



MIDLANDS STATE UNIVERSITY

**THE EFFECTIVENESS OF CONCILIATION AND ARBITRATION
AS DISPUTE RESOLUTION MECHANISM IN THE FERRO-ALLOY
INDUSTRY**

BY

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ABSTRACT

The research evaluates the effectiveness of conciliation and arbitration as an alternate dispute resolution mechanism in the Ferro – Alloy Industry. A case of ZIMASCO and Zimbabwe Alloys International, 2 major players in the industry, were examined in a descriptive research design. Backing the research is the concept of legal pluralism which then defined conciliation and arbitration as alternative dispute resolution systems. A sample size of 35 comprising of Management and Trade Union representatives, general employees and Labour Officers participated through interviews, semi – structured and unstructured questionnaires with the response rate of 100%. The research established that conciliation and arbitration’s strength as mechanism for dispute resolution lies on their accessibility, flexibility, cost effective and less adversarial nature and has contributed towards the effective resolution of disputes in some instances. However the research uncovered that despite the aforementioned strengths of conciliation and arbitration, the current legal framework was not providing a conducive and enabling regulatory environment to ensure an effective dispute resolution mechanism. The gaps in terms of time limits, the absence of explicit guidelines on conciliation, lack of finality to arbitral awards were identified as major drawbacks of the current legal structure. The State department, the Ministry of Labour, is the vehicle for an effective dispute resolution mechanism. The research identified that the department was inadequately resourced to enable speedy and prompt resolution of disputes. Due to the centrality and inevitability of disputes at workplace, the research recommended that government should amend the current legal framework to align it to International Labour Organisations provisions on conciliation and arbitration to ensure an effective resolution to disputes.

DEDICATIONS

To my wife, Mercy, this one is for you.

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Even the most seasoned travellers need help in plotting the course to follow. I am especially indebted to my supervisor Mrs M Mahapa who efficiently and effectively guided this project. I extend my gratitude to the Ministry of Labour, Midlands Province and the Executive Management of the Organisations that participated in the research, who, together with their personnel made undertaking the research possible. Lastly, the accomplishment of this endeavor is indicative of God's love. All the glory is to him for making it possible.

GENERAL DEFINITION OF TERMS

CONCILIATION.

“A strategy in which a third party supports the direct bipartite negotiation process by assisting them to identify the case and degree of their difference to establish alternative solutions and their various implications and to develop and agree on mutually acceptable settlement” (Salamon, 1992:102)

ARBITRATION

Arbitration is a strategy wherein direct negotiation between management and union is replaced with the practice of adjudication which involves the third party in making a decision between the two conflicting positions (Salamon, 1992: 106).

ALTERNATIVE DISPUTE RESOLUTION (ADR)

Entails a range of procedures that serve as alternatives to litigation through the courts for resolution of disputes, generally involving the intercession of a neutral third party (Matsikidze, 2013:32)

DISPUTE

The Zimbabwean Labour Act [Chapter 28:01] defines it as a dispute relating to any other matter concerning employment which is governed by the Act.

“It is a continued disagreement between two parties, employer and employees, or their unions as regards any matter of common interest, any work related factor affecting their relationship or any process and structures established to maintain such a relationship” (Muza, 2009:48).

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CHAPTER 1 - INTRODUCTION

Disputes and conflicts are the most prominent characteristics of human existence since time immemorial. It is this inevitability of disputes that still exists up until today in every sphere of human existence that calls for measures to be put in place so as to effectively and efficiently resolve them in order to manage the employment relationship. History is sated with records of conflicts at various levels of human relations whether at inter-personal, inter-group, intra-group and intra-national or international arenas, conflicts have been found recurring in social relations. It then follows that conflict is also an inevitable characteristic and perspective in employment relations. This is motivated and precipitated by the dichotomy in interests and goals between parties in an employment relationship, that is, labour and capital. This study was prompted by the inevitability of these class disputes, which was further polarised by the advent of Industrialisation, and the need for the state to design dispute resolution mechanisms in place that are effective and efficient to enable an environment that breeds productivity and enable business.

This study sought to review and analyse the effectiveness of Conciliation and Arbitration as alternate dispute resolution mechanism. They are considered alternatives to resolution by adjudication and the litigation court system. The Zimbabwean Courts have been characterised by back logs in labour cases taking more than 5 years to resolve and finalise and as a result an alternative to the court system has been established in order to counter the challenges associated with the court litigation route. The Zimbabwean legal structure is critical and of paramount importance as it provides the provisions within which the Conciliation and Arbitration derives its legal standing. Comparisons will be drawn from other Southern African Countries in terms of how their legal framework supports the alternative dispute resolution mechanism and enhance its effectiveness and efficiency. The study seeks to establish the effectiveness of Conciliation and Arbitration as dispute resolution mechanism with the case of Ferro –Alloy Industry in Zimbabwe. It seeks to

establish whether the alternative mechanism has managed to deal with the undependability of the courts system traceable to numerous shortcomings.

1.1 BACKGROUND OF STUDY

Conflict is an inevitable characteristic and perspective in employment relations. This is motivated and precipitated by the dichotomy of interests and goals between parties in an employment relationship, that is, employers and employees. The dichotomy and clash of interest breed differences which could be traced back to one classical founder of Social Science, Karl Marx in his Conflict Theory. According to Grint (2005) Karl Max propounded that individual and groups have different amounts of material and non-material resources that precipitate the clash of interest. The clash of interests precipitates organisational identity dissonance which subsequently pushes an aggrieved party to enlist the services of the third party to resolve such conflict or dispute. Conciliation and Arbitration have been employed since time immemorial as conflict resolution mechanisms.

This dissertation evaluates the effectiveness of conciliation and arbitration as conflict resolution mechanism in the Ferro- Alloy Industry, but will zero in on Zimbabwe Alloys International (ZAI) and ZIMASCO. Both companies are major players in the Ferro Alloy Industry. They both sit on 80% of the Chrome Ore reserves in Zimbabwe along the Great Dyke. Zimbabwe Alloys International was set up in 1949 as an overseas investment by a consortium led by the John Brown Group, a British Steelmaking and Ship Building firm under the Chairmanship of Sir Eric Mensforth. Initially known as Rhodesian Alloys up until independence, the company was the first Ferro-chrome operation in Africa. It has two arms of operations, the Mining division and the Refinery division. The mines are dotted along the Great Dyke from Mutorashanga in the North to Inyala in Mberengwa in the South Dyke. The Refinery Plant is situated in Gweru.

Zimbabwe Mining and Steel Company (ZIMASCO) have its roots in Anglo American Cooperation formed in 1923 and became the major supplier of ferro alloy product on the International Market. ZIMASCO just like Zimbabwe Alloys International have two arms

of operation, which are the Mining division and the Refinery Plant. The Mines are located along the Great Dyke and the Refinery Plant is based in Kwekwe. Midlands was chosen by both companies as the location of their Refinery Plants chiefly because of the availability of land and good communication system as well as accessibility to coal from Hwange and other raw materials like quartz and chrome fines. The mining division provides the main raw material, which is the chrome ore, which is transported by rail transport to the respective Refinery plants. The 2 company's end product is Ferro Alloy which is for export markets. Traditionally China used to be the major consumer of the product from Zimbabwe until 2007. Europe is now the main destination.

At their peak during the late 1990s, both companies used to employ in excess of 10 000 full time employees. They produced 250 000 metric tonnes of ferro alloy per annum which translated to about 10% of the ferro-alloy product on the international market. However at the turn of the new millennium the Ferro Alloy was faced by serious challenges precipitated by a combination of factors. First it was the plummeting of the price on the international market. The depressed prices were caused by the oversupply situation in China. Before 2000, China was the major consumer of ferro alloy product on the International Market but that changed at the turn of the millennium when China became the major producer and resulted in the decline of prices. Another factor that contributed to the decline of prices was the World Economic recession of 2007 and the Euro-Zone crisis of 2011 and prices never firmed after the down turn. The increase in the cost of production, mainly electricity and other consumables, also pose viability challenges to the ferro alloy industry.

Faced with the above viability threatening challenges, employers in the said Industry devised and implemented some austerity measures which unfortunately resulted in a clash of interests and conflict between the employer and the employees. As early as 2000 both companies engaged in massive retrenchments resulting in nearly half of their 10 000 strong workforce losing their jobs. At dollarisation, both companies engaged in another

retrenchment exercise to streamline labour in order to align it to the new production regime. Despite all these labour rationalization exercises which were carried out to reduce costs and ensure viability, the business still faces challenges. The following are some of the measures which were implemented by employers in the ferro alloy industry to ensure company survival and protection of jobs in the long run;

- Introduction of two weeks rotational leave and consequently paying the affected employees at 50% of their basic salaries
- Reduction of salaries with a certain percentage across all grades in order to align labour costs with production levels
- Removal of allowances such as schools fees assistance, study allowance, transport allowance among others
- Target based remuneration
- Grade rationalisation

As a result the Ministry of Labour in the Midlands region has witnessed a sharp increase in the number of cases from the above industry for Conciliation and Arbitration. It is against this back drop that the researcher was motivated to carry out this study in order to establish the effectiveness of Conciliation and Arbitration as dispute resolution mechanism given the increase in the volume of cases which puts the mechanisms to test. Conflict and disputes have been prevalent since time immemorial and Arbitration and Conciliation has been employed as dispute resolution mechanisms to bring disputing parties together and solve the dispute. The methods can date back to biblical times where people would approach Kings to seek recourse over disputes. One can quote 1 Kings 3 v 25 in the Holy bible where King Solomon acted as a conciliator in trying to solve a dispute between two mothers over the ownership of a the child. A solution was reached and the child was given to its rightful mother. However there have been some changes in terms of the form and process in contemporary conciliation and arbitration process which this study seeks to establish whether the current dispute resolution mechanism is effective in solving disputes.

The effectiveness of Arbitration and Conciliation as mechanism for dispute resolution cannot be analysed without scrutinising the development of Zimbabwean Legal-Labour system. The history and development of labour conciliation and arbitration systems in Zimbabwe cannot be fully appreciated without analysing the legal statutes that regulated labour relations in both pre- and post-independence Zimbabwe. The advent of industrialisation also signalled the genesis of Zimbabwean Legal Labour landscape (Haralambos and Holbon 2000). The industrial revolution which brought about industrialisation is a collective term for series of related developments that took place in Europe in the late 18th and early 19th Centuries which in their totality completely transformed society and employment relations. The developments took place in agriculture, mining, manufacturing and transportation.

The industrial revolution was perhaps the most important development in history of mankind as it resulted in the total transformation of society including the organisation of work. Industrialisation brought about the development of a factory system, mass production, division of labour and paid labour. The development of factory system and emergence of paid labour can be singled out as the most important developments that contributed significantly to the changes on the labour relations landscape. These two elements could be said to have contributed immensely to the development of capitalism whose major characteristic was private ownership of property including land and factories (Grint, 2005). The factory system constituted the shift of work from cottage industries, which is those based in individual people's homes to big centralised places called factories. Work therefore shifted from the private sphere of the home to public places. This enabled workers' to organise themselves and form their representative bodies like Trade Unions in order to fight what they considered was unfair labour practices through dispute resolution mechanism (Gwisai, 2000). Industrial revolution gave birth to paid labour. Workers brought their labour power to the factories which they sold to the industrialists/capitalists for a wage. Capitalists then would in return pay them much less than the value of what they produced or what their labour was actually worth. Social

Scientists can not divorce the development of the Zimbabwean labour issues from the industrial revolution. Industrial revolution had a wider impact on society as a whole.

It is the industrial revolution that gave birth to the development of regulations and legal structures that would govern employment relationship between workers and the employer. In the then Rhodesia, the Masters and Servants Ordinance (1901) was the first substantive piece of law that could regulate the employment relationship. This legislative structure specifically targeted the control of labour by capitalists or those who controlled the means of production (Cheater, 1991). This piece of legislation completely disregarded workers plight and issues in the employment relationship and further advanced the capitalist agenda to exploit workers. Gwisai (2006) further highlighted that the court system in the 1900s was used as an instrument of ‘civilised repression’ than as a fountain of justice. According to Marx the relationship between workers and capitalists was both exploitative and conflictual. The Master and Servants Ordinance was effective between 1890 – 1930. This is the period which saw the racists’ capitalist system catapulted by cheap and forced black labour. This legislative structure did not co-opt conciliation and arbitration as dispute resolution mechanism and as a consequence capitalists would further their interests.

The promulgation of the Industrial Conciliation Act (ICA) of 1934 ushered in a legal instrument which recognised regulations pertaining to collective bargaining. Arbitration law was first introduced through this legal framework. The same instrument also provided regulations for dispute resolution mechanism such as conciliation and arbitration. This marked the milestone in the development of dispute resolution mechanism. However a mind pondering question still confront contemporary industrial relations specialists whether these mechanism were used during that time? Whether the then political and social climate enabled workers to employ such methods in order to resolve dispute. Gwisai (2006) argues that arbitration and conciliation remained secondary methods hardly used and their effectiveness were never known during that period. It is also of paramount importance to highlight that the ICA breathed a racists

spirit given that, to begin with, the definition of employees excluded blacks. As a result their exclusion meant that their grievances were not provided for in the said legal framework.

During the tenure of the ICA, the industrial base started to grow and the then Rhodesia (Zimbabwe) witnessed various strikes across industries and wild cat strikes from black employees. Workers collectively came together and form unions that could negotiate their interests with the capitalists. In Zimbabwe there were labour unrests in the 1940s. Phimister (2008) noted that 1945 was a historic year in the history of the labour movement with the Railway Workers launching a countrywide strike in Bulawayo. These events led to the amendment of the ICA of 1945 to include black workers and recognise them as an important party to the employment relationship. The reasoning behind passing of this legal framework was the state's perception that the then present state of conflict between labour and capital needed some form of systematic bureaucratised adjudication (Cheater, 1991). The amended legislative structure ensured that the negotiations and outcomes were between parties although the state had ultimate responsibility over stability of industrial peace (Duve, 2011). The state's influence in the conciliation and arbitration process had a bearing on the outcome of the process. State and Capital during the colonial era played on the same side fighting labour. As a consequence a pro-capital state would tilt the industrial relations landscape to the advantage of the capital.

Zimbabwe got independence from colonial rule in 1980. The change in the political field also ushered changes in the Labour relation and regulation and consequently the regulation which govern the dispute resolution mechanism. Also during this period the twin developments of the unionisation of labour and international democratisation of the workplace gave impetus to a reordering of industrial relations. These developments significantly leveraged the influence of labour and empowered its voice in the employment relationship. The fact that labour movements fought alongside revolutionary movements, the attainment of independence in Zimbabwe ushered in an industrial order in which the labour movements gained significant power and influence over capital. This resulted in the repeal of hither to oppressive legislative structures and putting in place

structures that recognise that labour and capital are equal partners to the employment relationship. The year 1981 witnessed the formation of Zimbabwe Congress of Trade Union which was in alliance with the ruling party of that day, Zimbabwe African National Union Patriotic Front (ZANU PF).

During the period 1980 to 1985, the Industrial Conciliation Act (ICA), a colonial piece of legislation, remained in force. The first legal instrument in the independent Zimbabwe came in 1985, the Labour Relations Act (Chapter 28:01) Number 16 of 1985. As may be expected, there was little sensitivity to Conciliation and Arbitration as dispute resolution mechanism. Conciliation was not mandatory but dependent on the Labour Relations Officer. The Act also provided for compulsory arbitration on cases likely to lead to collective job action. A key feature of the period between 1985 and 1992 was a lengthy dispute resolution structure (Madhuku, 2010). These mechanisms were now fully and openly considered as critical instruments in dispute resolution and this legislation gave leverage and emancipated the hitherto oppressed labour and provided a level playing field for dispute resolution.

Zimbabwe adopted a Neo Liberalism policy at government level during the early 1990s whose implementation changed the Zimbabwe Labour Relations landscape. The adoption of a free market policies were implemented in Zimbabwe after recommendation and pressures from global financial houses like International Monetary Fund (IMF) and World Bank. This saw the implementation of Economic Structural Adjustment Program (ESAP) in 1992. Zimbabwe government had to move in and aligned their laws with the new developments. As a result the Labour Relations Amendment Number 12 of 1992 was promulgated into law. The law did not change much on Conciliation and Arbitration as dispute resolution mechanisms. Conciliation remained optional. The law did not guide the Labour Officers in deciding appropriate route except in matters involving compulsory arbitration.

The Law had no specific provisions on what was to be done where Conciliation failed. A Labour Relations Officer could not act as an Arbitrator but all he or she could do was to

refer for Arbitration where the Arbitrator was either the Labour Relations Tribunal or an Independent mediator appointed by the Minister of Labour (Labour Relations Act Chapter 28:01 of 1992). The law also saw the removal of state controls on minimum and maximum wages, introduction of sectorial bargaining and restrictions on the right to strike among others. The changes were seen by many taking away the employees power in the employment relationship and giving it to capital. Employees' major tool that is the withdrawal of labour which they were using to force employers to accede to their demands was taken away. Former Z.C.T.U Secretary General, who now leads Zimbabwe's main opposition party, the Movement for Democratic Change, once quoted as saying "we must be given the necessary tool – that is the right to strike – so that we are able to pressurise the employers." (Raftopolous, 2001). This subjected the conciliation and arbitration to manipulation by employers who had power by being in control of the means of production. As time went on the effects of ESAP then led to the revision of the Labour Relations Act in 1996. However the legal reforms relating to dispute resolution with conciliation and arbitration in particular were not made until the Labour Relations Act amendment number 17 and 7 of 2002 and 2005 respectively in which the provisions were clearly and explicitly spelt out.

With increasing unionization of the labour force and the changing political landscape, both locally and globally, greater pressure was exerted on the government to reform its labour legislation for it to comply with international best practices. The amendment number 17 of 2002 gave birth to the title Labour Act. It is also of paramount importance to highlight at this stage that the 2002 amendments brought about meaning and authority to the conduct of labour conciliation and arbitration. This act provides for more meaningful worker participation and less political control of the industrial relations sphere by the state. The influence of the state had prior the amendment was curtailed through some changes and refinements in the amendment which gave more power and control to the parties to a dispute. Sections 95 – 100 were repealed because they communally dealt with the power and conduct of labour officers and arbitration procedures. Other sections including 93-96 gave powers to labour officers to make final

decisions as judges on labour disputes hence the amendments reduced the authority of these government officials to merely conciliate disputes leaving conflicts to be resolved by discourse. Conciliation and Arbitration were enhanced through these amendments and in the Zimbabwean history of labour dispute resolution, this was the first time in independent Zimbabwe where they were observed in the system. The amendment of 2005 to the Labour Act was the relevant and latest statute governing compulsory arbitration. However in 2012, the responsible Minister through section 17 of the Labour Act (Chapter 29:01) passed regulations constituting S.I 173 of 2012.

It is of paramount importance to note at this stage that conciliation and arbitration are employed as alternative dispute resolution mechanism to the traditionally used cumbersome litigation process. The litigation process is usually long and cumbersome and the parties have little or no influence to the process in terms of speed. Muza (2009) highlighted that the undependability of the courts traceable to numerous shortcoming dogging them is the reason why arbitration should be opted for. Even Mazanhi (2010) substantiated the above position where he noted that the Zimbabwean labour Court has been profound of delays in attending to cases due to the long queues of cases waiting to be heard. It is against this background that arbitration and conciliation has been the most preferred mechanisms for dispute resolution. Arbitration and conciliation has been the most preferred because of its accessibility and speed. Muza (2009) added that litigation has been marred with inefficiency, arbitration and conciliations are mechanisms which offer an efficient and prompt settlement of disputes. The Chikurumani vs ZIMASCO case was registered at Labour court in 2013 and only for the Labour Court to advise that they will sit for the case in 2015. The 2009 Oliken (another player in the ferro-alloy industry) vs Mabhena case over industrial action which saw 23 worker representatives being relieved of their duties was registered with the labour court only to be finalised 4 years later in November 2013. It is along these examples and argument that conciliation and arbitration have been preferred mechanism for dispute resolutions.

Moving on to the types of disputes which are addressed in conciliation and arbitration, Gwisai (2006) argued in the Zimbabwean legal framework have basically broken

disputes down into two main types, which are disputes of rights and disputes of interests. Disputes of right are disputes with regards to legal rights and obligations or breach of contract, act or regulations made under the Act, Collective Bargaining Agreement (CBA) or contract of employment. It is a right to which a party is entitled to by law, contract or agreement and its transgression constitutes a civil or criminal offence. A dispute of interest on the other hand refers to any dispute other than that of right as defined by the act and this can be for example creation of new rights such as wage increments. It basically refers to a right which one is not yet entitled to but is seeking entitlement, once entitled however the dispute sought will become a right. Both disputes of interest and of right can be referred for compulsory arbitration under certain grounds.

As highlighted above the majority of cases which are brought for conciliation and arbitration emanates from a dispute of right, mainly from obligations or breach of contract. It is important to note at this point that this study was undertaken during a period when the Zimbabwean legal structure was going through transformation in order to address among other things the effectiveness of conciliation and arbitration as dispute resolution mechanism. Whilst Labour and Capital were working on labour reforms, July 17 2015, dubbed the 'black Friday', witnessed a development which is likely to change the industrial relations outlook of the country. There was a Supreme Court ruling by Judge President G Chidyausiku and 4 other senior Judges who upheld the 15 October High Court ruling that termination of contract by notice period is distinct from disciplinary dismissal and retrenchment. This was the Supreme Court ruling of the case of Zuva Petroleum vs Nyamande and another (LC/195/2014) which dates back to 2011 when the Zuva Petroleum took over BP Shell company. Before July 2015, relatively few employers terminated employees on notice. The mind pondering question that has confronted Industrial Relations Specialists is that; could this mean the need to pursue disciplinary dismissal or retrenchment falls away? This court ruling has the potential to radically alter the employer-employee relations given the issues of retrenchment and dismissal are the two processes that have constituted a very large part of Labour Relations and conciliation and arbitration in particular. The pressure on all elements in

the dispute resolution process, beginning with internal investigations and disciplinary hearings, through conciliation, arbitration and appeals to the Labour Court and then to the Supreme Court (and, increasingly, the Constitutional Court), will dramatically decrease.

The ruling saw more than 20 000 loosing their jobs in just one month and counting (Daily news, Friday 14 August 2015). Employers took advantage to rationalise their labour in line with capacity utilisation and revenue streams. However at the time of writing, the State moved in, through the Ministry of Labour, to end this ‘madness’ and restore sanity and level the industrial relations playing field. Many thought the President was going to invoke his temporary powers to amend the Labour Act temporarily by inserting subsections that would have the effect of immediately introducing retrenchment packages for permanent employees. However this option was not taken possibly because the option was tantamount to Executive interference with Judiciary. As a result the Minister of Labour had to gazette regulations to introduce retrenchment packages. The Labour Bill with 18 amendments (House of Parliament Bill, H.B.7, 2015) was gazetted on Friday 14 August 2015 and presented to the Parliament for debate on Tuesday 18 August 2015. The bill sought to repeal the common law provisions and give security of employment among other things. At the time of writing the bill had passed through both houses and waiting the State President’s signature to pass it into law.

Chulu (2011) is one major concerned party about the prevailing state of affairs in terms of conciliation and arbitration as he argues that regulations pertaining to the classification of disputes to be handled in conciliation and arbitration are dubious and make the whole process subject to manipulation. S 93 (5) of the Labour Act [Chapter 28:01] points out that a Conciliator can refer disputes of interest to arbitration without the parties consent if it is a dispute in essential services but in non-essential services cannot do so if the parties do not agree to it. Mawire (2009) then highlighted that some provisions of the Statutory Instrument 137 of 2003 devalues the reliability and subjects the former provisions of the Labour Act [Chapter 28:01] to manipulation as they provide that disputes of interests in non-essential services can be referred to compulsory arbitration without the parties consent if and when the Minister declares it essential services basing on the fact that the

strike in the non-essential sector, service or industry persist to the point of endangering the lives and personal safety of the general populace. He argued that this compromises objectivity in the referral of disputes for compulsory arbitration as there are no clear parameters demarcating when and where a strike endangers the lives of people or not and also argued the Minister is given more power than necessary hence affecting the effectiveness of the system. From his standpoint, one would also add that it seems all disputes of interests can be referred for compulsory arbitration and it is the Minister who calls the shots. In terms of disputes of right, the Labour Act under S 93 (5) (c) clearly points out that they can be referred for compulsory arbitration in all services

1.2 PROBLEM STATEMENT

Conflicts and disputes are an inevitable characteristic of employee relations. The conflict of interest between capital and labour is the source of dispute. Conciliation and Arbitration were entrenched in the legal framework and adopted as dispute resolution mechanism. It was also adopted as alternative dispute resolution mechanism to avoid the winding and complex litigation route and ensure an effective, speedy and efficient settlement of disputes. It was also meant to alleviate and reduce burden on our Courts and ensure and encourage the settlement of disputes at a local level. However cases have gone beyond Arbitration thereby disputes taking longer to settle. Zimasco vs Chikurumani case was registered with the Labour Court in June 2010 and only to be settled at the Supreme Court in August 2013. The Zimbabwe Alloys Limited vs Mhlanga and 239 others case on the underpayment of salaries was registered with the Labour Court early 2014 and the court has communicated that the case will be heard in November 2015. Outside the Ferro-Alloy industry, in the case of Zuva Petroleum versus Nyamande & Another (LC/H/195/2014), the disputes dated back to 2011 where Zuva Petroleum took over BP Shell companies but the Supreme Court award came out on Friday 17 July 2015. The Ferro-Alloy Industry has been affected since 2008 by the Euro zone crisis which impacted negatively on the prices of their product on the World market. The cost of power significantly increased their cost platform and coupled with depressed prices posed viability challenges in the Industry. Ferro-Alloy Employer's Association

(F.A.E.A) came up with austerity measures in order to ensure business viability. Some measures included amendments to current conditions of service which became a source of dispute with the Ferro – Alloy Workers’ Union (F.A.W.U). The period 2009 to date witnessed an increase in the number of cases within the Ferro-Alloy industry registered at the Ministry of Labour for Conciliation and Arbitration. It is against this background that this writer would like to establish the effectiveness of the Conciliation and Arbitration as dispute resolution mechanism.

1.3 OBJECTIVES OF STUDY

Main objective

- To determine the effectiveness of Conciliation and Arbitration as dispute resolution mechanism in the Ferro-Alloy industry

Specific objectives

- To examine the process and nature of conciliation and arbitration
- To establish the strength of adopting conciliation and arbitration as compared to other dispute resolution routes.
- To investigate the challenges faced by parties in using conciliation and arbitration as dispute resolution mechanism
- To examine the role of the state in conciliation and arbitration
- To proffer recommendations, if any, to improve the dispute resolution mechanism

1.4 RESEARCH QUESTIONS.

- Does the State have the capacity and resources to effectively support the administration of alternate dispute resolution mechanism?
- How accessible is conciliation and arbitration to disputants?

- What challenges are faced by both Labour and Capital in terms of costs and speed of conciliation and arbitration?
- What is the role of the State and Legal Practitioners in alternate dispute resolution mechanisms?
- Do our conciliators and arbitrators have the expertise and technical know how to effectively deal with cases brought to them?

1.5 JUSTIFICATION.

This study has come at a time when Labour, Capital and State are advocating for amendments to the current legislative structure governing the employment relationship not only to align labour laws with the constitution but also to promote productivity and competitiveness of local industry. Labour is pushing for finality and enforcement of Arbitral Awards and an independent law of appeal after Labour Court. On the other hand Capital is also advancing for a dispute resolution mechanism independent of the State. Amendment No 16 of the Labour amendment bill seeks to amend Section 93 of the Labour Act (Chapter 28:01) which deals with conciliation and arbitration to enhance effectiveness to the current dispute resolution mechanisms. At the time of writing the bill has been presented to both houses for debate further scrutiny before the President sign it into law.

Disputes and conflicts at organisational level have the potential to negatively impact on productivity and business viability in the long term. The analysis of instruments for dispute resolution is important as the foundations of resolving disputes is to advance social justice and promotion of democracy at work place and create an environment which enable business to thrive and succeed. To this end, parties in the employment relationship should strive to bridge and resolve their differences effectively in order to ensure a health employment relationship which is convenient for business. It is also against this backdrop that it becomes imperative that the instruments and mechanism adopted to resolve the disputes should be effective which ensure speedy resolution of the disputes. The writer has also observed that previous studies have dwelt much on speed, accessibility and

expertise of Labour Officers as the main units of measurement to determine the effectiveness of Conciliation and Arbitration as dispute resolution mechanism. The research by Maitireyi (2012) on Labour Arbitration: Fact or fiction dwelt much on speed, accessibility and expertise as yardsticks for evaluating the effectiveness of dispute resolution mechanism. Gwisai (2007) researched on Labour and employment law in Zimbabwe and over deployed emphasis on the above factors. However this study will analyse the influence of state and legal practitioners, the finality and enforceability of awards handed out at Conciliation and Arbitration, the capacity of the State as other yardsticks to evaluate the effectiveness of Conciliation and Arbitration as dispute resolution mechanism.

To the Human Resources practitioners, the study will inform them on the effectiveness of the dispute resolution mechanism at their disposal and how best they can use them in order to advance social justice at work place. It will also reveal weakness of the current legal structure and recommendations on how to enhance effectiveness of the alternate dispute resolution mechanism. The academics also stem to benefit as the study seeks to divulge into the extent to which conciliation and arbitration is effective and efficient as a means to just resolution of disputes, validation of its repute or its rebuke will result hence being another academic enlightenment and discovery. The whole industrial relations and labour legal system in Zimbabwe will also benefit as this research will be an added voice to the many calling for reforms to be made pertaining the practice of conciliation and arbitration.

1.6 CHAPTER OUTLINE

Chapter 1 provides a brief introduction of the area of study as well as the background to the research and the historical outline of the Industry under study. The research problem, objectives of study, research questions and justification of the study falls under chapter 1. Chapter 2 dwells on the nature and process of Conciliation and Arbitration and most importantly what literature has on the area under study. Chapter 3 gives the conceptual and theoretical framework that support and infers the research. Chapter 4 deals with the methodology with the final chapter looking on data presentation and interpretation.

1.7 CHAPTER SUMMARY

This chapter has managed to give the background of the Ferro –Alloy industry and the historical outline of 2 major players in the Industry, which are ZIMASCO and Zimbabwe Alloys International. The historical outline gave a history of their operations and state of current operations and their impact on employment relations. Note worthy is that the chapter provided the development of the Zimbabwean Legal – Labour system from the Masters and Servants Ordinance of 1901 and other colonial legislative structures like the Industrial Conciliation Act of 1934. The Chapter then chronicled the legal framework in the Independent Zimbabwe and all their amendments giving special attention on their impacts or influence on Conciliation and Arbitration. The objectives and research questions were also explained in this chapter with main objective being to establish the effectiveness of Conciliation and Arbitration as dispute resolution mechanism. A sound justification of the study was provided in this chapter emhpassising on the criticality of having an effective mechanism of dispute resolution given the negative impacts of dispute to productivity. Chapter 2 reviews literature.

CHAPTER 2 - LITERATURE REVIEW

2.1 INTRODUCTION.

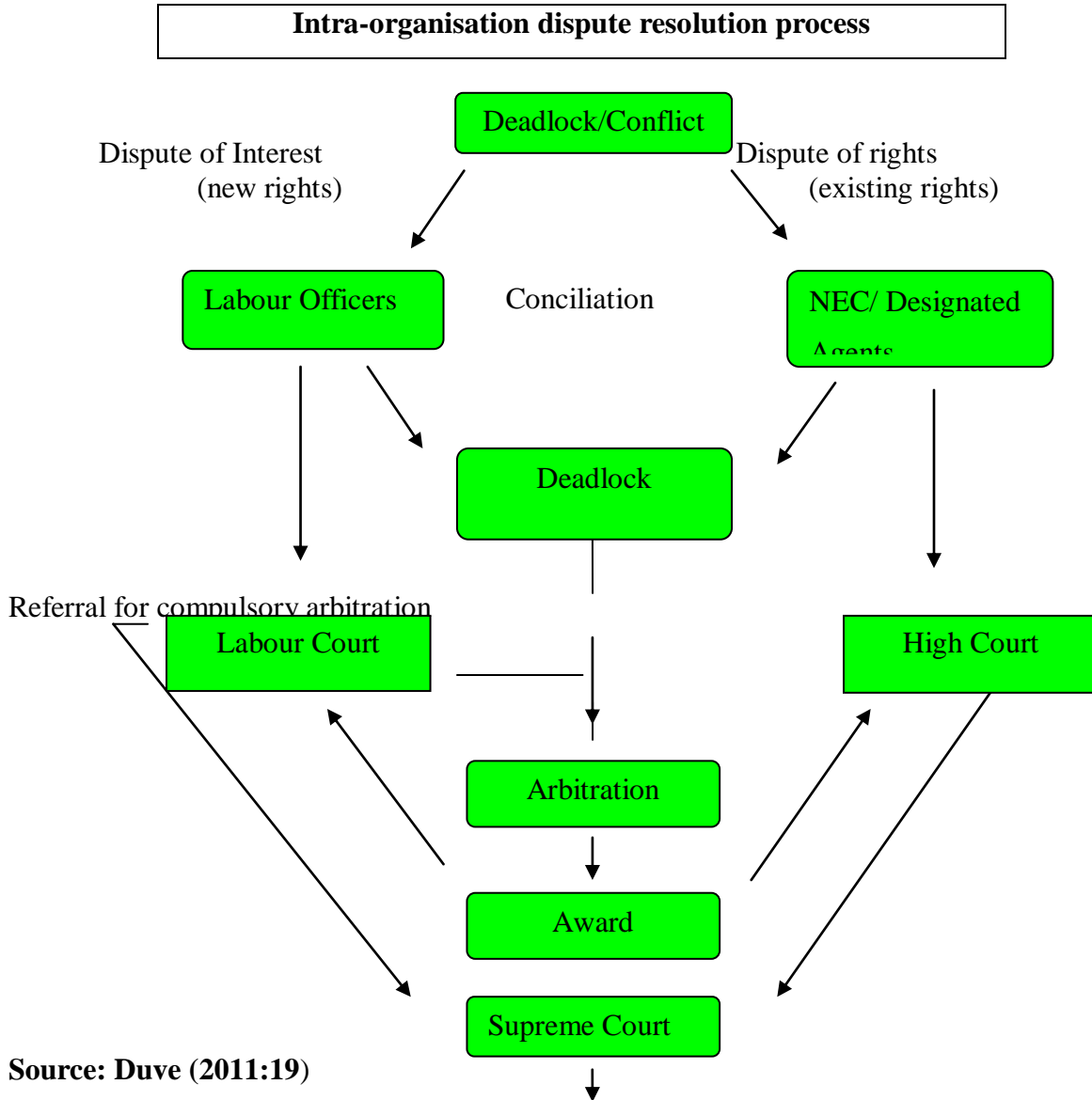
Literature review enhances insight into the problem and helps to refine the research questions being implored by the researcher. Saunders et al (2000) defines literature review as the basis for research, its main purpose being to give insight as to what other authors have researched in the same area. It is a search for information and ideas from what has been done already so as to build on the existing knowledge. In this chapter literature by various authorities will be reviewed as a way of getting an in-depth understanding of the topic under study. With the centrality of Labour dispute and resolution at workplace, a lot of literature have been written to scrutinize the current conflict and dispute resolution mechanism and in some cases proffering reforms and recommendations in order to ensure efficiency and effectiveness in dispute settlement.

2.2 NATURE AND PROCESS OF ARBITRATION

As depicted in Fig 2.1, it is important at this stage to expand the process of conciliation and arbitration. Once a labour dispute emerges, two parties to the employment relation seek recourse with the Ministry of Labour. The Ministry appoints a Labour Officer to sit over the case as a conciliator. However in an Industry with a registered Designated Agent (D.A), they register the dispute with the D.A who then sits as a Conciliator on the case. The National Legislative structure, the Labour Act (Chapter 28:01) Section 93 covers the conduct of conciliation in detail. The Conciliator is therefore like a mediator. Their role is not to pronounce judgement but to make parties appreciate the legal provisions of a dispute, if it is a dispute of right, and to explain consequences of not settling at that stage (Gwisai, 2007). The Conciliator as prescribed by the Labour Court has to facilitate the two parties to reach a mutually beneficial and agreeable solution. In the event of a deadlock, where two parties fail to reach a solution, the Conciliator will issue a certificate of no settlement to the disputants as prescribed by Section 93 (5) of the Labour Act. This is done upon consulting any labour officer senior to him and to whom he is responsible in

the area in which he attempted to settle the dispute. The issue is then forwarded for arbitration.

Figure 0.1: The Process of Conciliation and Arbitration in Zimbabwe



The disputants are given an option to choose either the Ministry's Labour Arbitrator or the Independent Arbitrator. The first option is usually longer and takes time to settle the dispute because of the volume of cases against a few responsible officials. However it is the cheaper option given that the parties are not required to pay anything. In order to control the process of Arbitration parties usually opt for the second option though the independent Arbitrator requires some payment. In Zimbabwe as in North America and China, the Arbitration system provides that the costs are borne equally by the disputants. In other regional jurisdictions like South Africa, Lesotho, Swaziland the costs of the arbitrator are borne by the state (Muriwo, 2008). Where as elsewhere, systems provides for timeframes within which disputes are resolved by Arbitration, the Zimbabwean system is silent in this regard.

It is important to highlight that it is the parties themselves who define their points of difference and the actual dispute to be arbitrated. This provision under section 98 (4) democratised the conciliation system as opposed to the previous system where the Labour Relations Act empowered the Senior Labour Officer to state issues which in his opinion had to be decided by arbitration resulting in the process being unjust on both parties (Duve 2011). This flexibility ensures that the arbitrator is appropriately guided and decides on the exact issues that have to be decided about. As a result there is no ambiguity on the nature of the dispute or the elements for which the disputants seek a resolution. The parties then make their presentations and heads of arguments in writing to the Arbitrator before the oral arbitral hearing. The appointment of Arbitrators consequently becomes the next step and it differs with the type of arbitration in course. In the case of compulsory arbitration, as previously illustrated, it is the Labour Officer who, after consulting a Labour Officer senior to him and to whom he is responsible in the area in which he attempted to settle the dispute refers the matter to an Arbitrator from a list provided by the Minister in consultation with the Senior President of the Labour Court and the fitting advisory council (Labour Act Chapter 28:01 of 2005). The role of the Minister with regards to the provision and supply thereof of Arbitrators to cases has been subjected to criticism. There is no clear rationalisation in appointing Arbitrators to cases

as the Arbitrators appear to be randomly selected. Mambara (2012) cited in Nemukuyu (2012) supported this notion with his opinion that the Arbitrator appointment system in compulsory arbitration is not systematic. He argued that Arbitrators are from different backgrounds and allocation of cases is done regardless of the area of expertise of that individual, thus arbitrators are given cases which they have no expertise in hence leading to poor decision making.

At Arbitration stage, the Arbitrator has the legal right to give an award that is binding and recognised legally despite there being no agreement between 2 parties. Section 98 (14) of the Labour Act of 2005 provides that once the Arbitral award is registered and shall have the effect, for purposes of enforcement, of a civil judgement of the appropriate court. The Labour Court, which is equivalent to a High Court, empowers arbitration through the emancipation of arbitral awards in this instance which gives more weight and relevance to the process. Howlett (1967) as cited in Duve (2011) supports this situation where he argues that for arbitration to command respect and facilitate the enforceability for its decision, it must take a sufficient role interpreting the general law of the state and be enforceable through it. Along the same line of argument, Duve (2011) then commented that arbitration has to work within the state's legal framework and distinctively outside the centralist state court system. However there are some critics like Chulu (2011) who are totally against the court's interference in arbitration. Through his analysis of the South African Arbitration system, Chulu (2011) recommended that there is need to have an independent arbitration board in Zimbabwe which enforces its own decisions. Mazanhi (2010) strengthens the argument stressing that once arbitration leaves room for courts then it ceases to be an alternative dispute resolution mechanism and this subjects the process to ineffectiveness thereof.

As alluded to in the previous paragraphs, the Arbitrator has a legal standing to award a binding decision recognised before the courts of law. However this does not disqualify the right to appeal against the award by any of the disputing parties. Labour Act Chapter 98 (10) provides that any part can appeal to the Labour Court. Unlike the Arbitration stage where costs are borne by two parties, the appellant is responsible for all legal fees.

There is however doubts whether the Labour Court has review power over an Arbitral award. Madhuku (2011) noted that Labour Court Judges do not have much jurisdiction in issues that are employment related. It has also been established that one party may decide to appeal an Arbitral award as a ploy to delay justice. This is so because our Labour Act does not specify time frames and as a result cases may take over 5 years to be finalised. As observed by this writer, there are many cases across industries which are pending before the Labour Court.

The above procedure mirrors the voluntary arbitration process. The disputants agree on their own to use an outside party, a conciliator and arbitrator to help settle their differences. Voluntary arbitration implies that the two contending parties, unable to compromise their differences by themselves agree to submit the dispute to an impartial authority, whose decisions they are ready to accept (Marsey, 2007). Under voluntary arbitration as outlined before, the parties to the dispute can and do they refer voluntarily and dispute to arbitration before it is referred for adjudication. Doyle (2012) noted that this type of reference is known as 'voluntary reference'. In some instances in voluntary arbitration, an award may not be necessary and binding because there is no compulsion and this may be specifically needed for disputes arising under agreements. Voluntary arbitration is the most common form of arbitration employed in Zimbabwe in general and Ferro-Alloy Industry in particular.

There is another form of arbitration which is not common in Zimbabwe, the compulsory arbitration route. This is a legal and binding arbitration between disputants by a neutral third party that has been mandated by the government (Marsey, 2007). Compulsory arbitration is used when collective bargaining and other negotiation methods have failed to settle a disputes without either side resorting to extreme measures such as strikes or terminations. In some countries, arbitration may also be ordered by a court as a means to prevent a situation from going to trial (Bucher, 2007). It is however important to highlight that both voluntary and compulsory arbitration involves enlisting the services of the third party in order to resolve an impasse.

The effectiveness of Conciliation and Arbitration has been a subject of debate and dwelt with in literature ever since the turn of the new millennium. There has been no unified measurement criterion for the effectiveness of Conciliation and Arbitration as dispute resolution mechanism. This has been caused by the absence of a unified unit of measurement. Unlike in statistical measurement where scholars placed emphasis measurement based on statistics of case outcomes, contemporary thinkers like Trudeau (2002) came up with a non statistical framework. He designed a three factor model where he came up with 3 units of measurement used as yardsticks to determine the effectiveness of Conciliation and Arbitration as dispute resolution mechanism. However this literature review will not be limited to Trudeau's (2002) factors only, but will also analyse various elements that impact on the effectiveness of Conciliation and Arbitration as dispute resolution mechanism.

2.3 STRENGTHS OF CONCILIATION AND ARBITRATION.

2.3.1 Accessibility

Trudeau's (2002) three factor framework looks at how accessible the Arbitration and Conciliation is to both parties. He argued that we can only talk of the strength of these mechanisms if the process is accessible and parties have full knowledge of how it works as well as how readily the facilities can be accessed. Accessibility refers to the ease with which the disputants can resort to the process without the complication of technical consideration and complex legal framework (Trudeau, 2002). It is important to highlight that strength of conciliation and arbitration should then be measured looking at how the disputants can easily access the mechanism without any challenges which are prohibitive. conciliation and arbitration is easily accessible where the appellant can just register a dispute with the Ministry of Labour or to the Designated Agent. There are no complex technical considerations or complex legal framework involved in this process thereby making the mechanism accessible to all. Mariwo (2008) noted that the fact that the State created a Ministry and institutions to deal with disputes goes to show that there is a commitment to make the process accessible to all and consequently and thereby creates an effective system for dispute resolution.

The issue of costs also comes in to play. The cost of Conciliation and Arbitration to parties is a fundamental determinant of the accessibility of the arbitration system. Where the costs are prohibitive, it becomes a barrier to accessibility. Conciliation is done by the Labour Officer or Designated Agent of the Industry within which the organization falls. There are no legal costs incurred at conciliation level since the Labour Officer is a Civil servant and the Designated Agent is also a full time employee of the Industry. Serve for legal representation costs, if either party chooses one, there are no other costs involved at conciliation stage.

2.3.2Speed

The strength of arbitration and conciliation as dispute resolution mechanisms should not be concluded without looking at the speed of the process in settling and resolving disputes. We should highlight at this stage that justice delayed is justice denied. The speed at which a system operates in dispensing justice is a paramount feature of justice delivery and a key feature of its strength and effectiveness (Duve, 2013). The process should be designed in such a way that it is not cumbersome and which should enable for expeditious resolution of the disputes by unnecessarily lengthening the dispute resolution process. Conciliation and arbitration were adopted in order to counter the court litigation process which traditionally is known for numerous shortcomings. Courts have been known for their lengthy processes with cases taking more than 5 years to settle through the court system. It took the Labour Court 4 years to finalise the dispute between Red Cross Zimbabwe vs Netsai Nyazema, who was their Human Resources Manager. The case was concluded on 6 July 2015 having been registered in 2011 (Herald, Tuesday 7 July). Geoffrey Nyarota's case against Associated Newspapers of Zimbabwe (ANZ), the publishers of Daily News, was registered with the High Court in 2010 and was finalised in July 2015 (Herald, Tuesday 14 July 2015). Matsikidze (2013) noted that Arbitrators often work faster than judges to settle disputes because of less procedure associated with the process. Whilst court litigation system has been marred with inefficiency, conciliation and arbitration on the other hand have offered an efficient and prompt settlement of disputes. According to a recent study Federal Conciliation Services of South Africa, the

average time taken to conclude a conciliation and arbitral case is 475 days, while a similar case can take up to 36 months to finalise through the courts (Clarke et al, 2008)

2.3.3 Less formal

The process of conciliation and arbitration is less formal than the court litigation route. The often convoluted rules of evidence and procedure do not apply in conciliation and arbitration proceedings making them less stilted and more easily adapted to the needs of those involved (Bendix, 2000). He added that conciliation and arbitration dispenses with the procedure called discovery that involves taking and answering interrogatory, dispositions and requests to produce documents often described as a delaying and game playing tactic of litigation. In conciliation and arbitration, most matters such as who will be called in as witness and what documents can be produced can be handled with a simple phone call. Litigation can involve mountains of paperwork, multiple hearings, subpoenas to mention only but a few. Conciliation and arbitration may eliminate some of these time consuming and expensive tools of litigation. It can also be noted that the less formal tag associated with conciliation and arbitration is less intimidating to both parties thereby ensure that all disputants approach the processes freely and can air their views and advance their arguments in a relaxed and accommodative environment. Gwisai (2007) observed that one of the strengths of conciliation and arbitration is that both processes tend to focus more on dispute resolution rather than assigning blame.

2.3.4 Private

Conciliation and arbitration hearings are usually conducted in private and both parties often agree to keep the proceedings and terms of the final resolution under lock and key. The process does not take place in an open court and transcripts are not part of public record (Salomon, 1992). This can be valuable to both parties. Both of these safeguards can be a boon if the subject matter of the dispute might cause some embarrassment or reveal private information such as company client list. In the banking sector where public opinion matters and competition is cut throat, excessive publication of legal cases may impact negatively on customer perception and attitudes towards the business as a whole. The negative effect on the market will negatively impact business as a whole. However

the court litigation system herald all cases, especially high profile ones. The recent one being the Zuva Petroleum vs Donga and another that made front pages for more than 2 weeks when the award was handed down at the Supreme Court on Friday, July 17 2015. The award resulted in more than 30 000 workers losing their jobs and as a result the publication was not good for Zuva Petroleum business. To this end conciliation and arbitration enjoys some sense of privacy where parties can agree to keep proceedings and decisions under carpet.

2.3.5 Not adversarial

The adversarial system or adversary system is a legal system where two advocates represent their parties' positions before an impartial person or group of people, usually a jury or judge, who attempts to determine the truth of the case (Bendix, 2000). Conciliation and arbitration is less adversarial because disputant parties are encouraged to participate fully and especially in conciliation they help structure the resolution and are more likely to work together peacefully rather than escalate their hostility towards one another as is often the case through the case of litigation. Parties are more satisfied with the outcome and likely to abide with the decision than the court litigation route because an award is dictated and written upon. Trudeau (2002) reiterated that rather than having a decision imposed by the court where one party feels like have lost, conciliation and arbitration create a win – win scenario.

2.3.6 Flexibility

Conciliation and arbitration provides a flexible mechanism which enable an effective resolution to disputes. Unlike the court litigation route where trials, which must be worked into overcrowded court calendars, conciliation and arbitration hearings can usually be scheduled around the needs and availability of those involved. Unlike a formalised court sessions which are marred with rigidity, conciliation and arbitration comes with flexibility which is more accommodative. According to (Mawire, 2009) determination and proceedings in conciliation and arbitration offers the highest degree of procedural flexibility. It is entirely up to the parties to agree on the content and structure of the proceedings. This also applies to cases when the proceedings are administered by

an institution. The rules provided by these institutions are neither comprehensive nor mandatory, allowing the parties and the mediator / conciliator / expert to structure and conduct the proceedings (Mawire, 2009). The flexibility associated with conciliation and arbitration also enhances its accessibility to all parties.

2.4 CHALLENGES OF CONCILIATION AND ARBITRATION.

2.4.1 Costs

The issue of costs has been highlighted previously as strength of conciliation given that the process is dwelt with by the Labour Officers who are government employees and as a result there are no conciliatory fees paid. In case of a no settlement at conciliation, the Conciliator initiates a certificate of no settlement and forwards the case for arbitration. If one party chooses a private Arbitrator, there are costs involved. The costs of arbitration according to the Labour Act Section 98 (7) are such that the Labour Officer or Designated agent for the employment council which is registered to represent the enterprise or industry from which the parties are from, will determine the share of Arbitration costs to be borne by each party (Gwisai, 2007). The trend is that many parties choose Arbitrator by Labour Officers notwithstanding the back log that is building up in this regard. Unfortunately, this has created the avenue for employers to plead incapacity to pay the costs of arbitration and opting arbitration by Labour Officers with the hidden agenda of subjecting the dispute resolution to delays which are inevitable with this route (Dube, 2011).

The government have through the Arbitration Act (Chapter 7:15), gazetted Arbitral fees with US\$300 as a minimum which normally involves one person against the company. As alluded above the Conciliator will determine the share of arbitral costs. However Mariwo (2008) observed that in cases which involves 'unfair dismissal', the arbitral costs are usually excessive to the appellant who is actually out of employment and seeking reinstatement through this mechanism. He added that the majority end up giving up on the process or opting for the Government Arbitrator where cases takes more than 36 months to be settled. Maitireyi and Dube (2013) noted that the pricing of arbitral costs

unfairly favours employers who have a better financial footing than employees. This may create an unenviable situation where unscrupulous employers abuse their financial advantage by frequently and deliberately declaring disputes in order to squeeze employees financially. This finding calls for a more flexible arbitration system that does not disadvantage the weaker party.

It is important to highlight that there has been a practice nowadays in Zimbabwe which has been designed in order to reduce arbitral costs and enhance accessibility and consequently effectiveness of the alternate dispute resolution mechanism. The practice according to Madhuku (2010) has developed in Harare as part of what is described as 'social responsibility'. As part of social responsibility, an independent arbitrator is asked to do at least two cases for free, without charging the parties any fees. This has been designed in response to the increasing number of parties who plead incapacity to meet the costs and thereby resulting in backlog of cases awaiting arbitration by government Labour Officers. However in the absence of a legal basis to push and sustain such a position or gesture, some Arbitrators refuse to take 'social responsibility' cases. This explains why the issue of social responsibility cases has been peculiar to the Capital City alone because there is no legal structure to push it to other regions of the country. However if entrenched in Labour Legislative structures, this will go a long way in enhancing the effectiveness of the dispute resolution mechanism. Lawyers, as an example, are required to do legal aid work as part of their pay back to society. The *pro deo* (for God) and *in forma pauperis* (for the poor) services are well known in the legal profession across the world (Gwisai, 2007). It has to be one condition of appointment of an arbitrator that he/she will be required to accept reasonable 'social responsibility' work.

2.4.2 Absence of time limits

Despite the fact that compared to the court litigation system, conciliation and arbitration as a mechanism for dispute resolution is relatively faster, it should however be noted that the major drawback of our Labour Act (Chapter 28:01) is that it is silent in terms of time lines within which the process of conciliation and arbitration could be concluded. The Zimbabwean Law does not impose a maximum time limit for a Conciliator or Arbitrator

to make an award. This gap in law accounts for some of the delays in resolving labour disputes (Gwisai, 2008). Although the process of conciliation usually is completed in one sitting and resolution or recommendations are passed, the arbitration process usually takes time to settle the disputes. This could be attributed to the absence of set time lines in our legal framework in order to force arbitrators to resolve disputes with speed. In other countries, like South Africa, their legal structure provides that the award should be awarded within 21-30 days from the day of the hearing (South African Labour Relation Act of 1995). In Lesotho, an Arbitrator is required to issue an award with brief reasons, within 30 days of the conclusion of the arbitration proceedings and that period can only be extended by the Director of the Directorate on good cause shown (Lesotho Labour Relations Act of 1990). In Botswana, Section 9 (9) of the Trades Disputes Act of 2003 provides that upon conclusion of an arbitration hearing, the arbitrator shall make an award and shall, within 30 days of the hearing, give reasons for the award. Gwisai (2008) noted that cases can take more than 12 months before an Arbitrator can give an award thereby delaying justice. Mariwo (2008) bemoaned the delays encountered in resolving disputes through arbitration in the private security sector. This is one example of several cases pending before the Labour Arbitrators. Government Arbitrators usually takes longer than Independent Arbitrators because of the volume of cases coming against the number of Government Labour Officers. As commonly said, the quote ‘justice delayed is justice denied’ is all but the earnest truth and in the Zimbabwean case. The much desired efficiency and expeditious resolution of disputes is rendered void, unrealistic and unachievable through this administrative malaise (Matsikidze, 2013).

2.4.3 Expertise of Conciliators and Arbitrators.

Expertise and competencies of those who preside over the process of conciliation and arbitration has been placed under serious scrutiny. Literature and research has uncovered that there exist a gap in terms of the expertise and competencies thereby impacting negatively on the service delivery (Trudeau, 2002). The principal actors presiding over the process should be unquestionably competent, experienced, disinterested and neutral parties (Bishop and Reed, 1998). Decision of Arbitrators should not end at being merely

reasonable; they should satisfy the requirement of fairness. It should be highlighted that again the Zimbabwean legislative structure pre -2012 did not set minimum qualification and experience for one to be able to sit as a Conciliator and Arbitrator. Madhuku (2010) conducted a study on behalf of the International Labour Organisation where he highlighted that Labour legislation, regulating conciliation and arbitration in Zimbabwe prescribed no minimum qualifications for principal actors. Some Scholars have attributed the failure of the dispute resolution mechanism to the incompetence of those who preside over the cases. Mazanhi (2010) even noted that some designated agents drawn from some employment councils do not have proper qualifications and expertise to effectively and efficiently resolve cases brought before them. Statutory Instrument (SI) 173 of 2012 was promulgated in order to address this anomaly. It stipulated that an Arbitrator or a Designated Agent should have a minimum of a University Degree with at least 2 years experience in Human Resources or Industrial Relations field, a diploma in People Management. This provision was welcomed by all stakeholders as they saw that it would go a long way in enhancing the effectiveness of Conciliation and Arbitration as dispute resolution mechanism.

Trudeau (2002) highlighted that competency of those who preside over cases also gives confidence in disputants and may also speedy up the time within which the resolution to the dispute can be made. The perception of the parties has a bearing on whether they would accept the arbitral award or not. A decision which is perceived to be unjust and unfair is likely to be appealed against, thereby prolonging the dispute. Madhuku (2010) highlighted that if there is one area of agreement among all social partners in Zimbabwe is the competency level for most Conciliators and Arbitrators is very low because there is no specific training offered to them before they begin their duties. The Independent Arbitrators tend to give outrageous and populists awards. A survey done by Muchadeyi in 2013 revealed that some awards given are outrageous in their insensitivity to the informality and social justice or equity implication of conciliation and arbitration as dispute resolution mechanisms. He added that according to SI 217 of 2013 frame L.R 7 requires the arbitrator to retain a copy of the award while the other copies are served on

the parties. There is no record that is being sent to the Ministry of Labour to enable the Ministry as the regulator to review and scrutinize the quality of awards being handed out. It is only at the Labour Court where the Ministry will get some scope as to the nature of awards given. However in South Africa, it is a statutory provision that every arbitration award be filed with the Registrar of the Courts (Madhuku, 2010).

Some Arbitrators have been criticised for awarding unrealistic rulings especially on the issue of remuneration. One case which quickly came to mind was the 2009 Arbitral award which set out the minimum salaries in the Textile Industry at US\$150, 00. The Arbitrator did not even consider the performance of the Industry in giving the award. The regional market rates were just below US\$100, 00. Such incompetence has been attributed as major reason why the process usually fails. The company could not meet such a huge wage bill obligation and accumulated salary arrears running into millions. Arbitrators tend to dwell much on advancing social justice at the expense of company survival and business viability. The company was eventually placed under Judicial Management and employees were forced to go on an indefinite unpaid leave. The Employer representative body EMCOZ has on numerous occasions castigated Arbitrators who come up with populists awards which go against business. Arbitrators have been criticised for being bookish and failing to take into cognisance the current environment within which business is operating in. EMCOZ is advocating for a mutually negotiated dispute settlement between the parties without the involvement of arbitrators. However the Workers' through their representative body, Zimbabwe Congress of Trade Union (ZCTU), argued that the Employers' position is influenced by their ignorance of the legal framework which governs employee relations (The Worker, August 2014).

2.4.5 Finality of awards

A critical area one needs to consider when assessing the challenges of conciliation and arbitration as dispute resolution mechanisms is the issue surrounding the finality of awards handed out to settle the dispute. Unlike voluntary Arbitration which prescribes final awards which are impossible to set aside, Compulsory Arbitration awards are susceptible to appeals (Madhuku, 2010). The Law provides an appeal on the question of

law. It has been observed that there are more appeals emanating from compulsory arbitral awards than warranted. As a result, many disputes are taking too long to resolve because of the provision for an appeal to the Labour Court. Conciliation and arbitration need to develop jurisprudence similar to that of ordinary courts with the view to ensuring more finality of arbitral awards in compulsory arbitration (Matsikidze, 2013). Until and unless the arbitration stage is provided a legal standing to offer final awards, the alternative dispute resolution mechanisms will remain a utopia. The option of appeal defeats the very purpose why conciliation and arbitration were adopted for. They were adopted in order to counter the court litigation system and enhance effectiveness in terms of speed and accessibility of dispute resolution mechanism. As a consequence, the absence of that legal standing to give final awards removes the efficiency which the mechanism was designed to create. As alluded to earlier in the previous chapters, either party has the legal right to contest an arbitral award to the Labour Court which sits at the same level as the High Court. A High Court ruling is not final since either party can contest to the Supreme Court whose decision or ruling will be final. It is against this backdrop that Labour is pushing for the finality of arbitral awards to avoid the complexities of the court system which usually take ages to settle.

2.4.6 Enforcement of awards

Closely related to the issue of finality of arbitral awards is the issue of enforcement of arbitral awards. In order to enhance and counter the current challenges of arbitration as a dispute resolution mechanism, the awards should not only be final, but they should also be enforceable. For the Labour Court, Section 92 B of the Labour Act Chapter 28:01 is explicit in terms of its enforceability. However regarding arbitration awards, the position is governed by Section 98 (14) which says that “any party to whom an arbitral award related may submit for registration the copy of it furnished to him in terms of Sub section (13) to the court of any magistrate which would have jurisdiction to make an order corresponding to the award had the matter been determined by it, or, if the arbitral award exceeds the jurisdiction of any magistrate’s court, the high court” (Labour Act Chapter 28:01). In practice the registration process is laborious and confusing. It is also important

to note that many workers are not even aware of this requirement and the time lapse between obtaining an award and seeking registration for enforcement may make it impracticable to get an effective remedy (Gwisai, 2007). One can also argue that the further requirement of registration also undermines the alternate dispute resolution mechanism in diverting the dispute to ordinary courts as the registering court also reserves the right to question the validity of the order and as a result open the issues again. Madhuku (2010) observed that some of the courts refuse to register awards not 'sounding in money', such as an order of reinstatement only. A closer look at the South African law, one can deduce that it provides and make Arbitral judgments executed in the same way as orders of the high court (South African Labour Relation Act of 1995 Section 163). The same applies to Malawi Labour Relations Act of 1996 says "Any decision or order of Industrial Relations Court shall have the same force and effect as any other decision or order of a competent court shall be enforceable accordingly.

In continuation of the above (Matsikidze, 2013) carried out the audit and discovered that breaching of conciliation agreements was a common affair. He added that there is no provision stipulating the effect of the conciliation agreement should one of the parties breaches it. As a result the other part is left with an award which cannot be converted into an arbitration award. In Swaziland they designed a legal structure which enforces the resolutions and recommendations from the conciliatory hearing. A memorandum of agreement settling the dispute is lodged with the Industrial Court for registration (Madhuku, 2010). Upon registration shall have the same force and effect as the registered collective bargaining agreement. Conciliation as a mechanism for dispute resolution has been criticised on its dependency on goodwill and utmost good faith and that there conciliator can not give a binding decision (Matsikidze, 2013). It have been noted that cases which may appear to have been solved at the conciliation stage usually resurface later thereby prolonging the dispute. The longer the case takes before finality impact negatively on how the aggrieved part has on the process as a whole thereby affecting the effectiveness of the dispute resolution in place. The fact that Conciliation is not enforceable in the Zimbabwean context places the mechanism at a disadvantage

(Matsikidze, 2013). To borrow from the South African set up, there is need to set up an independent system to govern conciliation and arbitration in Zimbabwe. Madhuku (2010) noted that there should be an independent panel of Conciliators and they should not be restricted to Labour Officers who are Ministry Appointees.

2.4.7 The involvement of legal practitioners

The presence of lawyers in our dispute resolution mechanism can negatively impact on the process. The law and practice in Zimbabwe is that the disputants may choose to be represented by their legal practitioners from Conciliation itself. Section 4 of the labour regulations states that “a party to a matter before a labour officer may be presented by a fellow employee, an official of a registered trade union, employers’ organization or a legal practitioner.” (Labour Act Chapter 28:01) In more cases than not, employers never bother to attend in person and send their lawyers instead (Madhuku,2010). In most cases Conciliators do not insist on the presence of the party in person, and as a result either party can choose not to attend in person.

Madhuku (2010) noted that this has impacted on the effectiveness of the dispute resolution mechanism. He recommended that our legislative structure should get insights from the practice in other Southern African countries. The common position is to distinguish between Conciliation and Arbitration. In South Africa and Botswana for an example, representation by legal practitioners is not permitted in conciliation proceedings but may be allowed in arbitration. The prohibition of legal practitioners at preliminary stages like Conciliation is done in order to give the disputants a chance to dialogue and find a mutually agreeable settlement before bringing in legal practitioners. Rule 25 for the conduct of proceedings before Commission for Conciliation, Mediation and Arbitration (CCMA) states that in Conciliation proceedings, a party to the dispute may appear in person or represented only by a director or employee of the party or any member or official of a registered Trade Union (South African Labour Relations Act of 1995). According to the University of Botswana Law Journal (2012), Section 10 of Trades Disputes Act in Botswana also mirrors the South African legal framework. It is well established that legal practitioners may be dilatory and many have a penchant for

diverting attention from real issues (Duve, 2010). This as a result, impact negatively on the effectiveness of the system as a dispute resolution mechanism.

1.7.1 Lack of transparency

As mentioned, the fact that arbitration hearings are generally held in private rather than in an open courtroom, and decisions are usually not publicly accessible, is considered a benefit by some people in some situations. Others, however, lament that this lack of transparency makes the process more likely to be tainted or biased, which is especially troublesome because arbitration decisions are so infrequently reviewed by the courts. The absence of guidelines in our legal framework on conciliation has also impacted negatively on transparency of the system. Transparency is a critical element in shaping perception and confidence of disputants. Perception is also critical in ensuring that those who approach the system will accept a resolution or award which comes out of the system. To this end a certain degree of transparency is needed in order to shape perception and even attitude of those who seek recourse. Awards should also be prone to evaluations and scrutiny by an established independent labour board as is the case in Malawi and Lesotho.

1.8 THE ROLE OF THE STATE AND ITS IMPACT ON EFFECTIVENESS

1.8.1 The State's influence on conciliation and arbitration

The State's influence in the dispute resolution mechanism should not be taken for granted. The State is difficult to define because it encompasses more than a single actor and many different institutions and government departments and can influence employment relations in various ways, for example, the army and police have been deployed during particular strikes and courts have passed judgments which have changed day to day relationship between managers, employees and unions. The State is normally taken to mean the elected government of the day, together with all other agencies that carry out the will of government and implement its policies and legislation (Gospel and Palmer, 1993). The overall objective of the State in employment relations is to maintain

high levels of employment, ensure price stability, maintain balance of payments and to protect the exchange rate.

The State is the Regulator but also an employer in its own right. As a consequence many scholars have doubted the neutrality of the state given the conflictual nature of their roles in employment relations. At its inception in 1985, the Labour Act gave all powers to the state in the Conciliation and Arbitration process. The State had more control and influence in the system. The State Officials were responsible for dispute resolution. Section 117 (1) of the Labour Relation Act of 1985 provided that where compulsory Arbitration was ordered by the Senior Labour Officer, the Minister had to be notified first without fail and the Minister had the sole responsibility and power to refer a matter to the Labour Relation Tribunal or to appoint an independent Mediator. The decisions or awards given by the Labour Officer or so called Independent Mediators reflected the economic interests of the state at the detriment of fairness and justice in the dispute resolution process (Duve, 2011).

In order to address what they termed the uneven and tilted playing ground for dispute and conflict resolution, amendments were made which saw the role of the state being reduced to mere facilitators without much influence in the awards given. The Labour Relations amendment number 17 of 2002 and number 7 of 2006 saw the reduction of state influence in the dispute resolution mechanism. This study was undertaken when the three parties to the employment relations, the State, Capital and Labour are discussing proposals on various reforms to the current labour dispute settlement system. Labour and Capital have proposed the setting up of an independent dispute resolution mechanism (Nemukuyu, 2014). This body shall be funded by the State to take charge of conciliation and arbitration of Labour disputes. In such an arrangement, the Ministry responsible for Labour shall provide the role of providing policy direction and general oversight over the administration of the body. The objective here is to enhance effectiveness and expeditious resolution of disputes. The Labour is also of the view that efficiency and effectiveness in dispute resolution can be achieved through administrative measures such as separation of roles of Labour Inspectors and dispute resolution.

1.8.2 Provision of guidelines on conciliation and arbitration

The State creates the regulatory environment for conciliation and arbitration. Madhuku (2010) also observed that the Labour Act does not explicitly define conciliation as a dispute resolution mechanism. He pointed out that there are no clear cut guidelines on how the process must be conducted. It has been observed that Labour Officers conducts the process of conciliation in different ways and this has a negative impact on the effectiveness of the process of dispute resolution. Gwisai (2007) also substantiated the above position where he noted that the absence of a clear framework in the conduct of the Conciliation process has retarded the effectiveness of conciliation. One would expect a legal structure or framework to provide rules and guidelines regarding service of documents particularly the notification to attend the Conciliation hearing. It has been observed that a party which is unwilling to attend or which anticipates a negative outcome which is detriment to their interests usually hides behind technicalities associated with service of the notification papers. Many cases have failed to kick start because one party in default may allege lack of knowledge of the proceedings. This will always prove problematic until it is plugged by putting in place guidelines which specifically deals with the service of notification papers. Unlike in the Labour Court where provisions regulating service of notification papers, an equivalent system could be recommended to be adopted on conciliation and arbitration.

Closely attached to the above, it should also be highlighted that the case management system is at best chaotic at the Ministry of Labour (Muza, 2009). The legal Instrument is silent on guidelines on how it is done. All complaints are referred to the Provincial Labour Officer who in turn seems to allocate cases using a roster and allocates to the officer who is next in the line. The officer who is allocated the case becomes the Conciliation Officer. On notification again, the audit carried out by Madhuku (2012) uncovered that the Ministry has no resources for communication apart from telephones, no vehicles to deliver documents by hand among other challenges faced by Labour Officers in trying to notify parties to come for conciliation and arbitration hearing. In some cases the complainant is expected to make arrangements to ensure that the

notification papers are delivered to the other party. A lot of time is usually spent before the papers are completed and delivered to the other party and may take several trips to the offices of the Ministry of Labour to have the forms completed. Lack of adequate resources impact negatively on the effectiveness and efficiency alternate dispute resolution mechanism. Time is a critical factor in the resolution of disputes and the longer the time spends before the dispute is resolved and settled, the ineffective and inefficiency the system becomes. There should be laid down and clear provision which stipulate procedures, so that it speeds up the process and enhance the effectiveness of the aforementioned dispute resolution mechanism.

In continuation of the above point, the Conciliators' powers are limited to mere facilitators of dialogue between the disputants' parties. In our Zimbabwean Law, the Conciliator's main role is to identify the cause and extent of differences by examining the real positions as distinct from the negotiating positions of protagonists and proffer alternative solutions in order to ascertain the implications of the options and their acceptability to each parties (Muza and Matsikidze, 2009).The conciliator, however, has no power to force the terms of a settlement on the parties if either one or both refuse to accept a recommended settlement. However in Botswana, Section 8 of Trades Disputes Act of 2003 clearly stipulates that the Conciliator may recommend a settlement or make an advisory award if it is in the interests of settlement to do so. The Conciliator is entitled by the regulation of Botswana to order any party to the proceedings to produce any relevant documents to the case which might help in the determination of the case. The limited powers of Conciliators have impacted negatively on the alternative dispute resolution mechanism and have left many scholars questioning and doubting its effectiveness. Conciliators need to be given jurisdiction to make advisory awards rather than to leave it as a preliminary stage before Arbitration. A closer analysis can review that few cases are settled at conciliation stage and many cases ends up at arbitration because of the lack of powers of Conciliators.

In the event of failure of the Conciliation process to settle and resolve the dispute, a certificate of no settlement is issued and the case is then referred for compulsory

arbitration. The choice of the Arbitrator is made by the Labour Officer and Designated Agent who presided over the Conciliation process. Given that in most cases there are several names on the panel, for example, they are 9 registered Independent Arbitrators in Midlands Province, the choice of the Arbitrator from the panel may be influenced by considerations that are less than professional. One such influence is that of favoring certain arbitrators to enable them to make money. Until and unless there is a clear cut guideline on the choice of Arbitrators, the system will always be criticised of inefficiency. Although there has been some evidence of consultations on the disputants on the issue of appointing Arbitrators, it has been observed that at the end of the day, influence still rests with the Conciliator. Although the Ministry claims that they follow a roster with the next on line being allocated the case available, it is not uncommon for some Arbitrators on the panel to make frequent visits to the Ministry of Labour to ‘campaign for allocations (Mawire, 2009).

1.8.3 The state’s capacity to deal with conciliation and arbitration.

It is also of paramount importance to highlight that conciliation in Zimbabwe buy and large falls, under Government Labour Officers. The number of Labour Officers at any given time is the exclusive prerogative of Public Service Commission (Matsikidze, 2013). As a result the number of available Conciliators available is small and insufficient to deal with the volume of Labour disputes seeking their services. In the current Zimbabwean environment, there has been a sharp increase in the number of disputes of right and with the Public Service Commission freezing all recruitments, it could be argued without doubt that the available Labour Officers may not cope with the cases being brought before them. Labour Officers are stationed at Provincial Capital Cities/Towns. In the Midlands region, there are only 9 Labour Officers who have the prerogative to sit as Conciliators for all Midlands region disputes. With the increasing volume of labour cases brought and registered with the Ministry per month, it will be difficult for Labour officers to cope and manage all case and resolve them expeditiously.

The system of restricting conciliation to paid Government employees is not a trend in Southern Africa. In South Africa as an example, Section 112 of the Labour Relation Act of 1995 establishes the Commission for Conciliation, Mediation and Arbitration (CCMA) which is decreed by Section 113 of the same Act to be ‘independent of the state, any political parties, trade union, employer, employers’ organisation, federation of trade unions or federation of employers’ organisation”. Its main function is to attempt to resolve labour disputes through conciliation, if conciliation fails, through arbitration (Madhuku, 2010). Swaziland has also inherited the South African legal structure by establishing a body called Conciliation, Mediation and Arbitration Commission (CMAC) in terms of section 63 of the Swazi Industrial Relations Act of 2000. In both South Africa and Swaziland, the governing bodies of the commissions are tripartite in character, which consists of representatives of organised Labour, Capital and the State. However in order to curb the limitation and weakness and defects of the Zimbabwean systems, SI 173 of 2012 provided that Designated Agents of a registered National Employment Council can sit as a Conciliator. However the agent can only preside over cases in his own Industry. As a consequence, those Industries or Organisation without a registered National Employment Council will only be restricted to the government controlled process thereby impacting negatively on the effectiveness of the dispute resolution mechanism. In the Ferro-Alloy Industry, which has 6 active players/companies, there is a registered National Employment Council with its Designated Agent who sits in Kwekwe which was deemed a central point for the 6 organisations. The availability of the Designated Agent is expected to go a long way in enhancing the effectiveness and efficiency of Conciliation as dispute resolution mechanism.

1.9 CHAPTER SUMMARY

The chapter managed to provide an insight into what literature has in terms of the effectiveness of conciliation and arbitration as dispute resolution mechanism. Traditional literature over deployed emphasis on accessibility, speed and expertise as the main factors to consider in analysing the effectiveness of alternative dispute resolutions structures. This paper managed to expand on the traditional yardsticks and scrutinised the

role of the state and its capacity, the role of legal practitioners, the finality and enforceability of the mechanism as some of the critical elements that can be used as units of measurement to establish and answer the objectives of this study. The chapter also outlined the current nature, process, strength and weakness of Conciliation and Arbitration in Zimbabwe. Emphasis was also placed on the role of the State and the regulator and impact of the legal structure and regulatory environment in conciliation and arbitration. Chapter 3 looks at the conceptual and theoretical framework.

CHAPTER 3 - CONCEPTUAL FRAMEWORK.

1.10 INTRODUCTION

Theoretical and conceptual framework entails assumptions, expectations, beliefs and theories that supports and infers on a particular research (Miles and Huberman, 1994). This is primarily a conception, model or theory of what is out there that the researcher is interested to study. The main purpose of a conceptual framework in a given study is that it does not only help to come up with objectives, research questions and sound justification but it also informs on the selection of an appropriate methodology and identify potential validity to interpretation of results and conclusion. This research is informed from the concept of social semi - autonomy which liberates conciliation and arbitration from legal centralism perspective.

1.11 CONCEPTUAL FRAMEWORK.

Conciliation and Arbitration can be conceptualised as the resolution of disputes outside the litigation court system when neutral and unconnected third parties come in to resolve

disputes by making recommendations which bind the parties. Conciliation and Arbitration were adopted as mechanisms for dispute resolution in order to avoid the technically complex litigation court system. The system had been found to be ineffective and inefficient in resolving and settling industrial disputes. The writer has observed that the majority of the cases or disputes in the Ferro-Alloy Industry stems from interpretation of employment and other conditions of service hence they need a speed and efficient dispute resolution mechanism which is mainly outside the court system.

Theoretically, the concept of Conciliation and Arbitration, as conceptualised by Sally Falk Moore (1965), cited in Mumme (2008), derives from the concept called social semi-autonomy which deals with the operation of social and quasi legal processes with some degree of autonomy from the state's judicial institutions. The main idea which reverberates around this framework is to move and divorce the state from being the centre of social study in which the law is viewed as hierarchically superior to society. This disregard the concept of legal centralism where the state sets the law and determines all social activity from the central point (Dupret, 2007). Falk Moore observed that there are some areas of social life that have the power to order their own sphere and operate in the shadow of state law. He highlighted that one such area is the employment relations domain where the contractual relations are said to create a law of the shop. These are laws of interactional and relational engagements, as a result the role of the state in these spheres is limited in its capacity to regulate relations. It is in this context that Labour Arbitration and Conciliation in Zimbabwe can be conceived in this study.

As alluded to earlier the concept of conciliation and arbitration is a departure from the traditional concept of legal centralism that puts the state at the centre of dispute resolution through the courts system. Legal centralism has been criticised for overlooking the human element interms of feelings of the subjects. The pursuits of court litigation in resolving labour disputes cannot satisfactory achieve the desired results. Arbitration and Conciliation can be conceived as a process of dispute resolution that seeks to depart from the formality and entrenched class differences of the legal system of the state, which is

focused on implementing the self governing rules of workplaces and on going relationship of the parties (Mumme, 2008).

It is however of paramount importance to highlight that Conciliation and Arbitration cannot operate in complete isolation from the state's legal system. Section 93 of the Labour Act (Chapter 28:01) provides for the Conciliation and Arbitration as alternate dispute resolution mechanism. As a consequence there is a linkage between the state legal system and shop floor rule for easy regulation of employment relationship. This approach is framed from the legal pluralistic perspective. It can be argued that for arbitration and conciliation to be effective and efficient, it must also assume a sufficient role in interpreting the general law of the state. To this end Conciliation and Arbitration as dispute resolution mechanisms should work within the legal framework and distinctively outside the centralists court system. The analysis of Conciliation and Arbitration system in Zimbabwe as enunciated in the Labour Act Chapter 28:01 squarely falls within the realm of the pluralist approach.

1.12 CHAPTER SUMMARY

The Chapter managed to outline the theoretical framework which support and inform the area under study. The legal centralism concept removes the state from the centre of dispute resolution mechanism during Conciliation and Arbitration. The State's function is to facilitate the process and provide the regulatory environment. Attached to the aforementioned concept is also the concept of legal pluralism where the state provides the legal framework and regulatory environment within which Conciliation and Arbitration takes place.

CHAPTER 4 - RESEARCH METHODOLOGY

2.1 INTRODUCTION

According to Rajasekar et al. (2006), research methodology is a systematic way to solve a problem. It is thus a science of studying how research is to be carried out and is essentially the procedure by which researchers go about their work of describing, explaining and predicting phenomena (Taylor et al., 2006). This chapter covers the research approach and design sampling frame, sampling procedure, sample size, sources of data, data collection instruments and how it dictated the use of case studies as the method to be used in investigating the research problem. The chapter clearly and concisely describes how purposive and convenience sampling were used in case selection. As a social science researcher, social ethics were observed and are of prime importance in research thus they will be presented in this section together with the limitations and delimitations to the study. The chapter also details the approach used in addressing issues of generalisability, reliability, validity and ethics.

2.2 RESEARCH APPROACH

This study employed the qualitative approach of information gathering. According to Corbin (1990:17), qualitative research is “any kind of research that produces findings not arrived at by means of statistical procedures or other means of quantification.....” and instead, the kind of research that produces findings arrived from real-world settings where the “phenomenon of interest unfolds naturally”. Kothari (2004) argues that qualitative research is concerned with subjective assessment of attitudes, or opinions and behaviour. It makes use of qualifying words or descriptions to record aspects of the world. Kothari (2004) went on to argue that qualitative research is a mere function of researchers’ insights and impressions. The choice to qualitative means is greatly influenced by the need to deeply and holistically understand the varying people’s

feelings, perceptions and experiences without difficulty. However the study made use of quantitative aspects only as simple descriptive statistics in data presentation.

2.3 RESEARCH DESIGN

Jahoda and Selltitz as cited by Thakur, (2003:121) defined a research design as ‘the arrangement of conditions for collection and analysis of data in a manner that aims to combine relevance to the research purpose.....’ The research design guides the researcher in the process of collecting, analysing and interpreting observations. Research design is the conceptual structure within which research is conducted and the glue that holds all the elements in a research project together (Trochim and Land, 1982; Trochim, 2006). Thakur (2003) highlighted two basic purposes of any research design, that is to provide answers to research questions as validly, objectively, accurately and economically as possible and to bring empirical evidence to bear on the research problem. This research took the descriptive research design as it sought to establish the effectiveness of conciliation and arbitration as dispute resolution mechanism.

2.3.1 Descriptive Research Design

The research design dictates the kind of methods to be used in investigating the problem. This study is a descriptive research aimed at evaluating the effectiveness of conciliation and arbitration as dispute resolution mechanism in Zimbabwe’s Ferro-Alloy Industry. The Ferro-Alloy Industry has not been spared by the economic challenges facing business in the current Zimbabwean environment as a consequence disputes between Labour and Capital have been on a rise. According to Shuttleworth (2008), descriptive research examines a situation as it is. A descriptive research design was therefore a valid method for this study in as far as it allowed the researcher to evaluate the effectiveness of the alternative dispute resolution mechanism from the data collected using a certain set of yardsticks from organisation that falls under the Ferro-Alloy Industry.

Descriptive research can be qualitative or quantitative in orientation. As indicated before, a qualitative orientation was adopted in this research. Rooney (2008) defined a qualitative orientation as descriptive research that is focused on observing and describing events as

they occur with the goal of capturing all of the richness of everyday behaviour. The current provisions regulating conciliation and arbitration were described and evaluated and their effectiveness were tested against the yardsticks of costs, accessibility, speed to mention only but a few.

2.3.2 Case Study Strategy

Yin (1994) defined a case study as an empirical enquiry that investigates a contemporary phenomenon within its real life context, when the boundaries between phenomenon and context are not clearly evident and in which multiple sources of evidence are used. Since the study was descriptive in design it therefore followed that the researcher needed a research method which would allow an understanding the current process and nature of conciliation and arbitration as enshrined in the legal framework in Zimbabwe. Comparison will also be drawn with other Southern Africana countries and establish how effective is our process. Case studies emerged as the most suitable strategy in pursuit of this objective. Yin (2009) supports this argument as he opined that case study methods may be used when one wants to appreciate a real life situation in depth, but however such understanding encompasses important contextual conditions that are highly pertinent to the phenomenon. The researcher used ZIMASCO and Zimbabwe Alloys International as case studies because these are the 2 major players in the Ferro-Alloy Industry employing more than 75% of all Ferro-Alloy workers in Zimbabwe. The researcher is also employed by one of the aforementioned mining power houses and hence information was readily available.

2.4 SAMPLING FRAME

In research, sampling frame is defined as a precise group of people or objects that possess the characteristics that are questioned in a given study (Yin, 2009). This study seeks to question the effectiveness of conciliation and arbitration as dispute resolution mechanism in the Ferro-Alloy Industry. It then follows that our sampling frame is ZIMASCO and Zimbabwe Alloys International from which our sample was drawn. At the time of the research ZIMASCO and Zimbabwe Alloys International employed about 1100 and 460 employees respectively.

2.4.1 Sample Size

The sample was drawn from 2 major players in the Ferro-Alloy Industry, Zimbabwe Alloys International and ZIMASCO. 5 Management, 5 Trade Union representatives and 5 general employees who are not Trade Union Representatives were drawn from the frame as sample from Zimbabwe Alloys International and ZIMASCO. 2 Labour Officers from the Midlands Region were also part of the respondents. The region employs 9 Labour Officers in total. The Ferro – Alloy Designated Agent (D.A) was also part of the participants. The assumption behind the aforementioned participants is that it truly represents all parties involved in conciliation and arbitration in the Ferro-Alloy Industry.

2.4.2 Sampling method

According to Tellis (1997), the unit of analysis is a critical factor in the case study. Tellis further highlighted that case studies tend to be selective focusing on one or two issues that are fundamental to understanding the system being examined. Stake (1995) emphasized that careful selection of cases is crucial so as to maximise what can be learned in the period of time available for the study.

In selecting cases for this research, the researcher in the first instance used purposive sampling which is also known as information-oriented sampling as opposed to probability sampling. According to Brewerton and Millward (2001), non-probability sampling unlike probability sampling does not use chance selection procedures but relies mainly on personal judgement. Information-oriented sampling was deemed the best for the study because the researcher needed to target a certain segment of the population, for example Trade Union Representatives. Unlike Workers' Committee Representatives, Trade Unions Representatives have the *loci standi* to represent workers during conciliation and arbitration process. As a result Workers tend to channel their grievances for conciliation and arbitration through Trade Union Representatives. Also the research also targeted Labour Officers who have specifically dwelt with Ferro- Alloy Industry disputes. Such information was drawn from the D.A for the Industry.

Yin (2005) argued that from both an understanding-oriented and an action-oriented perspective, it is often more important to clarify deeper causes behind a given problem and its consequences than to describe the symptoms of the problem and how frequently they occur. Random samples emphasizing representativeness will seldom be able to produce this kind of insight hence the researcher's choice of purposive sampling.

2.5 DATA COLLECTION

Data collection is the heartbeat of the research. The data collection methods consist of a detailed plan of procedures that aim to gather data for specific purposes, which is to answer a research question or to test a hypothesis (Grinnell, 1997: 458). Sources of data collection can be broadly divided into two, primary and secondary sources. Primary sources refer to data collected for the first time. This is data which is gathered from the source, it enhances originality hence it is reliable. This comprise of data gathered from Trade Union Representatives and Management employees of the companies under study. Secondary data are those which have already been collected by someone else and to be used by another. This research made use of media publications related to the research being carried out, data and statistics from the Ministry of Labour and Labour Consultancy like the Industrial Psychology Consultancy to mention only but a few.

2.5.1 Research Instruments

Research instruments are tools used for data generation and collection. There are several methods of data collection. Stake (1995) and Yin (1994) identified at least 3 sources of evidence in case studies as listed below:-

- Interviews
- Questionnaires
- Documents

After taking into account the characteristics of the respondents, the research objectives of the study in the evaluation of the effectiveness of conciliation and arbitration in the Ferro-

Alloy Industry, the researcher adopted for questionnaires and interviews for primary data collection and document analysis or review for the collection of secondary data.

2.5.1.1 Questionnaires

Gillham (2008) defines a questionnaire as a research tool consisting of a series of questions for the drive of gathering information from respondents. Kothari (2004) argues questionnaires are common in case of big enquiries therefore this research made use of them in lieu of getting many responses from various sources. The questionnaire was structured around the research questions and objectives and set yardsticks for evaluation of effectiveness of Conciliation and Arbitration. 2 Labour Officers, 1 Designated Agent (D.A) and 10 employees from ZIMASCO and Zimbabwe Alloys International were given questionnaires.

2.5.1.2 Interviews

Interviews are a way of collecting primary data and are one of the most important sources of case study information. Kahn and Cannell as cited by Saunders et al., (2007) defined an interview as a purposeful discussion between two or more people. Thakur (2003) highlighted that an interview has two objectives, which are discovery and measurement. Discovery indicates gaining new knowledge or new insight of certain unexplored qualitative aspects of the problem. An opportunity for the establishment of friendly relations with the interviewee is made possible thereby enabling the possibility of getting confidential information that they might feel reluctant to put to writing. In this regard, the interviews enabled the researcher to get insight into how effective is conciliation and arbitration as dispute resolution mechanism. Yardsticks for effectiveness were set and interviews were structured along the main factors which evaluate effectiveness of conciliation and arbitration. Interviews also allowed the researcher to gain new knowledge on the impact of the Zimbabwe legal framework on arbitration and conciliation process.

2.5.1.2.1 Unstructured Interviews (Interview guide)

Taylor et al., (2006) divided interviews into structured and unstructured interviews. Structured interviews are normally used when conducting quantitative research. Unstructured interviews are the most ideal when carrying out a qualitative research (Tellis, 1997). The researcher therefore made use of unstructured interviews to gather data from 10 Management Representatives and 10 Trade Union Representatives.

Unstructured interviews proved to be ideal for this research due to the following reasons:-

- Given the sensitivity around the subject under study, it was therefore crucial for the researcher to gain the trust of the participants being interviewed. Being constrained by the number of questions or by the precise order in which they would be asked would have hindered spontaneity and establishment of the rapport required in building trust. An interview guide was however devised to make sure that the interview covered all issues relevant to the research objectives.
- Unstructured interviews enabled the use of open ended questions. This therefore allowed free discussion between the researcher and the research participants on the effectiveness of the alternate dispute resolution mechanism against the given yardsticks.
- The researcher was able to clarify information given in the interview and corroborated it with evidence obtained from other sources. Structured interviews would not have allowed such diversion and exploration.
- An in-depth understanding of the current legal structure was required in order to evaluate its impact on the arbitration and conciliation. Through the use of unstructured interviews, the researcher was able to ask probing questions beyond the predetermined extent and thus obtained as much information as possible in specific areas.

Thakur (2003) recommended that the entire interview process be pilot tested using subjects with an appropriate background to enhance reliability and validity. In line with this recommendation, the researcher used the interview guide to conduct a pilot study on participants who were not part of the research.

2.5.1.3 Document Review

The shorter Oxford English dictionary as quoted in Taylor et al, (2006) provided an early (1727) definition of document as “something written, inscribed, which furnishes evidence or information upon any subject, as a manuscript, title deed...” This definition indicates that a document can take many forms. According to Saunders et al., (2007), document review is a way of collecting data by reviewing existing documentation of a particular issue of interest. Thakur (2003) noted that such documents could be letters, memoranda, agendas, administrative documents, meeting minutes or newspaper articles. The researcher had to review statistics from the Ministry of Labour regarding the process and nature of conciliation and arbitration in terms of their time frame and in an endeavor to answer some of the research questions. Used in conjunction with interviews, the documents served to corroborate evidence in the interest of data source triangulation. They also provided a source of data that was both permanent and available in a form that could be checked relatively easily by others. The findings were thus more open to public scrutiny (Denscombe as cited in Saunders et al., 2007).

2.6 ETHICAL CONSIDERATIONS

Issues pertaining to employment relations are always confidential. The researcher took cognisance of all potential ethical issues by addressing individual organization’s concerns and upholding anonymity and confidentiality. Organizations were not forced to release any data which they were not comfortable with. This was done in order to uphold ethical principles as supported by Bell (2007:112) who argued that, “it remains the duty of social researchers and their collaborators not to pursue methods of inquiry that are likely to infringe human values and sensibilities...” Disregarding ethical principles endangers the

reputation of social research and the mutual trust between social researchers and society which is a prerequisite for research.

- The researcher made no use of misrepresentation of information, duress or undue influence as means to solicit information rather data was collected at the consent of the participants and full disclosure of the researcher's name and purpose for research.
- Confidentiality was prioritised pertaining to responses gathered through interviews whilst anonymity was catered for on the drafting of questionnaires.
- Information collected was used for academic purposes only and no other reasons.
- Bias in data analysis, data presentation and other aspects of the research was avoided at all costs.
- Openness was valued in areas such as sharing of data, results, ideas, tools, resources and was open to criticism and new ideas.

2.7 LIMITATIONS

- Confidentiality and or fear of victimisation leading to withholding of relevant, important and useful information likely stood out as a drawback. The researcher made sure that clarity to the respondents that the findings were specifically meant for academic purposes was made.
- Due to busy working schedules, the researcher faced difficulties getting hold of the respondents. To curtail this risk, appointments were secured well before interview dates and time.
- False and or irrelevant information emanating from misinterpretation of the questions might have resulted during the research. Use of jargon was minimised therefore so as to present questions that are basic and easy to interpret

2.8 DELIMITATIONS

This research looked into the effectiveness of conciliation and arbitration as dispute resolution mechanism in the Ferro-Alloy Industry. The study used the case of ZIMASCO and Zimbabwe Alloys International companies which are headquartered in Gweru and Kwekwe respectively.

2.9 CHAPTER SUMMARY

Chapter 4 furnished a discussion on the choice of methodology used to conduct the present research. The study is a descriptive research with a qualitative orientation. The researcher supported the choice of case studies as the appropriate strategy. Case selection and data collection method were fully discussed together with issues of generalisability, reliability, validity and triangulation. The issue of confidentiality was highlighted in line with ethical considerations. Chapter 5 deals with data presentation and analysis.

CHAPTER 5 - DATA PRESENTATION AND ANALYSIS

3.1 CHAPTER INTRODUCTION.

Data presentation and analysis assists the researcher to draw up findings, analysis, recommendations and conclusions to the research study. Penneerselvam (2005) stresses that proper tools and techniques should be used for classification and analysis of data. This chapter presents and analyse the results of the research study. The results are based on an examination of 2 organisations in the Ferro-Alloy Industry, Zimbabwe Alloys International and ZIMASCO. The data collected from the study is both qualitative and quantitative. Quantitative data was presented in the form of comments and tables. In line with the popular phrase “a picture is worth ten thousand words”. Thematic approach was employed for qualitative data. Due to their roles in conciliation and arbitration, responses are presented and demarcated along Management, Trade Union Representatives, and Labour Officers’ responses. However in cases where responses differed between companies, the distinction would be highlighted and analysed.

3.2 DEMOGRAPHIC DATA.

3.2.1 Response rate

The interview response rate was 100%. All the respondents from the 2 organisations availed themselves for the interviews as shown in Table 5.1a and 5.1b.

Table 3.1a: Interview Response Rate (ZIMASCO)

| | Sample | Number of Responses | % response rate |
|--------------------------|---------------|----------------------------|------------------------|
| Management | 5 | 5 | 100 |
| Trade Union Reps | 5 | 5 | 100 |
| General Employees | 5 | 5 | 100 |

Table 3.1b: Interview Response Rate (ZIMBABWE ALLOYS INTERNATIONAL)

| | Sample | Number of Responses | % response rate |
|--------------------------|---------------|----------------------------|------------------------|
| Management | 5 | 5 | 100 |
| Trade Union Reps | 5 | 5 | 100 |
| General Employees | 5 | 5 | 100 |
| Labour Officers | 3 | 3 | 100 |

The researcher is employed in the Ferro – Alloy Industry as a result appointments were easily arranged and granted. That is the reason why the researcher managed to get 100% response rate. Conciliation and arbitration becomes a topical area in a challenging business environment. As alluded to earlier, the Ferro – Alloy has not been spared from the current economic challenges affecting business viability. These challenges have precipitated organisations to device and implement strategies to ensure company survival. However most of the strategies and initiatives have left the Employer on a collision course with Labour a situation which saw an increase in the number of disputes registered for conciliation and arbitration. Conciliation and arbitration is prominent in organisations given the above background and the 100% response rate reflects how interested all parties are to the alternate dispute resolution mechanism given the surge in the number of disputes registered for conciliation and arbitration.

3.2.2 Demographic profile of the respondent organisations

The profile of participating organizations is shown in the number of employees vs the sample drawn from each company as shown in Table 5.2 below

Table 3.2: Respondent Organisations and Number of employees vs sample drawn

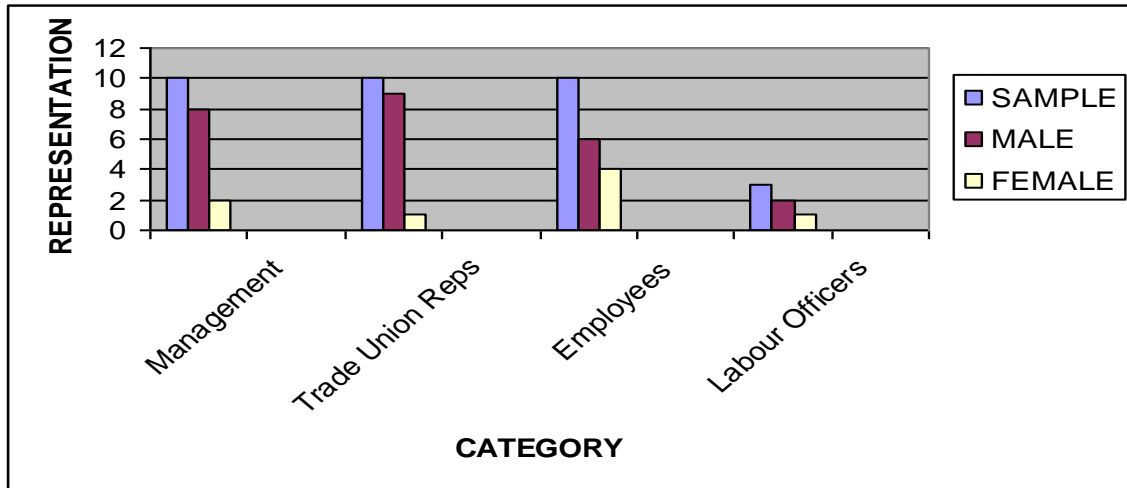
| | Population | Targeted Sample | Sample size |
|--------------------------------------|-------------------|------------------------|--------------------|
| Zimbabwe Alloys International | 460 | 15 | 15 |
| ZIMASCO | 1100 | 15 | 15 |
| Midlands Labour Officers | 9 | 3 | 3 |

Zimbabwe Alloys International employs 460 employees in total. Of these, 15 employees were drawn as sample for the study. The 15 employees are composed of 5 management representatives, 5 Trade Union Representatives and other 5 general employees who do not fall in any of the above category. The same principle also applied to the sample drawn from ZIMASCO which have a total of 1100 employees at the time of the study. The study mainly targeted those employees who are directly involved in the process of conciliation and arbitration. These are the employees who in most cases sit at National Employment Council. The Employee bench is represented by the Trade Union and the Employer bench is represented by the Management. Of the 9 Labour Officers in the Midlands region, 2 were chosen for this particular study and 1 Designated Agent. On the Labour Officer's side, the research also targeted Officers' who have previously dealt with dispute cases from the Ferro –alloy industry. The total Manpower levels for both Zimbabwe Alloys International and ZIMASCO is 1560 and it represents 75% of the total workforce in the Ferro – Alloy Industry. One can argue that the views gathered from the participants from 2 organisations can be generalised to the entire Ferro – Alloy industry.

3.2.3 Representation by gender from both organisations

The figure below outlines the representation of males and females from the sample drawn

Figure 3.1: Representation by gender



The figure above shows that of the 10 Management representatives, who participated in the study from both organisations, 2 were females and 8 were males. There were 4 males each from ZIMASCO and Zimbabwe Alloys International, and 1 female each from both organisations. On the Trade Union Representatives sample, 1 was female and 9 were males. This can further broken down into 1 female from ZIMASCO, 4 males and 5 males from Zimbabwe Alloys International. On the general employees' category 9 were males and 1 was female. Due to the nature of these companies' operations, females constitute less than 5% of total workforce. The operations at shop floor level are highly physical and manual as a result females struggle to adapt in such an environment. It is also important to highlight that companies are involved in a 24 hour operations which involve shift work and as a result the environment tend to be dominated by males in terms of numbers. Of the 3 Labour Officers, 2 were males and 1 was female. It is also important to note that few women participate in Trade Unionism because women generally are known to accept the status quo without question hence they are not motivated to participate actively in Unionism and other Labour bodies. To this end women responses from the Trade Union and general employees' category did not reflect a critical voice but was more of accepting the current scheme of things as far as conciliation and arbitration is concerned. Women are generally known as people who conform to the dictates of a given system without question.

3.2.4 Length of service of respondents

One important element which is of paramount importance is the length of service of the respondents. The table below shows experience in the Ferro-Alloy Industry

Table 5.3: Work Experience

| CATEGORY | ZIMASCO | | | | | ZIMBABWE ALLOYS INTER | | | | |
|-------------------|----------|----------|----------|----------|----------|-----------------------|----------|----------|----------|----------|
| | 0-5 | 6-10 | 11-15 | 16-20 | 20+ | 0-5 | 6-10 | 11-15 | 16-20 | 20+ |
| MANAGEMENT | 0 | 1 | 3 | 1 | 0 | 1 | 1 | 2 | 1 | 0 |
| TRADE UNION REPS | 0 | 1 | 2 | 1 | 1 | 0 | 2 | 2 | 0 | 1 |
| GENERAL EMPLOYEES | 0 | 1 | 1 | 2 | 1 | 0 | 1 | 1 | 2 | 1 |
| TOTAL | 0 | 3 | 6 | 4 | 2 | 1 | 4 | 5 | 3 | 2 |

The above table shows that only 7 management representatives from both organisations have more than 10 years experience in the Ferro-Alloy Industry. 2 are found between 6 – 10 years category and 1 have below 5 years experience. On the Trade Union representatives, 3 have between 6 – 10 years working experience in the Ferro – Alloy industry, 7 had more than 10 years experience. On the general employees’ side, 2 had more than 20 years working experience, 6 has between 10 – 20 years and 2 between 6 – 10 years.

The operations from two companies have more than 50 years hence it explains why we find people who have more than 20 years experience with the company. The researcher targeted respondents who had more experience in the Ferro –Alloy because they were bound to possess wealthy data in terms of the research under study. Those with more than 10 years experience have witnessed the legal transformation and changes in terms of conciliation and arbitration hence were trusted to give an indepth data in terms of current regulatory environment in comparison to the yester-year legal framework. Experience

within Ferro – Alloy Industry can be directly proportional to the experience gained of conciliation and arbitration process in the same industry.

On the Labour Officers, 1 had more than 10 years experience and 2 fell between 6 – 10 years experience.

3.2.5 Educational Qualifications

The table below shows the level of academic qualifications of the respondents

Table 3.3: Educational Qualifications

| CATEGORY | ZIMASCO | | | | | ZIMBABWE ALLOYS INTER | | | | |
|-------------------|-----------|----------|----------|----------|----------|-----------------------|----------|----------|----------|----------|
| | Post Grad | Degree | Dipl | O'Lev | ZJC | Post Grad | Degree | Dipl | O'Lev | ZJC |
| MANAGEMENT | 2 | 2 | 1 | 0 | 0 | 1 | 3 | 1 | 0 | 0 |
| TRADE UNION REPS | 0 | 0 | 1 | 3 | 1 | 0 | 0 | 2 | 3 | 0 |
| GENERAL EMPLOYEES | 0 | 0 | 1 | 3 | 1 | 0 | 0 | 1 | 2 | 2 |
| TOTAL | 2 | 2 | 3 | 6 | 2 | 1 | 3 | 4 | 5 | 2 |

The table above shows that from the 10 Management representatives who participated in this study, 3 are Masters holders, 5 are degree holders as maximum qualification and 2 diploma holders. The 2 companies' operations are highly technical especially on the processing plant and its imperative that those who sit at Management level should at least have a minimum of a diploma. On the Trade Union Representatives, 3 have diplomas, 6 attained O'Level and only 1 has ZJC. On the general employees' category, 2 are diploma. 5 managed to attain O'Level At shop floor level, serve for a few, the majority have O'Level or less qualifications. These are usually plant operators, machine operators, assistant technicians and general hands. In selecting their representatives in the Trade Union body, general employees also consider qualifications because Trade Union Representatives are expected to interpret legal statutes and coming up with position papers during arbitration and conciliation. Trade Union Representatives have a better understanding of conciliation and arbitration because unlike Workers Committee

Representatives, Trade Union as a body has the legal standing to represent employees on conciliation and arbitration.

Table 3.4: Educational Qualifications (Labour Officers)

| CATEGORY | Post Grad | Degree | Diploma |
|------------------------|------------------|---------------|----------------|
| LABOUR OFFICERS | 1 | 2 | 0 |

On the Labour Officer’s category, 1 has a master’s degree and 2 are degree holders.

All labour officers have a minimum of a degree in line with the provision of the Statutory Instrument (SI) 173 of 2012 which prescribed that Labour Officers must possess a minimum qualification of a University Degree. This requirement was precipitated by previous researches which uncovered that the then Labour Officers lacked the intellectual dexterity to interpret the legal statutes. Madhuku (2010) conducted a study on behalf of the International Labour Organisation where he highlighted that Labour legislation, regulating conciliation and arbitration in Zimbabwe prescribed no minimum qualifications for principal actors and was impacting negatively on their capacity to preside over cases and come up with sound judgments.

3.2.6 Age Groups

Table 3.5: Age Groups

| CATEGORY | ZIMASCO | | | | ZIMBABWE ALLOYS INTER | | | |
|-------------------|----------------|--------------|--------------|------------|------------------------------|--------------|--------------|------------|
| | 20-30 | 31-40 | 41-50 | 50+ | 20-30 | 31-40 | 41-50 | 50+ |
| MANAGEMENT | 1 | 1 | 2 | 1 | 0 | 2 | 2 | 1 |

| | | | | | | | | |
|--------------------------|----------|----------|----------|----------|----------|----------|----------|----------|
| TRADE UNION REPS | 0 | 1 | 3 | 1 | 0 | 1 | 4 | 0 |
| GENERAL EMPLOYEES | 0 | 2 | 2 | 1 | 0 | 1 | 3 | 1 |
| TOTAL | 1 | 4 | 7 | 3 | 0 | 4 | 9 | 2 |

The table above shows that of the 10 management representatives who participated in this study, only 1 member is aged 50 years and above. 6 falls between 41 – 50, 2 are between 31 – 40 and only one is between 20 – 30 years of age. On the Trade Union Representative category, also 1 member is above 50 years of age. 7 are between 41 – 50 years of age and 2 between 31 – 40 years of age. On the general employees’ category, 2 are above 50 years, 5 falls between 41 – 50 years and 3 are between 31 – 40 years of age. Of the 3 Labour Officers who participated in this study, 2 falls between 31 – 40 years and 1 is between 41 – 50 years of age. The issue of age is related to the experience in the Ferro – Alloy industry and those who have experience and more years are likely to give a critical analysis to a given or present scenario.

3.3 THE PROCESS OF CONCILIATION AND ARBITRATION IN THE FERRO – ALLOY INDUSTRY

Data on the responses of conciliation and arbitration will be presented together because the responses indicated that the process is the same in both organisations. However dichotomy in terms of responses between the two organisations will be highlighted. The research uncovered that both Management and Trade Union Representatives are well conversant with the process of conciliation and arbitration. All Trade Union representatives from both organisations noted that the process kick starts with the appellant registering a dispute with the D.A or Labour Officer from the Ministry of Labour. 80% of the Trade Union Representatives from ZIMASCO pointed out that they prefer to register their dispute with the Industry’s D.A to the Ministry of Labour Officials. They pointed that the D.A’s route is quicker than the Labour Office route given to what they termed a ‘cordial working relationship’ with the D.A. On the other hand 60% of Trade Union Representatives from Zimbabwe Alloys International highlighted

that the nature of the dispute determines and influence which option to take, either the D.A or the Labour Officers from the Ministry of Labour. All General employees from Zimbabwe Alloys International reiterated that they were not involved in the decisions on which options to take. One employee pointed out that;

“Vamiririri vedu mu Trade Union ndidzo nhume nenhungamidzo dzedu, ndivo vanovhura nekutinongedzera nzira isu totsika nepavanongedzera” (We have entrusted Trade Union Representatives with the mandate to make decisions on which course or path to take and we simply follow)

All Management Representatives noted that the process of conciliation and or arbitration kick starts wen they are served with nomination papers to attend a conciliation hearing. On his visit to ZIMASCO, the researcher was lucky to coincidentally arrive with one D.A serving notification papers for a conciliation hearing to Human Resources. All Management Representatives from ZIMASCO and Zimbabwe Alloys International highlighted that notification papers are normally served by the D.A and in few cases by the appellant. 80% of Management Representatives from Zimbabwe Alloys International highlighted that the notification from the Ministry of Labour is mainly done through telephone. One management representative from Zimbabwe Alloys International pointed out that

‘We are summoned to come and collect notification papers within a specified period of time failure to which the conciliation hearing would be convened in our absence to the possible detriment of our interest’

60% of Trade Union Representatives from ZIMASCO in continuation of the above noted that the D.A, whom they regarded as ‘gwevedzi’ (Go between) arrange a meeting in order to try to bring two parties together. 90% of Management Representatives from both organisations (50% from ZIMASCO and 40% from Zimbabwe Alloys International) and all Trade Union Representatives from both organisations reported that normally the conciliation outcome is determined in 1 sitting. One Labour Officer confirmed the above postion and reiterated that

“Our role is limited to advisory and brings disputants together, we recommend a dosage rather than to prescribe and force down a dosage, as a result the outcome is more determined by the disputants themselves than the principal officer”

All Labour Officers highlighted that failure to recommend a mutually agreeable settlement to a dispute means that the matter is referred for arbitration. From secondary sources at the D.A offices there was evidence that 90% of cases brought for conciliation are not settled at that level and as a result are forwarded for arbitration. The statistics were confirmed by 60 % of Management Representatives from Zimbabwe Alloys International and 40% of Management Representatives from ZIMASCO. The Labour Officers also reiterated that both disputants are given an opportunity to choose whether they prefer a private or public arbitrator. One Labour Officer noted that cases which involve Unionised employees usually take the private route and those which involve one individual who is not under union takes the public route but however confirmed that such cases were very minimal in the Ferro –Alloy Industry.

80% of Trade Union Representatives (40% from Zimbabwe Alloys International and 40% from ZIMASCO) indicated that the arbitral process starts with the submission of written arguments to the Arbitrator. This position was confirmed by all Management Representatives from both organisations who noted that the next level is the oral hearing. One Management Representative from ZIMASCO highlighted that

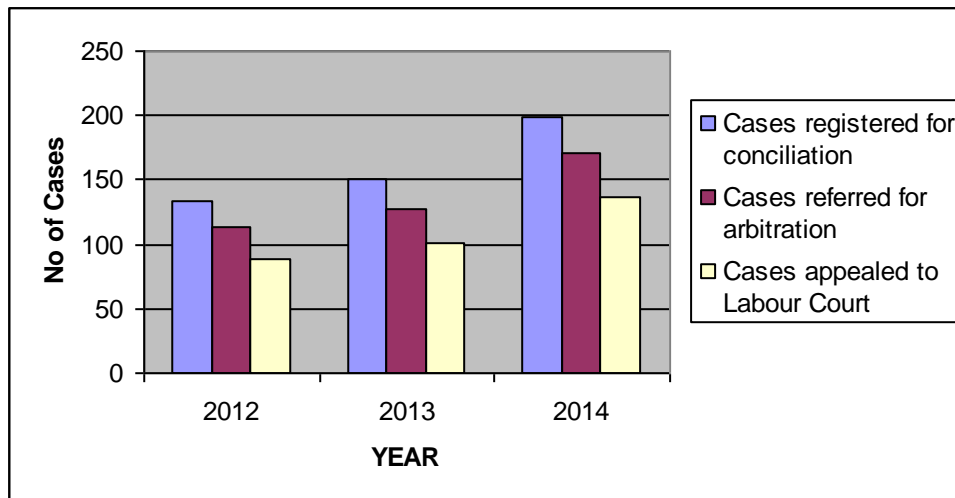
“The oral hearing serves as a follow up to the written submission where we provide proof and substantiate our written submissions”

Two Labour Officers highlighted that the process of arbitration is very long. One Labour Officer noted that the process is long because to begin with dispute resolution mechanism is a negotiation and negotiation is not an event but a process. The Labour Officer could not be drawn into time frames but 60% of Trade Union Representatives from both organisations (30% from Zimbabwe Alloys International and 30% from ZIMASCO) pointed out that the process can take as long as 36 months if its dwelt with by the Ministry of Labour Officials and 12 months with private Arbitrators. All Labour Officers

pointed out that after weighing both heads of arguments they then give an award which is enforceable and binding but not final. They even noted that 80% of the awards are being contested to the Labour Court. One Labour Officer provided the progression of cases from the conciliation through arbitration to the Labour Court for year 2012 to year 2014 from secondary data.

3.3.1 Progression of cases.

Figure 3.2: *Progression of cases from conciliation to the Labour Court*



The table above shows cases registered for conciliation and those which are then referred for arbitration. The Labour Officer indicated that the number of cases, from those referred for arbitration, whose awards are contested at labour court. He added that the table shows that 90% of the conciliation cases are referred for arbitration and 80% of those are contested further.

One can deduct from the data presented on the table above that the majority of cases goes beyond conciliation and arbitration. The non binding nature of conciliation process has contributed to the reason why 9 out of 10 cases are not solved at the conciliation stage. Also the limited powers of conciliators have impacted negatively on effectiveness of conciliation as an alternate dispute resolution mechanism Also the non-finality of arbitral awards and the provision for an appeal have precipitated the reason why 8 out of 10 cases

are contested at Labour Court. This is inline with Chulu (2010) who noted that the legal structure has created a perception among parties that conciliation and arbitration are just but procedures to be followed towards the Labour Court.

The data on the process on the process of conciliation and arbitration in the Ferro – Alloy generally conforms to the process as outlined on Section 93 – 98 of the Labour Act (Chapter 28:01). The process exposes some gaps in the legal framework, interms of guidelines on conciliation, the absence of time limits among other factors. As a result there are cases where some procedures are left at the prerogative of the principal officer yet the legal structure should guide the process to ensure uniformity. The research also uncovered another anomaly where the process of conciliation and arbitration slightly differed from the provisions of the law. The Labour Act prescribe that “.....in the case of compulsory arbitration, it is the Labour Officer who, after consulting a Labour Officer senior to him and to whom he is responsible in the area in which he attempted to settle the dispute refers the matter to an Arbitrator from a list provided by the Minister in consultation with the Senior President of the Labour Court and the fitting advisory council.” (Labour Act Chapter 28:01 of 2005). The research established that the consultations are never done and that it is the sole responsibility of the Labour Officer to make the appointment of the arbitrator.

From the data presented above, Trade Union Representatives from ZIMASCO highlighted that they prefer that all their conciliation proceedings be handled by the D.A for the Industry. This has been precipitated by the fact that the D.A for the Ferro – Alloy Industry is based in Kwekwe and ZIMASCO is also headquartered in Kwekwe. So interms of accessibility, the D.A is more accessible than the provincial Labour Offices in Gweru which is 60km away from Kwekwe. The Zimbabwe Alloys International Trade Union Representatives also pointed out that their choice of procedure is influenced by the nature of the case. This is because Trade Union Representatives from Zimbabwe Alloys International are Para-legal representatives and have a deeper understanding of differences between two procedures and their outcomes. It is interesting to note that the two parties differed on where the process of conciliation and arbitration really starts. This

is because Trade Union representatives are in most cases the appellant, as a result theirs starts at registration of a dispute with the Labour Officers. On the other hand, Management/Employer is in most cases the respondent, and to this end their process kick starts with the reception of nomination papers. It is however important to highlight that both parties gave similar accounts of the process of conciliation and arbitration. However on the general employees' side, ZIMASCO employees seemed to be more conversant with the process of conciliation and arbitration than the Zimbabwe Alloys International side. This could be attributed to the fact that in the sample under study, ZIMASCO employees are better in terms of academic qualifications than their Zimbabwe Alloys International counterparts.

According to the above presented data, it was reported that the D.A is responsible for serving nomination papers unlike in the Ministry of Labour where the appellant or telephone is used to inform the respondent. The D.A is better resourced than the Ministry of Labour Officials because of the access to vehicle among other advantages. The State does not have a vehicle specifically allocated for that purpose there by further lengthening the dispute resolution mechanism and impacting negatively on its effectiveness as an alternate dispute resolution mechanism. Gwisai (2007) made the same findings in the Construction sector where he noted that disputes which are dwelt and handled through the D.A's office progress faster than those which are handled by the Labour Ministry due to availability of resources at the disposal of the D.A's office.. The findings presented also reported that 90% of cases brought for conciliation are forwarded for arbitration. The statistic on its own shows that conciliation is not achieving what it was intended to achieve. Mariwo (2008) attributed this to the fact that Conciliators' role is not to pronounce judgments but to make parties appreciate the legal provisions of the dispute. Also the non – binding nature of conciliation proceedings and outcomes could also be a contributing factor why 9 – 10 cases find their way to arbitration.

3.4 STRENGTH OF CONCILIATION AND ARBITRATION IN THE FERRO – ALLOY INDUSTRY

3.4.1 Convenience

Convenience was highlighted as one of the strengths of conciliation and arbitration. 80% of Management Representatives from both organisations (40% from ZIMASCO and 40% from Zimbabwe Alloys International) noted that the process of arbitration and conciliation was convenient. One Management representative from ZIMASCO even highlighted that

“Conciliation and arbitration as a process is less complex and less intimidating and thereby open even to the shop floor worker”

The other 20% was mum and neutral on the issue of convenience. One Management representatives from Zimbabwe Alloys International pointed out that the fact that Management is summoned to collect nomination papers on rigid and specified time frames and with stringent conditions attached means that the process is to a lesser extend flexible.

All Trade Union representatitives from both organisations highlighted that the absence of conciliatory fees and the familiar environment within which the process is held is accommodative and open to all. 60% of Trade Union Representatives from ZIMASCO reiterated that the D.A office in Kwekwe is an open office to them and they are now familiar with the D.A to the point that they can even access the office without an appointment and get service. One Management Representative from ZIMASCO weighed in and reiterated that;

“The D.A is a full time Ferro – Alloy National Employment Council employee who has a better understanding and appreciation of the operations within the Industry and hence better placed to preside over disputes at an elementary stage.”

However on the general employees' category, 40% from Zimbabwe Alloys professed ignorance of the process of conciliation and arbitration arguing that they were not well conversant with the process. However 90% from ZIMASCO acknowledged that they were well conversant with the process. As highlighted above this could be attributed to the difference in level of academic qualifications of respondents from both companies. Also the D.A is based in Kwekwe, where ZIMASCO is headquartered so in terms of easiness and availability, the D.A is more available to ZIMASCO employees than any other player in the Ferro-Alloy Industry. One employee from ZIMASCO highlighted that;

“D.A mwana wemumusha medu, anonzwa nekugadzirisa zvigozhero zvedu semwana wemumusha” (We feel the D.A is part of us, who listens, understands and attends to our in-house disputes and resolve them)

2 Labour Officers also highlighted that part of their responsibility is to train and conscientise Trade Union Representatives and general employees on the provision of conciliation and arbitration. The Labour Officers however noted that Trade Union representatives are the only party that usually shows interests in the process of conciliation and arbitration. One Labour Officer also pointed out that the main function as principals is to restore sanity at workplace through creating a convenient and accessible environment which allows or enhance quick closure to a given dispute.

As presented above, one can analyse that the presence of the D.A in the Ferro – Alloy industry have gone a long way in bringing convenience to the process of conciliation and arbitration. The D.A is a full time employee of the industry whose main role among others is to conciliate cases which fall under her industry. As a result few cases go to the Ministry of Labour for conciliation as a result both parties feel the process is convenient. It can also be related to the absence of conciliation costs which have precipitated respondents to acknowledge that the process is highly convenient. Trudeau (2002: 61) noted that “.....a process can be said to be convenient and accessible if the costs of resorting to it are not prohibitive”. Given the fact that there are no conciliatory fees paid, the process becomes convenient. Both parties were silent on the influence of the

regulatory environment on conciliation and arbitration. Mariwo (2008) acknowledged that an enabling legislation is a critical element in the convenience and accessibility of a given dispute resolution mechanism convenient.

The issue of convenience attached to the processes of conciliation and arbitration seemed to have contributed positively to the effectiveness of conciliation and arbitration. An open system affords an environment or ground where parties can advance and register their dispute without fear or without facing rigorous challenges. An accessible and convenient system also has a positive effect on a speedy of the process and consequently speed the resolution of disputes (Madhuku, 2010). However despite both parties acknowledging the easy accessibility they enjoy when using the alternative dispute resolution mechanism, they did not specify whether the accessibility associated with the system was contributing to the effectiveness of the system. A system can be accessible but have other numerous challenges which would make the system ineffective.

3.4.2 Expediency and reduction of red tape

All Management representatives from both companies acknowledged that they were fairly happy with the swiftness of conciliation and arbitration. 80% of Management representatives from ZIMASCO they were relatively satisfied with the swiftness on conciliation because the resolution is usually passed in one sitting. 60% Management Representatives from Zimbabwe Alloys International also noted that they were also relatively contented with time taken by arbitrators to hand down the award. One Management representative from Zimbabwe Alloys International has this to say;

“Unlike the court system which is marred with complexities and backlog in terms of cases and as a result, disputes takes time to resolve, conciliation and arbitration brings relief in terms of time because employer and the employee can influence the process”

80% of Management Representatives from both organisations (40% from ZIMASCO and 40% from Zimbabwe Alloys International) conceded that the process which go through

the involuntary route (public or government arbitrators) takes more time than the voluntary arbitration (private or independent arbitrators) which is relatively fast and arbitrators stick to pre agreed time lines.

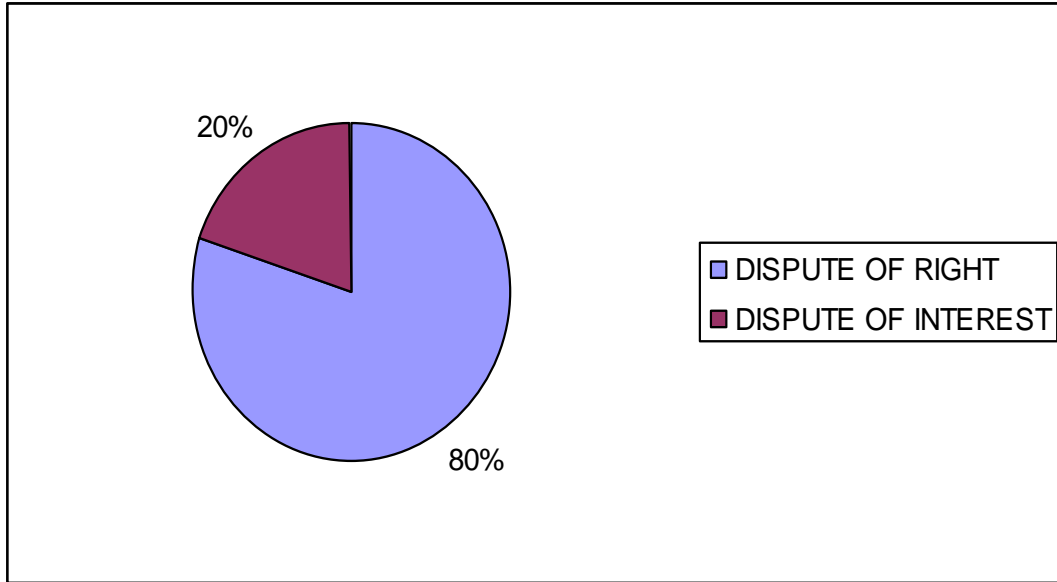
60% of Trade Union Representatives from ZIMASCO were however specific and highlighted that cases which are usually quantifiable normally take time to resolve where management feels they do not have capacity to meet the costs. 80% of Trade Union Representatives from Zimbabwe Alloys International also mirrored the same position, however one was more explicit and emotional and pointed out that

“Conciliation and arbitration as a system is quick but management sometimes play games or abuse the system and thereby delay justice by asking for postponements or any other excuses to frustrate the process”

All Labour Officers confirmed that conciliation resolutions were mainly passed in one sitting but were quick to point out that however 90% of the cases were referred for arbitration. One Labour Officer also echoed the same sentiments from the Trade Union Representatives where the Labour Officer pointed out that the issues with regards to underpayments of salaries usually go beyond arbitration and conciliation. The Labour Officer pointed out that 80% of disputes in the Ferro –Alloy Industry falls under dispute of right and as a result these cases are difficult to resolve at conciliation given the limited powers vested in the Principal Officer.

3.4.3 Disputes by Category

Figure 3.3: Categories of dispute as presented by the Labour Officer



The Labour Officer highlighted that the dispute of right involve disputes which emanates from failure by either party to afford an entitlement. The majority of cases emanates from the contractual obligations. He also pointed out that disputes of right are disputes with regards to legal rights and obligations or breach of contract. A dispute of interest on the other hand refers to any dispute which does not fall in the given category which a disputant is seeking entitlement.

Whereas other researchers such as Mariwo (2008) bemoaned the delays encountered in resolving disputes through arbitration in the private security sector, this research found that both management and employees were relatively satisfied with the promptness of resolving cases through conciliation and arbitration. This is a significant finding because in the Labour Act 28:01, there are no time prescriptions on arbitration cases. Trudeau (2002) highlighted that speed is a positive factor in the resolution of disputes. However speed of the process without resolution of the underlying dispute is meaningless. Although the concluding times were given a thumbs up by the respondents, in the majority of cases, conciliation and arbitration did not bring finality to the disputes. The concluding of conciliation and arbitration cases can only be a positive development if the

outcome brings finality and settlement of the dispute registered. In as much as conciliation and arbitration processes are expeditious, they may run the risk of being useless motions which do not yield the result that they were intent to do. According to Duve (2013) conciliation and arbitration were adopted as alternate dispute resolution mechanism to counter the longer and winding court system which is ineffective in terms of speedy resolution of disputes. Speed and expediency has to be accompanied by substantive relevance of the process for it to be a positive indicator of effectiveness. Chulu (2010) agreed that acceleration and expediency is a key feature of assessing effectiveness.

As presented above some Trade Union Representatives and Labour Officers indicated that there are some cases which take time to resolve and finalise despite glaring proof beyond doubt that the employer has breached a right. The researcher concluded that employers capitalise on the gap in law in terms of time limits hence the delay in the resolution of disputes. It was also uncovered that the Ministry of Labour as a State department seems to be inadequately resourced to ensure a speedy and timely resolution of a registered dispute thereby impacting negatively on the effectiveness of the dispute resolution mechanism. Mariwo (2008) in his research on the speedy resolution on dispute noted that in most cases it is usually the Employer who capitalise on these logistical challenges affecting the Ministry to dodge and drag its feet to respond and acknowledge receipt of nomination papers. This is consistent with findings from Trade Union Representatives' responses. The researcher noted that there exist another gap in terms of regulations governing the service of nomination papers and the procedure differs with case to case (Labour Act Chapter 28:01). The appellant in most cases is burdened with the responsibility of informing the respondent. To this end one can argue that the gap in terms of current legal structure also contributes or impact negatively on the effective and expeditious resolution of disputes.

It is important to note that the Ferro – Alloy has been faced with various challenges as a business since the dollarisation era. The ever increasing cost of production against plummeting and depressed metal prices on the World market has impacted negatively on

company operations and capacity to meet its contractual obligations among other obligations. Employers in the Ferro –Alloy has been battling to control their cost platform in order to ensure business viability. Labour costs have not been spared on rationalisation but unfortunately this has placed Employer and Employees on a collision course. As a result there has been a sharp increase on the number of cases registered for conciliation and arbitration with the majority emanating from the dispute of right. Mariwo (2008) undertook a research at the height of hyper inflationary environment in Zimbabwe and confirmed the above findings that dispute of right are precipitated by an unstable economy where companies struggle to meet their wage bill obligations. This explains why most cases are found on the breach of a right category as presented on the chart above.

3.4.4 Less prescribed and directed

Both Management and Trade Union representatives from both organisations acknowledged that the process of conciliation and arbitration was less prescribed and directed which gives the processes an edge over the complexities associated with the court litigation route. 90% (50% from ZIMASCO and 40% from Zimbabwe Alloys International) confirmed the above position. 40% of the Management Representatives from ZIMASCO were explicit when they attributed this to the fact that most conciliation cases in the Ferro – Alloy Industry are presided over by the D.A whom all parties are familiar with which brings flexibility in the process even in terms of appointments and hearings. One Management representative from Zimbabwe Alloys International noted that;

“The court litigation route has certain strict regulations which parties have to adhere to and operates on rigid schedules that are not accommodative to both parties”

All Trade Union Representatives from ZIMASCO echoed their Management position where they highlighted that they are comfortable with conciliation and arbitration because it is less formal. They added that the D.A’s office is not strictly formal and can

therefore register their disputes without fear of anything. 60% of Trade Union Representatives from Zimbabwe Alloys International however separated the two procedures where they highlighted that conciliation provides a less strict environment than arbitration where some rules are rigid and may not be good for dispute resolution process.

All Labour Officers pointed out that conciliation and arbitration were designed in such a way that it gives the disputants chance to settle their dispute on their own with a help of the third person who is neutral who directs the proceedings. One Labour Officer advised that

“Our role as Labour Officers is not to write a judgement upon parties in disputes but we strive to creat an environment that pushes parties in disputes to craft and construct their own solution which is beneficial to both Business and Labour, a dictated award is only granted when negotiation fails.”

From the data presented above one can point out that presence of the D.A in the Ferro – Alloy Industry impacted positively to the alternate dispute resolution mechanism. The D.A is an employee of the Industry whom all parties are all familiar with and deals with her on numerous occasions. The D.A is responsible for numerous trainings to companies that fall under the Ferro-Alloy Industry hence both parties have a relationship with their D.A. This has made the D.A office accessible and less formal hence both parties can easily approach the office in case of disputes. It is then expected that all parties should view conciliation and arbitration as less formal.

The findings mirrors Bendix (2000) who opined that the often convoluted rules of evidence and procedure do not apply in conciliation and arbitration proceedings making them less stilted and more easily adapted to the needs of those involved. It is important to highlight that because of the nature of the Ferro – Alloy operations, the industry is deemed to have Trade Union Representatives who are not highlyly educated. As a result these groups are not comfortable with technical systems which are usually complex

and rigid. To this end, the process of conciliation and arbitration is less rigid and directed than the court litigation system. A less prescribed and directed procedure

One can argue that the presence of a familiar mediator, who understands both parties and have a relationship with both parties, may contribute effectively to the resolution of disputes. It is of paramount importance to note that the D.A can make use of the familiarisation and less formal environment to bring parties closer. A relationship can be build from a less prescribed environment and both disputants can realise that they have more in common than what separates them. However from the research findings, the D.A categorically stated that 90% of the cases go beyond the conciliation. This indicates that yes the environment within which the conciliation is conducted is less formal but this does not have an effect on the effectiveness of the system as a dispute resolution mechanism. One can be forgiven to conclude that maybe one party or both parties may abuse the less formality associated with the process of conciliation and arbitration, with conciliation specifically, and fail to abide by the resolution of the conciliation. As reported from the findings, Trade Union Representatives reported that employer sometimes fail to honour resolutions made at conciliation, a resolution which contains his fingerprints. Muza and Matsikidze (2009) highlighted that the implementation of conciliation resolution seems to hinge on the premise of good will. This has seen cases which previously seemed resolved at conciliation resurfacing at arbitration again.

The less formal tag associated with conciliation is normally based on the non-binding nature of the resolutions set and that the resolutions are constructed by both parties who try to creat a win – win situation brought about by concessions and negotiations. There is no clear and explicit framework which guides the process of conciliation. Unlike arbitration, where there is an arbitration act which deals with the conduct of arbitration system, there is no such instrument at conciliation. As a result the process becomes less formal and either party can abuse the system. Gwisai (2007) also substantiated the above position where he noted that the absence of a clear framework in the conduct of the conciliation process has retarded the effectiveness of conciliation

3.4.5 Discreet and confidential processes

80% of the Trade Union Representatives from both organisations (40% from ZIMASCO and 40% from Zimbabwe Alloys International) highlighted that conciliation and arbitration proceedings are held in a closed environment which promotes confidentiality and respect. However 20% of Trade Union Representatives from both organisations pointed out that confidentiality associated with conciliation and arbitration plays to the advantage of employees. One Trade Union Representative argued that

“Some certain level of publicity is needed in order to push Management to implement resolutions especially at conciliation stage.”

80% of the general employees from Zimbabwe Alloys International noted that Management usually takes time to implement a resolution from a conciliation hearing especially if the outcome involves a lot of money.

All Management Representatives pointed out that conciliation and arbitration proceedings and outcome is not open for public consumption to protect both business and employees. 2 Management Representatives from ZIMASCO revealed that the confidentiality issue has actually enhanced the chances of the procedures to achieve discipline. 2 Labour Officers noted that conciliation and arbitration is private not by default but by design. One Labour Officer opined that;

“The only parties which really appreciate the gravity of the dispute are those in dispute hence conciliation and arbitration was designed to give 2 parties which are in dispute a chance to devise their own solution without the influence of the public”

As provided above all respondents highlighted that confidentiality and independent nature of conciliation and arbitration plays as its strength. They replicated Salamon (1992) opinion that the alternate dispute resolution mechanism’s proceedings and resolutions are not supposed to be for public record. However as presented, some sections felt the secrecy and closed nature of the process plays to the advantage of the employer.

This is in line with Pharaoh Maitireyi (2013) research on implementation of conciliation and arbitration awards, his findings established that 90% of conciliation awards are not usually implemented and noted that Management fails to honor a resolution that they have helped to construct

The issue regarding confidentiality saw flat contradicting positions from the Management and Trade Union Representatives. It can be connected to the fact that most of the outcomes or awards handed down are to the detriment interests of the employer hence Management would like to keep that under carpet. They wouldn't want proceedings and outcomes to be over publicised because they are in most cases found on the wrong side of the law. On the other hand publicity will have a positive effect to the Trade Union as a body and its membership and that might also increase its membership as many people would want to fall under an effective body which takes employer head on and bring results. Also in terms of honoring conciliation resolutions, one can argue that maybe employers help construct a resolution which they know they will not implement given the secrecy and non-binding nature of the outcome. If the outcomes were out for public consumption, that would force Employers to abide by its resolutions. The confidentiality and privacy associated with the alternate dispute resolution mechanism has played into the tune of employers who have the tendency to skip and dodge conciliation resolutions and arbitral awards.

The growing volume of Labour cases in Zimbabwe has been precipitated by the economic challenges the country is currently facing and as a result companies, not only under Ferro –Alloy Industry, are operating in a challenging business environment and way below optimum capacity. This environment has seen employers failing to meet other contractual obligations hence Labour, through their representative bodies have resorted to alternate dispute resolution mechanism to seek recourse. No employer would be comfortable with the publication of such issues as that would be tantamount to an everyday fight between employer and employees. Matsikidze (2013) noted that for public listed companies that would have a negative impact on market perception and consequently negatively influence share prices. Employers usually hide behind issue of

privacy and confidentiality issues but the main reason is because negative publicity is bad for business.

In terms of relationship between confidentiality and effectiveness, one would point out that privacy tend to render the system ineffective. If litigation cases are publicised in newspapers and carried out in a public court of law, conciliation and arbitration proceedings and outcomes should also be available for public consumption and scrutiny (Duve, 2009). Even Conciliators and Arbitrators would provide efficient service and deliver sound awards because they would be aware that their work is out for public scrutiny. Matsikidze (2013) noted that while the issue of privacy is meant to provide disputants parties to have one on one relationship without external interferences and judgments, which would ensure a negotiated settlement to a registered dispute, the outcome should then be made public. Privacy as an element has its own merits and demerits but on the study under analysis it can be argued that the high degree of privacy associated with the conciliation and arbitration has impacted negatively on justice delivery.

3.4.6 Less antagonistic and oppositional.

All 3 Labour Officers highlighted that the process of conciliation and arbitration was less antagonistic and oppositional. Two of the Labour Officers attributed this to the fact that both disputants are involved in the construction of the resolution unlike the court litigation system where decision is prescribed and written upon. 80% of Management Representatives from Zimbabwe Alloys International applauded the interactive environment being afforded by the conciliation and arbitration process. One Management Representative expanded this position when he pointed out that

“The interaction process in the presence of a neutral third party is critical in that it creates a conscious awareness that both parties have more in common than what separates us”

60% of Management representatives from ZIMASCO also mirrored the above position and added that the environment created by arbitration and conciliation is less confrontational and that enhances chances of coming up with a mutually beneficial settlement.

However 90% of Trade Union Representatives from both organisations (50% from ZIMASCO and 40% from Zimbabwe Alloys International) argued that Management dominates conciliation and arbitration hearings because as the employer they control resources within the organisation. They argued that the court system is better because it levels the playing field. 40% of the general employees from ZIMASCO also observed that employers sometimes have influence over the process because they control the financial resources and that puts their constituency at a disadvantage.

According to Salomon (1992), the antagonistic dispute resolution mechanism is at face value a challenge because, as a starting point it looks for a right and wrong. However in the labour related dispute sometimes it is difficult to try to resolve a dispute with that preconceived mindset. Even in a dispute of right employees and management provides their heads of arguments and at times a dispute might have been caused by other forces which are outside the control of either party. For example, many Employers have rationalised salaries in line with capacity utilisation and employees have approached Ministry of Labour to seek recourse. This is a dispute of right but if subjected to an antagonistic dispute resolution mechanism, it might provide a win – lose situation which might have negative effects to the business and employers' capacity to pay. This is the reason why employers appeal some cases for the sake of buying time. However such cases need a less adversarial dispute resolution mechanism where disputants are given a platform to come up or construct a mutually beneficial resolution. This is the main reason for conciliation, where the Conciliator's main role is to mediate and guide disputants to mutually beneficial resolutions and point out the legalities and technicalities of not finding a mutually benefiting resolution. It can be argued that parties have the tendency to implement or abide by the resolution that they have helped to construct. However research finding does not confirm to this position since it has been established that 90%

of conciliation cases are forwarded for either voluntary or involuntary arbitration.

It is important to highlight that 20% of the Trade Unions Representatives who preferred the less antagonistic route to dispute resolutions are those who were above 50. This can be attributed to the idea that usually people of old age prefer a negotiated settlement of dispute unlike a prescribed resolution. Old age is associated with issues of negotiations, non-confrontational and even at family set up, these are the people who are usually put at the fore front when you are to engage in negotiations of any kind. The 80% prefers an adversarial route because they feel at the negotiating table employers have more power and influence. Chulu (2010) confirmed the above findings where he noted that in most cases management prefers the non-adversarial route because they want to give an illusion of equality while they advance their interests.

Chinherende (2008) conducted a study where he, among other objectives, tried to investigate why the court litigation system to dispute resolution was more popular than the less adversarial conciliation and arbitration route in the mining sector. His study was conducted at the height of hyper-inflationary environment which also witnessed a growth in labour related matters. His findings are in tandem with the findings of this study where opinions were divided along managerial and non managerial lines. He uncovered that management seems to have faith in the less adversarial and less antagonistic route because they feel they have the advantage over the weaker party, which is the employees. However his conclusions were that the less adversarial and antagonistic route seems to be more effective because it creates an interactive process which is critical for relationship building and consequently ensure resolution and finalisation of disputes.

3.5 CHALLENGES OF CONCILIATION AND ARBITRATION IN THE FERRO – ALLOY INDUSRTY

3.5.1 Arbitration costs and other legal fees

90% of Trade Union Representatives from both organisations (50% from Zimbabwe Alloys International and 40% from ZIMASCO) highlighted that the arbitral costs were excessive and beyond their reach. They pointed out that despite the fact that conciliation was free, most cases were resolved at arbitration level. 2 Trade Union Representatives (1 each from ZIMASCO and Zimbabwe Alloys International) added that it is even worse for an individual who is out of employment trying to contest termination or dismissal and seeking reinstatement to raise **US\$300, 00** for arbitration costs. One Trade Union Representative from Zimbabwe Alloys was a bit emotional in his response to the issue of costs where he noted that;

“How can we pay to get justice, this is capitalism at best, this creates a them and us situation between disputants and this situation has never and will never be health in dispute resolution”

20% of Trade Union Representatives from ZIMASCO noted that the arbitral costs were designed to advantage employers who have the financial muscles to meet the costs.

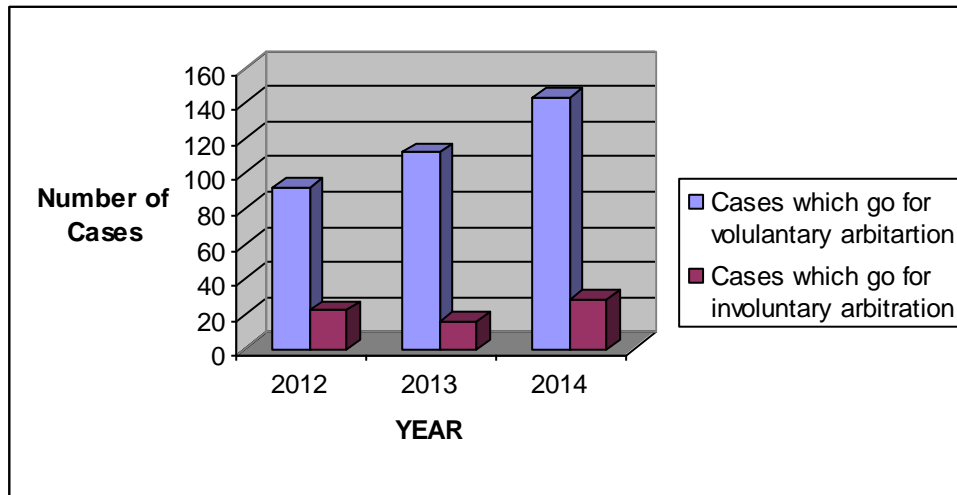
On the other side, however, all Management Representatives from both organisations noted that the costs were affordable because the Trade Union use membership subscriptions to meet the costs. One Management Representative from ZIMASCO highlighted that the Industry contributes not less than US\$2000, 00 monthly to Trade Union account and as a result there are in a position to meet legal fees associated with conciliation and arbitration.

One Labour Officer noted that the reason why some cases take long to resolve and give awards is because on party, usually the employee side fails to raise the arbitration fees thereby prolonging the dispute resolution process. The Labour Officers acknowledged that 10% of cases usually fail to progress because of failure to meet arbitration costs. 2

Labour Officers however noted that arbitration costs were favorable to both sides.

The Trade Union Representative's position on the issue of costs mirrors Maitireyi and Dube (2013) findings where they noted that the pricing of arbitral costs unfairly favours employers who have a better financial footing than employees. Although the conciliation process comes with no costs but it does not serve a purpose because the majority of cases end up at arbitration stage where arbitral costs are expected to be paid if one chooses to for an involuntary arbitration. As per the research findings, 80% of the disputes take the voluntary arbitration route where costs are involved. To this end, the cost of a system has a bearing to the accessibility and effectiveness of the process. It can be argued that employers, through their representatives, which are the Management, would prefer the costs of arbitration to be prohibitive to the employee side and thereby ensures that disputes are resolved in-house at Works Council level where Management has more power to influence the outcome. As per this research finding, Employers lost 80% of the cases brought for arbitration and as a result there would prefer another dispute resolution mechanism that they can influence the outcome.

Figure 5.4 Cases which take the voluntary vs the involuntary arbitration route



The above table was constructed from secondary data provided by the Labour Officers. The table above shows that 80% of the cases take the voluntary arbitration route where

arbitral costs are involved.

The involuntary arbitration is free because it is conducted by Government paid Labour Officers. However the advantage of a free system is outweighed by the fact that the involuntary arbitration route takes upto 36 months to finalise where as the voluntary one, with its arbitral costs, can take only 3 months to settle, as provided by the Labour Officers. As a consequence we cannot talk of a free arbitral system when the option takes 3 years to settle. Government Labour Officers mainly deals with conciliation with arbitration now done by Independent Arbitrators who charge a fee and ensures a speed resolution and finalisation to a dispute. As a result the cost is a critical element in assessing the effectiveness of a system (Tradeau, 2002). However only 1 in 10 cases fail to proceed because of failure to meet arbitration costs. One could argue that it would be an intellectual dishonest to conclude that arbitral costs were excessive and beyond the reach of disputants. It should also be highlighted that all non-managerial employees are Unionised and to this end their costs are taken care of by the Union which is a going concern because of membership subscriptions. Trade Union Representatives conceded that the Union has its own account which is they control without Management influence. They however suspected that some Employers, especially the Chinese Companies were deducting money from employees but there were not remitting the dues to the Union in suspected maneuver to cripple the Union and employee voice at large.

The research also uncovered that the class differences based on financial means has precipitated different responses from Trade Unions and Management. It should be highlighted that Employers can afford to seek Legal advise at arbitration stage and might bring the legal expert during arbitration proceedings. This is where the Trade Union and their constituency are at a disadvantage because legal experts come with the price. This is in line with Madhuku (2010) who acknowledged that the provision which allows Legal Practitioners to sit and contribute during conciliation and arbitration has tilted the

conciliation and arbitration turf to the advantage of Capital. In order to match the Employer and at least level the playing field, they will try to seek legal advice and bring a Legal Advisor during proceedings. At the end of day the process of conciliation and arbitration fails to provide the interactive element between disputants, the tenets with which the process and system is based (Chulu, 2008). This might be the reason why Trade Unions have maintained the position that arbitration comes with excessive costs.

3.5.2 Absence of time limits.

Absence of time limits was highlighted by Trade Unions as a major challenge with conciliation and arbitration. 80% of Trade Union Representatives from ZIMASCO highlighted that some Arbitrators take more than 12 months to hand out an award. They added that even Independent Arbitrators are failing to stick to agreed time frames thereby prolonging the dispute. 60% of Trade Union Representatives from Zimbabwe Alloys International gave an example of a case between Zimbabwe Alloys vs Mhlanga and 239 others on the underpayments of allowances that have been before the Independent Arbitrator for the past 9 months. 40% of the Trade Union Representatives from ZIMASCO gave an example of a case between ZIMASCO and Mataruse and 6 other Workers Committee Representatives which is yet to be given an award 8 months down the line from the date of first oral submissions.

90% of Management Representatives from both organisations (50% from Zimbabwe Alloys International and 40% from ZIMASCO) noted that the time frame was fair given the nature of disputes currently emanating from the Ferro –Alloy Industry. One Management representative from ZIMASCO indicated that the disputes calls for meticulous and research by Arbitrators to ensure that they come up with a sound judgement that protects both parties. Four Management Representatives from both organisations specifically highlighted that the issue of delays can be attributed to Trade Union Representatives. One of them highlighted that;

“Delays in settlement and finalisation of some disputes can be attributed to failure by Trade Unions to appreciate the fundamental principles of business as a result they come up with wild expectations in a resource constrained business environment”

All Management Representatives from both organisations also confirmed that conciliation process was usually done in one sitting with both parties contributing to the awards given. They added that at most conciliation procedures are concluded in 2 sittings with both parties controlling the process and outcome. Two Management Representatives from ZIMASCO however conceded that some cases or disputes take time to finalise through the arbitration route because of the complexities of the cases. They pointed out that nowadays, Arbitrators prescribe an advisory award first, which allows two parties to sit again and enter into Works Council negotiations and try to explore on other alternatives to resolve the dispute crippling the business operation and also protect jobs and employees. On the issue of advisory awards, 80% of Trade Union Representatives from both organisations (50% from ZIMASCO and 30% Zimbabwe Alloys International) viewed it as a time wasting procedure. One Trade Union Representative from ZIMASCO pointed out that

“The main reason why disputes are referred for arbitration is because it would have failed negotiations at enterprise level. Referring the dispute back to the same mechanism that failed to resolve it will be nothing but time wasting.”

All Labour Officers also noted that some disputes usually take time to finalise due to the complexities associated with the dispute. They argued that in giving out an award they should be guided by the legal statutes but at the same time should also protect business. They acknowledged that this has necessitated the emergence of advisory awards in order to give two parties another chance to negotiate and come up with their resolution to the dispute than an imposed resolution. They highlighted that in the current business environment, it is imperative that disputants establish an internal solution which is mutually beneficial. Sticking to the legal prescriptions is rigid and tends to cripple

business operations at large. They gave an example of Whelson Pvt Limited company, which falls under the Ferro –Alloy Industry, which went into liquidation after employees attached company property after an award was given. To this end Labour Officers noted that an advisory award is meant to give negotiations between disputants a second chance. They noted that 50% of the times, the disputants come out with different positions they were holding from the beginning. They emphasise that

“.....the process of negotiation is a give and take and disputants should acknowledge that concessions have to be made in order to settle disputes.”

From the data presented above should be highlighted that the system of conciliation and arbitration involves an interactive and negotiating element which means it is not an event but a process. This explains why the Zimbabwean Legal structure did not prescribe time limits to an interactive and negotiation process. Mawire (2009) also noted that the gap in legislation was not by default but by design and highlighted that the speedy conclusion of a process without a finalisation and amicable settlement to a dispute is meaningless. As a result although speed is a critical feature in dispensing justice, as justice delayed is justice denied, people should appreciate that the disputants are related and binded by an employment contract, as a result there is no dispute that cannot be settled amicably but an amicable solution needs time. Trudeau (2002) however noted that the speed with which a system operates in dispensing justice is a paramount feature of justice delivery and a key feature of effectiveness

It is also common that Management are more comfortable with the negotiating process because it gives them time or they can buy time hoping that time can solve their dispute with their employees. Duve (2009) highlighted that some conciliation and arbitrations process are never concluded because they find themselves overtaken by events. To this end Management Representatives, who are in most cases than not, the respondents will never be comfortable in a procedure which have strict time frames. On the other hand, Trade Union Representatives who are in most cases the appellant would prefer a procedure which is explicit in terms of time frames.

3.5.3 Competence and Qualifications of Conciliators and Arbitrators.

60% of Trade Union Representatives from both organisations (40% from ZIMASCO and 20% from Zimbabwe Alloys International) opined that most Government Labour Officers lack the expertise to deal with cases brought before them. They acknowledged that despite their academic qualifications, they still feel some of them lack the experience to deal with labour related issues.

All Management Representatives from both organisations quarried the competency levels of principal officers to the process of conciliation and arbitration. One Management Representatives echoed the same sentiments as that of the Trade Union Representatives where they pointed out that

“.....some Labour Officers do not even apply themselves as a mediator by trying to make two parties reach a settlement, what they simply do is to follow rather than guide the proceedings”

Management Representatives reiterated that Labour issues should be dwelt with experienced personnel in order to ensure and enhance prompt and effective settlement of disputes. Management also bemoaned some populist awards handed out by some Labour Officer and noted that some Labour Officers tend to have pre-conceived mind set especially when dealing with cases from Chinese firms in the Ferro-Alloy Industry.

In terms of academic qualifications the study revealed that all Labour Officers holds the relevant academic and professional qualifications as prescribed by law. It should be highlighted that minimum academic qualification were drawn as prerequisite in order to ensure correct interpretation of legal statutes (Madhuku, 2012). It should be highlighted that there are other skills which are beyond academic papers which enables one to be a conciliator or an arbitrator. The researcher concluded that these sought of skills are lacking in the Labour Officers of today. Lack of faith and confidence with the competency and integrity levels of conciliators will negatively impact on the effectiveness of the alternate dispute resolution mechanism. As pointed out in research

findings, Management seemed to point out that some Labour Officers were biased in their judgments where they talked of populist awards and pre-conceived mindset. To this end how would one part approach a system which they question their integrity and capacity to resolve the dispute? This explains why employers appeal or contest most arbitral awards to the next level, which is the Labour Court because they have a negative perception and believe that the conciliation and arbitration system was not a conclusive process of dispute resolution. Gwisai (2007) pointed out that parties have successfully challenged arbitral awards in a higher court and exposing the weakness and shortcomings of arbitrators. This fact on its own is a serious indictment against the quality and credibility of arbitration rulings.

The above findings point to a very negative picture of conciliation and arbitration in the Ferro – Alloy Industry. Bishop and Reed (1998) highlighted that the principal actors presiding over the process should be unquestionably competent, experienced, disinterested and neutral parties. The intention of legislators in crafting the arbitration procedures was to allow swift administration of justice and resolution of disputes. Section 2A subsection 1 (f) of the Labour Act (Chapter 28:01) provides that the purpose of the Act is “..... to advance social justice and democracy in the workplace by securing the just, effective and expeditious resolution of disputes and unfair labour practices.” An analysis of the Act’s purpose reveals that the intention is to, as much as is practicably possible, brings finality to labour disputes within the confines of the labour dispute settlement structures. It can be inferred from the findings of this research that conciliators and arbitrators are largely incapable of making judgments which meet the intentions and purposes of the Labour Act. The fact that most appeals and applications are admitted in the Labour Court points to a fact that the judgments are probably fraught with injudicious inconstancies and gross misdirections (Madhuku, 2012). If the end product of arbitration and conciliation process is such that it does not yield the outcome that the process intended it to yield, then it is undoubtedly in effective.

3.5.4 Lack of conclusiveness of awards handed down

Both Trade Union Representatives and Management Representatives shared the same plate of opinion on the point that in order to enhance effectiveness of arbitration and conciliation, the awards handed out should be final and enforceable. 90% of Trade Union Representatives from ZIMASCO highlighted that employers usually contest or appeal to the Labour Court even on disputes of rights as a ploy to delay or deny justice. They added that Arbitral awards should be final and easily enforceable. 80% of Trade Union Representatives from Zimbabwe Alloys International pointed out that a lot of cases, especially on unfair dismissal, when contested or appealed to the labour court normally signals their collapse because usually the time taken to finalise the case through the courts system makes it difficult for one to follow up on the case if out of employment.

However 60% of management representatives from both organisations (30% from ZIMASCO and 30% from Zimbabwe Alloys International) seemed to advance the idea that the provision for appeal should not be completely repealed because of lack of competency and understanding of business of some of the Labour Officers. One Management Representative from ZIMASCO indicated that

“If companies were to implement arbitral awards as they are handed out, business would not survive the next day but would collapse and collapse for good.”

Management Representatives noted that the main reason why the awards from the alternative dispute resolution mechanism are not final is because of the appreciation that some errors in judgments may appear and impact negatively on effectiveness of dispute resolution mechanism. They advanced the position that the court system seems to respect and appreciate the business environment and the challenges associated with the business operations. One Management Representative from Zimbabwe Alloys International gave a case between Olivine and its employees where the Labour Court overturned an arbitral award which had forced the employer to pay overtime allowance when the organisation is operating at below 30% capacity.

One Labour Officer also pointed out that conciliation and arbitration were stripped of powers when they denied the right to give final awards. The Labour Officer noted that the award given at arbitration level need to be registered in a court of law to get enforcement thereby showing that conciliation and arbitration are inferior processes to the court litigation system. Two Labour Officers also indicated that some awards which do not speak figures are failing to get registration for enforceability at the courts.

From the presented data Management and Trade Union offered flat contradicting positions on the lack of conclusiveness of the conciliation and arbitration. In line with the findings from Matsikidze (2013), Trade Union Representatives also noted that employers were failing to implement some of the resolutions from conciliation process because of lack of enforceability and finality of the process. Conciliation as a mechanism for dispute resolution has been criticised on its dependency on goodwill and utmost good faith and that there conciliator can not give a binding decision (Matsikidze, 2013).

Conciliation and arbitration were adopted as alternate dispute resolution mechanism to counter the long and complex court litigation route. This was created to alleviate the court litigation route after the realisation that the state has no capacity to deal with all labour cases at a formal court environment. As a result conciliation and arbitration were empowered to give binding resolutions. However the binding awards are not conclusive as either party can contest the ruling at a formal court system. Creating a provision for appeal defeats the purpose of alternate dispute resolution mechanism. Madhuku (2010) highlighted that many disputes are still taking too long to resolve because of this avenue of an appeal to the Labour Court.

All Management representatives tended to advance the point that arbitral awards should not be final but should be left with an option to contest. This position is possibly influenced by the fact that, from the data collected from secondary sources, Employers in the Ferro – Alloy loose 90% of the cases brought and registered for conciliation and arbitration process. They are not comfortable with the process being final but would want another avenue to contest and possibly buy time as pointed out by Trade Union

Representatives. Appealing to the Labour Court on a dispute of right is tantamount to delaying or denying justice and as a result the mechanism for dispute resolution becomes longer and ineffective. The Labour Officer's position points to a gross inefficiencies in the system precipitated by the gap in legal structures regulating conciliation and arbitration. The non-finalisation of arbitration awards have given birth to an ineffective alternate dispute resolution system (Mawire, 2008). Unlike the arbitral costs which are borne by both parties, costs of appeal are borne by the Appellant alone. The cost is currently US\$54, 00 and is affordable to both parties. It was the researcher's findings that Employers sometimes register an appeal without paying the costs which further lengthens the process because a case can only be considered for a date after payment of the US\$54, 00. In more cases than not, Trade Union as a body ends up paying the costs in an endeavor to speed up the process. To this end employers ride on this anomaly and sometimes frustrate the dispute resolution mechanism and impact negatively on its effectiveness to resolve disputes.

3.5.5 The role of legal practitioners and its impacts on effectiveness

Trade Unions Representatives were divided as to the merits of bringing legal practitioners to the process of conciliation and arbitration. 50% from both organisations (ZIMASCO 30% and Zimbabwe Alloys International 20%) were of the idea that bringing their own legal practitioners tend to level the conciliation and arbitration playing field which was traditionally dominated by the employers. However the other 50% (ZIMASCO, 20% and Zimbabwe Alloys International 30%) believe legal practitioners tend to dominate the proceedings and dwell much on technicalities. A case can end up being thrown out on technicalities but that does not remove the dispute registered.

80% of Management representatives from ZIMASCO noted that legal practitioners' role is advisory but they do not contribute much to the resolution. 60% of Management Representatives from Zimbabwe Alloys International pointed out that Legal Practitioners, like Labour Officers guide disputants in terms of provisions and their implications. One Management representative from Zimbabwe Alloys International indicated that;

“They sit in conciliation and arbitration proceedings not to prescribe but to advise and give recommendations. The final resolution rests with the two disputants parties”

All Labour Officers advised that the involvement of legal practitioners at conciliation and arbitration brings the technicalities and complexities associated with the court litigation system which conciliation and arbitration is trying to counter. They echoed the same sentiments as that of Trade Unions where they pointed out those legal practitioners are mainly concerned with technicalities and end up creating a win – lose situation which the process of conciliation and arbitration was designed to avoid.

From the data presented above some Trade Union Representatives were not comfortable with the idea of bringing Lawyers to the alternate dispute resolution procedure because of their emphasis on technicalities. Conciliation and arbitration is known to be a less adversarial system which is based on an interactive and provides a negotiation platform for disputants. Mariwo (2008) also highlighted that the Involvement of legal practitioners tends to remove the one to one interaction between the main disputants at conciliation and arbitration. Bringing a Legal Practitioners in a conciliation or arbitration hearing removes the negotiation and interactive process. According to Trudeau (2002) the interactive process helps built a relationship which is critical in dispute resolution. As pointed out by Labour Officers, Lawyers are dwelling much on case technicalities and thereby ignore the dispute at hand. An effective system to a dispute resolution should not only concentrate on closing cases based on whatever technicality but should over deploy emphasis on building an environment that facilitates the resolution and settlement to the dispute.

It is also important to highlight that the legal framework prescribe that either party can seek representation at conciliation and arbitration and he himself might not appear during proceedings. To this end if the conciliator does not insist on the presence of a party on the proceedings, the process may be conducted between lawyers and thereby impacting

negatively on the effectiveness of the system. It can be argued from the findings that Management is comfortable with the presence of Legal Practitioners because they have the financial muscles to seek legal advice even on a matter which they can resolve between them and the Trade Union. The Trade Union does not see the relevancy of another party to a dispute resolution because this also comes with costs which they may not be able to meet. Gwisai (2007) noted that this result the dispute resolution platform will end up tilted to the advantage of the employer. It is also important to highlight that by the nature and level of Trade Union Representatives in the Ferro – Alloy Industry, the presence of Legal Practitioners tend to dominate proceedings and removes the one to one interaction between disputants and thereby negatively impacting on effectiveness of the system.

3.5.6 Conciliation and Arbitration as closed sessions

Arbitration and conciliation were described as closed sessions by Trade Union Representatives. 60% of the Trade Union Representatives from ZIMASCO pointed out that the lack of transparency has played out to the advantage of the employer. Some conciliation resolutions have not been implemented because management enjoys the privacy associated with the process. 80% of Trade Union Representatives from Zimbabwe Alloys International pointed out that conciliation and arbitration was designed to favor those in power at the expense of the workers. They added that if the process is meant to benefit all why is there emphasis on privacy.

All Management Representatives from both organisations however pointed out that privacy is meant to ensure that disputes are resolved at enterprise level. One Management Representative from ZIMASCO noted that

“There is an understanding that only parties involved in the disputes appreciate better their situation at company level hence the dispute should be localised and come up with home or company grown solutions.”

All 3 Labour Officers also reiterated that the issue of a closed door sessions is meant to give negotiations a chance without outside influence. They however conceded that it is

true that Management have capitalised on the nature of conciliation and arbitration proceedings to skip and dodge other resolutions made.

Conciliation and arbitration were adopted in order to give disputants room to interact on their own without influence of outside parties. It is designed to be conducted in a private set up which give disputants an opportunity to construct a settlement to a dispute on their own. Conciliation as a process is designed to give disputants an opportunity to find a solution to their own dispute without enlisting an adversarial procedure. The design is important because in some cases the solution to a dispute rests with the disputants themselves. However the privacy associated with the system has been abused by certain parties by not implementing resolutions. Employees highlighted that sometimes Management fail to implement a resolution at conciliation because the process is regarded as an in house process hence its not prone to public knowledge and scrutiny. Mazanhi (2010) noted that for conciliation and arbitration to be considered effective, it is imperative that proceedings should be out for public eye and evaluation.

The issue of lack of transparency with conciliation and arbitration falls on the lack of explicit and clear guidelines regulating conciliation. There is a legislative gap in terms of guidelines on conciliation and as a result the process is not a transparent one because the procedure differs with one conciliator to the other. A transparent system is supported by clear regulations and guidelines which are known to all and this will enable parties to evaluate the process against set guidelines (Chulu, 2010). Both parties were not clear as to the steps followed in the conciliation system hence transparency is questioned. Transparency can only be talked about if both parties are in the know with legal statutes governing the system.

3.6 THE ROLE OF STATE AND ITS IMPACT ON EFFECTIVENESS OF CONCILIATION AND ARBITRATION

Trade Unions and Management Representatives agreed that the legal structure leaves a gap in terms of its provisions that regulates conciliation and arbitration. 90% Management representatives from both organisations (50% Zimbabwe Alloys

International and 40% from ZIMASCO) pointed out that the legal framework is not explicit in terms of procedures to be followed on conciliation. One Management Representatives from ZIMASCO argued that;

“This has created a gap interms of administration of the process and removes the consistency which is critical in dispute admistration and leaves the process as a guess work.”

60% of Trade Union representatives from ZIMASCO also highlighted that the State needs to come up with the sound legal instrument which guides on the appointment of arbitrators to preside over arbitration cases. The current practice is not supported by any legal structures. 80% of Trade Union Representatives from Zimbabwe Alloys International pointed out that without proper laid down procedures on alternate dispute resolution mechanism, Management will manipulate and abuse the process to their advantage.

All Labour Officers noted that they usually encounter challenges with Legal Practitioners during conciliation or arbitration process because of the absence of clearly explicit provision. They added that it is of paramount importance to have the procedures to enhance uniformity and ensure that what ever applies in Harare applies in Gweru and Bulawayo. They added that this has left the process prone to criticism and that has been one of the greatest undoing.

2 Labour Officers conceded that as a Ministry they are constrained in terms of resources to enhance their justice delivery mandate. They pointed out that it is the prerogative of the Ministry to notify respondent in writing, but because of lack of resources they only notify through telephone. They pointed out that some respondents have capitalised on the resource constraints and they profess ignorance of the case before the Labour Officer. The Labour Officers highlighted that the appellant usually is burdened with the duty to service notification papers to the respondent and the respondent should sign to confirm

receipt. 80% of Trade Union Representatives from both organisations (40% from Zimbabwe Alloys International and 40% from ZIMASCO) confirmed this position where they highlighted that sometimes they have to use their own resources in order to make sure they communicate with the other party.

Both Management and Trade Union Representatives echoed the same sentiments on the idea that the Labour Officers were overwhelmed by the increase in the volume of labour cases before them. All Management Representatives reiterated that Government should employ other Officers in order to alleviate the problems of back logs and ensure speedy resolution of disputes. 40% of Trade Union Representatives from Zimbabwe Alloys International added that individuals were failing to meet Arbitral costs charged by independent Arbitrators hence they resort to Government Labour Officers and as a result cases take more than 24 months to settle.

The role of the state has been identified as mainly that of creating a regulatory environment within which conciliation and arbitration operates. The environment either inhibits or enhances a process. However the findings pointed to the gap in terms of the legal framework. These gaps impact negatively on the effectiveness of conciliation and arbitration. The gaps include lack of clear cut guidelines on conciliation, the act is silent on time lines among other irregularities. As a result the process of arbitration is left at the mercy of Labour Officers. Gwisai (2007) also pointed out that the absence of guidelines on conciliation has created a legislative void that has impacted negatively on the effectiveness of the alternative dispute resolution mechanism. The State controls the institution that deals with conciliation and arbitration. The Ministry of Labour is a State department and Ministry responsible for conciliation and arbitration as a result the State has a major bearing on the effectiveness of the system. The Labour Officers are State employed personnel and the instruments and other apparatus used for conciliation and arbitration are State controlled as a result the input of the State cannot be downplayed (Mazanhi, 2010). However the research uncovered that the Government Labour Officers were overwhelmed by the number of cases coming for conciliation and arbitration resulting in a backlog and cases taking long to be heard and disputes settled. It is of

paramount important to highlight that conciliation and arbitration as alternate dispute resolution mechanisms were adopted in order to counter the longer and winding court litigation system. However with few Labour Officers against a growing volume of Labour cases in the Ferro –Alloy Industry and the nation at large means that cases will take longer to settle than intended. To this end the conciliation and arbitration system is failing to ensure the effectiveness to dispute resolution which it was created to grant.

In line with Musa and Matsikidze (2009) findings, this research also established that there are no clear provisions which guide the process of conciliation alone. The absence of clear cut guidelines as presented above can be argued to impact negatively on the dispute resolution mechanism. Laid down procedures give birth to uniformity and consistency which are critical pillars in dispute resolution mechanism. The absence of them severely exposed the dispute resolution mechanism. It is important to highlight that Trade Unions, Management and Labour Officers echoed the same sentiments on the idea that the current framework on conciliation should revert and mirror the provisions of the Labour Relations Act of 1985. The 1985 legal instrument gave the conciliators powers to give binding awards. The current legal structure has relegated Principal Officer during conciliation to mere facilitators with no legal standing to give a binding award thereby making the process a non-event (Madhuku, 2010). Given that 90% of the cases go beyond conciliation, it points to the fact that the process is not achieving what it was set to achieve. The conciliation process is seen as a step towards arbitration not a dispute resolution mechanism on its own.

3.7 EFFECTIVENESS OF CONCILIATION AND ARBITRATION.

Having looked at the process of conciliation and arbitration, its strengths and challenges in the Ferro –Alloy Industry and the role of the State and its impact on the process of conciliation and arbitration, it is noble to summarise and link the aforementioned elements to the effectiveness of conciliation and arbitration in the Ferro –Alloy Industry. The issue of affordability and availability of the processes of conciliation and arbitration was highlighted as one of the strength of the process. This is because of the absence of conciliatory fees at the preliminary stage of the dispute resolution, which is the

conciliation stage. However as pointed out by all Labour Officers, 90% of cases registered for conciliation usually find their way to arbitration where costs are involved in terms of arbitral costs and legal fees. As a result the absence of conciliatory fees does not make the process of conciliation affordable because the majority of cases are not settled at that stage. To this end the issue of affordability does not hold water given that most cases end up at a stage where costs are involved.

The issue of expediency and promptness of the processes was also highlighted as one of the strengths of conciliation and arbitration. The conciliation outcome is usually settled in one sitting as a result both parties acknowledged that the process would expedite the resolution of disputes. However as noted above, conciliation is one process which has been viewed as a step towards arbitration. There are no binding resolutions from conciliation hence most cases are forwarded for arbitration where there is a legally binding resolution. Trade Union Representatives from both organisations highlighted that cases takes more than 36 months to settle if you take the involuntary arbitration route and a minimum of 12 months for a voluntary route. As compared to the court litigation route, yes the process is quicker and swift but in the interest of speedy resolution of disputes, 12 months is a long time. As a result the processes are not effective.

It was also recorded that the alternate dispute resolution mechanism was less prescribed and less directed hence it have an edge over the complex and winding court litigation route. The above factors enhance accessibility of conciliation and arbitration and the flexibility may contribute to the effectiveness of conciliation and arbitration however it was noted that one party can manipulate and abuse the less prescriptive nature of the alternate dispute resolution mechanism to dodge and fail to implement mutually agreed resolutions especially from conciliation hearings. As a result it becomes a challenge to the dispute resolution mechanism. Also the discreet nature of conciliation and arbitration can play to the advantage of one part despite at face value it may appear as strength of the dispute resolution mechanism.

On the challenges of conciliation and arbitration the absence of time limits in the legal framework was noted as a major reason why cases are taking long to settle thereby

impacting negatively on the dispute resolution mechanism. In his research findings in the retail sector Mawire (2010) reiterated that Management Representatives bemoaned the incompetence highlighted by those who preside over disputes as a major challenge associated with the conciliation and arbitration. As a result this has seen cases taking too long to settle and parties contesting awards because they lack confidence in the presiding officers. Confidence in a system, especially a dispute resolution system, where parties are at logger heads become very critical to a point that lack of it will render the process inefficient and ineffective (Gomez, 1998). The issue of costs was also recorded as a major challenge associated with conciliation and arbitration thereby impacting negatively on effectiveness of conciliation and arbitration.

Unlike conciliation outcomes, arbitral awards are legally binding and enforceable. However they are not final. There is a provision to contest the award to the Labour Court. The alternate dispute resolution mechanism has the provision for the court system, the same system it was designed to counter. 80% of arbitral awards are contested and as a result the disputes take time to resolve and settle. The court litigation route takes more than 5 years in some instances. Given the centrality of disputes and their negative impacts on productive, the alternate dispute resolution mechanism is failing to resolve and settle disputes expeditiously and effectively.

The role of the State is basically to provide the legal framework within which the alternate dispute resolution mechanism operates. However there exist some gaps within the legal framework which impact negatively on the effectiveness of conciliation and arbitration. The absence of guideline of conciliation and arbitration, the absence of time limits of arbitration cases, the limited powers of conciliators were noted as some of the challenges with the current legal structure on dispute resolution. It was also highlighted that the State is not adequately resourced to ensure a speedy and effective resolution of disputes. This is in line with Mawire (2010) findings where he noted that the State is a critical pillar in the 3 legged pot and its capacity becomes of paramount importance in order to enhance the effectiveness of conciliation and arbitration. To this end the process of conciliation and arbitration is marred with a lot of challenges which make it

difficult for the process to achieve its mandate of speedy resolution and finalisation of disputes.

3.8 CHAPTER SUMMARY

The data presentation and analysis managed to outline the research findings and provided an indepth analysis of the research findings carried out. The chapter provided the research findings in line with the research objectives and research questions. Data from interviews and document reviews was presented inform of extracts, comments, graphs and tables. Data was collected from Management and Trade Union Representatives, General Employees and Labour Officers. Data was analysed in terms of availability, convenience, swiftness and expedition, time limits, competency of principal officers, capacity of the state, transparency, flexibility to mention only but a few. These were regarded as some of the critical factors to evaluate the effectiveness of conciliation and arbitration. Recommendation and conclusions will be discussed in the next chapter

CHAPTER 6 - RECOMMENDATIONS AND CONCLUSION

4.1 CHAPTER INTRODUCTION

This chapter aims to synthesize the main findings of this study, relate them to the stated aims and objectives, draw out and main conclusions arising from the research findings and outline some recommendations for further research work. Recommendations will be drawn from data analysis in an endeavour to ensure an effective alternative dispute resolution mechanism. The current economic challenges facing the currently ahs negatively impacted on company performance. This has precipitated an increase in labour related cases across industries. To this end recommendations have to be proffered in order to ensure an effective dispute resolution mechanism.

4.2 ZIMBABWEAN LEGAL FRAMEWORK

The Zimbabwean regulatory environment needs to be amended to enhance the effectiveness of arbitration and conciliation. There is need for;

- i) Clear cut and explicit guidelines on conciliation so that the process become standardised.
- ii) A provision for time frame or limits of time for cases brought for arbitration. The Labour Act should come up with a maximum period within which an award should be handed out. Our Labour Act should conform to the other SADC countries' legal statutes which have a prescribed time frame on arbitration cases to ensure prompt settlement of disputes.
- iii) The Labour Act or Arbitration Act should revoke the right to appeal on all cases. An arbitral award on the dispute of right should be binding, enforceable and final. The right to appeal should only be open to disputes of appeal. The research established that one party can abuse the right to appeal thereby lengthening the dispute resolution process.

- iv) The new Labour Amendment Act (No 5 of 2015) has empowered the Conciliator to give an award, a provision that mirrors the 1985 Labour Relation Act (28:01). This will give the conciliation stage weight and value as it was now viewed as a step towards arbitration. However Arbitrators need to be empowered to give final decisions on dispute of rights. Arbitrators should also reserve the right to allow for an appeal. Conciliation and arbitration were adopted to curb and counter the technically complex court litigation route. If conciliation and arbitration cases continue to find their way back to the system they are trying to avoid, then the alternate dispute resolution mechanism's purpose will remain a utopia.
- v) The involvement of legal practitioners tends to distort the purpose of conciliation and arbitration. As with the South African law, legal practitioners should only be involved at arbitration and the Arbitrator should enable the disputants to interact on their own without the influence of legal practitioners. As presented in the previous chapter, Legal Practitioners are interested in legal technicalities hence it removes the win – win situation with conciliation and arbitration were designed to achieve.

4.3 THE STATE

The State's influence to the dispute resolution mechanism platform should not be underestimated. Apart from providing the regulatory environment within which the system for dispute resolution operates, the State controls the Institutions and apparatus used for dispute resolution. However from the research findings, the researcher can recommend that:

- i) The State should adequately resource the Labour Ministry in order to ensure that they expedite the dispute resolution process. This research uncovered that the Labour Ministry faces challenges in terms of communication and serving notification papers thereby making the alternative dispute resolution system lengthy and complex.

- ii) The government should provide more resources such as a library and internet access to aid the Labour Officers in their duties as it is a prerequisite to the competence of them to be wide readers or researchers and still more access to Zanlii and Saflit websites provides instant access to cases for precedence sake.
- iii) The research established that the number of Labour Officers in the Midlands Region in particular and the Nation at large were few against the growing number of labour cases and cases taking more than 2 years to resolve and finalise. It should be highlighted that conciliation and arbitration were adopted as dispute resolution mechanism in order to alleviate pressures on the court litigation system. However because of shortage of Labour Officers cases are now taking long to settle same as the litigation route.
- iv) There is need to enroll the Conciliators and Arbitrators in postgraduate courses/diplomas in Conciliation and Arbitration so that Arbitrators and Conciliators can attend more workshops and get more exposure to Labour Related issues.
- v) Government should review its gazetted costs of arbitration especially on cases that involves one person. US\$300,00 is a bit on a higher side.

CONCLUSION.

Conciliation and arbitration were adopted as alternative dispute resolution mechanism in place of the technically complex, rigid, winding and longer court litigation system. This was precipitated by the realisation that dispute or conflict at industrial or organisational level can negatively impact on productivity. To this end conciliation and arbitration were adopted in order to ensure prompt settlement, conclusion and finalisation of disputes to enable a productivity environment at the work place. However it is note worth to highlight that the system has not achieved the effectiveness and efficiency it was designed and adopted to achieve. This research has uncovered that conciliation and arbitration are dogged with numerous challenges and inefficiencies that have impacted negatively on the effectiveness of the alternative dispute resolution procedure. Although the alternate dispute resolution mechanism was reported to be flexible, accessible, private and non adversarial which allows an interactive and negotiation environment between disputants, this was not enough to ensure an effective mechanism. The regulatory environment was reported to be the greatest undoing and was not enabling an adequate playing field. Gaps interms of guidelines, time lines to mention on but a few was highlighted as the major challenges faced by conciliation and arbitration and impacting negatively on the dispute resolution mechanism. Disputes find their way back in to the formal court litigation system, which points to the fact that conciliation and arbitration are nt effective enough to settle disputes at an early stage. The State as the main agent for conciliation and arbitration was reported to be in adequately resourced to facilitate the prompt settlement and conclusion to disputes at work place. Recommendations have been proffered to address the said challenges facing the current legal framework and ensure an effective dispute resolution mechanism.

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APPENDICES

Appendix A: Interview guide

**INTERVIEW GUIDE ADMINISTERED TO MANAGEMENT AND TRADE
UNION REPRESENTATIVES**

- 1) What are the strengths of conciliation and arbitration as dispute resolution mechanism?**
- 2) What are the weaknesses of conciliation and arbitration as dispute resolution mechanism?**
- 3) What areas of disputes do you usually register for conciliation and arbitration?**
- 4) Do you have internal dispute resolution mechanism in place before you refer issues for conciliation and arbitration?**
- 5) How accessible is the alternate dispute resolution mechanism?**
- 6) Are costs for conciliation and arbitration affordable?**
- 7) What is your view with regards to privacy often associated with conciliation and arbitration?**
- 8) How long does it take before an award is given? Is the time reasonable**
- 9) How flexible is the process of conciliation and arbitration?**
- 10) Do you think Conciliators and Arbitrators are competent enough to deal with cases brought before them?**
- 11) Do you have input on the selection of arbitrators for your cases**
- 12) Whats your views on the independence of the Labour Officers from the state**
- 13) Is the Labour Act clear on the provision of conciliation and arbitration**
- 14) Does the state have the capacity to expeditiously and efficiently deal with the process of conciliation and arbitration**
- 15) Does the inclusion of legal practitioners enhance the effectiveness of conciliation and arbitration**
- 16) Whats your view on the lack of finality and enforcement of arbitral awards**
- 17) In your opinion what are the main reasons for contesting awards?**

18) What can be done to enhance the effectiveness of conciliation and arbitration?

Appendix B: Questionnaire administered to Labour Officers

My name is Watadza Christopher currently undertaking a Master of Science in Human Resource Management programme with Midlands State University of Zimbabwe. I am doing a study on the effectiveness of Conciliation and Arbitration in the Ferro-Alloy Industry as partial fulfillment of the aforementioned programme. To this end information gathered will be used for academic purposes only. Please do not write your name anywhere on this questionnaire to ensure that noone relates any of your responses to you personally. Your cooperation will be greatly appreciated.

SECTION A

Sex: Male Female

Academic qualification (s):

Age : 20 – 30 31 – 40 41 – 50 50+

Work Experience
0 – 5 6 - 10 11 – 15 16 – 20 20+

SECTION B.

1) What areas of disputes are usually brought for conciliation and arbitration?

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2) In the past year how many disputes from ferro ally industry did you handle?

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3) How many were contested after giving an award?

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4) In your assessment what are the main reasons for contesting awards?

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5) How long does it take you to give an award after hearing?

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6) What are the reasons for cases dragging for long before awards are handed out?

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7) In your opinion do you think the Arbitral costs are affordable to both parties

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8) Would you say the state is adequately resourced to deal with cases brought before them? Explain your answer?

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9) Are there clearly stipulated guidelines on conciliation and arbitration?

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10) What can be done to enhance the effectiveness of the current dispute resolution mechanism?

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Appendix C: Questionnaire administered to General Employees

My name is Watadza Christopher currently undertaking a Master of Science in Human Resource Management programme with Midlands State University of Zimbabwe. I am doing a study on the effectiveness of Conciliation and Arbitration in the Ferro-Alloy Industry as partial fulfillment of the aforementioned programme. To this end information gathered will be used for academic purposes only. Please do not write your name or Works Number anywhere on this questionnaire to ensure that noone relates any of your responses to you personally. Your cooperation will be greatly appreciated.

SECTION A

Sex: Male Female

Qualification:

Age: 20 – 30 31 – 40 41 – 50 50+

Length of service in Ferro-Alloy Industry:

0 – 5 6 - 10 11 – 15 16 – 20 20+

SECTION B

1) Are you conversant with the process of conciliation and arbitration

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.....

2) What are the strengths of conciliation and arbitration as dispute resolution mechanism?

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3) What are the weaknesses of conciliation and arbitration as dispute resolution mechanism?

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4) Are you getting adequate representation from Trade Union Representatives? Explain your answer.

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5) In your opinion do you think the Arbitral costs are affordable to the Union

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6) Do you get feedback from your representatives on cases before conciliation and arbitration?

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7) Do you also make inputs and contributions to position papers for conciliation and Arbitration?

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8) Are you content with the current Labour Act's provisions on Conciliation and Arbitration?

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9) Does Management implement and abide by an arbitral award if the outcome is detriment to its interest.

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10) What can be done to enhance the effectiveness of the current dispute resolution mechanism?

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