskienė, I Žalėnienė *et al*, 'Bringing sustainability into dispute resolution processes' (2014) 4(1) *Journal of Security & Sustainability Issues*; HA Khan, F Khan *et al*, 'Alternative Dispute Resolution and Sustainability of Economic Development for the Consumer's Benefit: An Islamic Moral Economy Perspective' (2022) 2(2) *Asian Journal of Law and Policy* 99, this peer reviewed article advocate mediation as tool to achieve economic development and sustainable goals from a consumer perspective.

⁹⁶ C Muller, WJ Vermeulen *et al*, 'Pushing or sharing as value-driven strategies for societal change in global supply chains: two case studies in the British–South African fresh fruit supply chain' (2012) 21(2) *Business Strategy and the Environment* 127 at 129.

⁹⁷ R Mesnage, IN Tsakiris *et al*, 'Limitations in the evidential basis supporting health benefits from a decreased exposure to pesticides through organic food consumption' (2020) 19 *Current Opinion in Toxicology* 50 at 50.

⁹⁸ N Boltianska, O Boltianskyi *et al*, 'Environmental benefits of organic agricultural production' (2021) at 206.

⁹⁹ P Schleifer, 'Private regulation and global economic change: The drivers of sustainable agriculture in Brazil' (2017) 30(4) *Governance* 687 at 687.

have been developed in the industry on a global level.¹⁰⁰ This movement started in the 1990s¹⁰¹ and is contributed to by private and public actors. Loconto and Busch¹⁰² created the term ‘tripartite standards regime’ (hereafter “TSR”) to describe the governance model that includes standard-setting, accreditation and certification. Such private TSR standards include GlobalG.A.P,¹⁰³ UTZ/Rainforest Alliance Certification,¹⁰⁴ Linking Environment and Farming (hereafter “LEAF”),¹⁰⁵ and Fair Trade Certification¹⁰⁶.

Fouilleux and Loconto¹⁰⁷ state that 110 countries implemented organic public regulation by 2012, with at least 121 private standards. Compliance with private standards is compulsory and would thus form part of the regulatory framework for the industry. Conformity to these standards is assessed by third-party certification. The third party is an independent body paid for by the farmer and accredited by an external authority. The advantage of private regulation is that it is less costly for the state, while the benefit of sustainability still triggers down to all stakeholders.¹⁰⁸ These audits are primarily focused on food safety and quality, but social factors such as the treatment of workers on farms are also measured and enforced. However, conflicts and dispute resolutions by supply chain actors are not addressed.¹⁰⁹ Private regulation has different forms in developing countries based on local contexts.¹¹⁰ Contexts relate to local program characteristics, infrastructure and the regulatory environment.

¹⁰⁰ GLOBALG.A.P. <https://www.globalgap.org/> (accessed 12 November 2023); FAO-UN ‘Investment and capacity building for GAP standards: Case information from Kenya, Chile, Malaysia and South Africa’ <https://www.fao.org/3/ba0033e/ba0033e00.pdf> (accessed 12 November 2023).

¹⁰¹ E Fouilleux and A Loconto, ‘Voluntary standards, certification, and accreditation in the global organic agriculture field: a tripartite model of techno-politics’ (2017) 34 *Agriculture and human values* 1

¹⁰² A Loconto and L Busch, ‘Standards, techno-economic networks, and playing fields: Performing the global market economy’ (2010) 17(3) *Review of International Political Economy* 507 at 508.

¹⁰³ GlobalG.A.P (n 99).

¹⁰⁴ Rainforest Alliance ‘UTZ Certification amalgamated with Rainforest Alliance in 2018’ <https://www.rainforest-alliance.org/utz/> (accessed 14 November 2023).

¹⁰⁵ LEAF <https://leaf.eco/> (accessed 14 November 2023).

¹⁰⁶ FAO <https://www.fao.org/home/> (accessed 14 November 2023).

¹⁰⁷ Loconto & Busch (n 101) at 508.

¹⁰⁸ This refer to life cycle analysis of any agricultural product.

¹⁰⁹ See n 101-14, indicating websites perused for information of ADR practices or enforcement.

¹¹⁰ Schleifer (n 98) at 688.

Transnational regulatory pressure is a key motivation driving stakeholders in the agricultural sector to participate in private regulation.¹¹¹ Cafaggi¹¹² defines transnational private regulation as ‘those regimes that regulate the conduct of private actors across jurisdictional boundaries primarily through standards, which are voluntary, at least as a matter of formal law’. Internationally designed private standards thus pressure stakeholders in the agricultural supply chain to comply with regulations outside their national laws.

An example of the role that transnational regulatory networks play can be seen in the application of ADR, in which countries are designing legislation and national policy to reflect global standards.¹¹³ Even when such policy is not legislation, practices tend to mirror global standards to accept recognition of awards.¹¹⁴ Visser and Ferrer¹¹⁵ address private compliance standards in the South African agricultural environment, mentioning that private standards and certification initially allowed farmers access to global markets. Still, it has developed into local initiatives that provide domestic standards that farmers now comply with.

2.5.3 ADR and Sustainable Development

Scholars have linked ADR with advancing the goals of sustainable development.¹¹⁶ The majority of attention is given to arbitration as a resolution process in environmental disputes.¹¹⁷ The focus is limited to how other forms of ADR may contribute to sustainability.

¹¹¹ As above.

¹¹² F Cafaggi, 'A comparative analysis of transnational private regulation: legitimacy, quality, effectiveness and enforcement' (2014) *Quality, Effectiveness and Enforcement (June 12, 2014)* at 8.

¹¹³ Para 3.3.1 discusses this in more detail.

¹¹⁴ Chapter 3 and 4 deal with global ADR standards, policy and conformity of the regulatory framework.

¹¹⁵ M Visser and S Ferrer *Farm Workers' Living and Working Conditions in South Africa: Key trends, emergent issues, and underlying and structural problems* (2015) at 63.

¹¹⁶ J Alkhayer, N Gupta *et al*, 'Role of ADR methods in environmental conflicts in the light of sustainable development' (Paper presented at the IOP Conference Series: Earth and Environmental Science, 2022); R Kazanský and V Andrassy, 'Conflict resolution approaches towards smart sustainability of internal relations' (2019) 6(3) *Entrepreneurship and Sustainability Issues* 1468; NKMF Ng, Z Ismail *et al*, 'Towards sustainable dispute resolution: A framework to enhance the application of fast track arbitration in the Malaysian construction industry' (2019) 10(2) *International Journal of Sustainable Construction Engineering and Technology* 93.

¹¹⁷ Examples are Alkhayer *et al* as above; NC Abdullah, 'Going Green in Urbanisation Area: Environmental alternative dispute resolution as an option' (2015) 170 *Procedia-Social and Behavioral Sciences* 401; AH Ansari, MHB Ahmad *et al*, 'Alternative Dispute Resolution in Environmental and Natural Resource Disputes' (2017) 59(1) *Journal of the Indian Law Institute* 26 at 28.

In the strife for sustainable progress in agriculture, it is essential to determine the regulatory framework that supports and advances ADR in agriculture. A regulatory framework ensures a structured and consistent environment that protects all stakeholders in an industry.¹¹⁸ Such a framework should strike a balance between protecting all parties and still promoting economic vitality; in this case, it should protect communities, farm workers, supply chain stakeholders and consumers, as well as the farmer and their business interests. The social dimension of sustainable development is focused on improving living conditions, including eradicating inequality.¹¹⁹ Different scholars link the concepts of conflict, poverty, and development as an accepted nexus.¹²⁰ This link is usually based on political or armed conflict.¹²¹ Although the connection between violence and poverty is made in different scholarly articles,¹²² conflict does not necessarily mean the existence of violence.

2.6 Agriculture and ADR in South Africa

Research outputs on the use of ADR in South African agriculture are limited, and very few relevant research publications were found.¹²³ This might be due to the confidential nature of ADR.¹²⁴ South African case law on arbitration reviews shows the incidence of arbitration in farming disputes; however, examples primarily relate to labour disputes. The LRA provides not only for the CCMA¹²⁵ but also for Bargaining¹²⁶ and Statutory Councils¹²⁷ to provide dispute resolution services in labour matters.¹²⁸

Supply chain effectiveness is essential to all stakeholders in the chain. The benefits of using ADR rather than traditional litigation to resolve conflict include faster resolution

¹¹⁸ N Jensen and C Barrett, 'Agricultural index insurance for development' (2017) 39(2) *Applied Economic Perspectives and Policy* 199

¹¹⁹ Vallance & Perkins (n 91) at 344

¹²⁰ B Ikejiaku, 'The relationship between poverty, conflict and development' (2009) 2(1) *Journal of Sustainable Development* 15; R Kazanský and V Andrassy, above n 115.

¹²¹ As above.

¹²² A Summers, 'The choice: Violence or poverty' (2022) 32(4) *Labour and Industry* 349; TL Gillum, 'The intersection of intimate partner violence and poverty in Black communities' (2019) 46 *Aggression and violent behavior* 37.

¹²³ The following data bases were scrutinized: Scopus, Sabinet, HeinOnline. Keywords included 'alternative dispute resolution' and 'agriculture' and 'South Africa'. Publications found focused on labour disputes and environmental issues.

¹²⁴ Para 2.4.1.

¹²⁵ Paras 2.4.3 and 2.6.1.

¹²⁶ Sec 28.

¹²⁷ Sec 43.

¹²⁸ See also the discussion on conciliation and arbitration above para 2.4.3 and 2.4.5.

time, leading to less legal fees, and preserving relationships.¹²⁹ In a supply chain, actors are interdependent, and future working relationships are a reality that must be considered when addressing disputes.¹³⁰ One of the most significant advantages of using ADR is the flexibility it provides,¹³¹ as the parties can tailor processes to suit their needs and choose the facilitator, mediator or arbitrator to suit their operational expertise and circumstances.

2.6.1 Conflict in Agriculture

Conflict in agriculture is a researched topic, and books and articles have been written on the causes and impacts of conflict on agricultural production and stakeholders. Examples of such literature on conflict include publications on the effects of war¹³² and climate change,¹³³ as well as more direct farming concerns¹³⁴. Farming-related conflict spans topics relevant to conflict between supply chain actors, such as contractual disputes, including insurance claims, labour disputes, and operational agricultural disputes, such as sharing limited resources¹³⁵. One cause of conflict can lead to new and more complex forms of conflict if not addressed by a form of dispute resolution.¹³⁶ Realising the broad impact of conflict within the various agricultural contexts in South Africa is needed to understand the need for research on agricultural conflict and ADR. Practical challenges that may lead to conflict include labour relations, declining wastewater systems, limited port capacity, poor rail network infrastructure and load shedding burdens, and conflict with supply chain partners due to their inability to comply with agreed responsibilities.¹³⁷ From a South African perspective, the

¹²⁹ Para 2.4 .1.

¹³⁰ M Ngaka and E Zwane, 'The role of partnerships in agricultural extension service delivery: a study conducted in provincial departments of agriculture in South Africa' (2018) 46(1) *South African Journal of Agricultural Extension* 14 at 22.

¹³¹ Para 2.4.1.

¹³² R Bahn and R Zurayk, 'Agriculture, conflict, and the agrarian question in the 21st century' (2018) *Crisis and Conflict in Agriculture* 3; MQ Yusufi 'Effects of the War on Agriculture' in *The Tragedy of Afghanistan* (2019) 197; A Adelaja and J George, 'Effects of conflict on agriculture: Evidence from the Boko Haram insurgency' (2019) 117 (2019/05/01) *World Development* 184.

¹³³ V Koubi, 'Climate change, the economy, and conflict' (2017) 3(4) *Current climate change reports* 200; OA Ikhuoso, M Adegbeye *et al*, 'Climate change and Agriculture: The competition for limited resources amidst crop farmers-livestock herding conflict in Nigeria-A review' (2020) 272 *Journal of Cleaner Production* 123104.

¹³⁴ Webb (n 66).

¹³⁵ AJ Tanentzap, A Lamb *et al*, 'Resolving conflicts between agriculture and the natural environment' (2015) 13(9) *PLoS biology* e1002242.

¹³⁶ See n 4 where climate change is the instigator to conflict between farmers due to a decrease in resources.

¹³⁷ Personal interview, Christo van der Rheede, Chief Executive Officer at Agri SA, on 15 March 2023.

discussion of conflict in agriculture can be divided into four different sections: political, supply chain, labour and geo-political conflict.¹³⁸

Political conflict

Till¹³⁹ contends that the state has an important role to play by introducing agricultural policies as an instigator of agricultural development. This includes the availability of public funds. South African farmers do not receive state subsidies,¹⁴⁰ although many different organisations¹⁴¹ make loans available to farmers. Producer subsidies in other countries have the effect that farmers sell their produce at a price below production cost.¹⁴² This increases competition for South African products as such products enter the market at a higher price than subsidised country products. A solution to this is to put pressure on the government by role-players in the agricultural industry to negotiate low import tariffs and free markets.¹⁴³

Political conflict can also refer to conflict caused by political perceptions and feelings. In 2012, Afriforum and the Transvaal Agricultural Union (hereafter “TAU”) applied to the Equality Court to ban the song ‘Kill the Farmer, kill the Boer’ from being sung.¹⁴⁴ The court found in favour of these two parties against the ANC and Julius Malema, the then Youth leader of the party. After appealing the decision, parties were requested by the then Judge President, Judge Mpati, to consider mediation.¹⁴⁵ The mediation was successfully concluded within two days, and the appeal was withdrawn. In the words of the mediator, ‘it graphically demonstrated how mediation can be used to craft

¹³⁸ As above.

¹³⁹ E Rohne Till 'The Role of the State in Agricultural Development' in *Agriculture for Economic Development in Africa: Evidence from Ethiopia* (2022) 19 at 20.

¹⁴⁰ K Coetzee 'Farming without government support' 12 March 2018

<https://www.farmersweekly.co.za/tax-and-management/global-farming/farming-without-government-support/> (accessed 20 January 2024).

¹⁴¹ Loans seems to be focused on smaller farming initiatives and youth, see L Bakie 'A guide to the loan application process' 20 September 2023 <https://www.farmersweekly.co.za/farming-basics/how-to-business/a-guide-to-the-loan-application-process/> (accessed 20 January 2024).

¹⁴² As above.

¹⁴³ As above.

¹⁴⁴ Mail & Guardian 'ANC, Malema, AfriForum settle on 'shoot the boer' controversy' 31 October 2012 <https://mg.co.za/article/2012-10-31-00-shoot-the-boer-debate-put-to-rest/> (accessed 20 January 2023).

¹⁴⁵ C Nupen, 'Mediation and conflict resolution in South and Southern Africa : a personal account of the past 30 years' (2013) 13(3) *African Journal on Conflict Resolution* 85 at 109.

a mutually beneficial outcome in circumstances in which, had the matter proceeded on appeal, there could only have been a winner and a loser'¹⁴⁶.

The State may play an active role in solving conflict, as seen in the De Doorns riots in the agricultural sector in 2012/2013. Farm workers in the Western Cape demanded higher wages and better working conditions.¹⁴⁷ Although De Doorns was the centre of the strikes, it escalated to include 16 towns and, before it ended, had the effect of farms producing 400 000 cartons of fruit less than the year before, while the riots led to two farm workers' deaths.¹⁴⁸ This situation was critical, and the State tried to intervene without success.¹⁴⁹ After an urgent request to trade unions and farmer representative bodies to negotiate an agreement, the CCMA was approached and duly offered to assist in reaching a short-term agreement.¹⁵⁰ With the facilitation of the CCMA, an agreement that formed the basis of further developments in the industry was reached.¹⁵¹ This instance exemplifies the efficacy of ADR in the agricultural sector through the collaboration of labour, state, and farmer representatives throughout the negotiation process, as well as their reliance on an external entity in the event of a negotiation impasse.

Supply chain conflict

Conflict may originate from disagreements between role players in the supply chain.¹⁵² This is due to the dependence on information, money, and products from both the demand and supply side.¹⁵³ Assery¹⁵⁴ studied the link between conflict resolution and relationships between supply chain partnerships and performance. It was found that conflict resolution had a significant impact on positive supply chain performance.¹⁵⁵ The authors state that conflict within one business and between business partners or

¹⁴⁶ As above, 10.

¹⁴⁷ SAHO 'The Western Cape Farm Workers Strike 2012-2013' 2015 <https://www.sahistory.org.za/article/western-cape-farm-workers-strike-2012-2013> (accessed 14 November 2023).

¹⁴⁸ As above.

¹⁴⁹ As above.

¹⁵⁰ As above.

¹⁵¹ As above.

¹⁵² S Assery, HK Tjahjono *et al*, 'The role of conflict resolution on supply chain performance' (2020) 9(3) *International Journal of Scientific & Technology Research* 4007 at 4007.

¹⁵³ As above.

¹⁵⁴ As above.

¹⁵⁵ As above, 4009.

companies have different characteristics and must be studied to manage positive outcomes effectively.¹⁵⁶

Supply chains might include different actors depending on the specific agricultural activity or area. South Africa has nine provinces, each with its own governance, climate and preferred farming methods. Farms and provinces are not exclusive to certain ethnic groups but exhibit characteristics of ethnic governance and culture. In this way some provinces rely on customary ways of dealing with conflict, such as involving the chief in some farming disputes. In contrast, other provinces rely solely on legislation and formal policy.¹⁵⁷ Acknowledging the role of the chief is considered an advantage, as the chief is still recognised in many areas as the authority to resolve disputes between members in their communities. They can mediate or arbitrate a dispute between farm labourers or suppliers in small farming communities.¹⁵⁸

Understanding the supply chain and its partners and the power of ADR may provide practical solutions to challenges, as is shown in the Vinpro-Apple cider quest in 2021/2022. At the time, grape producers had excess amounts of wine due to liquor bans during the COVID-19 pandemic national lockdown in 2020.¹⁵⁹ Liquor legislation and industry regulations determined that 75% of ciders must consist of apple juice.¹⁶⁰ The Wine and Spirits Board and the SA Liquor Brandowners Association (hereafter “SALBA”) were petitioned by actors in the table grape and wine supply chain to include the use of grape juice in apple ciders.¹⁶¹ This successful process was called a ‘mediation, negotiation and cooperation’¹⁶² process and led to amendments to the Liquor Products Act in July 2022¹⁶³. Another example of mediation in an agricultural supply chain is the Tiger Brands-Food canning dispute of 2022.¹⁶⁴ In June 2022, Tiger

¹⁵⁶ As above, 4010.

¹⁵⁷ Personal interview with T De Jager, CEO of SAAI, on 23 November 2022.

¹⁵⁸ As above.

¹⁵⁹ K Child ‘Wine farmers get a leg up as use of grape juice in cider gets the nod’ 14 July 2022 https://www.businesslive.co.za/bd/national/2022-07-14-wine-farmers-get-a-leg-up-as-use-of-grape-juice-in-cider-gets-the-nod/#google_vignette (accessed 20 January 2024).

¹⁶⁰ Liquor Products Act 60 of 1989.

¹⁶¹ Child (n 162).

¹⁶² Telephonic interview with C Conradie, Vinpro Stakeholder Engagement and Stakeholder Manager, on 20 August 2023.

¹⁶³ Liquor Products Amendment Act 8 of 2021.

¹⁶⁴ AGRISA ‘Closure of Tiger Brands’ Langeberg and Ashton canning fruit factory spells disaster’ 22 June 2023 <https://agrisa.co.za/media/closure-of-tiger-brands-langeberg-and-ashton-canning-fruit-factory-spells-disaster> (accessed 20 January 2024).

Brands informed staff and clients of the closure of the canning plant. This closure threatened the employment of 250 full-time employees and 4300 seasonal workers and the potential closure of farming activities for 300 farmers.¹⁶⁵ Prominent individuals in the industry intervened and worked together to mediate an agreement, putting the sale of the factory on hold for one season.¹⁶⁶ This allowed farmers and workers some time to come up with alternatives.¹⁶⁷ Conflict in the labour landscape is well managed by provisions of the LRA¹⁶⁸ and will be discussed below as a separate heading due to the importance of labour and the history of farmer exploitation.¹⁶⁹

Labour conflict

Devereux¹⁷⁰ states that farm workers are widely exploited regarding wages, contractual agreements, and health and safety violations. This statement, indicating an abuse of worker rights, is also echoed by other authors.¹⁷¹ The CCMA, established in terms of the LRA, provide for ADR in labour disputes.¹⁷² During the 2021/2022 CCMA financial year, agriculture/farming was found to be within the top eight sectors, referring cases for dispute resolution, with 3691 cases representing 4% of the caseload of referrals.¹⁷³ It is clear that ADR is thus well addressed in direct labour and agriculture through provisions from the LRA. The De Doorns example above also emphasises the importance of using ADR in agricultural labour disputes and the role of the CCMA.

International geo-political conflict

Many agricultural products are exported to foreign markets from South Africa. At the same time, different commodities are imported to be used by the agricultural

¹⁶⁵ As above.

¹⁶⁶ Van der Rheede (n 139).

¹⁶⁷ M Gumede 'Tiger Brands factory won't be canned just yet' 12 July 2022.

<https://www.businesslive.co.za/bd/companies/industrials/2022-07-12-tiger-brands-factory-wont-be-canned-just-yet/> (accessed 22 August 2022).

¹⁶⁸ Para 2.3.

¹⁶⁹ Para 2.3.

¹⁷⁰ Devereux (n 45) at 400.

¹⁷¹ F Brandt and F Ncapayi, 'The meaning of compliance with land and labour legislation: understanding justice through farm workers' experiences in the Eastern Cape' (2016) 39(3) *Anthropology Southern Africa* 215; Visser & Ferrer (n123) 64.

¹⁷² Paras 2.4.3 and 2.3.5.

¹⁷³ CCMA '2022/23 Annual Performance Plan'

<https://www.ccma.org.za/resources/annual-performance-plan-2022-2023/> (accessed 23 August 2023).

industry¹⁷⁴- international geo-political conflicts such as the Ukraine-Russia war impact input products and international supply chain relationships. Global market developments, such as the Russian-Ukraine conflict, lead to high fuel prices, fertiliser and agrochemical shortages and an increase in local prices.¹⁷⁵ Such global forms of conflict impact the cost of production and distribution, leading supply chain partners like South African producers to look for alternatives.

2.7 Conclusion

This chapter endeavours to bring context to the agricultural environment and ADR in South Africa. The landscape is very diversified, with smaller rural farming on one end of the spectrum and large commercial farming on the other. The DALRRD, together with provincial departments of agriculture, provides for a focus on sustainability, but not in the context of conflict resolution or ADR. The main focus of these departments is on land reform. Sustainability as a concept is linked to the enforcement of private business standards in the supply chain. Compliance with these private business standards is compulsory in some supply chains and forms part of the regulatory framework. Social sustainability standards include a focus on the conditions of labourers and other vulnerable supply chain actors. Some scholars have indicated that ADR practices can be linked to achieving social sustainability. The chapter concludes by discussing forms of conflict, with some examples of how ADR can be helpful in resolving disputes. The next chapter will discuss the current legal framework addressing ADR in South African agriculture.

¹⁷⁴ NAMC 'Russia-Ukraine conflict and its potential impact on trade and food prices for South Africa' <https://www.namc.co.za/wp-content/uploads/2022/03/Russia-Ukraine-conflict-and-its-potential-impact-on-trade-and-food-prices-for-South-Africa.pdf> (accessed 25 January 2023).

¹⁷⁵ As above.

Chapter 3 – Legal framework for ADR in agricultural disputes

3.1 Introduction

This study aims to evaluate the current position of ADR within the legislative and policy framework specific to the agricultural industry in South Africa.¹⁷⁶ Although ADR is not new to South Africa, the focus shifted towards litigation with colonisation and only slowly turned back to ADR in the past 50 years.¹⁷⁷ Recognition of the role of ADR has increased rapidly in the past few years, specifically in the fields of labour disputes, family disputes and even land disputes.¹⁷⁸ This chapter endeavours to provide a picture of the provision for the use of ADR in South Africa through current litigation, court rules and other policies. As there are limited examples of ADR-specific legislation and policies in the agricultural environment, the focus is on the broader application of ADR provisions in the general agricultural environment.

3.2 The Constitution of the Republic of South Africa, 1996

3.2.1 ADR and the Constitution

The Constitution does not specifically provide for the use of ADR methods. It is primarily focused on establishing the fundamental principles and structures of the South African government, protecting human rights, and promoting democracy. However, the use and availability of ADR may be linked to the right of access to justice.

3.2.2 Access to Justice

The right of access to justice is firmly entrenched in the South African Constitution.¹⁷⁹ Access to justice refers to the right to have access to any court or other appropriate body. The concept has evolved from focusing on the right of access to different forums to that of access with a fair outcome.¹⁸⁰ Considering other Constitutional rights, such

¹⁷⁶ Para 1.6.

¹⁷⁷ Rantsane (n 10).

¹⁷⁸ P Ampeire 'ADR in South Africa: A Brief Overview' 9 December 2017

<https://immediation.org/2017/12/09/adr-south-africa-brief-overview/> (accessed 20 August 2023).

¹⁷⁹ Sec 34 states that 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.

¹⁸⁰ As above.

as the right not to be discriminated against¹⁸¹ and the right to dignity¹⁸², it is clear that everyone, regardless of personal circumstances, race or gender, should have access to a fair hearing.

The ideal, as described above, is not always met. Rhode¹⁸³ states that 'equal justice under law is a principle widely embraced and routinely violated'. A primary research study done in 2019¹⁸⁴ on a global level found that 50% of participants in the study had difficulty with access to justice in the two years prior to the study. Due to reasons, including ignorance of the law or alternatives to well-known legal resources, less than 20% followed up their disputes with formal authorities, forums or tribunals. This indicates that around 1.4 billion people globally struggle with fair and proper access to justice.¹⁸⁵

Even though access to justice is not a given reality, the importance of the concept is globally accepted and forms part of the SDG. The official aim of Sustainable Development Goal 16 is to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.¹⁸⁶ Nagtegaal and Jooste¹⁸⁷ argue that South Africa needs a 'people-centred approach to access justice'. ADR may be a solution to achieve this goal, as it can be a tool towards effective access to justice.¹⁸⁸

3.3 Arbitration

¹⁸¹ Sec 9.

¹⁸² Sec 10.

¹⁸³ DL Rhode, 'Whatever Happened to Access to Justice Symposium: Access to Justice: It's Not for Everyone' (2008) 42 *Loy. L. A. L. Rev.* 869 at 872.

¹⁸⁴ World Justice Project 'Global insights on access to justice' November 2019 <https://worldjusticeproject.org/sites/default/files/documents/WJP-A2J-2019.pdf> (Accessed 20 June 2022).

¹⁸⁵ As above.

¹⁸⁶ UN 'Goal 16' <https://sdgs.un.org/goals/goal16> (Accessed 16 November 2023).

¹⁸⁷ J Nagtegaal and Y Jooste, 'A Future of Justice Inclusion: Examining Access to Justice in South Africa through the 'Ethic of Care' and 'Complexity' (2022) 14(3) *African Journal of Legal Studies* 306 at 307.

¹⁸⁸ A Nylund, 'Access to justice: Is ADR a help or hindrance?' (2013) (12/01) *The Future of Civil Litigation: Access to Courts and Court-annexed Mediation in the Nordic Countries* 325 at 325.

3.3.1 The Arbitration Act

The practice of using arbitration is part of South African customary law¹⁸⁹, and arbitration was not legislated until 1965. The Arbitration Act of 1965¹⁹⁰ (hereafter “AA”) has the purpose of settling disputes by arbitration tribunals and provides for the enforcement of awards. Case law developed the application of the AA such as *OCA Testing and Certification South Africa (Pty) Ltd v KCEC Engineering Construction (Pty) Ltd and Another*¹⁹¹. In this case, involving a dispute on breach of contract and a claim for the recovery of money regarding services rendered, the dispute was referred to an arbitrator, later accused of gross negligence in determining his award. The SCA found that the arbitrator was negligent and, in its decision, clarified principles for the review of an arbitration award in cases of alleged gross irregularity.

The AA is specific to domestic disputes referred to as arbitration. The tribunal must heed the terms of the parties’ written agreement. However, the AA was not modelled on the UNCITRAL Model Law. Although the AA is not modernised and in line with global standards, it still forms the foundation of local arbitration proceedings in all industries and disputes.

3.3.2 The International Arbitration Act

In 2017, the International Arbitration Act (hereafter “IAA”)¹⁹² was promulgated to address arbitration of international disputes. The IAA binds parties to international commercial agreements. The effect is less concerning for international investors, as efficient and effective dispute resolution is a step closer to soundly safeguarding their investments. The IAA incorporates UNCITRAL Model Law, and this development has led to South Africa being an important regional centre for arbitration. One of the benefits of arbitration, and a detriment to record holding, is the confidential nature of arbitration. However, due to this confidential nature of arbitration, the exact number of arbitrations in South Africa and, more specifically, links to specific industries (e.g. Agriculture) are unknown. As the agricultural value chain can incorporate various supply chain partners, both from the input and output side, disputes with foreign

¹⁸⁹ Rantsane (n 10).

¹⁹⁰ Act 42 of 1965.

¹⁹¹ *OCA Testing and Certification South Africa (Pty) Ltd v KCEC Engineering Construction (Pty) Ltd and Another* (1226/2021) [2023] ZASCA 13.

¹⁹² Act 15 of 2017.

stakeholders may be referred to arbitration. With the emergence of arbitration institutions in South Africa, such as the Arbitration Foundation of South Africa (hereafter “AFSA”) and the IAA, international arbitration disputes can be easily resolved and services accessed.

3.3.3 International treaties related to arbitration

South Africa is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹⁹³ This means South Africa is bound to the convention rules concerning recognising and enforcing foreign awards. UNCITRAL Model Law¹⁹⁴ is not a treaty obligation such as the New York Convention.

3.3.4 Contractual provision for arbitration

Arbitration clauses in contracts are well known in domestic and foreign contracts. The advantages of having such a clause relate to the benefits of arbitration, including lower costs, speedier outcomes, more flexibility and control over the process and the choice of an arbitrator.¹⁹⁵ In a specific industry such as agriculture, having an expert act as arbitrator may ensure a more favourable outcome.

The South African Cereals and Oilseeds Trade Association (hereafter “SACOTA”) provides an example of how the industry views ADR, specifically arbitration.¹⁹⁶ SACOTA developed their standard contract for members to incorporate a mandatory arbitration clause, which is to be administered by the Arbitration Foundation of South Africa (hereafter “AFSA”). To ensure effective arbitrations, SACOTA trained arbitrators who are knowledgeable in the industry.¹⁹⁷ Although statistics are not readily available, and reliable statistics on arbitration in the agricultural sector are hard to come by, AFSA reported having done 4134 arbitrations in 2020 across industries.¹⁹⁸ This is an

¹⁹³ New York Arbitration Convention ‘The New York Convention’ <https://www.newyorkconvention.org/> (accessed 20 February 2024).

¹⁹⁴ UN (n 68).

¹⁹⁵ Para 2.4.5.

¹⁹⁶ SACOTA ‘Who we are’ <https://www.sacota.co.za/> (accessed 20 February 2024).

¹⁹⁷ GSA ‘SACOTA and arbitration’s role in our grain and oilseed industries’ <https://www.grainsa.co.za/sacota-and-arbitration-s-role-in-our-grain-and-oilseed-industries> (accessed 20 February 2024).

¹⁹⁸ Thomson Reuters Practical Law ‘Use of Arbitration and Recent Trends’ [https://uk.practicallaw.thomsonreuters.com/4-502-0878?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/4-502-0878?transitionType=Default&contextData=(sc.Default)&firstPage=true) (accessed 14 November 2023).

indication of the growing demand for arbitration in general, which is relevant considering that this is only one institution's contribution. Arbitration also plays a significant role in agricultural insurance contracts, notably in harvesting insurance.¹⁹⁹ Compulsory arbitration is, in many instances, contractually required concerning claims.²⁰⁰

3.4 Mediation

3.4.1 The legislative position of mediation

Mediation is not currently legislated in South Africa as an independent form of ADR, although it is practised in various different disciplines. In South Africa, mediation is legislated in family law²⁰¹ and labour law²⁰² within Acts, focussed on these disciplines. Mediation is referred to in more than 50 statutes,²⁰³ in some instances relevant to the agricultural industry.²⁰⁴ However, although all these Acts refer to mediation as an option for resolving conflict, the mediation process is not addressed in any of these Acts.

Providing for mediation in a mediation-specific context is in the development phase, as seen by the SALRC's Project 94.²⁰⁵ Project 94 started with a focus on arbitration, which was broadened to include other aspects of ADR, notably mediation, in 1996.²⁰⁶ In 2017, regarding Project 94, a meeting was held to discuss the possibility of a generic Mediation Act and possible actions to be taken in this regard.²⁰⁷ The Draft Mediation

¹⁹⁹ Personal interview with A Wiese, National Business Development Manager at Hollard Insurance, on 15 July 2022.

²⁰⁰ As above.

²⁰¹ Mediation in Certain Divorce Matters Act 24 of 1987.

²⁰² Labour Relations Act 66 of 1995.

²⁰³ J Brand, F Steadman *et al Commercial mediation: A user's guide* (2016) at 97.

²⁰⁴ Income Tax Act 58 of 1962; Human Rights Commission Act 54 of 1994; Restitution of Land Rights Act 22 of 1994; Labour Relations Act 66 of 1995; Commission on Gender Equality Act 39 of 1996; Land Reform (Land Tenants) Act 3 of 1996; Telecommunications Act 103 of 1996; Extension of Security of Tenure Act 62 of 1997; National Environmental Management Act 107 of 1998; National Forests Act 84 of 1998; National Water Act 36 of 1998; Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; Rental Housing Act 50 of 1999; National Land Transport Act 22 of 2000; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; Gas Act 48 of 2001; National Ports Act 12 of 2003; National Credit Act 34 of 2005; Electricity's Regulation Act 4 of 2006; Companies Act 71 of 2008; Consumer Protection Act 68 of 2008.

²⁰⁵ SALRC '2020/2021 Report on the activities of the South African Law Reform Commission' https://static.pmg.org.za/SALRC_AR_2020-21.pdf (accessed 20 February 2024).

²⁰⁶ As above.

²⁰⁷ As above.

Bill was approved in 2021 by the Advisory Committee but is not yet available for public comment. How provision is made for, or to what extent the Bill applies to, role players in the agricultural environment is thus still unclear.

Provision for mediation across state borders must be addressed as the agricultural supply chain includes, in many instances, global supply chain partners. Challenges with concerns and expectations of global business partners and investors led to the proposed Regulations in terms of the Investment Act: Draft Regulations on Mediation Rules²⁰⁸ in 2016. Although this is not directly relevant to the agricultural industry, it shows how legislation can help safeguard potential business transactions. These rules deal with investor-state mediation in South African investor-state conflicts. This came after case law's²⁰⁹ depiction of issues with foreign investment. Threats to investments stemmed from the potential for unanticipated state action. The Protection of Investment Act²¹⁰ and the Mediation Rules became operative in 2018. In instances where government action could make an investor feel endangered, the Rules provide for mediation procedures and deadlines.

3.4.2 Court rules and approaches to mediation in civil disputes

While legislation fails to address the application of mediation effectively, court rules have been implemented to encourage mediation in disputes. Rule 37A²¹¹, introduced in 1997, prescribes the requirement for a pre-trial conference. In *MB v NB*²¹², the court noted that this rule requires parties to consider mediation. Positive references to the requirement of mediation can also be found in earlier judgements. Examples are the 2003 judgement of *Van der Berg v Le Roux*,²¹³ where the court commented that 'only subsequent to the conclusion of the mediation process could either party approach a competent court' and in the 2004 judgement of *Townsend-Tuner and Another v*

²⁰⁸ Government Gazette 40526, Notice 958 of 2016.

²⁰⁹ ICSID Case No. ARB(AF)/07/01; *Piero Foresti, Laura de Carli and others v. Republic of South Africa* (2007). The case concerns a number of international investors who claimed they were treated unfairly when regulations of Black Economic Empowerment were implemented.

²¹⁰ Act 22 of 2015.

²¹¹ Uniform Rules of the High Court.

²¹² *MB v NB* 2010 3 SA 220 (GSJ).

²¹³ *Van den Berg v Le Roux* 2003 All SA 599 (NC).

Morrow,²¹⁴ where parties were ordered to attend mediation. Parties can also agree contractually that they will first enter mediation if a dispute arises out of the contract.

In the more recent past, policy initiatives started introducing mediation to disputing parties, such as Rule 41A²¹⁵, which compels parties to consider mediation before proceeding with litigation. Rule 41A was introduced in March 2020 and requires a Notice by parties to state their grounds for agreeing or opposing mediation of their dispute. Rules regulating the conduct of proceedings in the Magistrate's Court have also been amended in 2023. These rules²¹⁶, inserted in Chapter 2, provide for the use of mediation prior to continuing to litigation, either by own agreement or by enquiry of the court. Therefore, any civil disputes in agriculture will be subject to these rules.

Voluntary Court-Annexed Mediation came into operation in 2014 in an effort by the Department of Justice to enhance access to justice.²¹⁷ Its purpose was to encourage mediation at the court level before litigation commenced. However, this initiative was paused in March 2022.²¹⁸

From the above, it can be deduced that the judiciary views mediation as a viable and preferred method of addressing disputes. This will also be true for agricultural/farming disputes. Evidence of commercial mediation as an accepted method to resolve business disputes is limited, but change does seem imminent.²¹⁹ In a 2021 court case²²⁰, the court referred to the 'embryonic stage of our Rule 41A mediation process and the paucity of case law or literature on the specific topic', confirming the idea that mediation is still regarded as being in its infancy. It can be noted, however, that not all participants in the judiciary system are visionaries of the positive outcomes of

²¹⁴ *Townsend-Tuner and Another v Morrow* 2004 All SA 235 (C).

²¹⁵ See above, (n 213).

²¹⁶ Rules 70, 71, 72, 73, 74, 75, 76, 77, 78 and 79.

²¹⁷ DOJCD 'Court-annexed Mediation' <https://www.justice.gov.za/mediation/mediation.html> (accessed 16 November 2023).

²¹⁸ As above.

²¹⁹ P Daya E Warmington and A De Meyer. 'Commercial mediation in South Africa' <https://www.linklaters.com/en/insights/publications/commercial-mediation-a-global-review/commercial-mediation-a-global-review/south-africa> (accessed 16 November 2023).

²²⁰ *Kalagadi Manganese (Pty) Ltd and Others v Industrial Development Corporation of South Africa Ltd and Others* (2020/12468) [2021] ZAGPJHC 127 (22 July 2021).

mediation. In a 2022 judgement²²¹ on a restraint of trade clause, Judge Daffue made the following remark, with regard to the failure of complying with Rule 41A:

“I have serious reservations as to the relevance of Rule 41A at present. The rule makers apparently believed that speedy and less expensive resolution of disputes between parties would be achieved and possibly also an avoidance of over-congested court roles. Unfortunately, this is a pie in the sky. Unless mediation is peremptory and provision is made for payment of mediators by the State, litigants will in most cases endeavor to obtain adjudication of their disputes by the court”.

The above statement emphasises the importance of knowledge, not only of the law itself but of practical implications for disputing parties and the legal fraternity, such as fee structures and timelines of alternatives to litigation. Parties may choose their mediator by agreement and can better control costs. Not all mediators allow attorneys to attend the mediation but would allow parties to consult with their legal representatives at their request. These are some aspects that may be negotiated before a mediation takes place. The same benefits available to parties in the arbitration of an agricultural dispute will also be available to parties in a mediation that of having better control over the appointed mediator, the process and resources spent.

3.5 Conclusion

Although South African legislation addresses ADR to some extent, it is not sufficiently included and enforced in the business and agricultural policy environment. Reasons for this may partly be blamed on the ignorance of the legal fraternity and stakeholders in the supply chain. ADR methods, such as mediation and arbitration, provide farmers with flexible and tailored solutions that can promote amicable resolutions and preserve valuable relationships within the agricultural community, and support by legislative and court-appointed methods would assist in achieving this.

²²¹ *DIY Superstores (Pty) Ltd v Kruger and Another* (113/2022) [2022] ZAFSHC 75.

Chapter 4 – A Comparative Study

4.1 Introduction

The effectiveness of an ADR system is not solely dependent on legislation but also on the culture, infrastructure, and support of legal professionals and institutions in a specific industry. Comparing agricultural practices, specific to ADR, to Western practices may provide interesting insights. However, it would sacrifice an understanding of the development of conflict resolution in the context of realistic practices in Southern African farming. Many African countries have realised the need for ADR in agricultural disputes, as it resonates with traditional practices. For this reason, this chapter attempts to address ADR mechanisms applied to agriculture in both a Westernised and African country.

Western countries that provide for ADR programs in agriculture include the United States (hereafter “US”), Canada, the United Kingdom (hereafter “UK”) and Australia. The focus is on ADR programs rather than legislation or formal policy. Australia has a comprehensive legal framework for ADR, while the agricultural landscape has similarities to South Africa in operational and cultural practices. For this reason, a legal comparison will be made using Australia as a well-developed ADR counterpart and Nigeria as an African country, which is one of the most prominent identified ADR centres in Africa.

4.2 Australia and ADR in agriculture

4.2.1 The Australian agricultural environment

Fifty-five percent of Australian land is used for agricultural purposes. The agricultural industry contributed 2.4% to GDP and 2.5% to employment in 2021/2022. Climate, water, soil type and access to markets determine agricultural activity. Horticulture and crops are usually grown near coastal areas and are not widespread due to the above factors and geography. Livestock grazing is generally found in most areas.²²²

²²² DAFF (n 24).

There are many reasons for comparing the Australian ADR experience and history with that of South Africa; both countries have diverse populations in terms of demographic characteristics with unique geographical landscapes. The colonisation history of Australia is well documented, with the impact still felt and seen in contemporary inequalities between groups, ranging from social disparities, including education and health, to conflict from land ownership and harming of cultural heritage and language suppression.²²³ ADR is also recognised as a part of the heritage of indigenous communities before colonisation.²²⁴ However, while Australia is a developed country with a sophisticated economy and infrastructure, South Africa is a developing country struggling with many socio-economic challenges.

4.2.2 The Australian Constitution and access to justice

The Constitution of the Commonwealth of Australia (hereafter “Australian Constitution”)²²⁵ divides constitutional power between two levels of government—the Commonwealth (federal or central) government and six State governments.²²⁶ Australia also has two territories—the Northern Territory and the Australian Capital Territory—but they are not independent.²²⁷ Unlike legislation of the States, legislation of the territories can be overridden by the Commonwealth legislature, which also has the power to abolish the territories entirely.²²⁸ The Australian Constitution allows the Commonwealth government to legislate on specific enumerated issues, such as marriage and taxation.²²⁹ Contrastingly, the Australian States retain the power to legislate on all issues that the Australian Constitution does not explicitly assign to the Commonwealth.²³⁰ This sharp distinction between the levels of government in Australia contrasts with South Africa, which has been described as ‘semi-’ or ‘quasi-’ federal.²³¹ South Africa is regarded as being only semi-federal, partly because the

²²³ Y Paradies, 'Colonisation, racism and indigenous health' (2016) 33(1) *Journal of Population Research* 83

²²⁴ MA Noone and LA Ojelabi, 'Alternative dispute resolution and access to justice in Australia' (2020) 16(2) *International Journal of Law in Context* 108

²²⁵ Commonwealth of Australia Constitution Act 1900.

²²⁶ S Joseph and M Castan *Federal Constitutional Law: A Contemporary View* 5th Edition (2019) at 14.

²²⁷ As above.

²²⁸ As above.

²²⁹ As above at 17 and Australian Constitution (n 227) sec 51.

²³⁰ Joseph and Castan (n 228)

²³¹ K Malan *From A Quasi-Federal Constitution to Centralist Command* (2006) 39:1 *De Jure* 149 at 149; LJ Kotze & R Bates, *Similar but Different: Comparative Perspectives on Access to Water in Australia and South Africa* (2012) 15(2) *University of Denver Water Law Review* 221.

distinctions between the three levels of government established by the South African Constitution are less crisp.²³²

The Australian Constitution does not expressly confer legislative power on the Commonwealth government over issues of agriculture or the environment. Thus, these are issues that fall within the plenary powers of State governments. Nevertheless, the Commonwealth government does use its other heads of power to regulate matters that relate to or impact the environment and agriculture. For instance, the Commonwealth has relied on its foreign affairs head of power to legislate to prevent the building of a dam in Tasmania.²³³ Constitutional power over dispute resolution is similarly shared between the Commonwealth and States.

On the one hand, the Commonwealth has the power to legislate regarding ‘conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State’.²³⁴ On the other hand, the States retain the power to legislate regarding disputes that do not extend beyond their borders. Thus, an array of Commonwealth and State legislation regulates the mediation and arbitration of agricultural disputes in Australia.

Australian law is based on English law, leading to similar principles between the two countries. Access to justice is an essential principle of the law and is not only about accessing courts and institutions but about a fair outcome that ensures justice.²³⁵ However, though it is an essential element of the rule of law, it is not included in the fundamental Constitutional rights. The World Justice Project Rule of Law Index presents a picture of the rule of law in 139 countries²³⁶ and indicates in their research that Australian people’s access to justice and ADR processes are effective and have remained stable over the last ten years.²³⁷

²³² Malan (n 233) at 149.

²³³ *Commonwealth v Tasmania* (1983) 158 CLR 1.

²³⁴ Australian Constitution (n 227) sec 51.

²³⁵ Noone & Ojelabi (n 226).

²³⁶ WJP (World Justice Project) 2022 ‘WJP Rule of Law Recession Continues’ <https://worldjusticeproject.org/rule-of-law-index/>. (accessed 7 October 2023)

²³⁷ Australian Government Treasury ‘Access to justice’ <https://treasury.gov.au/policy-topics/measuring-what-matters/dashboard/access-justice> 21 July 2023 (accessed 7 October 2023)

4.2.3 Australian courts and legislation on ADR and its use in agriculture

The Australian court system curtailed the principle of party control many years ago, giving power and control to courts while moving to a greater focus on ADR.²³⁸ This led to a focus away from court adjudication to a party-controlled approach afforded by ADR, specifically, mediation.²³⁹ Australian ADR is thus seen as an integral part of its formal civil justice system, with community justice centres (hereafter “CJC”) available in all states and territories that provide ADR services.²⁴⁰ A CJC provides free ADR services to people experiencing conflict. This might be compared to the function of the CCMA in South Africa, except for the general application in ADR as opposed to the labour-focused design of the CCMA. The majority of states have institutions that concentrate on farming or agricultural disputes, such as Agriculture Victoria’s dispute resolution service, where it is compulsory to offer mediation to farmers before recovering farm-related debts²⁴¹ and in line with the Farm Debt Mediation Act²⁴². Farm debt mediation is a process legislated and supported in all states. Other examples are the NSW Rural Assistance Authority²⁴³, Queensland Agriculture and Rural Economic Development Authority (hereafter “QAREDA”)²⁴⁴, and Agricultural Business Research Institute (hereafter “ABRI”)²⁴⁵. These many institutions offer mediation services related to all fields and stakeholders connected to the agricultural environment. Arbitration centres are also found, with the Federal Court having jurisdiction over the International Arbitration Act²⁴⁶. Legislative provision is thus made for ADR in resolving specific farming disputes and general ADR legislation to guide the use of ADR mechanisms in agricultural supply chain disputes.

²³⁸ WLR De Vos and T Broodryk, 'Managerial judging and alternative dispute resolution in Australia : an example for South Africa to emulate? (part 1)' (2017) 2017(4) *Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg* 683.

²³⁹ As above.

²⁴⁰ Noone & Ojelabi (n 226).

²⁴¹ Agriculture Victoria 'Farm Debt Mediation' <https://agriculture.vic.gov.au/farm-management/business-management/farm-debt-mediation> (accessed 30 September 2023).

²⁴² Act of 2011 with amendments in 2022 to strengthen farmers rights with regards to debt mediation.

²⁴³ ADR 'NSW Rural Assistance Authority' <https://adr.org.au/category/raa/> (accessed 30 September 2023).

²⁴⁴ Queensland Rural and Industry Development Authority 'Queensland Agriculture and Rural Economic Development Authority (QAREDA)' https://www.qrida.qld.gov.au/loans?qclid=Cj0KCQjw66pBhDQARIsALIR2zD7I2-uXAfewo-e1ovo-Z7bbao1JSb7GnM9L5KSqQbHXXbimZ3s014aAkDfEALw_wcB (accessed 30 September 2023).

²⁴⁵ ABRI <https://abriweb.une.edu.au/> (accessed 30 September 2023).

²⁴⁶ Australian Act of 1974.

Australia provides mandatory mediation and has a success ratio of 80% in settlement outcomes.²⁴⁷ South African changes in legislation and court rules also seem to be going toward mandatory mediation, with many critiques as to the voluntary nature of ADR and concern that mandatory mediation is contradictory to the essence of ADR. However, considering the above-mentioned success rate, it would seem that the focus is not on voluntary attendance but rather should be on a voluntary process of outcome, as is the case in Australia.

Skrimizea²⁴⁸ argues that conflict is necessary for social change within Australia's agricultural systems. The focus of their research is on achieving sustainability in Australia's agriculture. Although Australia is not plagued with the conflict challenges typically found in Africa, conflict between stakeholders in agribusiness needs to be addressed. The most prominent aspect relevant to this study is the Australian view of staying focussed not on voluntary attendance on ADR but rather on a voluntary process of outcome and the direct involvement of state institutions to provide ADR support and facilities in agricultural sectors.

4.3 Nigeria and ADR in agriculture

4.3.1 The Nigerian agricultural environment

Nigeria's agricultural land (% of land area) amounts to 75.37 %, and agriculture contributed 20% to GDP in the first quarter of 2023.²⁴⁹ As with other African countries, scholars mention food security, good governance, and sustainable practices within the

²⁴⁷ A Limbury 'Compulsory Mediation – The Australian experience' 22 October 2018 <https://mediationblog.kluwerarbitration.com/2018/10/22/compulsory-mediation-australian-experience/#:~:text=The%20settlement%20rate%20has%20remained,over%2080%25%20for%20several%20years.&text=Most%20Australian%20courts%20have%20statutory.and%20other%20forms%20of%20ADR> (accessed 7 October 2023).

²⁴⁸ E Skrimizea, L Lecuyer et al, 'Sustainable agriculture: Recognizing the potential of conflict as a positive driver for transformative change' (2020) 63 *The Future of Agricultural Landscapes, Part I* 255

²⁴⁹ Trading economics 'Nigeria Agricultural land' [https://tradingeconomics.com/nigeria/agricultural-land-percent-of-land-area-wb-data.html#:~:text=Agricultural%20land%20\(%25%20of%20land%20area\)%20in%20Nigeria%20was%20reported,compiled%20from%20officially%20recognized%20sources](https://tradingeconomics.com/nigeria/agricultural-land-percent-of-land-area-wb-data.html#:~:text=Agricultural%20land%20(%25%20of%20land%20area)%20in%20Nigeria%20was%20reported,compiled%20from%20officially%20recognized%20sources). (accessed 27 September 2023).

agricultural environment as concerns.²⁵⁰ Due to an oil dependency, agricultural contributions to the economy are often overlooked.²⁵¹

Nigeria is an African country rife with conflict. Conflict is not restricted to civil matters, but political conflict is a concern.²⁵² Ajala²⁵³ paints a picture in his article of conflict in Nigerian agriculture of farmers and herders walking around with guns slung over their shoulders. Due to the high incidence of conflict and crime in agriculture, restorative justice²⁵⁴, one avenue of ADR, as a construct addressing farmer-herder disputes in Nigeria, is also relevant for ADR-agricultural research²⁵⁵. This links up to the reality of farm murders in South Africa, where restorative justice may also be used to redress harm in the resolution of conflict.

4.3.2 Nigerian Constitution and access to justice

Nigeria has had successive Constitutions, with the 1999 Constitution still in force.²⁵⁶ Nigeria is a federation with democratic rule. The federal government has legislative power, together with the House of Representatives and the Senate.²⁵⁷ Section 36(1) of the Constitution provides for the right of access to justice by stating that ‘in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality’. However, access to

²⁵⁰ S Igbiniedion and J Aihie, 'Towards good governance and sustainable food security in Nigeria: challenges and the way forward' (2015) 8(05) *OIDA International Journal of Sustainable Development* 41; IJ Olaoye, OE Ayinde *et al*, 'Fertilizer Policy, Governance, and Agricultural Transformation in Nigeria: A Review of Political Economy from Historical Perspectives' (2020) *The Palgrave Handbook of African Political Economy* 449.

²⁵¹ A Elwerfelli and J Benhin, 'Oil a blessing or curse: A comparative assessment of Nigeria, Norway and the United Arab Emirates' (2018) 8 (5) *Theoretical Economics Letters* .

²⁵² ACLED <https://acleddata.com/10-conflicts-to-worry-about-in-2022/nigeria/> (accessed 27 September 2023).

²⁵³ O Ajala, 'New drivers of conflict in Nigeria: an analysis of the clashes between farmers and pastoralists' (2020) 41(12) *Third World Quarterly* 2048.

²⁵⁴ K Shonk 'Alternative Dispute Resolution Examples: Restorative Justice' 29 June 2023 <https://www.pon.harvard.edu/daily/dispute-resolution/alternative-dispute-resolution-examples-restorative-justice/#:~:text=Within%20the%20criminal%20justice%20system,dispute%20resolution%20called%20restorative%20justice> (accessed 27 September 2023).

²⁵⁵ El Onah and BE Olajide, 'Applying restorative justice in resolving the farmers-herdsmen conflict in Nigeria' (2020) 20(1) *African Journal on Conflict Resolution* 8.

²⁵⁶ The Constitution of the Federal Republic of Nigeria 1999.

²⁵⁷ Herbert Smith Freehills (n 22) at 244.

justice is inhibited by time delays in courts, litigation costs, illiteracy of disputing parties and reliance on technical rules.²⁵⁸

4.3.3 Nigerian courts and legislation on ADR and its use in agriculture

The International Chamber of Commerce (hereafter “ICC”) reports that arbitration in sub-Saharan Africa accounted for approximately five percent of all parties globally in its 2019 caseload. This is calculated from 130 parties to disputes, with the highest number from Nigeria and South Africa.²⁵⁹ ADR has been noted as a priority dispute resolution method in Africa, notably by the African Union (hereafter “AU”), which strives to promote cooperation and achieve a better life for all African people.²⁶⁰ Specifically, mediation is seen as an essential part of the peace-making role they envisioned²⁶¹. This led to the creation of the AU Mediation Support Unit in 2023.²⁶² It is thus clear that ADR is recognised and applied in Africa and, specifically, in Nigeria and South Africa.

Nigeria’s legal system is based on both common law on the one hand and indigenous law (including Sharia law) on the other²⁶³. Indigenous law in this context refers to the practice of applying customary principles, which include customary arbitration.²⁶⁴ Nigerian legislation introduced the Nigerian Arbitration and Conciliation Act (hereafter “NACA”)²⁶⁵ in 1988, which reflected UNCITRAL Model Law and UNCITRAL Arbitration Rules. Later amendments to the Act were that parties may approach the Nigerian High Court when a dispute arises concerning appointing arbitrators and setting aside arbitration awards. The NACA and thus Nigerian law, until 2023, drew a clear distinction between international commercial arbitration and domestic arbitration. The Lagos Arbitration Law (hereafter “LAL”) came into effect in Lagos in 2009, also based on the UNCITRAL Model Law. LAL does differentiate between international and

²⁵⁸ NS Okogbule, 'Access to justice and human rights protection in Nigeria: problems and prospects' (2005) 2 *Sur. Revista Internacional de Direitos Humanos* 100 at 105.

²⁵⁹ White and Case 'Institutional arbitration in Africa: Opportunities and challenges' <https://www.whitecase.com/insight-our-thinking/institutional-arbitration-africa-opportunities-and-challenges> (accessed 24 November 2023)

²⁶⁰ AU 'African Union' <https://au.int/en/> (accessed 23 November 2023)

²⁶¹ Mutanda (n 80)

²⁶² As above.

²⁶³ Herbert Smith Freehills (n 22) at 244.

²⁶⁴ As above.

²⁶⁵ Act of 1988.

domestic arbitration.²⁶⁶ In May 2023, a new Arbitration and Mediation Act (hereafter “AMA”) was promulgated. This Act replaces the NACA.²⁶⁷ Some innovation to the AMA is the Award Review Tribunal (hereafter “ART”). Provisions of the ART, specifically grounds for review, align with the provisions of UNICITRAL and the New York Convention. The AMA also provides for the appointment of emergency arbitrator procedures, third-party funding²⁶⁸, electronic communication, and the enforcement of awards.²⁶⁹

Akujobi²⁷⁰ provides context to Nigerian ADR and agriculture by explaining conflicts and possible solutions. The authors relay the need to settle conflict outside of court but mention ignorance concerning the existence of ADR and customary institutions resolving disputes. Nigeria has formal centres in cities and towns that provide ADR services by legal professionals according to the above-mentioned Acts. Arbitration institutions in Nigeria include the Regional Centre for International Commercial Arbitration – Lagos (RCICAL); the Lagos Court of Arbitration (hereafter “LCA”); Chartered Institute of Arbitrators (hereafter “CIArb”) UK (Nigeria Branch); Lagos Chamber of Commerce International Arbitration Centre (hereafter “LACIAC”); the Nigerian Institute of Chartered Arbitrators (hereafter “NICArb”); and the Multi-Door Courthouse (hereafter “MDC”) Initiative.²⁷¹ Nwazi²⁷² recounts the growth of ADR by referring to the discontent of disputants after courts did not address environmental issues sufficiently. This caused them to turn to ADR, which proved to be a more efficient forum for resolving pollution and environmental disputes. However, other

²⁶⁶ Herbert Smith Freehills (n 22) at 248.

²⁶⁷ R Wheal ‘Recent Arbitration Reforms in Nigeria’ 15 June 2022 <https://www.whitecase.com/insight-alert/recent-arbitration-reforms-nigeria> (accessed 27 September 2023)

²⁶⁸ E Oger-Gross ‘New Arbitration Regime Comes into Force in Nigeria’ 21 June 2023 <https://www.whitecase.com/insight-alert/new-arbitration-regime-comes-force-nigeria#:~:text=The%202023%20Arbitration%20and%20Mediation,the%20most%20notable%20provisions%20below> (accessed 27 September 2023).

²⁶⁹ CDH ‘Nigeria’s incoming Arbitration and Mediation Bill’ 22 June 2022 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Dispute/International-Dispute-Resolution-in-Africa-22-June-Nigerias-incoming-arbitration-and-mediation-bill-2022.html> (accessed 27 September 2023).

²⁷⁰ C Akujobi, S Ebitari *et al*, ‘Arable land resource conflict in Nigeria’ (2016) 72(1) *Journal of Applied Science and Development* 39 at 49.

²⁷¹ P Okakpu ‘Arbitration Institutions in Nigeria’ 20 April 2021 <https://www.linkedin.com/pulse/arbitration-institutions-nigeria-peter-okakpu-aciarb-/> (Accessed 27 September 2023).

²⁷² J Nwazi, ‘Assessing the efficacy of alternative dispute resolution (ADR) in the settlement of environmental disputes in the Niger Delta Region of Nigeria’ (2017) 9(3) *Journal of Law and Conflict Resolution* 26.

scholars²⁷³ contend that Nigeria, as a developing economy, has not succeeded in matching its envisioned ADR policies with commercial reality.

Customary law also provides for ADR in agricultural disputes, and centres have been erected to provide ADR services. Although sufficient examples of successful application of ADR in agriculture in Nigeria are lacking, it does seem as if a landscape is being set to ensure effective ADR also in agricultural contexts. Nigeria, as a developing counterpart to South Africa, is moving, despite challenges, towards a more considerable emphasis on ADR as a dispute resolution mechanism.

4.5 Conclusion

Some scholars note a concern²⁷⁴ in the inconsistent interpretation and enforcement of the New York Convention in sub-Saharan Africa. As seen from the Nigeria comparison, ADR is still a developing tool for dispute resolution in Africa. However, a robust framework by legislation and the provision of ADR centres is being erected in Nigeria and can be accessed by agricultural communities. Positive examples of the use of ADR in the agricultural sector, such as that of Australia, should be noted, and the possibility of following some initiatives, such as the mediation institutions for mediation of conflict between disputing parties, should be considered.

²⁷³ OJ Olujobi, AA Adeniji *et al*, 'Commercial Dispute Resolution: Has Arbitration Transformed Nigeria's Legal Landscape?' (2018) 9(1 (31)) *Journal of Advanced Research in Law and Economics* 204.

²⁷⁴ A Okubote, '60 Years of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958: are we there yet in Sub-Saharan Africa?' (2019) *60 Years of the New York Convention : key issues and future challenges*.

Chapter 5 – Conclusion

5.1 Introduction

The title of this dissertation is ‘An Evaluation of Alternative Dispute Resolution in the South African Agricultural Environment’. Specific questions were formulated and asked to evaluate the prevalence and use of ADR in agriculture. In answering the primary research question, this study attempted first to determine the current regulatory framework that supports ADR practices specific to agricultural role players. In Chapter Two, it was clearly shown that the agricultural industry is not only impacted by legislation but that international policy and industry or private standards determine the actions and behaviour of stakeholders. Such policies and standards are thus part of the regulatory framework. The drive behind the industry standards is compliance with sustainable development goals and a global quest to work toward economic growth, social justice, and a sustainable environment, not only for businesses but also for individuals and communities linked to agriculture. Access to justice, a key to social justice, is shown to be an essential element of sustainability and ADR practices, including mediation and arbitration, may be an essential step towards access to justice for all South Africans. Chapter Three dealt with the regulatory framework of ADR in agriculture currently found in South Africa. In contrast, Chapter Four evaluated Nigeria and Australia to identify methods of improving knowledge of ADR and its application in the agricultural industry. This chapter aims to provide a synopsis of all the above by answering the research questions.

5.2 Current position of ADR in South African agriculture

This study aimed to evaluate the current position of ADR within the legislative and policy framework specific to the agricultural industry in South Africa and to identify ways to improve such a framework.²⁷⁵ In achieving this, research questions were formulated regarding how ADR contributed to sustainability, the current regulatory framework of ADR in South African agriculture and how other countries deal with ADR in agriculture.

²⁷⁵ Para 1.6.

It is clear that agriculture is an essential industry in South Africa and consists of various stakeholders across supply chains.²⁷⁶ Power imbalances and the self-interest of stakeholders contribute to conflict.²⁷⁷ Legal transactions between employer-employee, supplier-farmer, exporter-farmer, importer-farmer or consumer/NGO-farmer may be concluded.²⁷⁸ In these examples, resources are more easily accessed by one of the two parties due to available financial and knowledge resources. In cases where such conflict escalates to a dispute, litigation is the traditional route to resolve the dispute.²⁷⁹ However, the downfalls of litigation are the need for attorneys, as disputants rarely have the required legal knowledge to represent themselves in court, and the high costs of engaging attorneys in a legal dispute.

Research further shows that while sustainable development is a priority to the DALRRD, ADR is not addressed. It is also clear that access to justice is a Constitutional right²⁸⁰ supported by international policy and SDG.²⁸¹ Utilising ADR may contribute to helping achieve sustainable development goals.²⁸² ADR is an inclusive method that allows parties to settle their disputes in a timely and more cost-effective manner. However, national policy and legislation do not address solving agricultural disputes by ADR in a direct and supportive manner.²⁸³ Even though the Arbitration Act²⁸⁴ and the International Arbitration Act²⁸⁵ exist, the acts do not address agricultural disputes directly. The draft of the Mediation Act is in the process of regulating mediation in different fields. Still, it is not yet available for public comment to analyse its use in the agricultural environment. Thus, although general legislation applicable to some farming areas refers to ADR, it is not actively advocated or addressed.²⁸⁶ Recent changes, such as Section 41A of the High Court Rules and Chapter 2 of the Magistrates Court Rules²⁸⁷, are moving in a more definite direction of forcing parties to take note of the benefits of ADR rather than litigation. However, parties will only be

²⁷⁶ Para 2.3.

²⁷⁷ Para 5.3.2.

²⁷⁸ Para 2.5.3.

²⁷⁹ Para 2.4.1.

²⁸⁰ Paras 1.2, 2.3, 3.2.2.

²⁸¹ Para 1.2.

²⁸² Para 2.5.3.

²⁸³ Para 2.6.

²⁸⁴ Para 3.3.1.

²⁸⁵ Para 3.3.2.

²⁸⁶ Para 3.5.

²⁸⁷ Para 3.4.2.

confronted by the option of using mediation after consulting with their legal counsel. Although the importance of mediation is recognised in some examples of case law, as can be seen from the *Superstores v Kruger* judgement²⁸⁸, one challenge is that legal representatives and judges themselves do not always recognise the benefits of ADR and may, therefore, be reluctant to advise parties on mediating disputes or advise them on using arbitration. The importance of industry standards and the drive towards sustainable practices in the agriculture environment is evident from the enforcement of international business standards such as GlobalGap.²⁸⁹ Currently, none of these third-party standards address ADR as an option for resolving agricultural supply chain disputes in South Africa. However, the power of these international business standards cannot be ignored when investigating a possible solution to introduce better dispute resolution methods to disputes, including those of vulnerable individuals or groups. Another challenge highlighted by research is the lack of publications presenting primary research on ADR in agriculture and the confidential nature of ADR proceedings²⁹⁰, making it challenging to understand stakeholders' perceptions and actual knowledge regarding social and legal concerns.

The Australian example of state entities providing ADR services in agricultural disputes may be an ideal way to encourage parties to use mediation services. This is also true for value chain stakeholders. Chiefs in more rural areas were mentioned as a successful way to mediate disputes between direct stakeholders in the specific area.²⁹¹ More primary research is also needed on the possible use of mediation in contractual agreements between farmers and suppliers, as arbitration was shown to be included in some contracts. From the research in this study, few examples of case law could be found, with fewer examples of farmers coming up as the winner in disputes. Litigation is a long, expensive and arduous process that few farmers can afford.

²⁸⁸ Para 5.2.

²⁸⁹ Para 2.5.2.

²⁹⁰ Para 2.6.

²⁹¹ Para 2.6.1.

5.3 Recommendations

In answering the primary research question of “How can the regulatory framework be adapted to enhance alternative dispute resolution in contributing to the sustainability of the South African agricultural environment?” the following recommendations are proposed.

5.3.1 The need for more robust research

Primary research studies on the prevalence of conflict in the agricultural supply chain are needed. To determine the potential success of ADR and its impact on the agricultural industry, preferred methods of dispute resolution and existing knowledge of ADR by supply chain actors must be researched. The possible impact of using ADR as a contributing factor to ensure social sustainability in the agricultural supply chain also needs to be researched.

5.3.2 Involvement of DALRRD and state intervention

Indeed, ADR is generally well-developed in labour matters in South Africa and the agricultural labour environment. The LRA and the CCMA application are well-used and well-understood, even in poor communities. The impact of power imbalances may affect employees' cautiousness about approaching the CCMA, but the legal framework for this is well set out; parties understand the role of the CCMA, and evaluation of statistics of the CCMA workload indicates that it is well known. Creating agricultural ADR hubs using the CCMA model, where agricultural disputes can be resolved, would achieve access to justice and allow parties to achieve speedier, cost-effective and fair justice.

5.3.3 Adding ADR as a preferred method of dispute resolution to industry standards

The role and impact of private business standards were addressed in this study. Research shows that market-driven private standards impact stakeholder behaviour. As a contributor to sustainable agricultural practices as part of the regulatory framework, ADR should be emphasised and incorporated into preferred socially sustainable practices.

5.3.4 Educating on Alternative Dispute Resolution

The recommendation in paragraph 5.3.3 above can only be realised if parties are educated about the role and benefits of ADR methods. Understanding the current regulatory framework supporting ADR in agricultural environments is imperative to establish knowledge centres and create awareness of this form of dispute resolution.

5.3.5 Legislative changes

In Chapter 1, a reference was made to Nyenti, who argued that the right of access to justice should empower people who rely on a dispute resolution system by eliminating barriers specifically to the poor and disadvantaged.²⁹² It is thus imperative that the legislator introduce supportive mechanisms to ensure access to justice for all South Africans. Communities dependent on agriculture continue to be vulnerable. The state should take a more prominent role in advocating for ADR in agriculture disputes by providing ADR services not only in employee disputes at the CCMA. Research should be done to find ways of extending ADR services to farming communities, using existing infrastructure or new initiatives. Considering the existing Arbitration Act of 1964, legislation addressing all forms of ADR should be enacted to regulate and encourage parties in disputes, including agricultural disputes. Legislation is a tool for social change, a crucial component of the legal system, and plays a fundamental role in shaping society's perceptions and behaviour.

5.4 Conclusion

In evaluating ADR in the South African agricultural environment, many concerns and positive initiatives were noted, and possible improvements to the regulatory framework were identified. ADR has flourished in recent years by providing a flexible, efficient, and effective alternative to traditional litigation. A robust legal framework is needed to support cost-effective and time-sensitive dispute resolution, as it ensures a credible and fair dispute resolution process. The importance of agriculture and the active participation of stakeholders, including powerful businesses and vulnerable individuals, makes such fair and affordable dispute resolution processes imperative. To achieve successful ADR, the education of all stakeholders is essential, legal action to support and direct disputes to ADR is needed, and research must be undertaken to

²⁹² Nyenti (n 15).

identify key challenges and solutions in introducing ADR stakeholders to sustainable agricultural supply chains.

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