

**COMPETENCE LEVELS OF  
ALTERNATE DISPUTE RESOLUTION FACILITATORS  
IN THE  
CONSTRUCTION INDUSTRY IN SOUTH AFRICA**

**OLIVE DU PREEZ**

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By

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## **DECLARATION**

I, Olive R.C. du Preez, declare that the dissertation hereby submitted by me for the Master's degree in Quantity Surveying at the University of the Free State is my own and independent work through the professional guidance of my study leaders, Dr. F.H. Berry and Prof J.J.P. Verster. I have not previously submitted this dissertation at any other university/faculty. I furthermore cede copyrights of this dissertation in the favour of the University of the Free State.

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**DATE:**                       **2 July 2012**

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## **ABSTRACT**

The complex nature of the construction industry calls for an effective claims management system which is supported by Alternate Dispute Resolution (ADR). Research indicates that ADR is not applied effectively in the industry, which raises the question as to the competence levels of practicing professionals in the role of ADR facilitator. The purpose of the study was to identify the requirements for effective ADR practice and to determine the competence levels of practicing professionals facilitating ADR in the South African construction industry. The findings of the research are intended to determine possible education and training requirements which may be employed to ultimately improve the contribution of ADR in the industry.

A literature review was conducted to identify the requirements for effective ADR practice based on international standard practice. A questionnaire based on identified competencies was then developed and administered amongst the practicing professionals in order to determine current knowledge, skills, attributes and experience levels of practicing professionals in the South African construction industry. The findings of the data analysis were plotted on a competence model which reflected the key competencies as identified in the literature review. The competence models reflected the competence levels of practitioners in the industry.

A situational competence model was developed illustrating the development process required for ADR facilitators in the construction industry through which professionals should progress in achieving competence however; the model is based on the current situation and will be subjected to variations as the situation changes. The situational competence model suggests that practicing professionals progress through four stages before becoming fully competent in facilitating ADR. Respondents were also grouped into age groups in order to address education and training compared to experience gained. This was intended to determine at which point competence is achieved by comparing the state of the new entrants to the industry with the more experienced professionals.

Qualitative data was obtained by means of interviews and open ended questions posed in the questionnaire provided the information required to assess the current situation in the industry. The findings indicated that the problem areas tend toward the the application of the methods, skills and techniques however, respondents consider the application of the fundamentals of ADR important and they are applied effectively as required for successful dispute resolution. The high ratings on the self analysis in terms of the active listening competence raised the question as to the possibility that there may have been a degree of misinterpretation regarding the effective application of this competency. This response also suggests the possible influence of response bias.

It was concluded that ADR in the industry is not applied according to the requirements of standard practice and according to the data analysis of the self evaluation; practicing professionals do not meet the requirements for competence in the practice of ADR. It was also identified that experience needs to be addressed in order to achieve competence. Practicing professionals are knowledgeable of the requirements for effective practice, however, experience is lacking.

A further need which was identified in practice was for conciliation to be facilitated on site in order to minimize the risk of dispute, in the project environment.

The findings support the need for more emphasis to be placed on ADR in the construction industry in the form of education, training and mentorship.

**Keywords:** ADR, conciliation, mediation, practitioners, situational competence model, construction industry.

## OPSOMMING

Die komplekse aard van die boubedryf noop 'n effektiewe eise-bestuurstelsel wat deur die Alternatiewe Dispuut Resolusie (ADR) ondersteun word. Navorsing dui aan dat ADR nie doeltreffend in die bedryf toegepas word nie, wat vrae laat ontstaan rondom die bevoegdheidsvlakke van praktiserende professionele persone wat die rol van die ADR-fasiliteerders vervul. Die doel van die studie was om die vereistes vir effektiewe ADR-praktyk te identifiseer en om die bevoegdheidsvlakke van praktiserende professionele persone wat in die SA boubedryf fasiliteer, te bepaal. Die bevindings van die navorsing is gerig op die vasstelling van moontlike vereistes vir onderrig en opleiding, wat dan toegepas kan word om uiteindelik die bydrae van ADR in die bedryf te verhoog.

'n Literatuurstudie is gedoen om die vereistes vir effektiewe ADR-praktyk, gebaseer op internasionale standaardpraktyk, te identifiseer. 'n Vraelys, gebaseer op geïdentifiseerde bevoegdhede, is daarna saamgestel en onder praktiserende professionele persone versprei om die huidige vlakke van kennis, vaardighede, eienskappe en ondervinding van praktiserende professionele persone in die Suid-Afrikaanse boubedryf vas te stel. Die bevindings van die data-analise is op 'n vaardigheidsmodel aangebring wat die kernvaardighede, soos geïdentifiseer in die literatuurstudie, weerspieël. Die vaardigheidsmodelle het die vaardigheidsvlakke van praktisyne in die bedryf aantoon.

'n Situasie-vaardigheidsmodel wat die ontwikkelingsproses waardeur die ADR-fasiliteerders in die boubedryf moet vorder om vaardigheid te bereik, is ontwikkel. Die model is egter op die huidige situasie gebaseer en sal aan variasies onderworpe wees na gelang van veranderinge in die situasie. Die situasie-vaardigheidsmodel dui aan dat praktiserende professionele persone deur vier fases vorder voordat volle vaardigheid ten opsigte van ADR-fasilitering bereik word.

Respondente is ook volgens ouderdomsgroepe gegroepeer om onderrig en opleiding met verworwe ondervinding te kan vergelyk. Die doel was om te bepaal op watter stadium vaardigheidsbevoegdheid bereik word deur die nuwelinge in die bedryf met die meer ervare professionele persone te vergelyk.

Kwalitatiewe data is verkry deur middel van onderhoude, asook ope vrae gestel in die vrae lys waaruit die nodige inligting om die huidige situasie in die bedryf te beoordeel, verkry is. Die

bevindings het aangetoon dat die probleemareas na die toepassing van metodes, vaardighede en tegnieke neig. Die respondente beskou egter die toepassing van die grondbeginsels van ADR as belangrik en dit word doeltreffend toegepas soos noodsaaklik vir suksesvolle dispuut-oplossing. Die hoë beoordelings binne die self-analise in terme van aktiewe luistervaardighede het die vraag laat ontstaan of daar 'n moontlikheid kon wees van 'n mate van waninterpretasie ten opsigte van die doeltreffende toepassing van hierdie vaardigheid. Hierdie respons dui ook op moontlike respons-vooordeel.

Die afleiding is dat ADR in die bedryf nie volgens die vereistes van standaardpraktyk toegepas word nie. Volgens die data-analise van die self-evaluering, voldoen praktiserende professionele persone nie aan die vereistes vir vaardigheid in die ADR-praktyk nie. Dit is ook geïdentifiseer dat ondervinding aangespreek moet word sodat vaardigheid ten volle bereik kan word. Praktiserende professionele persone is kundig omtrent die vereistes vir doeltreffende praktyk, maar daar is 'n gebrek aan ondervinding.

'n Verdere geïdentifiseerde behoefte in die praktyk is dat konsiliasie op terrein gefasiliteer behoort te word om sodoende die risiko vir dispute in die projekomgewing te verminder.

Die bevindings onderskryf die behoefte dat meer klem op ADR in die boubedryf geplaas moet word in die vorm van onderrig, opleiding en mentorskap.

Sleutelwoorde: ADR, versoening, bemiddeling, praktiseerders, situasie-vaardigheid model, konstruksiebedryf.

## **CHAPTER ONE**

### **FRAMEWORK OF THE STUDY**

#### **1.1 TITLE**

Competence levels of Alternate Dispute Resolution facilitators in the construction industry in South Africa.

#### **1.2 PROBLEM STATEMENT**

Practicing professionals fulfilling the role of principal agent or project manager in the construction industry are often confronted with differences between the contracting parties during the course of a project. Referring disputes to an external mediator may result in unnecessary time loss and subsequent cost implications on a project. If professionals are competent to effectively facilitate conciliation on site, differences may be prevented from developing into disputes which may lead to possible cost and time savings. Lack of knowledge, skills and experience relating to the Alternate Dispute Resolution (ADR) methods, and facilitation procedures may negatively affect the expeditious resolution of disputes. Apart from competency to facilitate conciliation, professionals require an understanding of the ADR context in order to appropriately apply ADR in the process of managing a project.

Research conducted by Povey (2005:2-6) indicates that mediators in the construction industry are inclined to unilaterally resolve a dispute for disputing parties rather than assisting such parties in negotiating their own settlement.

Discrepancies in the dispute resolution process may result in questions being raised about the understanding, application and effectiveness of the ADR methods in the construction industry, and whether practitioners are competent to perform this practice. Furthermore, are practicing professionals fulfilling the role of principal agent aware of the requirements of the internationally

accepted standard practice of facilitation and the appropriate ADR methods relating to the construction industry?

The effective application of the appropriate methods of ADR in the project environment contributes favourably to resolving differences before a dispute develops (Pretorius, 1993:1).

**The research question addressed:** What are the knowledge levels, understanding, application and effectiveness of ADR in the construction industry and how competent are practicing professionals in fulfilling the role of facilitator?

### **1.3 HYPOTHESIS**

Practicing professionals in the South African construction industry do not meet the competence level profile in regard to mediation and conciliation when compared against local and international standards.

### **1.4 INTRODUCTION**

The competitive and expeditious nature of the construction industry, wherein practicing professionals are employed in the management and administration of projects, calls for effective management of differences and disputes. Practicing professionals may therefore be required to achieve competence in the dispute resolution process to keep abreast of the challenges which stem from the ever increasing risk of dispute.

Besides arbitration, alternative methods of dispute resolution became more appealing in the management of projects when the rate of construction increased and the design and procurement of contracts became more complex (Finsen, 2005: 214-216).

ADR is increasingly becoming an integral part of the management of a project and plays an important role in the successful completion of such (Finsen, 2005: 216; Verster, 2006:17).

Lack of competence in ADR may have a negative effect on dispute risk as the function demands a high level of knowledge, understanding, skills and experience from the facilitator of the ADR process.

In South Africa mediation and conciliation are very similar and a less formal and expensive method of dispute resolution to that of arbitration (Business Law, 2000: 247). Authors however have differences of opinion regarding the relationship between mediation and conciliation. Boulle & Rycroft (1997: 62-66) suggest that mediation in the construction industry is positioned between conciliation and arbitration, with overlapping similarities.

The South African construction industry has developed a hybrid form of ADR which stems from traditionally practiced arbitration which in itself has veered from common practice and developed its own identity (Pretorius, 1993: 176).

The conciliation and mediation methods are so closely related that it may be difficult to distinguish between the two. Mediation and arbitration share similar qualities of flexibility and control by the parties as opposed to the formal court system. However, both methods are private and confidential (Boulle & Rycroft, 1997: 62-66).

Povey (2005: 2) on the other hand suggests that mediation in the construction industry is not applied according to the accepted standard practice.

The question is raised: what is standard practice? It is proposed that the mediator skills and techniques applied in international and labour disputes be referred to as accepted standard practice.

Due to the interrelated principles and the development of the hybrid form of ADR practice, more emphasis was placed on the facilitation of the mediation method which tends to be the preferred and more frequently used method of ADR in the South African construction industry (Povey, Cattell & Michell, 2006:44).

Mediation was used as a point of reference because of the similarities to conciliation and the relative basic fundamentals relate to all methods of ADR. However, the term mediator was used synonymously with that of conciliator, and conciliator was used with reference to the practicing professional fulfilling the role of principal agent or project manager. The term facilitator refers to the role of mediator and conciliator.

The complex nature of the construction industry may call for an expert mediator. The facilitator may invariably be an experienced professional currently practicing in the industry or a retired professional who has registered as a mediator with the Association of Arbitrators (Povey, 2005:2). In addition to the role of mediator in the industry, dispute resolution may be supported by the practicing professional who as conciliator is tasked to manage a project, the adjudicator to make a decision on submitted evidence and the arbitrator who makes a judgment call (Finsen, 2005: 216-222).

## **1.5 DEFINITIONS, ACRONYMS AND INTERPRETATIONS**

**ADR:** Alternate Dispute Resolution.

**AoA:** Association of Arbitrators (Southern Africa).

**Adjudication:** an adjudicative process adopted by the contracting parties according to the agreement they have concluded.

**Agent Resolution:** a supervisory role assigned to the agent of the employer.

**Arbitration:** an adversarial process supported by law.

**ASAQS:** Association of South African Quantity Surveyors.

**CJRP:** Civil Justice Reform Programme.

**CL:** Competence Levels.

**Conciliation:** a facilitative ADR process.

**CPD:** Continuous Professional Development.

**DAB:** Dispute Adjudication Board.

**DoJ and CD:** Department of Justice and Constitutional Development.

**ECSA:** Engineering Council of South Africa.

**FIDIC:** International Federation for Consulting Engineers.

**GCC:** General Conditions of Contract for construction works.

**JBCC PBA:** Joint Building Contracts Committee Principal Building Agreement.

**Mediation:** an evaluative ADR process.

**NEC:** New Engineering Contract.

**Practicing Professionals:** Practicing Professionals who are tasked to manage a project in the South African construction industry, with specific reference to Principal Agents, Architects, Construction Engineers and Quantity Surveyors.

**QS:** Quantity Surveyor.

**SAIA:** South African Institute of Architects.

**SAICE:** South African Institute for Civil Engineers.

**SCM:** Situational Competence Model.

**Standard practice of mediation:** the mediator skills and techniques applied in international and labour disputes.

**The Four Cs:** the basic fundamentals of the ADR context.

**UFS:** University of the Free State.

## **1.6 LIMITATIONS**

Due to the nature of ADR practice in the construction industry in so far as facilitation may need to be conducted by practicing professionals fulfilling the role of principal agent or project manager, the study was limited to the ADR roles fulfilled by practicing professionals in South Africa and focuses on the principles, skills and techniques of the mediation process which forms the basis of all methods of ADR and which, according to Boule & Rycroft (1997: 62-66), is positioned centrally between arbitration and conciliation with overlapping similarities.

The principles, skills and techniques which are important elements to successful ADR addressed in this study are based on South African methods and where applicable, international information was also sourced. Results as determined through an empirical study and documentary review are reflected in this study.

## **1.7 OBJECTIVES OF THE STUDY**

The objectives of the study included:

1. To consolidate and report on the current competency levels of professionals practicing ADR in the South African construction industry;
2. To identify the appropriate methods of ADR in the South African construction industry and the application thereof;
3. To define competency in the ADR context;
4. To identify the key characteristics and attributes required by facilitators to effectively facilitate the ADR process;
5. To identify the various roles fulfilled by practitioners facilitating ADR in the industry;
6. To identify the difference between current and standard practice of ADR;
7. To identify the ADR role of the practicing professional in the industry; and
8. To report and make recommendations on findings.

## **1.8 ASSUMPTIONS**

The reliability of this study is subject to the following assumptions:

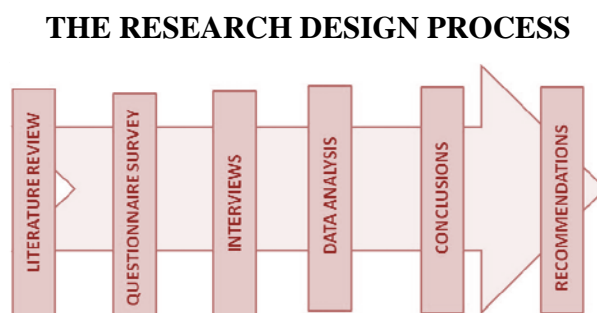
- That an acceptable response to the questionnaires used in this study is received to serve as a representative sample of the target population;
- That personal interview serves as a link between theoretical studies and applied practice;
- That observation records serve as a practical representation of actual practice; and
- That relevant and current documentation and records sourced satisfy the research objectives.

## 1.9 RESEARCH METHODOLOGY

The research question, what is the understanding, application and effectiveness of ADR in the South African construction industry, was answered by identifying the important elements of ADR in the literature study and developing a questionnaire from the findings of the literature review in order to conduct an empirical study, upon which a comparative analysis was conducted to compare current practice with the findings of the study. Qualitative data was gathered by means of interviews and the respondents' opinions of ADR practice in the construction industry captured in the questionnaire.

The research involves an exploratory study applying both qualitative and quantitative measures needed to determine the competence levels of ADR facilitators (Cooper & Schindler, 2008: 162-164). A competence model was developed based on the findings of the literature review and the results of the empirical study are reflected in the model depicting the competence levels of the practicing professionals when measured against the identified ADR elements.

Figure 1.1 illustrates the process of the research design which was followed to test the hypothesis.



**Figure 1.1: The process of the research design**

Hesse-Biber (2010: 8-29) suggests that research is better viewed from different perspectives to gain a better understanding of the research problem and a better opportunity to make a more meaningful conclusion.

The results of the analysis are presented as qualitative and quantitative data. Quantitative measures were used to determine the competence levels which were based on self-assessment questions, whereupon qualitative data was collected. Through the process of triangulation (Creswell, 2008: 29), the data was used to verify the findings of the research, upon which the present situation in the construction industry was recorded.

The rationale and application of both the questionnaire and model are discussed below.

### **1.9.1 Data collection**

The data collection strategy included:

- Selected secondary data by both international and South African authors to determine whether the methods and procedures used in South Africa compare to international practice in order to identify whether ADR practice is applied according to set guidelines or whether it has taken on a hybrid form to suit the needs of the industry;
- Self-administrated questionnaires completed by professionals who are currently active in the South African construction industry; and
- Interviews conducted with practicing professionals in the construction industry.

### **1.9.2 Literature review**

Literature on ADR in the construction industry was sourced to inform the study in terms of ADR practices in South Africa and internationally. The requirements of ADR were sourced from literature in the form of books, reports, journal articles, official documentation and the internet to determine the essential requirements for effective application. Articles, conference proceedings and recent publications provided the information as practice has it.

The methodology of the research was initiated with a literature review which was conducted and addressed in Chapters 2-5 to determine the requirements for practitioners to achieve competence in ADR facilitation. An overview of the context, competency, process and practice of ADR in the South African construction industry is provided. The principles, skills, attributes, roles and functions which are critical elements to successful ADR and the application thereof are

addressed and analysed in order to report on the degree to which practicing professionals facilitating ADR measure up to the criteria of effective practice.

The conclusions from the literature review which were based on international (standard) practice were analysed and compared to present practice to determine the skills, attributes, roles and functions for effective dispute resolution. These requirements were grouped into elements which are required for competence.

The literature available on ADR in the South African construction industry dates from 1976 when mediation was introduced as an alternative to arbitration (Quail, 1978: 165). However, authors only started placing emphasis on the advantages of the consensual methods when Loots 1991 (8-13) identified the Four Cs.

A questionnaire based on the requirements for effective ADR practice identified in the literature study was developed and circulated to registered mediators in the built environment as well as practicing professionals who fulfil the role of principal agent or project manager in the industry. The questionnaire survey was based on the conclusions of the literature review which identified the requirements for effective ADR in regard to the competence levels of practitioners.

### **1.9.3 Review of current practice**

ADR practice discussed in Chapter 5 was supported by a review on current practice in the industry and sourced from conference proceedings, journal articles and latest publications of literature. A basis of current practice was formed to compare this with standard practice.

### **1.9.4 Development of the questionnaire**

The questionnaire for the empirical study was based on the requirements for the effective application of ADR as identified in the literature review. Both quantitative and qualitative measures were addressed in the questionnaire.

Elements relating to competence in ADR were identified in the literature review; however, due to the interdependency of the process and the fact that all the factors relating to competency are

interdependent, it required an equal distribution of the weighting factor. An example would be where facilitating a particular method of ADR is dependent on effective negotiation, which is in turn dependent on active listening for satisfactory end results. All the methods are supported by negotiation, a skill which is dependent on effective listening and numerous other skills for effective application. This conclusion was based on the conclusions of the literature review addressed in Chapters 2-5.

The essential elements of the ADR process identified for effective facilitation were addressed in the questionnaire in order to determine the respondents' knowledge, skills, attributes and experience relating to competence and are as follows:

- **The ADR context**

Meeting with the requirements of the Four Cs (Satisfactory end results):

Consensus;

Control;

Continuity; and

Confidentiality.

- **Selected methods**

Adjudication (according to the discipline of the respondent);

Arbitration;

Agent resolution;

Unassisted negotiation;

Conciliation;

Mediation; and

Appropriate dispute resolution (the ability to apply the appropriate method of to the dispute.

- **Facilitation skills**

Communication;

Negotiation;

Organisational skills;  
Basic management; and  
Emotion management.

- **Attributes**

Active listening;  
Creativity;  
Empathy;  
Impartiality;  
Neutrality; and  
Other: relating to sound judgment, perseverance, trustworthiness and patience.

- **Contracts, rules and guidelines**

The JBCC Dispute Resolution Clause;  
The JBCC Adjudication Rules;  
The AoA Arbitration Rules; and  
The AoA Mediation Guidelines.

The respondents' regard to the levels of importance of the attributes were also addressed in the questionnaire in order to compare the attributes identified in the literature review with those considered as important by the respondents.

Due to the extent of the target population of architects, engineers, quantity surveyors and construction project managers, the sample group was limited to volunteers registered with the Association of Arbitrators (AoA) and a convenient purposive sample of professionals who currently manage or are employed in practices in the construction industry. Resource constraints in so far as fees for the distribution of the questionnaire by the Engineering Council of South Africa (ECSA) constituted a limitation. Two hundred and five questionnaires were distributed throughout the target population of which forty five responded.

The questionnaire was distributed electronically or delivered personally to practicing professionals in the construction industry, upon which respondents were requested to complete them. Respondents were also contacted telephonically in regard to delayed responses. A copy of the individual analysis was offered to respondents for their own interest as a token of appreciation for their participation. Respondents were assured that individual responses would be treated as confidential.

### **1.9.5 Interviews**

Further qualitative measures were addressed by means of personal interviews with practicing professionals in the industry. When respondents were contacted on a personal basis they were asked to comment on the current situation in the industry. The information gathered from the interviews was used in supporting the literature review and recorded in the findings of the research.

### **1.9.6 The development of the competence model**

The research question addressed focuses on the competence levels of ADR facilitators in the industry on which the model was based. A competence model was developed based on the conclusions of the literature review and the results of the empirical study are reflected in the model depicting the competence levels of the practicing professionals when measured against the identified ADR elements. Output competencies (skills, techniques and attributes) which constitute the observable performance a person exhibits in the job, were calculated by taking the average of knowledge and skills which represents the self-assessed competence level and multiplying it by the number of interventions experienced (where competence increases with experience).

Input competencies relating to ADR are addressed as:

- Knowledge;
- Skills and
- Attributes, which are rated on the Likert scale of 1-5 with 1 being the least and 5 the most.

A graphical model depicting the competence levels of facilitators in the various attributes, knowledge and skills relating to ADR is presented. Different colours are used to simplify the illustration in the model as explained in Chapter 6.

The area of achieving competence which falls in the third quadrant of the situational competence model is rated between 50% and 75% as reflected in the competence model. This percentage as an indicator of competence was derived as an average of common practice by higher education and professional bodies.

#### **1.9.7 The development of a Situational Competence Model; how it works and what it measures**

The ADR Situational Competence Model was based on the Situational Leadership Model developed by Hersey and Blanchard (1968: online) and adapted to illustrate the progressive competence levels of practicing professionals facilitating ADR in the industry.

This model illustrates the development process to achieving competence of ADR facilitators in the construction industry. It should however be noted that the model depicts the current situation and will be subjected to variations as the situation changes. The Situational Competence Model suggests that practicing professionals progress through four stages before becoming fully competent in facilitating ADR. The model proposed by Hersey & Blanchard (1968: online) provides for a four stage development in the competence level process which is illustrated in the four quadrants of the model namely:

**Competence Level (CL): CL 1, CL 2, CL 3 and CL 4.**

**CL 1** = Low competence and a high need for direct supervision.

As suggested by the above, an individual rated in this quadrant of the model may have the required knowledge to perform the task but generally lacks the specific skills. In all probability, such person may also lack the confidence and/or motivation to take on the task without

supervision. Theory suggests that individuals in this position may be dependent on or require a high degree of direct supervision.

**CL 2** = Low competence and a high need for direction and support.

An individual rated in this quadrant of the development process may be described as an individual with limited skills but still not ready to take on the task. Such individuals would require a high degree of support and direction.

**CL 3** = Increasing competence and need for objective support.

An individual rated in the third quadrant of the development process may be described as having a high degree of competence but may require limited guidance and support. Such individuals, although somewhat competent, may still need limited objective support.

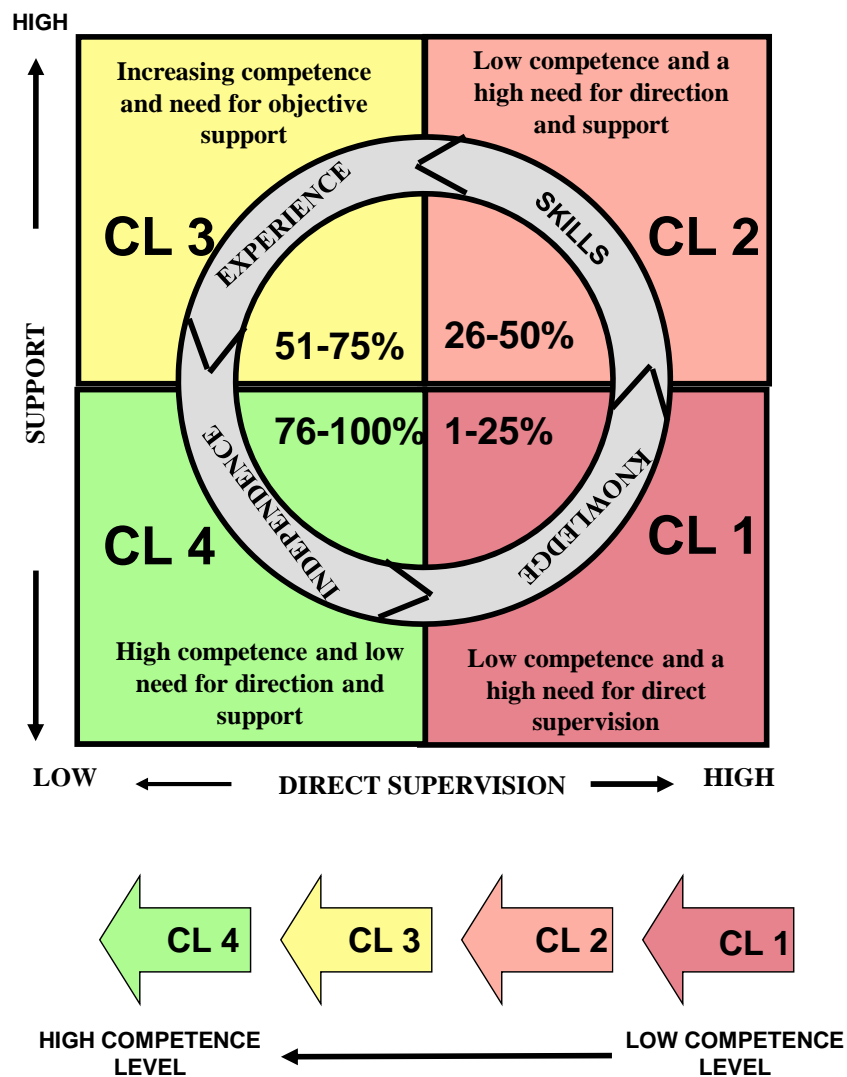
**CL 4** = High competence and low need for direction and support.

Individuals in the fourth quadrant may have reached self-actualisation with no need for direct support and supervision. These individuals are considered competent. However, support and direction if needed, may be requested by the individual.

The competence levels are recorded in each quadrant. These competence levels should be revised at regular intervals to determine the current situation of professionals.

Figure 1.2 illustrates the ADR Situational Competence Model and the process of achieving competence. The process passes through four stages to achieve competence levels and it is important to note that mentorship continues even after competence is achieved.

## ADR SITUATIONAL COMPETENCE MODEL



**Figure 1.2: ADR Situational Competence Model**

Source: (Hersey & Blanchard, 1968: online)

### **1.9.8 Application of the Competency and Situational Competence Models to the various practicing professionals facilitating ADR.**

The application of the competence model was conducted as follows:

**Stage One:** Practicing professionals complete the questionnaire.

**Stage Two:** Analysis of completed questionnaires.

**Stage Three:** Plot the results on the Competence Model.

**Stage Four:** Plot the results on the Situational Competence Model.

The Competence Model was used to illustrate the results of the data analysis relating to the various areas of competence, whereas the Situational Competence Model illustrates and records the competence level and the support required in achieving competence.

### **1.10 ETHICAL CONSIDERATIONS**

Cooper and Schindler (2009: 34) state that ethics are generally accepted behaviour that guides moral choice about our relationships and behaviour towards others. In this light, the following considerations were applied to the study:

- **Voluntary participation:** participation in this research was on a voluntary basis and measures were taken to ensure that participants were not misled or coerced into participation.
- **Informed consent:** all participants were fully informed as to the purpose, process and benefits of the research.
- **Confidentiality and respect:** the researcher ensured the confidentiality of participants and their responses.
- **Data Integrity:** data is treated as confidential and stored in safekeeping.

## **1.11 RESPONSE BIAS**

The greatest challenge in the use of self-report questionnaires is that of response bias. According to Cooper and Schindler (2008: 221-222) there are generally two primary causes of response bias, namely:

- Participants fail to correctly complete answers, or
- Respondents consciously or unconsciously misrepresent actual behaviour, attitude, preference, motivation or intent.

Whatever the cause, the researcher must be alert to the ever-present threat of response bias, and as far as possible take measures such as qualifying participants according to their ability to answer the questions in order to reduce data error caused by response bias.

## **1.12 STRUCTURE OF THE DISSERTATION**

### **1.12.1 Chapter Two: Overview of ADR**

Chapter Two is based on the literature review and addresses an overview of ADR in general, the basic fundamentals and specific application of ADR methods in the construction industry. The study includes an analysis of the different methods of ADR applied in the construction industry to determine which of the available methods are most appropriate to the industry. The JBCC PBA (2007: 30-31) Dispute Resolution Clause 40 was used as a guide to identify relevant methods. However, the study includes the methods employed by the JBCC PBA Dispute Clause 40 and also considers the influences of agent resolution.

### **1.12.2 Chapter Three: Competence in ADR**

Chapter Three is based on a literature review intended to identify the critical competencies relating to the attributes, skills and techniques required by ADR practitioners in the construction industry. The related elements required to measure the competence of practitioners in the industry were identified in the literature review and are addressed in this chapter.

### **1.12.3 Chapter Four: The ADR Roles**

In Chapter Four the conclusions of a literature review focusing on the roles and functions related to ADR practitioners in the construction industry are briefly documented to gain an overview of the application of the various functions and what is required to effectively apply the process in practice.

### **1.12.4 Chapter Five: ADR Process and Practice**

In Chapter Five the conclusions of documentation of current ADR practice, which is supported by the conclusions of the literature review and interviews, are documented whereby a comparative analysis is conducted.

### **1.12.5 Chapter Six: Synthesis of the findings, conclusion and recommendations**

Chapter Six includes a report on the findings of the research which support the objectives and test the hypothesis. The results of the empirical study were analysed and are presented in this chapter. A comparative analysis was conducted to compare current practice with the findings of the study. Based on the findings, conclusions and recommendations were made.

## **1.13 CONCLUSION**

The graphical presentation of the results of the critical success factors relating to ADR in the industry is an indication of the situation in the industry upon which the areas requiring attention may be identified.

The situational process assists professionals to identify their situation in regard to the support which is needed.

The facilitators may identify their situation on the competence model in order to manage their own development. However, the situation might change as knowledge, skills and attributes are gained and experience increases. As such, knowledge, skills and attributes are considered as important as experience gained.

## **CHAPTER TWO**

### **OVERVIEW OF ADR**

#### **2.1 INTRODUCTION**

Mediation was introduced to the South African construction industry in 1976 as an alternative method of dispute resolution to the cost and time consuming method of arbitration. The Joint Study Committee issued a practice note with the intention of saving costs and time in the resolution of disputes. However, it was submitted that should parties be dissatisfied with the outcomes, they were still entitled to submit to arbitration (Quail, 1978: 165).

The complex nature of the construction industry harbours an inherent threat of dispute risk which invariably has a negative impact on project cost and time goals (Verster, 2006: 13). The potential negative impact of disputes may in all probability have a direct correlation on how effectively dispute resolution methods, skills and techniques are applied.

The successful application of ADR is supported by cost, contract and claims communication in the claims management process as depicted by Verster (2006: 17). Verster (2006: 17) suggests in the project management knowledge and skills areas diagramme that the professional should be able to apply the dispute resolution methods more effectively in order to create more time to be spent on the management of the project.

Although Povey, Cattell and Michell (2006: 46) identify mediation as the preferred and more frequently used method of ADR, adjudication is applied when disputing parties require a decision to be made for them in a short time (Finsen, 2005: 223). Conciliation may be applied as an extension of the negotiation process on site and as a primary process to prepare the parties for mediation (Moore, 1986:124).

Adjudication is applied as a dispute resolution method when the parties require a decision to be made for them and this decision is provisionally binding unless it is overturned in a subsequent

arbitration (Finsen, 2005: 222-223). As such arbitration, being the original method of ADR, may be considered the support system to the ADR process in the construction industry.

Having adopted a process which is exclusive to ADR practice in the South African construction industry, the context in which the methods (which originally stem from arbitration and have overlapping similarities) may vary and the application may prove to be somewhat confusing when compared to standard practice.

## **2.2 THE ADR CONTEXT**

ADR suggests various methods of resolving disputes other than the more formal methods of litigation and adjudication through the courts. The ADR process is intended to give parties control and responsibility for the outcome (Bevan, 1992:18).

Pretorius (1993: 2) and Verster (2006: 13) suggest that the original goals of ADR are intended to supplement court procedures, *inter alia*:

- To prevent undue cost and delay;
- To relieve court congestion;
- To facilitate access to justice; and
- To provide effective dispute resolution.

The relief of court congestion has been addressed by the Department of Justice and Constitutional Development in the Civil Justice Reform Programme (CJRP) (2012:14-20) by simplifying lengthy and complex court processes and implementing ADR in the form of mandatory mediation and adjudication in order to settle out of court.

The goals of ADR are therefore favourably applicable to the construction industry in terms of prevention of undue cost and delay, and effective dispute resolution.

ADR practice is based on fundamentals which lead to satisfactory end results and is applicable to all methods (Loots, 1991: 8-13). However, if these fundamentals are not applied, ADR cannot be

applied in its true form. In view of this, competence in ADR therefore relies on the effective application of these basic fundamentals which lead to satisfactory end results. In construction jargon these fundamentals are known as the 'Four Cs'.

According to Loots (1991: 8-13) and Verster (2006: 13), the main features of the ADR context are referred to as the Four Cs and apply to the non-adjudicative methods of ADR and are as follows:

- Consensus
- Continuity
- Control
- Confidentiality

### **2.2.1 Consensus**

It is essential that the parties reach consensus, without which it would be an impossible task to facilitate or resolve a dispute (Bevan, 1992:2). Consensus initially starts with consenting to the process/procedure.

Boulle and Rycroft (1997: 14) suggest that 'mandatory mediation' eliminates consensus and therefore undermines the integrity of mediation. The South African construction industry provides an opportunity for the parties to select their own method of dispute resolution in the Joint Building Contracts Committee Principal Building Agreement (JBCC PBA), (2007); however, this is based on consensus on signing the contract. This only entitles the parties to submit to mediation without forfeiting their right to adjudication.

If the professional were to inform the parties of the importance of reaching consensus prior to signing the contract, this may prove to limit any complicated issues and delays when a dispute arises. Parties may then realize that if consensus is not reached, heading in opposite directions may not effect a settlement.

### **2.2.2 Control**

ADR practiced in the construction industry allows for parties to be in control of the outcomes of a dispute resolution process. Apart from creating a win-win situation in regard to mediation and conciliation, this suggests that through consensus, both parties accept the outcome, thus creating outcome based satisfaction (Moore, 1986: 6).

Parties are self-empowered because they negotiate their own settlement and do not rely on a third party to make a decision for them, leaving them in control of the outcome (Brown & Marriott, 1993: 10). This form of conflict resolution may naturally leave the parties with a sense of control and empowerment which supports an environment of cooperation and involvement.

Guidance by the skilled facilitator of the ADR methods may therefore assist the parties to better understand the situation, to view the dispute on a broader context and to appreciate the other party's point of view. This makes it possible for the parties to make a decision based on the real issues to the dispute and allows them to be in control and satisfied with their decisions.

In contrast, the adversarial system uses evidence to argue against each other to impose a decision which normally leads to a win-lose result (Bevan, 1992: 1-2).

### **2.2.3 Continuity**

A continuous healthy business relationship is imperative in today's competitive construction industry. Loots (1991: 8) suggests that irreparable harm to the on-going business relationship should be avoided. Boule and Rycroft (1997: 37) and Moore (1986: 13) suggest that mediation preserves and improves relationships by applying the "gentle art" of reconciliation rather than the confrontationist process approach by the courts.

Continuity between contractors and subcontractors is important because they depend on established relationships for performance of future contracts, hence the need for a cooperative attitude in the negotiation process (Finsen, 2005: 221).

It is suggested that the practicing professional place considerable emphasis on the importance of the continued relationship as the lack of performance in this regard may have an impact not only on the individual project but indirectly, on the industry as well. In support of this, Pretorius (1993: 9) suggests that little harm can be done to a good existing relationship between the parties if the ADR process was managed effectively.

#### **2.2.4 Confidentiality**

Confidentiality is of great importance to the parties in respect of the integrity and ethics of their business. Based on ethics practiced by the practicing professional fulfilling the role of project manager, confidentiality is considered to be a norm; therefore the facilitators need to regard confidentiality as a top priority in terms of withholding confidential information from the respective parties, in a relaxed and modest manner (Bevan, 1992: 78).

Confidentiality is controlled by the disputing parties and no recordings and transcripts are made. Parties contractually commit themselves and any evidence which takes place behind closed doors is considered confidential and it cannot be used as evidence in a court of law (Boulle & Rycroft, 1997: 39; Trollip, 1991: 17). The mediator should make this clear in the initial meeting.

The JBCC, PBA Clause 40.6.3 (2007: 31) states that if an agreement is reached it is put in writing and signed by the parties and considered final and binding however, it is still considered confidential.

#### **2.2.5 The Four Cs**

In view of the arguments posed in this paragraph in regard to the Four Cs, it would be advantageous if practicing professionals were knowledgeable on the basic fundamentals of the ADR context which lead to satisfactory end results. Lack of knowledge and understanding of the application of the Four Cs may impact on the efficiency of ADR.

## **2.3 ADR METHODS**

### **2.3.1 Introduction**

ADR methods provide for a neutral third party who assists the parties in reaching a mutual agreement and makes suggestions of a solution, placing emphasis on the consequences thereof.

The more regularly used methods, however, may be those that are included in the JBCC PBA (5<sup>th</sup> edition, 2007) which most building professionals may be familiar with. Finsen (2005: 32), Verster and van Zyl, (2007: 3) state that the more common methods of ADR include:

- Arbitration;
- Adjudication;
- Agent resolution;
- Negotiation;
- Conciliation; and
- Mediation.

According to Pretorius (1993: 3), dispute resolution is categorised as follows:

- Dispute resolution processes involving private decision-making by the parties, including negotiation and mediation;
- Dispute resolution processes involving private adjudication by third parties and arbitration; and
- Dispute resolution processes involving adjudication by public authority, including administration, decision-making and formal litigation.

Adjudication in the engineering discipline follows a different process in the form of Dispute Adjudication Boards (DAB) (Lalla & Ehrlich, 2012: online) which is supported by the International Federation for Consulting Engineers (FIDIC), General Conditions of Contract for Works of Civil Engineering Construction (GCC) 2010 and the New Engineering and Construction (NEC) (2005) contracts, whereas in the building industry, adjudication is supported

by the JBCC PBA (2007). The South African Institute of Architects (SAIA) generally practices adjudication according to the JBCC PBA Dispute Clause 40 (The Cape Institute for Architecture, 2010: online). The DABs follow much the same process however, the establishment of the board differs where three adjudicators are appointed to resolve the dispute. The process relies on the expertise of engineers (Owen, 2003: 25).

Similar to this process is the method of expert determination where as with adjudication, a dispute is referred to an expert rather than to litigation where a judge may base his decision on law, rather than technical issues. The process is also based on rules (What is ADR, 2010: online). This suggests that adjudication in the JBCC PBA (2004) was based on the principles of expert determination as reviewed in Chapter 2. In view of the above, DABs are based on the same principles and may involve more experts which according to Swart, (2012: personal communication), tends to generate expenses and may be suited to larger projects.

Apart from agent resolution which was implemented even before mediation, which according to Quail (1978: 165), was introduced in the construction industry in 1976, these methods may be considered common due to their inclusion in the JBCC PBA (2007: 30-31) Dispute Clause 40. Agent resolution was included in the PBA of 1991 Dispute Clause 37 which was recommended by the JBCC PBA (1991: 21). Agent resolution as a method of dispute resolution was identified in the Association of South African Quantity Surveyors (ASAQS) 1981 Practice Manual in the Agreement and Schedule of Conditions of Building Contract (1981: 17). However, agent resolution was included in this study due to its popularity in practice (ASAQS, 1981:17; Verster & van Zyl, 2009: 7; JBCC PBA, 1991: 21). Although conciliation is not included as a method of dispute resolution in the JBCC Contract documentation, it may suffice as a method of informal dispute resolution as required in Clause 40.2 (JBCC PBA, 2007: 30-31).

Dispute resolution in the construction industry is different due to the use of unique adjudicative methods whereby judgments can be rejected with non-binding decisions which are characterised with consensual and control features (Finsen, 2005: 223-224).

Various authors are of the opinion that conciliation and mediation are very similar methods of ADR and that the terms are sometimes interchangeable and are normally used synonymously in most discussions (Brown & Marriott, 1993: 19; Boule & Rycroft, 1997: 62; Business Law, 2000: 247).

The similarities that exist between arbitration, the oldest method of ADR, and mediation, may be appreciated because new methods were developed for the purpose of speeding up the arbitration procedure so as to provide a more informal and cost-effective way of resolving disputes (Butler & Finsen, 1993: 8).

According to Brown and Marriott (1993: 18-20), Boule and Rycroft (1997: 60-66) and Bevan (1992: 3-26), the preferred methods of ADR in the construction industry are all commonly used in standard practice. However, the application of these methods may vary from accepted standards.

The applicable methods of ADR are reviewed and addressed in paragraph 2.3.2 - 2.3.7 below and describe the skills, techniques and preferences relevant to the construction industry.

### **2.3.2 Arbitration**

Arbitration is defined as an adversarial process supported by law in terms of the Arbitration Act 42 of 1965 whereby disputing parties refer a dispute to an impartial and neutral third party for a final and binding decision regarding issues of the dispute which have been submitted to him (Moore, 1986: 7; Business Law, 2000: 248; Butler & Finsen, 1993: 1).

Arbitration is supported by most contract agreements, the Arbitration Act 42 of 1965 and the common law (Finsen, 1993: 181). The arbitration clause was generally incorporated into a building contract and in the absence of this; a dispute would be referred to a court of law (H.S McKenzie & S.D. McKenzie, 2009: 3).

Arbitration has been the favoured method of dispute resolution for many years and still is considered an alternative method of dispute resolution to litigation because it offers more privacy

and procedural flexibility. However, like litigation, it is still based on court procedure and is of an adversarial nature (Finsen, 2005: 216-217; Brown & Marriott, 1993: 9).

There are differences of opinion as to whether arbitration is a method of ADR. Brown and Marriott (1993: 9) suggest that there is a definite distinction between litigation and arbitration on the one hand and ADR on the other.

In view of the above, this may be due to the fact that both arbitration and litigation have an adversarial approach and are subject to a final and binding judgment, whereas parties in ADR settle by consensual means, assisted by a mutually acceptable third party facilitator (Brown & Marriott, 1993: 9).

Contrary to Brown and Marriott's (1993:9) suggestion that litigation and arbitration are not included in ADR, when arbitration is referred by the court, this is done in accordance with the arbitration agreement and as such, arbitration becomes an alternative to litigation (South Africa. Arbitration Act 1965:5-6). Since new methods of ADR have been adopted, arbitration seems to have held its position in terms of a way of resolving disputes which have failed in mediation.

According to Finsen (2005: 216-217), arbitration has become more formal with an improved decision-making process. However, the cost and speed of arbitration have resulted in a move towards the more informal and speedy methods of dispute resolution.

Any natural person may be appointed as an arbitrator; however, the unique nature of the construction industry calls for an arbitrator with expert knowledge (Finsen, 2005: 216-217).

Arbitration is supported by:

- the contractual agreement;
- The Arbitration Act 42 of 1965; and
- the common law (Finsen, 1993:18).

A positive aspect of arbitration is that it affords the parties the opportunity to select a decision-maker with the appropriate expertise in construction. However, this may also apply to the other methods of ADR. Arbitration may therefore offer a competitive outcome as opposed to the satisfactory end result produced by mediation (Bevan, 1992: 1).

Although arbitration will, depending on the situation, be included as a method of the dispute resolution process, its win-lose nature (in so far as there are no negotiated outcomes and only an award (Finsen, 2005: 219), may well impact on present and future relationships between the disputing parties, and as such the outcome could be measured in terms of present and long-term cost.

Arbitration is a well-used method of ADR in the construction industry and is used on a consensual basis where parties agree on submitting a dispute to arbitration. However, the final and binding decision of the arbitrator may well disqualify arbitration from being equated to mediation and termed an alternate method to litigation. In spite of the finality of arbitration, government contracts in South Africa include litigation as a means of dispute resolution. Although the parties may agree to submit to arbitration which affords them a certain amount of control regarding the relevant procedures, continuation may be jeopardised if judgment is passed and one of the party's expectations are not met. As in all methods of ADR, confidentiality is upheld in arbitration (Finsen, 2005: 217).

According to Finsen (1993: 181) ineffective arbitration may be a result of the wrong choice of arbitrator which may leave the parties in a worse position than litigation!

In spite of the application of new methods to speed up the dispute resolution process, the unique and expeditious nature of the construction industry may lend itself to even more time-saving applications; hence the inconsistency indicated in Povey's (2005: 2) research with the principles relating to an accepted mediation process and the evolution of a mediation process unique to the construction industry.

It is suggested that arbitration may therefore be referred to as the “backbone” of dispute resolution in the construction industry and forming part of the ADR context, because it may well be considered a last attempt at resolving a dispute if others are unsuccessful. It is also important to note that the consensual nature of arbitration places it in the ADR context.

In conclusion, arbitration was the first alternative method of ADR to litigation in the construction industry and since then mediation and other hybrid methods have stemmed from this method. However, in spite of all these new methods, arbitration remains the last alternative to resolving a dispute when an impasse has been reached (JBCC PBA, 2007:31; Finsen, 2005:230). It is suggested that unless arbitration in the construction industry is approached in a professional manner, the ineffective application may result in the cost exceeding that of litigation.

### **2.3.3 Adjudication**

Adjudication in South Africa differs from adjudication in the United Kingdom which is based on legislation and results in a final and binding decision. In South Africa adjudication is adopted by the contracting parties according to the agreement they have concluded (Finsen, 2005: 223; Bevan, 1992: 10-11).

South Africa has a unique system of ADR where adjudication is adopted by the contracting parties (Finsen, 2005: 223). The use of adjudication was intended to speed up the resolution of disputes in order to avoid the loss of valuable contract time.

Clause 40.6 of the JBCC PBA (2007: 31) entitles the parties to submit a dispute to adjudication, arbitration or to mediation at any time. Adjudication is supported by the Construction Industry Development Board (CIDB) and is now included in most construction agreements. Unlike the British method of adjudication where a binding decision is made, the decision in the South African construction industry is provisionally final and binding in so far as if the parties are not satisfied with the decision, it is subject to revision by an arbitrator. The parties are however not obligated to submit to adjudication and are entitled to submit to arbitration or mediation (Finsen, 2005: 223; Brown & Marriott, 1993: 19; JBCC PBA, 2007: 31).

Adjudication was introduced to the South African construction industry and included in the JBCC PBA Series 2000 4<sup>th</sup> Edition (2004: 30). This approach took effect after the change elsewhere to adjudication, adopted from the Latham Report in the United Kingdom (Scott & Markram, 2004: 1).

Adjudication has been incorporated into the construction industry building contracts as a method of ADR and although it is of an adversarial nature, the aim is to achieve a speedy resolution to a dispute, based on a decision being made on a consensual basis between the parties (Bevan, 1992: 11). The adjudicator acts as an expert; he/she receives the information on the dispute which is submitted by the parties and makes a decision (JBCC, 2007 4.1 Adjudication Rules, 6.3.1).

Although adjudication is of an adversarial nature, sharing similarities with arbitration and litigation, it has become a well-used method of ADR in the construction industry. Adjudication or arbitration is an obligatory measure in the JBCC PBA (2007: 30). However, Clause 40.5 states that it is not translated as a waiver of the parties to submit to mediation.

Consensus in so far as the contracting parties agree on the method of adjudication and of the adjudicator, may be agreed to at the time of drawing up the contract. The fact that the parties may have an option to submit to arbitration if not satisfied with the outcome leaves them in control of the process and suggests that a business relationship may continue.

#### **2.3.4 Agent Resolution**

The architect was normally appointed as the principal agent and authorised accordingly by the employer for the general management of the project. To provide for the resolution of these disputes, the architect was often empowered to adjudicate a dispute in the first instance with a right of appeal from his award to an arbitrator (H.S McKenzie & S.D. McKenzie, 2009: 3, 113 & Finsen, 2005: 38).

Today it is possible for both the principal agent in an authoritative context and a project manager in a managerial context to have respective roles in a project. An architect would normally fill this role. There may be times when a quantity surveyor is appointed as a principal agent; and this

may normally occur in an alteration type of project where extensive costing is involved (Verster, 2006: 15, Finsen, 2005 : 38; H.S McKenzie & S.D. McKenzie, 2009: 3, 113). In the engineering field, the engineer fulfils the role of principal agent (GCC, 2010: 64).

In South Africa, the architect's discretion as principal agent was provisionally considered to be final and binding with the right to have it overturned by an arbitrator as a safeguard against biases. The employer and contractor may on consensual terms appoint the architect fulfilling the role of principal agent, as arbitrator (Butler & Finsen, 1993: 112).

Architects were formerly given more authority than they presently have. However, the supervisory role is now assigned to the agent of the employer (H.S McKenzie & S.D. McKenzie, 2009: 113). An agreement as such, may however be to the advantage of the parties provided the principal agent remains impartial as he/she may be the most informed and qualified person on the issues of the project and be ideally suited to fulfil the role of mediator.

According to research conducted by Verster and van Zyl (2009: 7), agent resolution is a favoured method in the industry in spite of the fact that it does not offer the advantages offered by mediation.

Agent resolution therefore meets with some of the criteria suggested in the Four Cs and compares favourably with adjudication where a decision is made for the parties. However, as with adjudication and mediation, parties are permitted to submit to arbitration if they are not satisfied with the outcomes (JBCC PBA, 1991: 21).

### **2.3.5 Negotiation**

Negotiation is considered a primary method of ADR and as such cannot be further reduced into elements and may rather be termed a critical element of all methods of ADR. Negotiation which takes place between the disputing parties alone may also be referred to as unassisted negotiation, whereas mediation and conciliation are the main forms of assisted negotiation (Boulle & Rycroft 1997: 60-61).

It is preferable that the practicing professional encourages the option of facilitated negotiation in order to inform the parties of the correct procedures so that they may better understand the dispute, failing which, they may enter into negotiations based on uninformed principles (Tiruneh, Verster & Kotzé, 2007: 5). Loots (1991: 8) suggests that disputes can be best settled at the point where the relevant information is best understood, which may imply the need for the practicing professional to suggest the option of facilitated negotiation in order to inform the parties so that they may better understand the dispute, failing which, they may enter into unassisted negotiations based on uninformed principles.

Bevan (1992: 3) describes negotiation as a basic dispute resolution process. However, this may be true to form if assistance is not rendered by the conciliator. Negotiation also forms part of the conciliation process and it may prove to be more effective when facilitated by a third party rather than the possibility of being subjected to the inflated emotions of the parties.

A structured or facilitated process describes the negotiation method of ADR as opposed to direct negotiation (unassisted) by the parties themselves (Pretorius 1993: 4). The natural way to resolve differences is through negotiation. However, in the case of disputes in a complex industry one may rather look for guidance in terms of correct procedure and expert knowledge.

### **2.3.6 Conciliation**

Conciliation is a structured negotiation process facilitated by a neutral third party (Pretorius, 1993: 4). This closely resembles the description given for negotiation; however, it is important to note that the method of conciliation is a facilitative procedure which builds positive relationships and creates an atmosphere of trust and cooperation (Moore, 1986: 124; Boulle & Rycroft 1997: 62).

Conciliation is the psychological component of mediation where the neutral third party will attempt to create an atmosphere of trust and cooperation which is conducive to constructive negotiation. The aim of conciliation is to correct perceptions, reduce fears and improve communication in order to relax parties and guide them into conflict-free negotiations and bargaining. Conciliation also offers parties the opportunity to determine their own end results.

Conciliation as a primary element of mediation is applied with the intention of preparing the parties psychologically to enter into the extended process of mediation (Moore, 1986: 4-6, 124).

In view of the above, as with negotiation, conciliation is a primary process of mediation and may be termed a critical element of the mediation process in order to prepare the parties psychologically to continue with the evaluative element in the mediation process. However, the method of conciliation may also be applied as a method on its own.

According to Loots (1991: 8-13) ADR involves a change in emphasis and a different challenge in order to create satisfactory end results. These techniques are not considered “soft” options but rather a technique which is used to settle, as opposed to a trial settlement. As such, an understanding by the practicing professional of the conciliation method of ADR may therefore be regarded as important in practice, as a difference may well be avoided, with the advantages offered by improved interaction between the parties. The method of conciliation would not meet the required standards and be considered appropriate to the ADR context if the features of the Four Cs are not applied.

### **2.3.7 Mediation**

In the South African construction industry mediation refers to a facilitated negotiation process in which a non-binding opinion is given by the mediator (Finsen, 2005: 220). The method of mediation may be regarded as a collection of techniques to promote more effective negotiations and the aim is to rather use a cooperative as opposed to competitive problem-solving procedure in order to achieve a win-win outcome (Moore, 1987: xi-xii).

Mediation is a voluntary process which cannot be enforced on the contracting parties and as such, the facilitative nature does not provide for the enforcement of a judgment on the parties. Mediation follows the facilitative process of conciliation once the parties are prepared for cooperative and conflict-free negotiations. As with conciliation, mediation is an extension and elaboration of the negotiation process facilitated by an impartial and neutral third party selected by the disputing parties (Moore, 1986:6, 19, 124).

The more informal procedures of mediation may provide a more favourable environment in which to effectively apply the Four C's as suggested by Loots (1991: 8-13). There is no set legislation for mediation and any natural person may facilitate mediation, and enforcement by the court of a settlement would be based on a contractual rather than a statutory provision (Finsen, 2005: 220). The emphasis which has been placed on the Four C's highlights the advantages of mediation as opposed to the formal court system.

The only enforcement of the mediation process is in the contractual process wherein the JBCC PBA 2000 Edition 5.1 Clause 40.6.3 (2007: 31) stipulates that on settlement, a mediation agreement should be recorded and signed, upon which the mediation would be considered final and binding.

The South African Institute of Civil Engineers (SAICE) estimated the success rate of mediation to be 80% and that the procedure as practiced in the construction industry has proven to be successful (Povey, 2005: 2-7). In support of the above, a survey conducted by the University of the Free State (UFS), van Zyl and Verster (2007: 7) concluded that mediation and agent resolution are the preferred methods of ADR in the South African construction industry with an 80% preference.

When comparing research results by Povey (2005: 4-7) and Verster and van Zyl (2009: 8), there is a distinct preference to mediation and agent resolution, which may be regarded to be an informal arbitration, referred to as being quasi-arbitral. However, this procedure, as practiced in the construction industry, and as Dison (2006: 23) suggests should not be changed, varies from standard practice.

Research conducted in the engineering field by Povey (2005: 4) on mediation indicates that 24% of the facilitators in the consulting engineering field are retired senior professionals recalled to provide a mediation service. This may therefore have a correlation to the similarities of arbitration founded in the mediation process, hence the reference to mediation by Boulle and Rycroft (1997: 66) as a quasi-arbitral function and Dison (2006: 23), as non-binding arbitration. In view of the mediation process being referred to as being quasi-arbitral in so far as arbitration

principles are practiced in mediation, it may be assumed that the practicing arbitrators of the industry would also have moved on to practice mediation to keep current with a changing industry.

In spite of the application of new methods to speed up the dispute resolution process, the unique and expeditious nature of the construction industry may lend itself to even more time-saving applications; hence the inconsistency indicated in Povey's (2005: 2) research on the principles relating to an accepted mediation process and the evolution of a mediation process unique to the construction industry.

## **2.4 MEDIATION COMPARED TO CONCILIATION**

The distinction between the facilitated consensual methods of mediation and conciliation in the South African construction industry is questioned.

Various authors are of the opinion that conciliation and mediation are very similar methods of ADR and that the terms are sometimes interchangeable and are normally used synonymously in most discussions (Brown & Marriott, 1993: 19; Boulle & Rycroft, 1997: 62; Business Law, 2000: 247).

Having inherited its legal system from Rome, the Netherlands and England, the South African construction industry contracts, as well as the 1965 Arbitration Act, were based on English prototypes. In the South African construction industry mediation is a process whereby the mediator is expected to recommend a non-binding solution if the mediator fails to guide the parties to an agreed solution. However, where the mediator is not expected to make a recommendation, such mediator is referred to as a conciliator (Finsen, 1993: 177; Bevan, 1992: 15; Pretorius, 1993: 4; Finsen, 2005: 217).

Research indicates that the practice of mediation has been adjusted to suit the needs of the industry as reflected in the compilation of the various JBCC PBAs. According to the Principal Building Agreement 1991 edition and the GCC published in 1990, the mediator was required to

offer his opinion on the dispute. However, the opinion was binding if it was not rejected by the parties within a stipulated time (Finsen, 2005:232).

The JBCC PBA (2007) has no mention of the mediator expressing his own opinion and suggests that he/she not be too hasty to offer an opinion of a possible solution. Having a certain respect for the mediator's authority and expert knowledge, parties may be inclined to request his/her opinion for a solution to settlement (Finsen, 2005: 232). Published guidelines for mediation by the AoA and the SAICE had no set rules of procedure, as one of the advantages of mediation is that the procedure should be flexible and left to the discretion of the parties (Finsen, 2005: 232). The GCC (2010: 67) Dispute notice 10.3 replaces the functions of conciliation and mediation with the Amicable settlement clause 10.4 and if not successful, the dispute should be referred to adjudication within 14 days. This approach in the engineering field compares favourably with that of the JBCC PBA (2007) however; more emphasis is placed on mediation in the building industry. Recent adjustments to the process have been made by the Department of Justice and Constitutional Development in the form of a Strategic Plan (2012-2017) in regard to court based mediation rules which have been drafted and submitted in December 2011 for promulgation and will be implemented gradually (South Africa. Department of Justice and Constitutional Development, 2012: 114).

When considering the differences between the conciliation and mediation methods of ADR, the extent of overlapping similarities are realized, as well as how difficult it is to clearly define the two methods.

Brown and Marriott (1993:19) indicate that the distinction between conciliation and mediation is that conciliation tends towards a more facilitating approach whereas mediation tends to favour more of a proactive roll.

Dison (2006:23) suggests that mediation in the South African construction industry is somewhat formal and has been described as non-binding arbitration. Boule and Rycroft (1997: 60) suggest that evaluative mediation is a quasi-arbitral function and the boundaries with arbitration are blurred. It is suggested that the method of conciliation may therefore be best suited to the non-

technical type of dispute where positive relationships are built and mediation, to the technical type of dispute where expert advice and guidance is required.

Moore (1986: 11) suggests that in the case of conciliation where a trusting and cooperative relationship does not exist, it would be advisable to turn to the evaluative approach of mediation where an expert can lead the parties to consensus and satisfactory end results.

Boulle and Rycroft (1997: 63) define conciliation as a neutral, voluntary and interventionist process. However, the evaluative model referred to as mediation fits the same definition.

Considering the above arguments, the practicing professional may not be an expert in all the fields of dispute, in which case the dispute would be referred according to the contractual agreement. However, the professional who is initially able to apply the conciliation method to all disputes in the course of practice may have an advantage in terms of reducing the potential negative effects of disputes. Practicing professionals in their capacity as principal agent may use conciliation as a method of settling differences between parties, whereas the facilitators of mediation are referred to as mediators for which expert knowledge may be required for the technical type of dispute.

Although arbitration holds its position, adjudication and mediation methods are being adapted to suit the needs of the industry and Pretorius (1993: 3) refers to these methods as primary methods of ADR. All other ADR methods have stemmed from these. In support of these methods being considered as primary methods, they were selected to be included in the JBCC PBA Dispute Clause 40 (2007: 30-31).

## **2.5 APPROPRIATE DISPUTE RESOLUTION**

Appropriate dispute resolution may involve the ability of the professional to identify the nature of the dispute based on the degree of antagonism of the parties, and should it seem unlikely that they would reach a settlement, to make the suggestion to redirect the dispute to adjudication or arbitration. However, it is suggested that this should not occur without initially informing the

parties of the procedure beforehand in order for them to reach consensus on the appropriate method (Pretorius, 1993:1-3). A dispute may need to be analysed and applied in terms of contract procedures or government regulations, an example being that litigation is the currently the more commonly used form of dispute resolution in South African Government contracts as government bodies are reluctant to use arbitration as a method of ADR (Finsen, 2005: 217). In support of this, Samuel, R. Deputy Director General Inner City Regeneration, Department of Public Works, Bloemfontein (2012: personal communication) confirmed that litigation is used as a final dispute determination procedure of ADR in state contracts.

Nupen (1993: 41) suggests that mediation will only be the preferred and appropriate method as opposed to adjudication when parties are in favour of controlling their own outcomes. There may be instances where the parties would prefer a decision being made for them, in which case adjudication would be considered the appropriate method.

ADR is applicable to both contexts of Alternate and Appropriate Dispute Resolution in the construction industry in so far as it is an alternative to litigation, selects the appropriate method and applies the appropriate processes and procedures if the accepted standards and procedures are not suited to the dispute (Pretorius, 1993:1). As such, the design of new procedures and the evolution of new methods may be imperative to keep up with a diverse industry.

## **2.6 SUMMARY**

The literature review provides the information relating to consensus, control, continuity and confidentiality upon which the questionnaire was designed and respondents measured against. The Four Cs, being based on local and international practice, is intended to provide an unbiased measure which reflects the current levels of practice in terms of the views of the participants.

The basis of the effective application of ADR was identified as an understanding which professionals require of the ADR context and the methods applicable to ADR practice in order to effectively apply the methods.

The attributes, skills and techniques which complement effective ADR facilitation are addressed in Chapter 3.

## **CHAPTER THREE**

### **COMPETENCE IN ADR**

#### **3.1 INTRODUCTION**

Competency, as defined by Ahadzie, Proverbs and Olomolaiye (2005: 2), is the personal attribute that individuals draw upon as part of their work activities, whereas competence relates to a person's ability to comply to a range of externally agreed standards (e.g. output based measures). Competency underlies competence and as such, competence underlies experience in as much as the required skills may need to be experienced in order to achieve ultimate competence.

Crawford (cited in Ahadzie *et al.*, 2005: 2-3) refers to the proposition of three classifications of competency namely:

- Input competencies;
- Personal competencies; and
- Output competencies.

Input competencies are the knowledge and skills a person brings to the job. Personal competencies are the attributes underlying a person's capabilities to execute the job. Output competencies relate to the observable performance a person exhibits in the job. Crawford is of the opinion that the above classifications are combined towards achieving competence in performance (Crawford cited in Ahadzie *et al.*, 2005: 2-3).

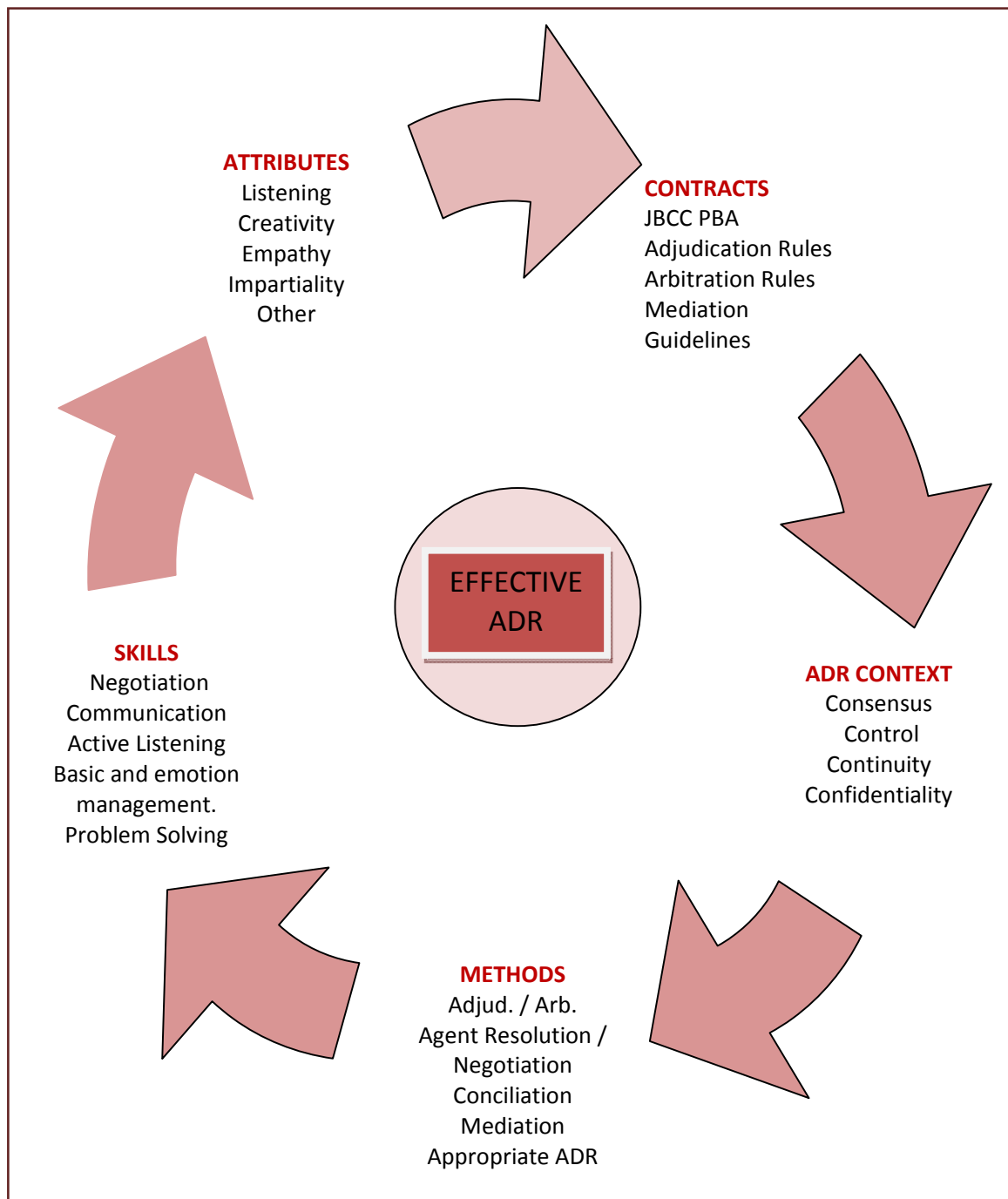
Being a people driven process, ADR is largely dependent on effective personal interaction and as such may be reliant on the competence of the people applying the ADR processes. ADR competencies may be determined by identifying the relevant skills required for effective facilitation and as such the identification and being aware of the relevant attributes may promote the effective application of the skills.

According to Boulle and Rycroft (1997: 139-140) and Brown and Marriott (1993: 251) referring to standard practice of mediation, mediators require a range of skills and techniques which support the applicable functions.

The mediation skills applicable to the construction industry were identified and applied to the dispute resolution functions. It is however important to note that according to Boulle and Rycroft (1997: 139-140) each mediation skill supports a function and can contribute to more than one function. Some mediators may be gifted with inherent skills such as active listening and compassion; however, all mediator skills can be learned, practiced and developed and can be measured and assessed with a certain degree of objectivity. The skills and techniques of mediators depend on their training, experience and personal attributes. Professional background also plays an important role; an example being that counsellor mediators would have good listening skills and construction mediators would have good evaluative skills.

The qualities (which refer to qualities of the facilitator or the relevant attributes required in the application of the skills), skills and techniques (which refer to the application of certain skills and processes) were identified in the literature review in order to determine the requirements for a professional to achieve competence in ADR.

Figure 3.1 illustrates the requirements for effective ADR, where one requirement complements the next stage of the process. Various sources led to the conclusion of these requirements which were extracted from Loots (1991) and Verster and van Zyl (2009) who placed emphasis on the ADR context; the JBCC PBA (2007) and Verster and van Zyl (2009) who stressed the importance of contracts, rules and guidelines; and Boulle and Rycroft (1997), Brown and Marriott (1993), Moore (1986) and Butler and Finsen (1993) who addressed the requirements for effective ADR facilitation in regard to methods, skills and attributes.



**Figure 3.1: The requirements for effective ADR**

Source: Author's own diagramme

Although professionals fulfilling the role of arbitrator, adjudicator and mediator in the construction industry are by way of their experience equipped with evaluative skills of

facilitation, the knowledge and understanding of the applicable skills may add value to the evaluative process of ADR. The qualities, skills, techniques and attributes are addressed under the headings: Facilitation skills, Organisation skills and Attributes in Chapter 3.2.

Negotiation forms the basis of ADR and effective facilitation branches from this basic function (Brown & Marriott, 1993: 88). The negotiation process may invariably be facilitated in a conflicting environment where parties may not have the mind-set for effective negotiation and as such, the facilitator may be challenged to create an atmosphere conducive to constructive negotiating; upon which the relevant attributes and problem solving techniques may be required.

According to Richbell (2008: 19), successful negotiations require effective communication between the parties and the facilitator, who ensures that the message is received and conveyed in an effective manner. In order to receive and convey the message without distorting it, the facilitator may be required to listen actively (Moore, 1986: 128).

Active listening is supported by paralanguage which assists in identifying the psychological state of the parties and reframing and reiterating which ensures the message is conveyed effectively. In addition to active listening, communication is supported by non-verbal communication and being silent (Boulle & Rycroft, 1997: 155-167).

The qualities and attributes are numerous, upon which impartiality and neutrality are qualities which provide for a fair process. Listening may be considered an attribute as well as a skill as this requires an inherent patience to master. Understanding and empathy may go hand in hand in support of the parties' feelings and perceptions. Creativity and constructiveness would support problem solving. When the abovementioned attributes and qualities are displayed, this may result in trustworthiness which relates to a combination of the attributes in the facilitator who displays trustworthiness. Authority is a quality given by appointment and which, when combined with trustworthiness and sound judgment, may display competence. Flexibility is an attribute required to adjust to a diverse industry, while independence relates to the ability to work without assistance. Perseverance, persistence and patience are required attributes for the challenging cases, as well as humility, an attribute which prevents a condescending nature. Ultimately, self-

reflection may result in wisdom by identifying and learning by past mistakes in order to achieve wisdom, which relates to competence (Boulle & Rycroft, 1997: 139-167; Brown & Marriott (1993: 251-253; Trollip, 1992: 41-51).

The abovementioned skills, techniques, qualities and attributes are categorised and addressed individually in order to determine the requirements for competence of facilitators in ADR. Skills and techniques play an important role in the facilitation of ADR and are applied in conjunction with the relevant attributes relating to practice (Brown & Marriott, 1993: 246). The questions raised are whether practicing professionals are competent to apply these skills and techniques, and whether it would be to the advantage of the industry.

The ADR qualities, skills and techniques which were identified in the literature review as standard practice are addressed in Chapter 3.2, followed by the attributes in Chapter 3.3 in order to identify the requirements for competence in facilitation.

## **3.2. FACILITATION SKILLS AND TECHNIQUES**

Facilitation skills may vary considerably in so far as personality affects the style of negotiation (Brown & Marriott, 1993: 88). Negotiation is a primary element of the facilitation process and is supported by effective communication. Negotiation and communication skills proficiencies will apply to all mediators. ADR facilitators need a sound theoretical and practical knowledge of negotiation which is fundamental to all consensual ADR activity (Brown & Marriott, 1993: 88; Boulle & Rycroft, 1997: 60).

### **3.2.1. Negotiation skills**

Negotiation presents itself as a method of ADR and it is also an important skill required by facilitators in order to achieve competence in all consensual methods of ADR. Pretorius (1993: 12) suggests that a thorough understanding of the principles and techniques of negotiation is considered an advantage to those who facilitate ADR.

Due to the lack of negotiation skills education, relatively little is known of the science and art of the subject (Brown & Marriott, 1993: 88; Pretorius, 1993: 12). In support of this, Bevan (1992:

3) suggests that most lawyers are self-taught and as such, the basic theory of the skills and processes may add value to competence in facilitation.

When differences occur, parties negotiate for a better outcome as opposed to what they presently have. This however presents itself as competitive negotiation, although negotiation tends toward a competitive approach (Fisher & Ury, 1991: 104) and parties to a contract in the construction industry may find that productivity is more likely when satisfactory end results are achieved. It is important to note that positional bargaining becomes a contest which may have a negative effect on negotiations (Fisher & Ury, 1991: 6).

Competitive negotiations laced with emotion may well break down the communication process (Moore: 1986: 143). The ultimate outcome is blurred by the win-lose attitude normally associated with the competitive approach.

Mutual interests and fair options should be identified before bargaining for positions (Fisher & Ury, 1991: 153-159; Boulle & Rycroft, 1997: 95). The objective of negotiation is to achieve mutually satisfactory outcomes with no winner or loser, and positional bargaining creates a competitive approach.

Identifying mutual interests and fair options encourages the parties to consider the other point of view by avoiding positional claims (Boulle & Rycroft, 1997: 95).

Focusing on the problem rather than the people may separate perceptions and feelings from the real problem and this will disclose common interests (Bevan, 1992: 3). Raiffa (1982: 338-340) suggests that it may be necessary to motivate and encourage the negotiation process. By isolating a problem from the “big picture” and finding a solution for it, identifies the ability to solve the problem and places parties in a position to attempt the whole problem.

Mutual outcomes varying in strength should be created from different perspectives. The idea is to look for mutual gain and identify shared interests which are in every negotiation. Shared interests have to be identified as opportunities for mutual gain. The needs and interests should

however be determined before negotiating a settlement. If continued relationships are at stake, the advantages and disadvantages should be considered (Fisher & Ury, 1991: 71-76).

Considering the above arguments, parties may find that losing something to gain another may result in satisfactory end results. An opportunity to compare possible gains to losses may provide guidance in the decision-making process. Most importantly; identifying alternatives for a solution may encourage the parties to accept the possibility of settling for something other than what they had set their hopes on.

A lack of harmony between the parties may have a negative effect on the negotiation process (Raiffa 1982: 337-338). The first step towards negotiation is getting people to want to communicate with each other and this may be achieved through conciliation where the psychological component is processed. As such, this stresses the importance of conciliation and the Four Cs in the construction industry, which is supported by effective communication.

In view of the above, consensus may not be reached if there is no harmony between the parties. If people were to consent to negotiating, half the battle may be won. This is a sure indicator that parties may need to be educated and informed on the principles of the ADR context and negotiation before commencing with facilitation.

Although the theory of negotiation is identified in the ADR process, a person can only “learn from doing”, and by being aware of what he/she is doing, can assist a person in the learning process, ultimately achieving competence (Fisher & Ury, 1991: 71-76).

Communication is an important element in the negotiation process upon which a facilitator relies to enhance his/her own communication and to facilitate the parties’ communicating abilities (Boulle & Rycroft, 1997: 152). The important elements of communication are elaborated on below.

### **3.2.2 Communication skills**

Communication skills are supported by a facilitator portraying expertness, trustworthiness, sincerity and ultimately, humble authority (de Wet, 1991: 46; Boule & Rycroft, 1997: 153-154). de Wet (1991: 1) suggests that communication is the imparting of ideas to achieve a mutual understanding. However, in ADR these messages may become difficult to understand when subjected to emotional stress. This is where the skill of effective communication will take effect in the mediation process which is combined with the facilitative procedure of conciliation. Moore (1986: 143) suggests that the extent, structure and quality of communication contribute to the successful outcomes of negotiation and as with most negotiations; communication is the central component in the negotiation process upon which good communication skills support constructive negotiations.

Considering the above, the quality of communication may therefore be dependent on the parties and the participants such as the facilitator, and as such, communication is identified as a critical competence of the ADR process.

According to research conducted by Povey (2005: 6), most mediators in the construction industry depend on their communication skills rather than applying specific mediation skills. Communication is not only an important element to the negotiation process, but supports numerous other mediation skills such as basic management or organisation skills for effective application. In addition to this, communication in a highly strung atmosphere may require other components of the mediator skills such as psychological support to promote positive and constructive negotiations and as such, this may be a clear indicator that by acquiring and applying communication skills the effectiveness of dispute resolution will be enhanced.

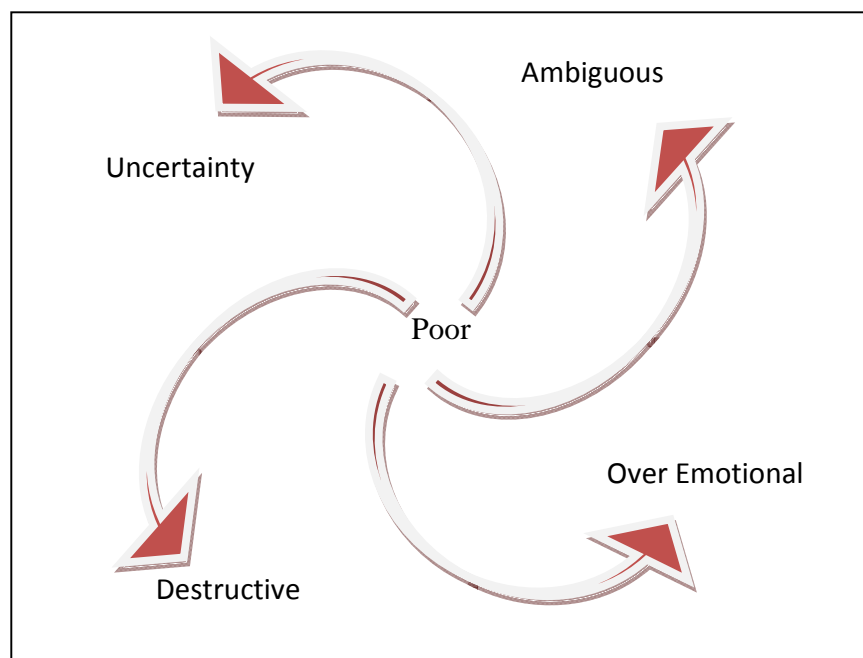
Some consider communication to be a natural or inherent skill, but Knipe, Van der Walt, Van Niekerk, Burger & Nell (2002: 108) believe that communication skills can also be learned.

Communication is an important element in project management and as such, has been identified as a Knowledge Area in the Project Management Body of Knowledge (PMBOK) (2008: 243). However, it may be likely that differences or disputes may develop due to communication

management failure (Boulle & Rycroft, 1997: 152). These differences and disputes may then be addressed in claims management.

Considering the above, the effective application of communication which is regarded a primary element in the negotiation process may enhance negotiations. Communication skills which enhance the negotiation process are in turn supported by various supporting skills such as active listening, which will be addressed in Chapter 3.

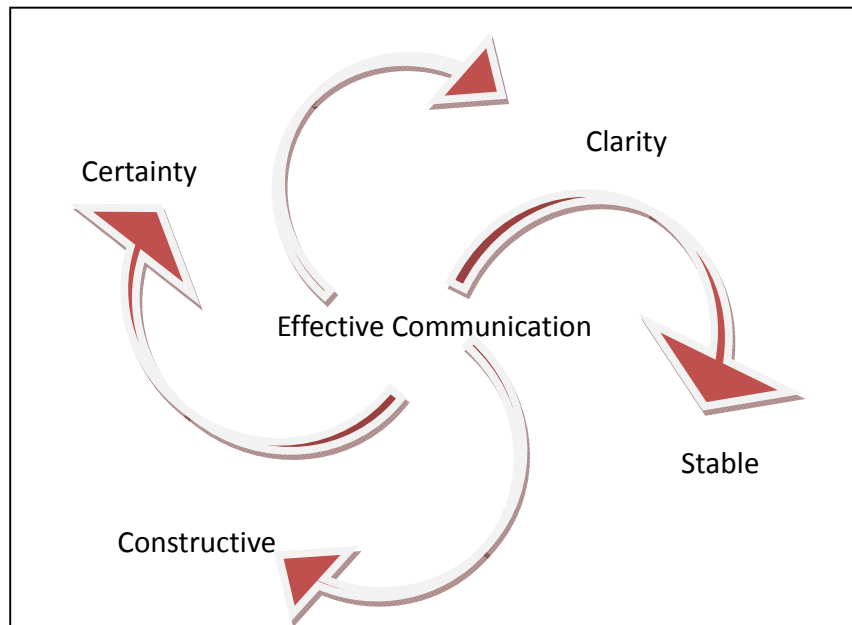
As illustrated in Figure 3.2, conflict invariably stems from poor communication and may inhibit the negotiation process. Ineffective communication may lead to a breakdown in the negotiation process which may result in a deadlock. This may create a challenge for the mediator who may need to creatively restructure communication to encourage the pursuit of negotiations. Poor communication skills create a negative cycle in which disputes are difficult to resolve (Richbell, 2008: 12; Boulle & Rycroft 1997: 152; Moore, 1986: 143-144). Ineffective communication may cause a dispute to worsen and the facilitator may need to apply good communication skills in order to restore constructive communication channels (Boulle & Rycroft, 1997: 121).



**Figure 3.2: Unproductive communication**

Source: Adapted from: (Boulle & Rycroft, 1997: 152).

Figure 3.3 illustrates the advantages offered by productive communication where positive outcomes are achieved (Boulle & Rycroft, 1997: 152).



**Figure 3.3: Productive communication**

Source: Adapted from: (Boulle & Rycroft, 1997: 152).

As illustrated above, a positive approach will continue producing outcomes for effective mediation.

Competitive negotiations laced with emotion may in all probability break down the communication process (Moore, 1986: 143). The ultimate outcome is blurred by the win-lose attitude normally associated with the competitive approach.

Communication may be regarded a critical element of negotiation and Gepp and Haigh (cited in de Wet, 1991: 1) indicate that communication originates from the Latin word “communicates” meaning “making common, imparting, relaying and taking one’s audience into one’s confidence”. This translation therefore highlights the critical features of communication. “Making common” may refer to Ury and Fisher’s (1991: 17) methods of “separating the people

from the problem” and “focusing on interests, not positions”. Imparting on the other hand is to communicate the intention, and “taking one’s audience into one’s confidence” may create the critical element of a trusting relationship conducive to positive negotiation.

The question raised is: are these communication skills natural, inherent, learned or acquired by experience? Based on a comment made by Yuill, a senior professional architect (2010: personal communication), few people have the skills to resolve a dispute within minutes of walking into a room; it would appear that not only the communication skills, but the authority, expertness and goodwill portrayed by the facilitator contributed to the success of the mediation.

Considering the above response, this suggests that communication skills may rarely be inherent, which may also be the case with the attributes in support of these skills. As Yuill is a more experienced and senior professional in the industry, this suggests that experience may also play a role in competence.

Underlying the theory of productive communication are the basic skills which support one another for effective communication. Active listening is an important element in the communication process and enhances competence in communication, which assists parties to understand a communiqué better (Brown & Marriott, 1993: 253).

### **3.2.2.1 Active listening**

Active listening is an important element in effective communication and it is a technique which has progressively developed and is used as a tool by facilitators to identify the emotional status of the parties. It is a technique in the communication process whereby the receiver of the communiqué has listened attentively in order to analyse the conveyor’s emotions in the message and to reiterate the message for confirmation (Moore, 1986: 128).

Active listening underlies the communication process in ADR of which the mediator requires a good understanding. Although listening is addressed as an attribute in sub paragraph 3.5.3, active listening is also a skill which is vital to the communication process and addresses various important factors, *inter alia*:

- Parties speak without interruptions to allow full explanation of their dispute and expressing emotions;
- Parties are assured that they have been heard;
- Emphasis on the individual demonstrates the acceptability of expression and develops a better understanding of the concerns based on both the verbal and non-verbal message;
- Helps the speaker to identify his/her own emotions;
- The mediator can better understand, summarise and analyse the parties' concerns and
- Creates a situation where the mediator can absorb the message, verify and integrate it into an extension of the negotiation process (Boulle & Rycroft 1997: 153-154; Brown & Marriott, 1993: 253; Moore, 1986: 128).

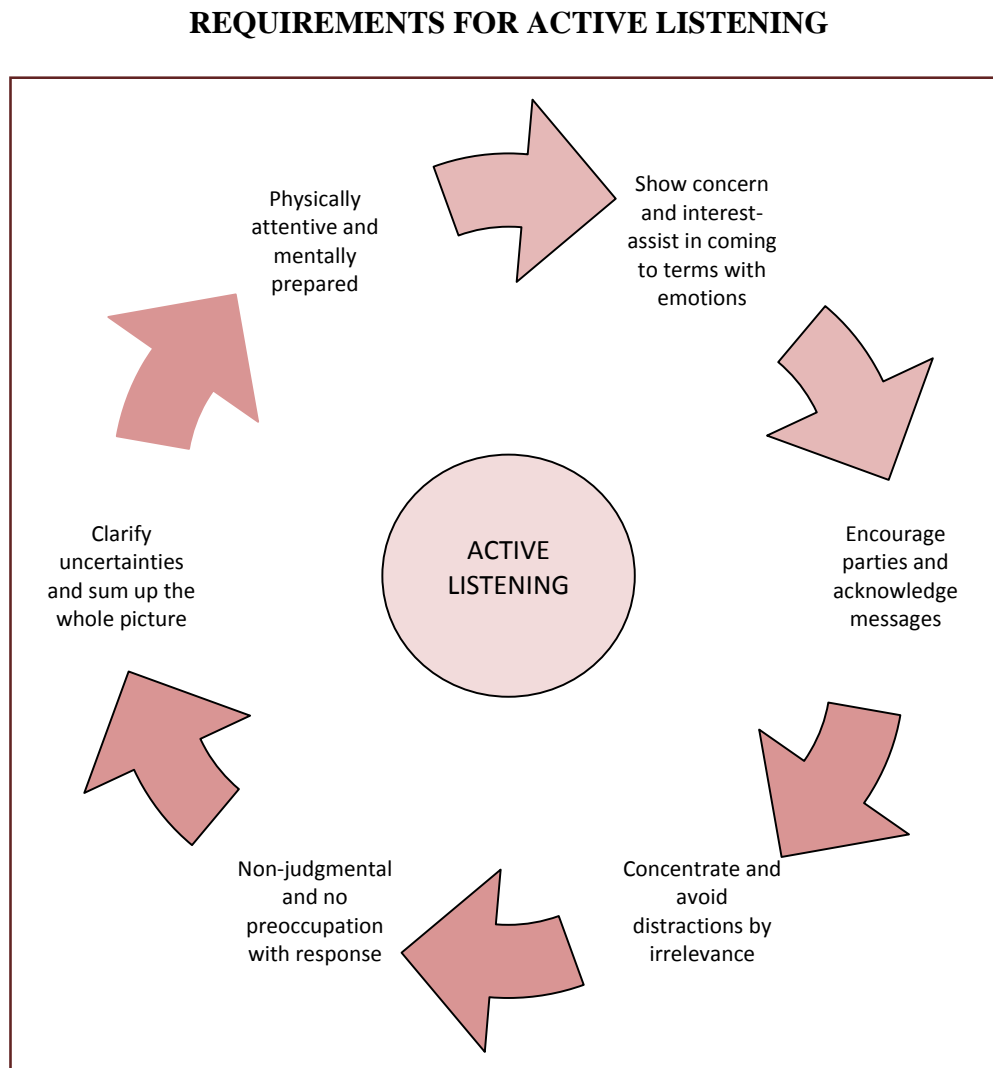
In view of the above, the mediator may therefore need to be aware of the parties' capabilities of absorbing the messages because a distraught disposition may hamper a person's ability to listen actively.

The objective of active listening in the negotiation process is to create a mutual understanding by clarifying uncertainties, summarising facts, concerns and feelings, acknowledging the message and reiterating to facilitate a better understanding of concerns, feelings and emotions. By displaying an understanding of the parties' feelings and emotions and receipt of the facts, may assure parties that a concerted effort is being made to resolve the dispute (Boulle & Rycroft, 1997: 154-155; Brown & Marriott, 1993: 253-254; Moore, 1986: 128-129).

In view of the above, active listening may be regarded an important element in the negotiation process which may also extend to the evaluative process of mediation. Active listening may effect a mutual understanding between the parties to allow for effective negotiations and as such, its importance should also be conveyed to the disputing parties. Effective communication therefore supports the facilitative and the evaluative process of negotiation.

Boulle and Rycroft (1997: 154) are of the opinion that effective listening goes beyond hearing spoken words; it assists in understanding the meaning of messages.

Figure 3.4 below illustrates the extent of the skills and attributes required for the effective application of active listening where one requirement complements the next. This knowledge may assist facilitators to apply their attributes effectively, hearing and understanding the message.



**Figure 3.4 Requirements for active listening**

Source: Adapted from: (Moore, 1986: 128-129; Boulle & Rycroft, 1997: 154-155).

Boulle and Rycroft (1997: 155) suggest that there are three categories of skills which promote active listening which assures the parties in the negotiation process that:

- Physical attention is displayed by interest and encouragement where face-to-face, relaxed and direct eye contact is suggested;
- A display of full comprehension is noted by minimal encouragement, occasional questions, reframing and summarising notes; and
- Reflecting and summarising the whole picture.

In view of the above, active listening goes beyond merely audibly receiving a message in order to convey it; it develops an understanding of each other's views and intentions. Considering the skill of active listening relating to competence in negotiation, practicing professionals may need to familiarise themselves with the theory to support effective application.

### **3.2.2.2 Reiterating and reframing**

Reiterating and reframing were identified as skills required for achieving competence in facilitation due to the importance of conveying the message effectively, but which may prove to be ineffective under the strenuous conditions experienced by the parties.

Poor communication may lead to a situation where persons may not be able to express themselves sufficiently and the mediator may request the parties to reiterate a statement of relevance, and by reframing, may assist parties to better understand something that may have been missed or misunderstood (Boulle & Rycroft, 1997: 254).

Reframing is an important mediator skill where the message is rephrased to portray it in a different light or to re-word a statement so as to change the frame of reference and to create a better understanding. Reframing is the process of the receiver of the message (the mediator) confirming his/her understanding of such message by repeating such message to the sender in his own words. A different perception of the message may well place the sender's view in a different light and help to create a positive and constructive approach to the problem. However, careful thought should go into reframing as rewording or inexperience may have negative connotations. Reframing may be viewed as an act to turn negative connotations in the negotiation process to positive options (Brown & Marriott, 1993: 257; Boulle & Rycroft, 1997: 15; Moore, 1986: 176-177).

Considering the above arguments, reiterating and reframing with confirmation by the communicator that this was actually the intended message seems important in the negotiation process. This may be required to correct poor communication on behalf of the parties. The receiver of the message may not be listening attentively for many reasons such as such being distraught or thinking of possible outcomes (Boulle & Rycroft, 1997: 154). In a situation such as this, reframing may however enlighten the situation.

### **3.2.2.3 Paralanguage**

The management of paralanguage was identified as a requirement for competence in the facilitation process due to the importance of identifying the emotional state of the parties.

Paralanguage refers to the “tones” or “effects” used to emphasise messages. Awareness of these effects will assist the mediator to better assess the mood (Boulle & Rycroft, 1997: 159; de Wet, 1991:51). Paralanguage may be less complicated to identify; it may however pose a challenge to address, especially in an emotional situation.

The identification of the psychological state of the parties may assist the mediator in directing negotiations to suit the mood of the negotiators. The approach to the negotiations may need to be adjusted as the mood changes. Apart from being aware of the paralanguage of the disputing parties, the mediators may consider managing their own (Bevan, 1992: 73).

Considering the above, competence in facilitation relating to paralanguage requires the ability to identify emotions through listening actively and to avoid displaying emotions on a personal level.

### **3.2.2.4 Non-verbal communication**

“The most important thing in communication is to hear what isn’t being said” (Drucker, 2001: online).

In addition to paralanguage, the skill of identifying non-verbal language is considered important in achieving competence in the facilitation of ADR in so far as the emotional state of the parties can be detected and, according to de Wet (1991: 47), they may contradict verbal messages. Body language is identified in many ways, from a person's dress, attitude and body movements. The skill of interpreting body language can be intuitive or learned. However, the mediator who is able to master this skill will be able to adjust the approach appropriately. As with verbal messages, body language should also be used appropriately and in a positive sense, bearing in mind that body language varies between different cultures (Boulle & Rycroft, 1997: 159).

Considering the above, this may create a challenge in a multi-cultural society such as South Africa and supports de Wet's statement (1991: 48), thus suggesting that practicing professionals also need to identify the cultural elements the project is subjected to.

Non-verbal communication can be used to send both positive and negative messages and the mediator would do well to recognise and appropriately react to these non-verbal messages throughout the mediation process. The identification of non-verbal messages plays an important role in communication. These messages can portray the parties' underlying feelings such as status, anxiety or lack of confidence. In addition to this, it can be used to threaten, show authority or even show encouragement (Boulle & Rycroft, 1997: 155-157; Brown & Marriott, 1993: 253-254; Moore, 1986: 147-148).

Apart from being alert to these non-verbal messages the mediator should also be conscious of his/her own non-verbal messages so as to be perceived by the parties to have an unbiased and positive attitude. As the mediator would be observant to identify the body language of the parties, careful consideration should be given not to display any feelings such as irritation or impatience in the form of body language (Boulle & Rycroft, 1997: 158-160).

In view of the above, non-verbal communication may say much more than the parties ever intended; however, according to Boulle and Rycroft (1997: 159), having the knowledge and ability to recognise and diagnose these messages may enlighten the mediator as to the psychological and emotional level of the parties.

### **3.2.2.5 Being silent**

Being silent is identified as a technique used by facilitators in a positive sense; it may however also have negative connotations. Boulle and Rycroft (1997: 167) and Brown and Marriott (1993: 260) suggest that silence can be manipulative to those who may be uncomfortable with it. In a situation such as this, the uncomfortable party may be forced into a decision. However, in the positive sense this may provide the moment of silence to reflect and the parties may consider propositions.

As with verbal and non-verbal communication, being silent represents a form of communication.

## **3.3 PROBLEM SOLVING**

Boulle and Rycroft (1997: 154) suggest that professional mediators are inclined to narrow their focus on the problem rather than looking at the broader picture.

The mediator may consider improving such by identifying the unspoken “soft” elements (attributes relating to psychological and personality traits) which come into play such as the need to be heard and to display his/her interest in the parties and a determination to resolve the dispute (Boulle & Rycroft, 1997: 140). By viewing a dispute in a broader context may assist in better understanding the parties’ feelings and perceptions.

Boulle and Rycroft (1997: 154) suggest that a mediator as expert in the construction industry may concentrate on the hard facts of evaluative mediation regarding technical issues. However, it is thus proposed that they should not lose sight of the empathetic fact that the disputing parties are concerned and anxious about the unknown; they may feel the need to be competitive so as not to be on the losing end and need to be informed and assured of the benefits involved.

### **3.4 BASIC MANAGEMENT SKILLS**

Basic management skills are required by the facilitator to achieve competence in ADR facilitation to ensure that the mediation process runs its course in an effective manner. Planning is the first step in the management process (Management: Fresh perspectives, 2007: 13) and as such, effective implementation may be supported by effective planning in regard to the initial stages of the mediation.

In planning, goals and objectives are set which leads to the second step: organisation. This is where the organisational skills of the facilitator take effect. The facilitator would lead the process, but monitoring would address the flexible nature of ADR (Brown & Marriott, 1993: 252).

By maintaining control of the process creates a positive basis on which final decisions are made (Management: Fresh perspectives, 2007: 13).

Loss of control may well result in the reduction of trust and confidence amongst the parties. The management style should be gentle, firm and impartial to create a sense of authority and in so doing, avoid adverse consequences and behaviour (Brown & Marriott, 1993: 258).

### **3.5 ATTRIBUTES**

In addition to the skills, attributes were identified as being essential personal elements contributing to competence in the application of facilitator skills (Brown & Marriott, 1993: 251).

#### **3.5.1 Introduction**

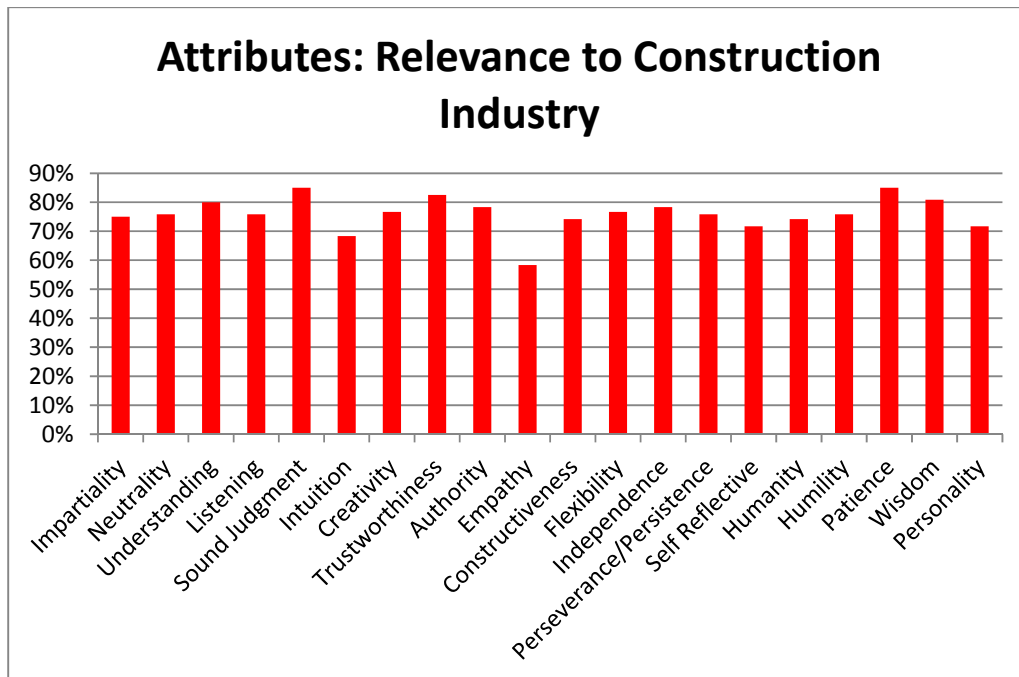
Attributes are required by facilitators to enhance the application of the skills and functions of ADR.

According to the Oxford English Dictionary (2002: 47), an attribute is defined as a “characteristic quality”; a distinct feature which makes a person different from others. Some may

find that they are naturally equipped with inherent qualities which are considered an asset in the application of facilitation skills. However, these qualities have to be demonstrated by the facilitator and according to Boule and Rycroft (1997: 78, 140), are often inherent qualities and are referred to as attributes, generally known as “soft” skills.

Brown and Marriott (1993: 252) suggest that attributes relate to psychological and personality traits whereas the Oxford Dictionary (2002: 673) defines psychological traits as the mental characteristics or the attitude of a person. Characters may therefore be formed and influenced by an individual’s surroundings. Attributes may however be generally learned and developed through practice and experience.

Secondary data sourced from a study conducted by Du Preez, Berry and Ramabodu (2010: 12) testing the relevance of the identified attributes which may add value to the ADR process is illustrated in Figure 3.5 below. These attributes were tested for their relevance to the construction industry with sound judgment, trustworthiness and patience rated high, with empathy lacking somewhat. Contrary to these results, the literature review also places emphasis on listening, impartiality and empathy.



**Figure: 3.5: The relevance of the attributes to the Construction industry**

Source: (Du Preez *et al.*, 2010:12).

According to Brown and Marriott (1993: 252) attributes are useful qualities to bring into the mediation process which includes the facilitative and evaluative processes. Boulle and Rycroft are of the opinion that these attributes are indispensable to most forms of dispute resolution.

The attributes identified in the literature review are discussed below:

### **3.5.2 Impartiality and neutrality**

Impartiality and neutrality are identified as being essential attributes due to the importance of upholding the ethics and fairness of the ADR process.

Boulle and Rycroft (1997: 18-19) believe that neutrality relates to the relationship to the parties and the dispute and impartiality to even-handedness, objectivity and fairness to the parties during the dispute.

The impartiality of a practicing professional as an employer of the client may be questioned when he/she has to fulfil the role of facilitator. However, the contractor may have experienced this impartiality during the course of the project and would know if he is comfortable with the professional facilitating the mediation.

In view of the above, by initially displaying impartiality and neutrality, the practicing professional may win the respect and trust of the parties to fulfil this role.

Finsen (2005: 76) suggests that although under obligation, it is a matter of professional honour for the principal agent to be fair and impartial to both parties. The contractor however, under unfavourable circumstances may revert to the initial dispute resolution conditions of contract should he/she not be satisfied with the decision taken by the principal agent.

Although impartiality may be considered a learned attribute, neutrality may be questionable and professionals may be required to disclose a relationship or alternatively avoid leading the dispute resolution process if he/she cannot claim to be neutral. Considering the above, neutrality may therefore be considered a requirement rather than an attribute and as such, remains an essential element of competence.

### **3.5.3 Listening**

The ability to listen is identified as an attribute as it supports the skill of active listening which is an important element in achieving competence in ADR facilitation.

Boulle and Rycroft (1997: 154-155) are of the opinion that the ability to listen is not just a passive exercise. Listening is defined as making the effort to hear something (Oxford Dictionary, 2002: 488).

Trollip (1991: 47) suggests it is the act of hearing and hearing and hearing and listening! This may imply that the act of listening does not involve interruptions, interpretation or raising an opinion of what is being said.

In response to the above, although listening skills can be learned, the inherent ability to listen actively may add value to the active listening process. It is however not a reactive exercise and an effort should be made to hear. As research indicates that mediators rely on their communication skills for effective ADR (see Chapter 3), this accentuates the importance of this attribute in terms of competence in facilitation skills.

### **3.5.4 Sound judgment**

Sound judgment is identified by Butler and Finsen (1993: 74) as an essential attribute to have in arbitration. However, this may also apply to mediation, considering the similarities of arbitration found in mediation due to the evolution of a mediation process unique to the construction industry (Povey, 2005: 2).

Sound judgment as defined by Brown and Marriott (1993: 252) is a rational approach and shrewd common sense.

In view of the above it would be beneficial to the parties if the facilitator made a decision which is accepted without question.

Having reached a deadlock, disputing parties may have to turn to the mediator for expert knowledge and as such, a judgment call may be welcomed from somebody in whom trust has been placed (see Chapter 3,). According to Trollip (1992: 51) timing and sound judgment are critical factors in successful mediation, considering the mediator is constantly required to make judgments in the mediation process; when to be silent, when to raise an opinion or concern and when to move parties from listening and analysing to compromise.

In view of the above, the mediator's role of making judgments is not simply making the call, but rather tactical judgments (Boulle & Rycroft, 1997: 15) with fair and due process; it is the art of making a judgment call and being able to offer a logical explanation in making effective judgments.

### **3.5.5 Intuition**

Intuition may best be described as a sixth sense that triggers an impulsive response. According to Brown and Marriott (1993: 252), intuition is the ability to sense indirect information without conscious reasoning and as such, is identified as an essential attribute in facilitation. Trollip (1992: 51) refers to it as “gut feel” and advises to go with it. This “gut feel” may develop in time with experience.

### **3.5.6 Creativity**

Creativity is identified as a useful attribute in the ADR process due to the extent of problem solving in the negotiation process which, according to Moore (1986: 39), may require creative thinking in converting positional claims to interest based negotiations. The innovative approach to problem solving and responses may best define creativity in the mediation process. Boulle and Rycroft (1997: 79) are of the opinion that mediators need a creative approach to problem solving.

Mediation is a creative process laden with possibilities. However, the task of the mediator is to analyse what is available, and at his own discretion, determine what is favourable, positive and agreeable to the parties (Trollip, 1991: 41). Differences invariably occur in the construction industry and the mediator is faced with the task of analysing the situation and constructing various possible solutions which the parties may consider in terms of settlement.

Creativity refers to the use of the imagination and original ideas to invent and generate options which parties may follow in order to lead them to easier settlement (Brown & Marriott, 1993: 252). This suggests that the practicing professional may require a certain amount of experience. However, the application of creative ideas must fall within ethical perimeters of the profession and be applied with integrity. Creativity may likely become a product of mediation experience (Boulle & Rycroft, 1997: 79).

### **3.5.7 Constructiveness**

A positive frame of mind and the will to produce a practical solution may be required in the mediation process. According to Trollip (1991: 53) constructiveness is acting with purpose rather than merely reacting. Constructiveness refers to the ability to identify and motivate positive

possibilities in a practical way in order to support successful outcomes (Brown & Marriott, 1993: 252). This ability may be regarded as a quality which is inherent in the practicing professional based on the challenges which need to be faced in the construction industry.

### **3.5.8 Trustworthiness**

According to Boulle and Rycroft, (1997: 79) trustworthiness is regarded an essential requisite for effective mediation and as such, may be referred to as the attribute which supports a good reputation and it is as important in mediation as it would be in any undertaking. Trustworthiness should therefore be developed, maintained and nurtured in order to reap the positive effects thereof (Boulle & Rycroft, 1997: 79). Trollip (1991: 51) is of the opinion that gaining the trust of others is achieved by being consistent in an appropriate way.

De Wet (1991: 46) is of the opinion that trustworthiness is identified in a person who has more knowledge and experience. However, this may in essence be attributed to wisdom. Goodwill is recognised as a quality in a person and it draws people in search of a trusting relationship conveying a sense of undeveloped friendship (de Wet, 1991:46). This suggests that trustworthiness is supported by various attributes which may result in competence in ADR facilitation and as such may be recognised in a person with credibility.

Gaining the total trust of the parties may only take place once a relationship has been established, but that may only stem from desirable behaviour (Trollip, 1991: 44). According to Boulle and Rycroft (1997: 86), integrity and commitment by the facilitator build trust from the initial meeting. This is however considered important as mediation should inspire trust in others. Trustworthiness may go to the extent of building trust in one another. Richbell (2008: 68) suggests that trust is a two way thing between the parties and the facilitator.

Trollip (1991: 44) suggests that humanity is a matter of being genuine (authenticity) which supports trustworthiness. Humanity may be the attribute which sets the parties at ease at the initial meeting; the quality portraying one's genuine intentions to support them through an uncertain journey.

### **3.5.9 Authority**

Authority is defined in the Collins English Dictionary (1974: 68) as the influence exercised by virtue of character or moral qualities. Initially the mediator gains authority by virtue of his appointment to the role (Moore, 1986: 274). However, the ability to maintain such authority will be vested in his displayed knowledge and skills in exercising such authority. The ability to effectively apply this authority may develop with practical experience. Brown and Marriott (1993: 252) suggest that firmness in approach may create a perception of authority which may be supported by the role of the practicing professional as project manager.

### **3.5.10 Empathy**

Empathy is identified as an essential quality in ADR facilitators according to Brown and Marriott's (1993: 252) opinion that it reflects an awareness and respect for the parties' concerns. Sharing the feelings of a person may only be more realistic if it comes from a person who can relate to the experience. The statement made by a respondent that they do not have the time to worry about the parties' feelings, suggests that some professionals may have become so business focused that they find it difficult to relate with empathy.

Throughout his/her actions and behaviour the mediator should acknowledge and validate understanding and appreciation for the feelings and ideas of all parties to the dispute.

Empathy refers to the comprehension the facilitator has on the thoughts, perceptions and feelings of the parties and responding to them in a sympathetic way (Boulle & Rycroft, 1997: 78-79). The practicing professional may have a good understanding of the more general types of disputes which occur in a project and may therefore naturally have empathy when relating to these. Butler and Finsen (1993: 73) are of the opinion that empathy would encourage the parties to respond and explain their situation better, but this should be applied in an even-handed manner.

### **3.5.11 Understanding**

Understanding is identified as an attribute contributing to the effective application of the psychological elements in the conciliation process and should not be confused with the knowledge of the process.

Understanding is the ability to comprehend the explicit and implicit concerns and apprehensions of the parties to conflict (Brown & Marriott, 1993: 252). Butler and Finsen (1993: 73) are of the opinion that understanding is a desirable attribute in an arbitrator, but it should be accompanied by even-handedness.

In addition to this, Boule and Rycroft (1997: 140) suggest that understanding the emotion before acknowledging it will add accuracy to identifying emotions. However, this process is supported by active listening which illustrates the interdependence of the attributes and skills.

Considering the above in so far as parties to dispute may vary in their ability to effectively communicate their desires and concerns, the facilitator may need to develop the ability to understand what it is that the parties are trying to communicate in order to facilitate the process accordingly. It may be said that understanding goes beyond comprehension, an in-depth perception of the parties' feelings and an insight of their hopes and needs, and as such understanding supports the psychological process of facilitation which contributes to competence.

### **3.5.12 Flexibility**

Flexibility is identified by Boule and Rycroft (1997: 78) as an essential attribute in ADR facilitation and this is supported by Brown and Marriott's (1993: 252) reference to the importance of flexibility as the ability to cope with change in varying situations. Adapting to change is one of the challenges a facilitator faces in a diverse construction industry.

As one challenge is overcome, the facilitator may invariably be faced with another. The ability to deal with challenges and display sufficient flexibility may reduce any possible disruptions in the event of a dispute. The facilitator may find when a party is given a better understanding of the situation, it may result in a change of heart regarding his/her expectations, and hence the ability to be flexible is important for the mediator, as issues in a dispute may often change in the course of mediation.

### **3.5.13 Independence**

Independence is referred to as an important attribute in facilitating ADR; the requirement of the professional to facilitate ADR independently without external support. Barrett, cited in Brown and Marriott (1993: 252), suggests that isolation is one of the psychological ingredients of a mediator's job; that a mediator works independently without the support and assistance of a supervisor. This attribute may also be learned as a facilitator in the construction industry may not be independent from the start due to the learning process.

### **3.5.14 Perseverance**

Perseverance is identified as a positive term for persistence and an important attribute in the ADR facilitation process; to continue with a course of action in spite of difficulty or lack of success.

Boulle and Rycroft (1997: 79) suggest that persistence where parties are discouraged and want to terminate the mediation, may be of a positive effect. However, persistence where one or more of the parties feel they are forced to settle can have a negative effect as the agreement can be invalidated on grounds of coercion or undue influence. Persistence by the mediator where parties are discouraged and negative about a positive settlement may well be of positive nature and perseverance may only deliver positive results if the objective criteria are upheld and not lost sight of.

The facilitator may need to distinguish between perseverance and stubbornness, the latter being a negative form of perseverance. It may be possible that s/he is blinded by determination to make amends for the benefit of the project.

### **3.5.15 Self-reflective**

The outcomes of the mediation process and the degree to which the disputing parties are satisfied with the outcome will serve to indicate the level to which the process could be considered successful. The ability to self-reflect as a mediator may be one of the more beneficial attributes of the mediator.

Boulle and Rycroft (1997: 79) suggest that self-reflection requires critique of what went well in the mediation and what could have been done differently at the most basic level. This attribute provides for self-development and may be developed in time.

### **3.5.16 Wisdom, patience and humility**

Butler and Finsen (1993: 74) describe the personal qualities of a good arbitrator as follows:

- The wisdom of Solomon
- The patience of Job
- The humility of St. Francis

#### **Wisdom**

According to Butler and Finsen (1993: 74) it is not easy to define wisdom, a quality that may develop, which refers to the knowledge and experience one develops over time. Wisdom supports the application of the other attributes in as much as when experience is gained, wisdom increases.

It may seem unlikely that attributes can be learned without a deeper experience that would be developed or acquired over a period of time. Trollip (1991: 51) suggests that knowledge can be taught and wisdom can be learned.

Research conducted by Povey (2005: 4) indicates that there is a tendency for more senior members to fulfil the role of mediators in the industry. This may however imply that knowledge and experience ultimately translates into wisdom.

#### **Patience**

Patience is identified as an essential attribute in ADR facilitation based on Boulle and Rycroft's (1997: 79) opinion that working with others' problems in a conflicting atmosphere may prove to be trying and testing in so far as a good temperament needs to be maintained. A patient nature may be inherent but patience may also be learnt or developed over time.

To be irritated in facilitation may prove to be disastrous. Boulle and Rycroft (1997: 159) are of the opinion that irritation can be sensed in the tone of voice, mannerisms and attitude upon which parties may become negative and irritated. A calm and tolerant nature may create the patience required for the lengthy and repetitious negotiations which may occur from time to time.

### **Humility**

According to Law (cited in van der Westhuizen, 2012: 4) “Humility is not thinking less of yourself but thinking of yourself less” (William Law, *BloemNuus*, p 4, 6 April 2012).

Bevan (1992: 68) suggests that a mediator should have sufficient personal drive and ego with a willingness to be humble and the mediator may consider steering clear of the impressive presence projected by lawyers.

The professional may face a challenging task in being humble and showing authority at the same time.

## **3.6 APPLICATION OF THE ATTRIBUTES**

Brown and Marriott (1993: 252) and Butler and Finsen (1993: 74) have been quoted as referring to mediators who have all the above attributes as being divine beings. However, if a mediator were to learn and develop the above ‘soft’ (psychological) skills, he/she may be considered competent in the application of the attributes which support facilitation skills.

The attributes which are discussed above are somewhat interdependent in regard to the application of the facilitation skills. Brown and Marriott (1993: 252) suggest that the attributes are largely due to inherent personality and psychological makeup and as such may be applied at the discretion of each individual according to the appropriate function (Boulle & Rycroft, 1997: 139).

It may seem unlikely that inherent skills such as empathy can be learned without a deeper understanding of the situation which may be developed or acquired over a period of time. Attributes may therefore develop with experience in time. Some soft skills may however be

inherent or learned, acquired or developed with previous experiences gained in other fields (Boulle & Rycroft, 1997: 139-140). To achieve competence in the application of the attributes may require conscious will and dedication to master.

It would be beneficial for facilitators to be aware of all these attributes as self-evaluation is the starting point of their development. These qualities should be real and perceived and must be demonstrated (Trollip, 1991: 41).

In view of the above, facilitation skills and attributes are interrelated and enhance all methods and functions of ADR. However, this may be due to the hybrid form of ADR practice in the industry where new methods were developed to improve on existing methods. Although practitioners are inclined to rely on their inherent negotiation and communication skills (Povey, 2005: 6) when facilitating ADR, the application of various personal attributes which relate to ADR practitioners may add value if considered, developed and applied effectively.

Having identified the skills and the supporting attributes required for the professional to achieve competence in ADR facilitation, emotion management is addressed in the ADR process in order to support the dispute management function.

### **3.7 EMOTION MANAGEMENT**

Having addressed the physical and factual aspects of disputes, the emotional needs of the parties have to be considered in conjunction with the basic management skills. Emotion management supports the function provided by the Four Cs in regard to striving for satisfactory end results. Emotions are contagious, which suggests that the emotions of the facilitator will be transferred to the parties. Emotions are inevitable where people negotiate, especially in a contract situation. The positive aspects are that good emotional management creates cooperative responses and as such, emotional contagion draws positive characteristic displays (Hatfield, Cacioppo & Rapson, 1994: 127).

Totterdell of the Institute of Work Psychology (IWP) ([n.d.], online) is of the opinion that emotion management is the way in which people influence their own feelings and expressions and others' feelings. Emotional intelligence can be defined as a person's ability to monitor, understand, use and change emotions in self and others. Emotion management may encourage healthy relationships and emphasis should be placed on the contract procurement stage. Emotions may have a negative effect on the contract procurement stage where parties may be somewhat apprehensive and lacking in trust. Emotion management should always be seen as a cooperative process designed to address the emotional needs of all parties. It should never be used as a tool to manipulate stations in favour of either party's desired outcomes.

### **3.8 SUMMARY**

As with the application of the appropriate ADR methods, facilitation skills may also be applied effectively. A full understanding of the facilitation skills is required in order to identify the requirements for appropriate dispute resolution and the effective application thereof.

Effective communication in the form of speaking clearly, listening actively and the ability to understand verbal and nonverbal meanings and gestures is required of the ADR facilitator to achieve competence. A conscious knowledge of the required personal attributes relating to the construction industry and the effective application thereof may improve the effectiveness of communication.

## **CHAPTER FOUR**

### **THE ADR ROLES**

#### **4.1 INTRODUCTION**

As mediation is a commonly used method of ADR in the South African construction industry as reviewed in Chapter 2, the roles relating to the procedure were identified in the literature review to address the application of the attributes and skills required for achieving competence in the facilitation of dispute resolution. As such, emphasis was placed on the process of mediation by an external facilitator and conciliation in the project environment.

In view of the conciliation process, the function of avoiding differences before they develop into a dispute supports the role of facilitator fulfilled by the professional in the industry and as such, is an indicator of the requirements for competence in effective application.

The facilitator may be required to assess the dispute and the psychological status of the parties in order to apply conciliation. This refers to appropriate dispute resolution (Boulle & Rycroft, 1997: 59, 71).

Mediator roles are inclined to be interrelated and interdependent, overlapping and certain functions may support all the roles. The various roles were sourced and adapted from Brown and Marriott (1993: 246-251).

#### **4.2 ROLES OF ADR FACILITATORS IN THE CONSTRUCTION INDUSTRY**

The roles and functions of the mediator are somewhat interchangeable and synonymous in as much as the role supports the function and the function fulfils the role (Moore, 1986: 25; Boulle & Rycroft, 1997: 113).

Mediators are in support of a fair process and opt for a consensual rather than a particular settlement (Moore, 1986: 16). Impartiality and neutrality support this function which underlies

the basis of the ADR context. Mediator functions are complimented by mediation skills and techniques (Boulle & Rycroft, 1997: 139).

The practice of mediation calls for the fulfilment of multi-disciplinary roles and these are applied on demand (Brown & Marriott, 1993: 246).

The terms education and informing are synonymous in the ADR process but for the purpose of this study, informing relates to educating the parties of the process and education to the knowledge received from tertiary education and guidance from the mentor.

#### **4.2.1 The role of the informer**

Bevan (1992: 61) suggests that informing (educating) the parties should not, but could be, a difficult function, depending on the parties' perception of the dispute resolution approach, an example being that they may consider the approach of "putting back the dispute in the hands of the disputants" as a "cop out" on behalf of the facilitator.

The facilitator may need to inform the parties of the mediation process in order to conduct the mediation as effectively and efficiently as possible and as such, Boulle and Rycroft (1997: 123) are of the opinion that it is important for the mediator to inform the parties of the mediation process at the initial meeting. However, in doing so when concluding a contract may serve to avoid unnecessary lapse of time as opposed to wasting precious contract time while time is spent on explaining the mediation process. Contrary to this, Finsen (2005: 217) suggests that the appointment of an inappropriate expert may have negative connotations on a project.

#### **4.2.2 Authoritative role**

The authoritative role may be supported by the management and building of trust functions. Moore (1986: 124) suggests that the building of trust function is an on-going process which supports the authoritative role throughout the mediation process. By setting ground rules for the process also projects a sense of authority (Pretorius, 1993: 43).

Although ADR is a consensual process, Butler and Finsen (1993: 73) suggest that the facilitator requires a certain amount of firmness in creating the authority to remain in control of the ADR

process. The practicing professional as facilitator's authority may be created by means of his affiliation with the construction industry which relates to expertness (Moore, 1986: 274).

#### **4.2.3 The role of the psychologist**

The psychologist's role supports the "dealing with emotions" function. The facilitator acts as a third party in consultation with the parties to improve the relationship between the disputants before an attempt is made at the resolution of the dispute. A positive and harmonious atmosphere should be established before the negotiating process commences (Moore, 1986: 116, 166).

The mediator may be required to manage and control interventions when anger is out of control (Boulle & Rycroft, 1997: 145). However, according to Trollip (1991: 49), emotions may surface well into the mediation process and the mediator should be well prepared for such events. In support of this Pretorius (1993: 74) suggests that avoiding the win or lose outcome will decrease emotional outbursts.

#### **4.2.4 The role of the negotiator**

The negotiator's role supports the facilitating function. The facilitator as communicator also partakes in this function as communication is an important element of the negotiation process (Brown & Marriott, 1993: 248).

The intensity of the facilitating function may involve various roles which are interdependent, as discussed in this chapter in order to optimise the facilitating function which also includes the evaluative process of mediation. This may be an indication of the sensitivity and interdependency of the skills and attributes relating to the mediation process.

The negotiator's role in mediation in the construction industry is intended to address the positions and determine the parties' interests in order to create possible solutions for settlement. This procedure may then be followed by a quasi-arbitral function or an evaluative type of mediation (Pretorius, 1993: 176).

#### **4.2.5 The role of the evaluator/expert**

According to de Wet (1991: 46), expertness is achieved with good knowledge of the subject matter with appropriate application thereof and credibility which stems from a communicator's expertness. In the construction industry the evaluator is referred to as "an expert" or one who has expert knowledge and may be expected to facilitate an advisory form of arbitration (Pretorius, 1993: 176).

Communication skills may be considered essential for the facilitator to fulfil his/her role as evaluator/expert and Oosthuizen, Köster and De La Rey (1998: 83) believe that effective communication is the key to the successful implementation of technical performance. Technical performance relating to mediation may refer to both the facilitative and evaluative processes in mediation.

The role of evaluator takes effect in the second stage of mediation when the facilitative stage has not produced a settlement and the mediator as an expert will proceed with further questioning to gain a better understanding in order to make a recommendation for a possible solution to the problem (Finsen, 1993: 184-185). This role may be supported by the role of conciliator throughout the mediation process.

However, in the primary facilitative stage of mediation, as discussed in Chapter 2, the facilitator may not be expected to offer his/her opinion, but rather fulfil the role by guiding the parties to mutually acceptable solutions.

#### **4.2.6 The role of the communicator**

It is important that the facilitator portrays the qualities of a credible communicator and an expert. Credibility may be portrayed in the communicator's expertness, trustworthiness and goodwill toward the recipients. This is illustrated in the efficient way the facilitator presents and appropriately applies the subject knowledge (de Wet, 1991: 46).

There are three distinct stages in the mediation process where the mediator's role as effective communicator is considered important:

- The initial meeting where introductions are made, the process explained and the parties' view of the dispute are stated;
- The separate meetings which involve interpersonal communication; and
- The closing stage where conclusions are communicated.

These stages are particularly important in communicating and presenting a well-facilitated procedure creating satisfactory end results (Boulle & Rycroft, 1997: 152-153). However, these steps are applied in conjunction with the organisational skills addressed in Chapter 5.

It is interesting to note the various functions which apply to the role of communicator in regard to the initial meetings, interpersonal communications, resolution of disputes and the extent these roles are integrated.

#### **4.2.7 The role of the manager**

Although the mediator is managing the process, the parties should understand that they are in control (Boulle & Rycroft, 1997: 147). Richbell (2008: 108) suggests that the mediation process should be managed efficiently. However, the flexibility of the process suggests that there may be a certain degree of proactive management involved.

The final stage of mediation once again calls for the mediator in the role as manager where the process has been planned, implemented, controlled and finalised (Brown & Marriott, 1993:250-251). The JBCC PBA (2007: 31) Dispute Clause 40.6.3 states that on settlement, the decision must be recorded in writing and once it is signed by the parties, it is considered binding unless either of the parties renounces the settlement within 10 days (Finsen, 2005: 232).

The basic management skills addressed in Chapter 3 supports this role.

#### **4.2.8 The role of the investigator and information gatherer**

The role of investigator may become complicated depending on the hidden agendas of the disputing parties. Brown and Marriott (1993: 248) suggest that the information can be gathered

indirectly through hints, non-verbal communication and secondary data and as such the role of information gatherer rather applies to the process where the hidden agendas prohibit the flow of information.

In comparison, the adjudicator is considered advantaged because according to Finsen (2005: 228) information is presented by the parties in adjudication. As such, the mediator in his/her role as information gatherer may consider informing the parties that costs may increase with information that is held back.

#### **4.2.9 The role of the facilitator**

All the above mentioned roles apply to the role of the facilitator. It is important that the professional is knowledgeable of the requirements for effective facilitation regarding the functions required to fulfil the various roles, in order to ultimately achieve competence.

### **4.3 SUMMARY**

The roles of the ADR facilitator in the construction industry are diverse and these stem from the various functions performed to execute the mediation process which addresses disputes in a fast-track industry. The roles are interconnected and may be applied to both the mediator as evaluator or practicing professional acting as conciliator.

It may be possible for facilitators to have inherent mediator characteristics and attributes to fulfil the various ADR roles. However, a theoretical background may enhance the application of the skills in fulfilling the roles. To fulfil the above-mentioned roles may require identification of the various functions and where lacking, the determination to develop the identified attributes and skills for effective facilitation.

Credibility may be considered the ultimate achievement that may be achieved by a facilitator of the ADR process.

## **CHAPTER FIVE**

### **ADR PROCESS AND PRACTICE**

#### **5.1 INTRODUCTION**

Previously dispute resolution had a dual role in the construction industry fulfilled by arbitrators or mediators or alternatively, principal agents. Building contracts previously vested extensive powers in the principal agent to manage the project and act as a quasi-arbitrator. Presently the principal agent fulfils a supervisory roll (H.S. McKenzie and S.D. McKenzie, 2009: 113). In addition to these roles and due to the increase in the size of projects, professionals are tasked to supervise sections of a project and as such, may require the basic skills required by mediators, arbitrators and principal agents in order to avoid differences developing into disputes.

Arbitration in South Africa was used as the method of dispute resolution since the days of colonialism until the Arbitration Act 42 was promulgated in 1965. The South African legal system supports arbitration as an alternative to litigation (Finsen, 2005: 217; Pretorius, 1993:176). The evolution of a unique process of ADR in the South African construction industry as an alternative to litigation and arbitration has taken place over a period of three decades from 1976 when Quail (1978: 165) identified the introduction of the mediation process.

Pretorius (1993: 176) suggests that there was a slow trend for professional practitioners to move on to alternative methods of dispute resolution from the traditional method of arbitration. Although arbitration was practiced in the traditional way, the approach was being adjusted to suit the complex and specialised nature of construction disputes.

In addition to this, costs relating to time based penalties may also be addressed by favourable time factors offered by mediation and conciliation

ADR in the industry is referred to as unique in so far as practice differs from international standard practice as discussed in Chapter 2. South Africa inherited its legal system from English

and Roman Dutch Law. The present Arbitration Act 42 of 1965 and contract documentation were based on English Law and as such, mediation and conciliation in South Africa and the UK are in some respects applied in a different manner to international standard practice. In standard mediation practice, the mediator is not required to recommend a solution to the dispute and in the construction industry it is required of him. The application of conciliation is also reversed (Butler & Finsen, 1993: 10-11).

In spite of adjudication being based on the Latham report, the South African construction industry has further adapted the practice of adjudication which differs from adjudication in the UK construction industry which is based on statutory provisions and results in a final and binding decision. In South Africa, adjudication may be regarded as somewhat unique and is applied according to the requirements agreed upon in the contract documentation (Finsen, 2005: 222-223). To accommodate the fast-tracking nature of the industry, it is provided by the JBCC PBA (2007: 30-31) that according to the needs of the parties, they may submit to mediation or adjudication.

The requirements for the effective practice of ADR according to international standard practice are addressed in this chapter and compared to the somewhat unique application in the South African construction industry.

## **5.2 THE FOUR Cs**

Quail (1978: 165) identified mediation as a quasi-arbitral process and the Four Cs were identified by Loots (1991:8-13) upon which the practice of mediation became more consensual and somewhat informal, thus steering away from the arbitral function. In support of this, secondary data collected by du Preez and Verster (2012: 8) indicates that professionals are aware of the advantages offered by the Four Cs and consider them important in ADR practice.

### **5.3 STANDARD PRACTICE OF THE MEDIATION PROCESS**

A literature review was conducted to identify the ADR dynamics relating to its application in practice. Apart from the skills and attributes identified in Chapter 3, the ADR facilitator requires an understanding of the process and the application in practice.

#### **5.3.1 Organisation skills**

Organisation skills can be categorised as “macro skills” in so far as they are general overall plans and interpretations contributing to effective mediation (Boulle & Rycroft, 1997: 140). These skills may be considered important in the mediation process, as it is the preparation for the building of a sensitive procedure and should never be underestimated. It is suggested that organisational skills are applied using the basic management procedure where planning is as important as control and implementation is supported by effective planning.

Effective planning and preparation lays the groundwork for achieving satisfactory end results (Boulle & Rycroft, 1997: 86). In addition to this, control may refer to the facilitation process and closure, the recording of the decision which may then be supported contractually.

##### **5.3.1.1 Initial meetings**

The initial meeting is identified as an element in achieving competence in ADR facilitation based on Brown and Marriott’s (1993: 121- 122) opinion that the initial meeting represents a critical stage of the mediation process.

Knowledge of the process of initial meetings may lead to competence in effective application. A certain amount of uncertainty may prevail in so far as the parties may be uninformed or have not yet reached consensus. Richbell (2008: 68) suggests that this intervention be used to build trust between the parties, gather information and reassure apprehensive parties.

Initial meetings are considered to be important in the mediation process and may be underestimated by the facilitator. With reference to the discussion on trustworthiness and

authority (Chapter 3) the facilitator may display his/her humble authority and gain the respect and trust of the parties at this time. There is more to be achieved in the initial meeting such as informing the parties, summing up the personalities of key role-players. The psychological situation may also need to be considered (Moore, 1986: 32). Furthermore, Trollip (1991: 65) suggests that parties must fully understand their own case in order to communicate it. This may also be said for the mediator.

#### **5.3.1.2 Arrivals and departures**

Knowledge of the importance of timeliness in the mediation process may be required to better understand the process (Trollip, 1991: 51). The mediator may be required to supervise the arrivals and departures of the parties and any hostilities which may have been noted by the facilitator during the preparation interviews may need to be taken into account when planning the supervised arrivals and departures of the parties (Folberg & Taylor cited in Boulle & Rycroft, 1997: 140). Timeliness projects commitment which in turn may project an element of professionalism, authority and confidence.

#### **5.3.1.3 Venue and seating arrangements**

The tactical and protocol issues relating to venue and seating arrangements in formal ADR sessions is important for professional facilitators however; it may be beneficial for practitioners to also be aware of these requirements should the need arise. The physical environment portrays the atmosphere the procedure is intended to create (Boulle & Rycroft, 1997: 158). Seating arrangements have different implications for successful negotiating processes and the individual's space is important to him/her so as not to feel threatened and restricted (Boulle & Rycroft, 1997: 140).

Trollip (1991: 44) suggests that seating should be arranged so as to divert anger intended for the other party to the mediator, and that parties should be seated with a good view of the flip chart. In support of this, de Wet (1994: 48-49) states that the use of space and distance may be determined by the emotional state of the parties. In addition to this, Moore (1986: 150-152) is of the opinion that formality may emphasise the seriousness of the matter and to be appropriately addressed may have a positive effect on the outcome of the negotiations. However, this may

need to be carefully considered in the South African construction industry where the trend is to be casual and formal attire may cause rejection of the facilitator or create a negative perception of him/her.

#### **5.3.1.4 Educating and informing**

Educating and informing are identified as part of an important process in ADR facilitation in the initial enquiry for mediation as parties may be uncertain about the procedure. When disputing parties engage in ADR, queries on the procedure invariably occur on a verbal basis and a good comprehension of the ADR process is required of the professional in order to explain the process and its advantages (Brown & Marriott, 1993: 121-123). Where parties have been educated on and informed of the negotiation process, a more beneficial and mutually satisfactory outcome can be expected (Anstey, 1993: 12).

However, informing the parties of the negotiation process may present a challenge and may need to be approached in a sensitive manner, depending on the psychological state of the parties. It is suggested that the professional prepare the parties for the likelihood of a dispute which according to various authors (Finsen, 2005: 214; Povey, 2005: 1) is inevitable in the construction industry.

Education may go beyond informing the parties of the facilitation process. Communication is considered the core function of effective negotiations (see Chapter 3) and is applied by both the facilitator and the parties. However, the facilitator may subsequently inform the parties how to communicate effectively in order to negotiate effectively.

### **5.4 THE EVOLUTION OF AND CURRENT ADR PRACTICE IN THE SOUTH AFRICAN CONSTRUCTION INDUSTRY**

The method of arbitration had adopted a hybrid approach to suit the demands of the construction industry and as such, mediation may have followed suit. According to Butler and Finsen (1993:10) the application of conciliation and mediation differ from standard practice. There are two basic types of mediation procedures, namely the methods of conciliation and mediation, the former being facilitative and the latter, evaluative.

Should conciliation be applied as a method on its own in the construction industry, the conciliator cannot impose a binding decision of a settlement (Boulle & Rycroft, 1997: 62). Mediation may be selected as a primary option according to the agreement; however the parties may need a better understanding of the process and the application thereof (JBCC PBA, 2007: 30-31). According to the AoA's Mediation guidelines, any person can qualify to be a mediator however; in the construction industry the requirements are deemed to be that of an expert in so far as the mediator may be required to offer his/her opinion on a solution to the dispute in the evaluative process (Pretorius, 1993: 176).

Arbitration in the industry is supported by consensus between the parties. It is important to note that the consensual nature of arbitration places it in the ADR context (Pretorius, 1993: 176; JBCC PBA, 2007: 30-31). Adjudication now takes precedence to arbitration in the GCC (2010: 68-71), NEC3 (2005: 28-33) and FIDIC (1999: 66-70).

Arbitration may be considered the backbone of ADR in the industry in so far as if mediation or adjudication fails; the dispute is referred to arbitration (JBCC PBA, 2007: 30-31). However, professionals are knowledgeable of the method. In view of this inherent belief in arbitration and Pretorius's (1993: 176) opinion that the construction industry has developed and maintained a dispute resolution process particularly suited to the needs of the industry, it may be understood why mediation is referred to as a hybrid method with a quasi-arbitral function.

The intention to expedite dispute resolution with the more informal and quicker method may have resulted in a hybrid type of mediation developing within the South African construction industry, adopting its own approach to dispute resolution. In support of the hybrid form of ADR practice, Goldsmith, Ingen-Housz and Pointon (2006: 199) are of the opinion that there are two fundamental principles which should underlie the evolution of ADR:

- the process should remain human and rely partly on intuition; and
- it should be rationally based in so far as the perception is that feelings should not be considered in business. However, disputes are not resolved until the underlying feelings of those involved are recognised.

## 5.5 THE STANDARD ADR PROCESS COMPARED TO CURRENT PRACTICE

Table 5.1 compares standard practice of mediation to current practice. The table is divided into two columns; the left column is an illustration by Moore (1986: 32) of the standard mediation process in a detailed description which works through set stages. It is important to note that the process may be somewhat tapered to suit the hybrid type of ADR practiced in the South African construction industry, which is based on the conclusions of Povey's (2005: 2-7) research. The reader may find that the stages relating to current practice have been adjusted or eliminated to more accurately reflect the situation in the industry. Due to the possibility of the lengthy stages being questioned in regard to the construction industry, the process was adjusted to accommodate the trend to expedite the mediation process.

**Table 5.1: The process of standard practice of mediation compared to current mediation practice**

<b>Standard practice of the mediation process</b>	<b>Current mediation practice</b>
Stage 1: Initial contacts with the parties <ul style="list-style-type: none"> <li>• Making initial contacts with the parties</li> <li>• Building credibility</li> <li>• Educating the parties about the process and selecting approaches</li> </ul>	Stage 1: The dispute is reported according to JBCC PBA, 2007 Dispute Clause 40
Stage 3: Collecting and analysing background information <ul style="list-style-type: none"> <li>• Collecting and analysing relevant data, dynamics, and substance of a conflict</li> </ul>	Stage 3: The principal agent has all the information at hand
Stage 6: Beginning the mediation session <ul style="list-style-type: none"> <li>• Opening negotiation between the parties</li> <li>• Establishing an open and positive tone</li> <li>• Assisting the parties in venting emotions</li> <li>• Assisting the parties in exploring commitments, salience and influence</li> </ul>	Stage 6: Beginning the mediation session <ul style="list-style-type: none"> <li>• Opening negotiation between the parties</li> <li>• Establishing the problem</li> <li>• Facilitator offers an opinion for a settlement</li> </ul>
Stage 9: Generating options for settlement <ul style="list-style-type: none"> <li>• Generating options using either positional or interest-based bargaining</li> </ul>	

Stage 10: Assessing options for settlement <ul style="list-style-type: none"> <li>• Reviewing the interests of the parties</li> <li>• Assessing how interests can be met by available options</li> <li>• Assessing the costs and benefits of selecting options</li> </ul>	
Stage 11: Final bargaining <ul style="list-style-type: none"> <li>• Reaching agreement through either incremental convergence of positions, final leaps to package settlements, development of a consensual formula, or establishment of a procedural means to reach a substantive agreement</li> </ul>	
Stage 12: Achieving formal settlement <ul style="list-style-type: none"> <li>• Identifying procedural steps to operationalise the agreement</li> <li>• Establishing an evaluation and monitoring procedure</li> <li>• Formalising the settlement and creating an enforcement and commitment mechanism</li> </ul>	Stage 12: Achieving formal settlement

Source: (Adapted from Moore, 1986: 32; Povey, 2005: 2-7).

Stages 2, 4 and 8 regarding the strategy, design and hidden interests were eliminated due to the existing involvement of the professional fulfilling the role of principal agent or project manager.

The questions raised are the following: are professionals willing to apply the dispute resolution process to its fullest extent, or would the process be adapted to suit the needs of the industry?

Mediation in essence has gradually developed since 1976 to its present form and as industry has it, the most appropriate methods and skills are used to create an effective system. Until recently the GCC (2010), NEC3 (2005) and the FIDIC (1999) contracts have supported dispute resolution in the industry followed by the JBCC PBA (2007) (Finsen, 2005: 223). As discussed in Chapter 2, the introduction of mandatory mediation or adjudication is intended to be a gradual process

which may afford the facilitators the time to adjust. This may in all probability present a challenge to ADR facilitators who may be resistant to change.

Negotiation is seen to be a natural skill which a person gradually develops. However, Brown and Marriott's (1993: 88) suggestion that learning negotiation skills will improve on any inherent skills, may be an indication that the construction industry may consider following this approach. In addition to this, Fisher and Ury (1991: 153-154) are of the opinion that the application of common sense combined with experience may provide a framework for negotiation. This may be particularly applicable to the current situation in the construction industry where the natural skills and experience are applied rather than considering the theory to enhance negotiations.

Mediation is applied successfully in the industry with research results recording success rates by the UK and the SAICE at 75% (Finsen, 2005: 223). A study conducted by Verster *et al.*, (2011: accepted for publication) indicates that mediation is a preferred method of ADR in as much as it enjoys more advantages of satisfactory end results above those of adjudication.

In view of ADR in the construction industry, the fast-tracking nature as illustrated in Table 5.1 calls for the expeditious yet effective resolution of disputes to reduce time and cost implications. However, the application of the methods, skills and attributes addressed in Chapters 2 and 3 applied in the fast-track process, may still result in effective ADR.

## **5.6 PROACTIVE MANAGEMENT STYLE**

Pretorius (1993: 176) suggests that increased communication and co-ordination between the different fields of dispute resolution may increase effective application in the industry. Conciliation on site provides the opportunity for dispute resolution to be facilitated by the person who is closest to the dispute. Loots (1991: 8) suggests that disputes can be best settled at the point where the relevant information is better understood, which may imply the need for the practicing professional to proactively apply conciliation on site and avoid differences developing into disputes.

A proactive management style may be implemented in the initial planning of the dispute risk although this may invariably need to be replaced by a reactive approach as the mediation progresses.

The problems may stem from the ineffective settling of differences on site which develop into disputes. Early identification of possible disputes and settling differences in the form of conciliation on site (solving problems), may lead to the successful completion of a project (Richbell, 2008: 122) and as such, a reduction in ADR interventions.

## **5.7 EDUCATION AND TRAINING**

Boulle and Rycroft (1997: 123) are of the opinion that the education in mediation is not only a didactic function. This suggests that education and training in mediation is supported by mentorship and experience in the industry.

Education and training provide a sound background to ADR in the industry. However, professionals enter the industry with a basic theoretical background and as such; mentorship by current facilitators may provide the support required for effective application of the skills.

## **5.8 DISCUSSION**

The South African construction industry has a fast-track culture (Povey, 2005: 2) and according to the literature review based on current trends, ADR has followed suit. As such, the time saving efforts in so far as decisions are made for the parties, may have effected a less effective process of ADR. The introduction of set rules for mediation may in all probability result in an improved process much the same as set rules have impacted on adjudication. ADR in the industry has been adapted without considering the basic needs for effective application and the casual approach to dispute resolution may have negatively impacted on competence levels.

Another point to consider is that mediation in the construction industry differs to that of standard practice which may in all probability present a challenge when implementation takes place.

Education and training may also need to be adapted in terms of skills and attributes in order to increase the competence levels of professionals in ADR practice however; this may require effective mentorship and determination from candidate professionals in regard to self-development.

Should professionals have a sound knowledge of the ADR process, methods, skills attributes and dispute risk management, competence should be achieved with experience. The challenge is presented in regard to where and how professionals can gain this knowledge.

## **5.9 SUMMARY**

ADR in the construction industry is unique and presents a challenge with the diverse nature of applications and regulations as well as the increasing need to expedite construction to suit the needs of a fast-tracking industry.

Cost and time implications have resulted in the South African construction industry adopting a unique method of dispute resolution which differs in some respects to that of standard practice. In order to create a more effective practice of ADR, practitioners may increase their competence levels by familiarising themselves with the theory relating to the international standard practice as well as gaining experience regarding current practice from their mentors.

## CHAPTER SIX

### SYNTHESIS OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

#### 6.1 INTRODUCTION

The purpose of the research was to determine the competence levels of practicing professionals fulfilling the role of ADR facilitator in the South African construction industry. In so doing, the methods, skills, attributes and application in the industry were identified according to standard practice upon which the requirements for effective application were determined. Interviews and qualitative data captured from open ended questions in the questionnaire provided the information required to assess the current situation in the industry. The research methodology is defined in Chapter 1. It is important to note that the findings are based on the responses received from the questionnaire which are reflected as a group response (albeit a very small group) and does not portray the situation of the entire population of the construction industry. The findings are reflected below in the competence model, whereupon the final competence level average was determined and plotted on the situational competence model as addressed in Chapter 1.

The responses to the qualitative questions are discussed upon which the syntheses of the findings are presented.

#### 6.2 ANALYSIS OF COLLECTED INFORMATION

The responses were recorded by discipline as reflected in Table 6.1.

**Table 6.1 Categorisation of respondents**

<b>Profession:</b>	<b>Number</b>
1. Architects	5
2. Engineers	5
3. Quantity Surveyors	32
4. Construction Project Managers	3
Total	45

This constituted a 22% response rate of the 205 distributed questionnaires. Ten architects were approached personally of which five were sceptical about completing the questionnaire and claimed they do not have the required knowledge to do so. It is therefore uncertain how many respondents who were contacted electronically had the same sentiments.

Leedy (1985: 152-153) is of the opinion that “*the larger the sample size the better*” however, in the event of a smaller sample size, the sampling distribution of means is very nearly normal for  $N > 30$ , even when the population may be non-normal. Based on the size of the response, it was not possible to categorise the respondents into disciplines in order to conduct a comparative study.

### **6.2.1 Graphical presentation of the models**

Supporting the main objective of the research, the competence models below illustrate the competence levels of the different groups that were tested. The requirements for effective facilitation were included in the questionnaire and the analysis of the quantitative data is presented in graphical format to illustrate the competence levels of ADR facilitators.

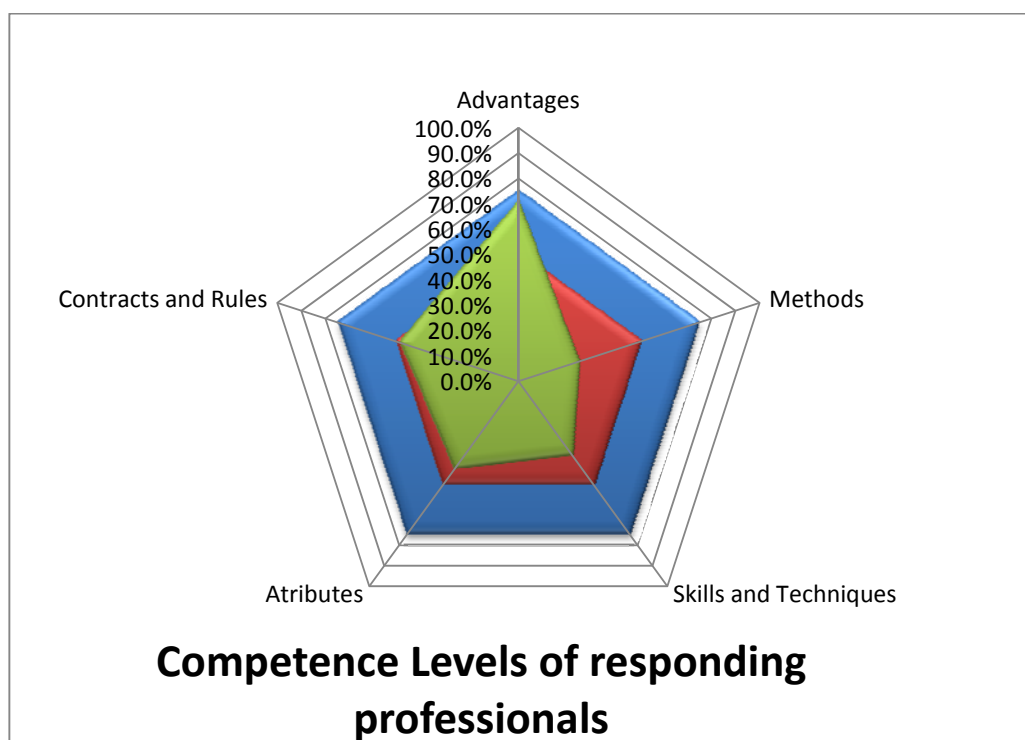
Questions 1-5 address the data required for the competence model. This included the knowledge, skills, attributes and experienced interventions which were requested from the respondents in terms of the methods, skills and attributes however, the respondents’ opinion of the importance of the attributes was an additional request. The effectiveness and the satisfactory end results experienced were requested in terms of the ADR Four C’s (Chapter 2) as well as the familiarity and interventions experienced regarding the contracts, rules and guidelines. The questions were based on the requirements for effective practice of ADR as identified in the literature review.

Using the Likert scale, respondents were requested to rate their level of knowledge, skills, attributes and interventions experienced relating to the methods, skills and techniques, attributes, contracts and rules. The effectiveness of the advantages and the extent of satisfactory end results

experienced was based on the Four Cs. Averages of all respondents were calculated to determine the overall competence ratings of responding professionals.

As discussed in Chapter 1, the blue shading in the competence model represents the area in which competence is achieved and the red shading, the area where competence has not yet been achieved, as rated by the individual respondents, grouped together to reflect a group response. The green shading represents the self-analysis of the individuals presented as a group.

The competence analysis reflected in the competence models below (Figure 6.1) was deduced from the self-analysis conducted by the respondents on an individual basis and reflected as a group response and illustrates the competence levels of the respondents.



**Figure 6.1: Competence model for responding professionals**

As discussed in Chapter 1, the area between 50 and 75% reflects the minimum competence range, whereas 76-100% depicts competence levels where no further direction or support is

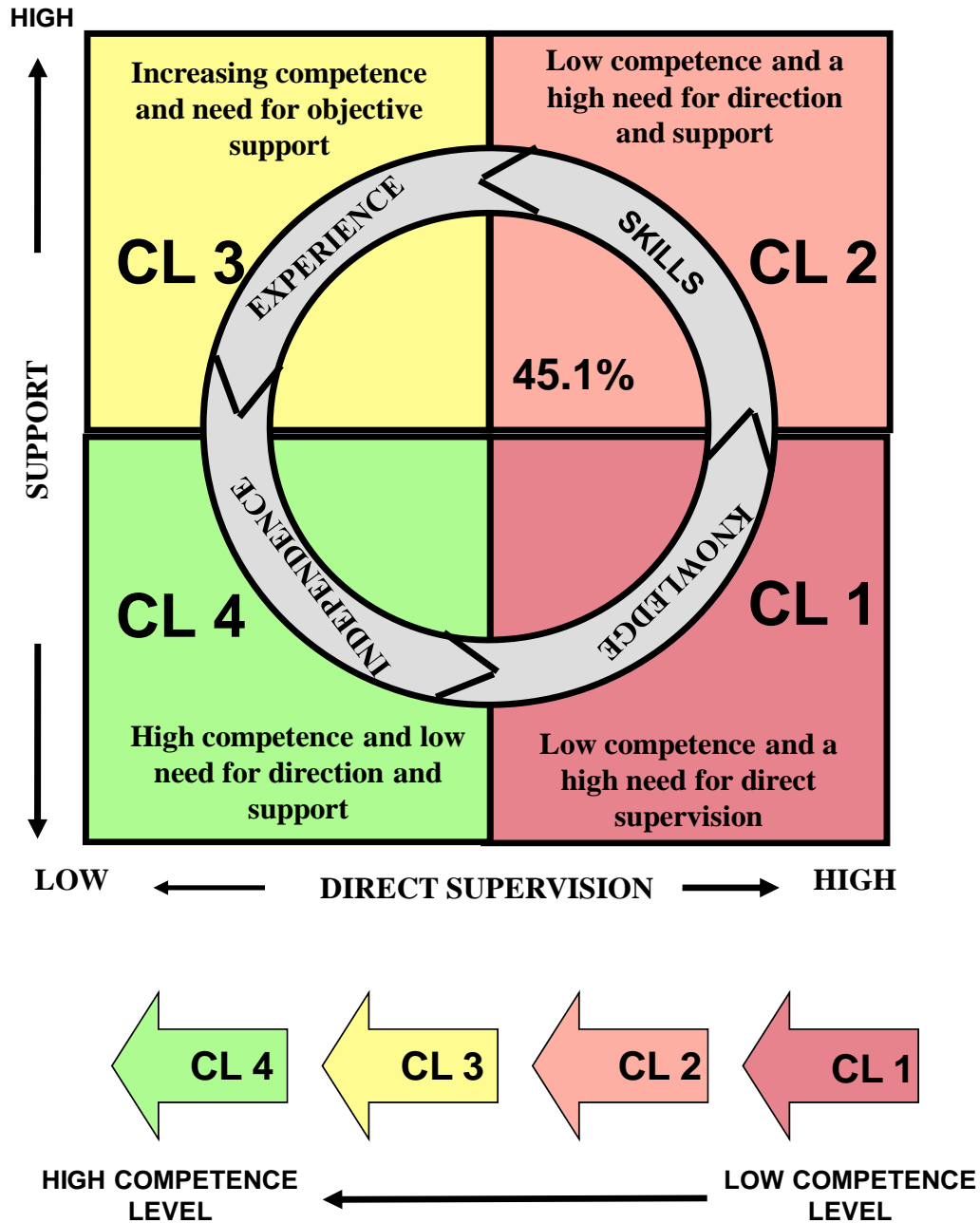
considered necessary. As reflected in the model, the group rating of the self analysis of respondents did not fall within this area. The blue competence area depicted in this model relates directly to the third quadrant of the Situational Competence Model illustrated in Figure 6.2.

The application of the elements which offer the advantages of satisfactory end results is the only area where competence is identified for the respondents however; contracts and rules just fall short of the blue area of competence. This model indicates that attributes, skills and techniques are below the desired competence levels with the application of the methods falling well short of desired levels.

Although this analysis was based on a small sample group compared to the target population, this may be an indicator that ADR skills, techniques, attributes and methods may need to be considered as future development possibilities in the construction industry.

As discussed in Chapter 1, Figure 6.2 below based on Hersey & Blanchard's, (1968) situational model, reflects the situational position of the responding professionals in regard to competence in ADR at 45.1%. However, this is presented as a group and the situation will change according to the individual. Generally, responding professionals in the industry are considered as not having achieved competence as yet, as the situation is assessed at a low competence and a high need for direction and support, as reflected in Quadrant 2 of the Situational Competence Model. The Situational Competence Model reflects the graphical representation of the data which is intended to easily identify development requirements.

## ADR SITUATIONAL COMPETENCE MODEL FOR RESPONDING PROFESSIONALS



**Figure 6.2: Situational competence model for responding professionals**

Source: (Adapted from: Hersey & Blanchard, 1968: online).

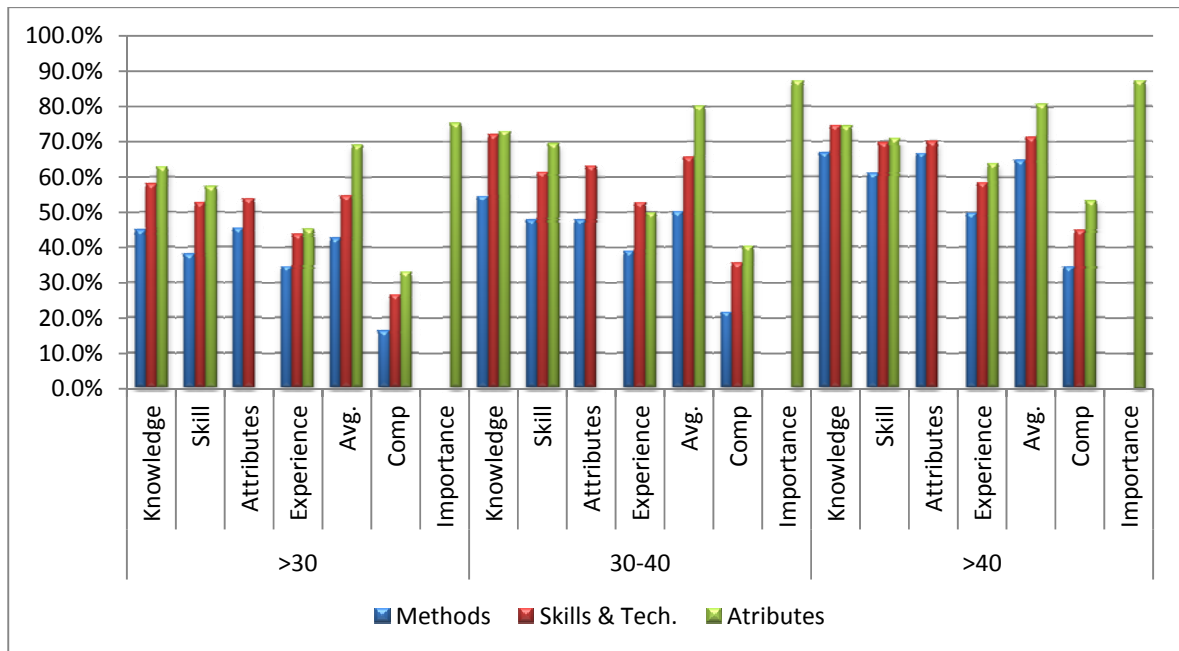
Table 6.2: Reflects the number of respondents in each age group. Although the data analysis did not qualify for categorisation of the age groups, the table was created to reflect the distribution of the different age groups in order to compare the competence levels as reflected by the self-analysis of the new entrants to the industry, with the more experienced professionals, to serve as an indicator of the current situation in the industry.

**Table: 6.2 Distribution of respondents in age groups**

<b>Age groups</b>	<b>Total</b>
Under 30 years	13
30 - 40 years	14
Over 40 years	18
Total	45

### **6.2.2 Further quantification of data**

The results of the quantitative data were categorised into three different age groups to identify at which point knowledge gained develops into competence. Figure 6.3 graphically illustrates the three categories of the under 30, 30-40 and over 40 years age groups however; it is important to note that these results merely serve as an indication for future development areas.



**Figure 6. 3: Categorisation of results into age groups**

The graphical presentation based on the data analysis reflects that knowledge levels also seem to increase with experience however; it appears that levels of competence, according to the self-analysis, do not increase much up to the age of 40. The analysis indicates that according to their self analysis, the responding professionals become more aware of the supporting attributes as experience increases however, all respondents considered the attributes to be important.

Table 6.3 below presents a report on the qualitative responses captured from Questions 7-9 and 12-14 in the questionnaire which is an indication of the current situation of ADR in the industry.

### 6.2.3 Nominal categorical response data

The nominal categorical response data was collected from the questionnaires and interviews and presented in Table 6.3 to address the Yes/No Type of questions (Statistical Programmes, (n.d.): online).

**Table 6.3: Nominal categorical response data**

ADR VARIABLES	PARTICIPANT RESPONSE	IMPLICATIONS
<p>1. Communication</p> <ul style="list-style-type: none"><li>As addressed in Question 8, are communication skills inherent or learned?</li></ul>	<p>60% of respondents believe that communication is both inherent and learned which suggests that 40% of respondents indicated that they had either learned or inherent skills.</p>	<p>There is a need for further adult education in ADR orientated communication skills.</p> <p>Further research would need to be conducted in order to determine the actual competence levels of the practicing professional's communication skills.</p>
<p>4. ADR facilitation</p> <ul style="list-style-type: none"><li>As posed in Question 12, what is the success rate of ADR facilitation in the South African construction industry?</li></ul>	<p>The majority of mediators rated the success rate of facilitated mediation between 50% and 100%.</p>	<p>The results apply to mediators and not professionals in the industry.</p>

<p>5. Mediation process</p> <ul style="list-style-type: none"> <li>As posed in Question 13, does on site conciliation reduce the number of disputes?</li> <li>As posed in Question 14, do practicing professionals follow a set mediation process?</li> </ul>	<p>89% of the respondents indicated that they believe that conciliation on site would reduce the possibility of differences developing into disputes.</p> <p>68% of the respondents do not follow a set mediation process which supports practice in the South African construction industry. These included the experienced and less experienced.</p>	<p>These results do not correlate with the results of Question 10 which are illustrated in Figure 6.19. This suggests that the concept may not be understood.</p> <p>14 respondents indicated that they had practiced mediation before which suggests that they may be confusing conciliation with mediation.</p>
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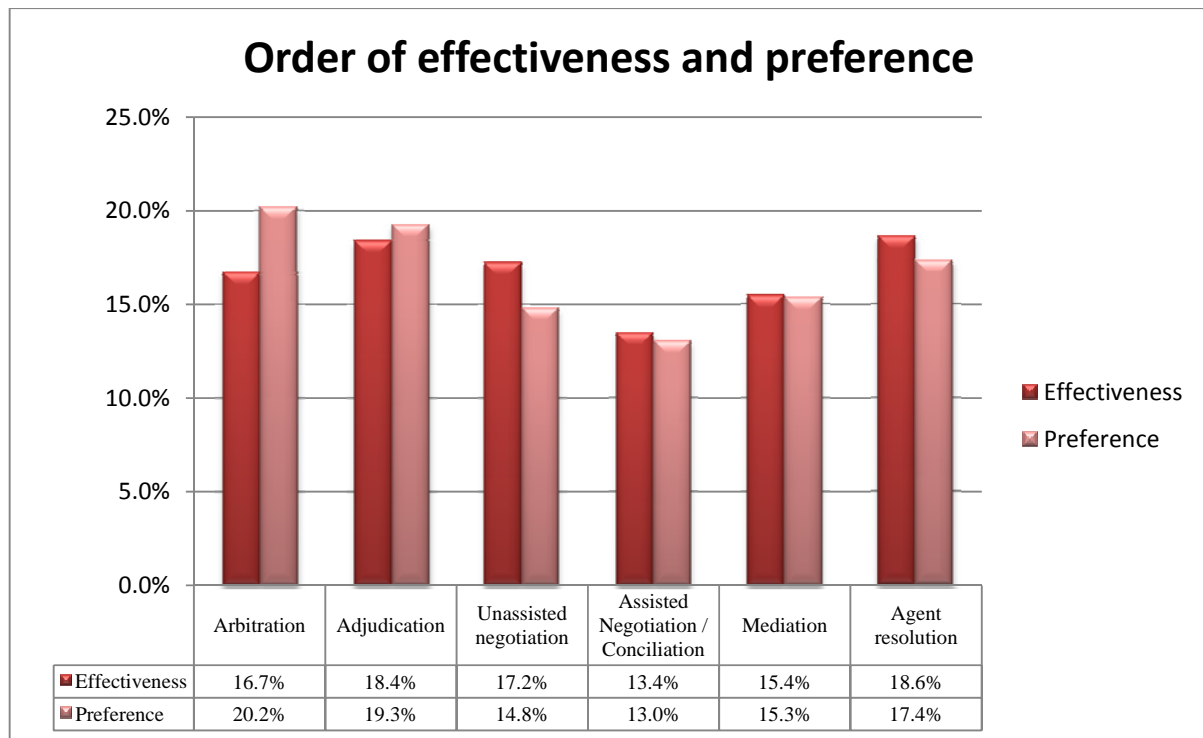
Question 15 is an open ended question intended to gain the participants' perspective on the current situation in the industry which will serve to provide a qualitative perspective of the current situation when compared to standard international best practices.

#### 6.2.4 Order of preference and effectiveness

Figure 6.4 illustrates the opinion of the respondents in regard to order of effectiveness and preference as requested in Question 6 of the distributed questionnaire. This analysis was determined by adding the preferences of the 45 respondents and dividing the totals by 45. These figures are based on a total of 100% to reflect the order of effectiveness and preference of responding professionals in order to identify the application of mediation and conciliation in the industry and the participants' opinions of the various methods.

According to the self analysis, the respondents indicated that arbitration is the preferred method of ADR, followed by agent resolution, and conciliation, the least. Agent resolution is considered the most effective followed by adjudication. This may suggest that professionals prefer agent resolution in so far as this method has been practiced since 1981 as identified in the ASAQS Practice Manual as discussed in Chapter 2. The method of preference is identified as arbitration followed by adjudication, and as with the effectiveness, may suggest that professionals support

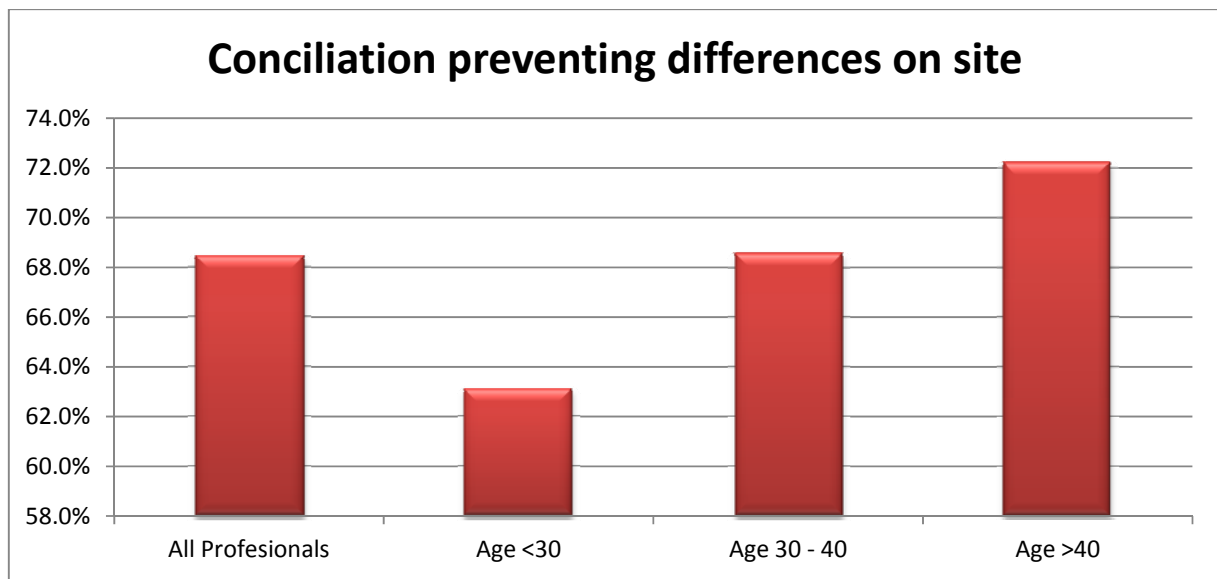
the notion that arbitration supports all methods of ADR. It may be noted that conciliation is considered least effective and yet it forms the basis of the evaluative process of mediation.



**Figure 6.4: Order of effectiveness and preference**

### 6.2.5 Conciliation preventing differences on site

The Likert scale was used to illustrate the opinion of the respondents regarding the extent that conciliation on site would prevent differences developing into disputes as requested in Question 10. Figure 6.5 illustrates the opinions of the respondents. The results of the self analysis indicated that the responding professionals may realize the need for applying conciliation on site with experience. The age group categories were used to identify future development areas.



**Figure 6.5: The opinion of respondents regarding conciliation preventing differences on site**

#### **6.2.6 Qualitative data from questionnaires**

The qualitative data gathered from the questionnaires varied somewhat. The opinions of the respondents supported the findings and provided an explanation of the current situation in the industry

A respondent suggested that “*conciliation is applied without realising it*”. This statement coincides with the stance expressed by other professionals who said they did not have the knowledge to complete the questionnaire however, after a discussion they could relate to the concepts.

Another respondent suggested that “*ADR is flexible and personal traits and character play a major role*”. This response as well as others such as “*to find a quick solution*” and to “*keep the legal people out of it*” suggests that professionals do realise the advantages of the consensual process.

The responses also included negative feedback however, the analysis of these responses suggest that many may be due to insufficient knowledge of the ADR process.

Other professionals realized the advantages of the available “*expert knowledge*” in the construction industry. There are also professionals who place trust in arbitration to “*settle the disputes*”.

Most respondents were in favour of improved and increased education and training in ADR and felt that currently they did not have the “*required knowledge*” to apply ADR effectively. Furthermore, the risk posed by “*untrained facilitators*” was highlighted.

Dispute risk management was a matter of concern and the need for workshops was proposed.

Comments relating to the potential advantages relating to the Four C’s of ADR and its effectiveness were generally positive.

In conclusion, positive feedback was delivered however; the negative feedback may need to be addressed regarding the attitude towards ADR in the industry.

### **6.2.7 Qualitative data from interviews**

The subjective qualitative data gathered from the interviews reflects ADR as currently practiced in the industry

A respondent suggested that “*it was not important for the parties to be in control as a decision was made for them*” and “*confidentiality was the most important advantage of the Four C’s*”. Another respondent stated that “*empathy has no part in business*” and that “*direct negotiations are ideal because parties should settle a difference amongst themselves*”.

The need for education and training was identified while others suggested that increased dispute risk management would solve the problem. Ras (2012: personal communication), a professional architect and lecturer suggested that there was a need for improved skills and techniques for effective application, specifically amongst the younger professionals.

It would appear that some professionals in construction have come to terms with the lack of ADR application skills and the need for education and training.

## **6.3 MEETING THE OBJECTIVES**

The objectives of the study were met as follows:

**Objective 1:** *To consolidate and report on the current competency levels of professionals practicing ADR in the South African construction industry.*

This objective formed the basis of the research. The requirements for competency in ADR were identified in the literature review and compared to commercial practice in order to determine its application in the construction industry. The objective was met by developing the Situational Competence Model upon which the findings were recorded in Chapter 6.

The results from the self-analysis of the respondents indicated that the more experienced professionals in the industry seem to be competent in ADR as reflected in the response however, when based on an overall average, results indicate that responding professionals in the South African industry have not as yet achieved competence.

**Objective 2:** *To identify the appropriate methods of ADR in the South African construction industry and the application thereof.*

This objective was met by identifying the appropriate methods applicable to ADR practice in the JBCC PBA Dispute Clause 40 (2007) due to its popularity in the industry. These practices formed the foundation against which the more commonly used methods such as Agent Resolution were measured in order to evaluate their appropriateness (Finsen, 2005: 32; Verster & van Zyl, 2007: 3). The methods were identified in Chapter 2. Research results indicated that the understanding and application of the methods in ADR is generally lacking in practice.

**Objective 3:** *To define competency in the ADR context.*

Competence is a development process which according to the ADR Situational Competence Model (SCM) is developed with the application of the knowledge, skills and attributes combined with experience gained as illustrated in the third quadrant of the model.

Figure 1.2 illustrates the process of achieving competence in the ADR Situational Competence Model where competence is achieved with ratings between 51% and 75%. Competency levels were defined and reflected in the model.

**Objective 4:** *To identify the key characteristics and attributes required by facilitators to effectively facilitate the ADR process.*

The characteristics and attributes were identified in the literature review, after which the data was evaluated by practicing professionals to determine their relevance to the industry. The results of this study are reflected in Figure 3.5 and applied to the construction industry and practitioners to determine their relevance. These attributes are addressed in Chapter 3.

**Objective 5:** *To identify the various roles fulfilled by practitioners facilitating ADR in the industry.*

This objective was set to apply the ADR functions to practice. The roles fulfilled by practitioners facilitating ADR were identified in the literature review and addressed in Chapter 4. Their relevance was determined by identifying the requirements of ADR practice in the South African construction industry, to which the functions were applied. The roles and functions were applied to complement one another. The various roles identified in the literature review all relate to the role of ADR facilitator in the industry.

**Objective 6:** *To identify the difference between current and standard practice of ADR.*

Standard practice of ADR was identified in the literature review and the state of current practice in articles and conference proceedings based on the current situation, interviews and qualitative data. These findings were presented in a comparative format and reflected in Table 5.1 to identify how ADR has been adjusted to suit the fast-track nature of the industry. The qualitative results indicated that the practice of ADR in the industry is generally rushed which poses a threat of ineffective application.

**Objective 7:** *To identify the ADR role of the practicing professional in the industry.*

The ADR role of the practicing professional in the industry serves as a base line against which current practice can be measured. The role was identified in the literature review, interviews and qualitative data, and applied to the nature and needs of the South African construction industry. Current practice was addressed in Chapter 5. The increased risk of dispute calls for a shift from the external mediator toward the professional as a conciliator on site. This also serves as dispute risk management.

**Objective 8:** *To report and make recommendations on findings.*

This objective was met in Chapter 6.

## **6.4 TESTING THE HYPOTHESIS**

The hypothesis was stated as: *Practicing professionals in the South African construction industry do not meet the competence level profile in regard to mediation and conciliation when compared against local and international standards.*

The results of the data analysis support the hypothesis in so far as it concludes that based on an average result, practicing professionals in the South African construction industry do not seem to meet the competence level profile in regard to mediation and conciliation when compared against local and international standards.

## **6.5 SYNTHESIS OF THE FINDINGS**

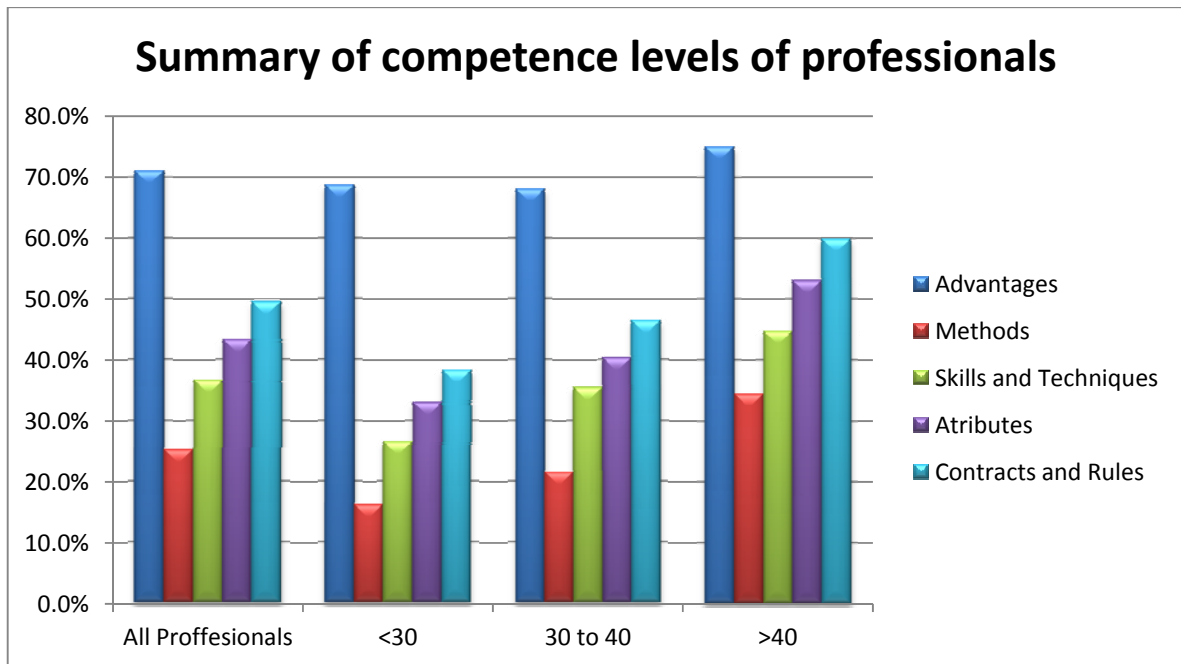
The qualitative data gathered from open ended questions in the questionnaire and interviews contributed towards identifying the current ADR situation as practiced in the South African construction industry.

The requirements for standard practice of ADR facilitation are similar to current practices. It was however found that current practice is lacking depth in regard to the skills and attributes relating to effective application.

Both positive and negative responses were gathered from the questionnaires and interviews. This information may be considered valuable to the industry in so far as positive statements highlighting the need for further education and training and other possible remedial considerations, whereas the negative statements identified other areas of concern that may require further investigation.

The findings identified the application of the methods, attributes and skills of ADR as being somewhat lacking in competence however, these results may serve as a means of identifying development through education and training.

The graphical presentation of the summary of the competence levels determined by the data analysis of responding professionals illustrated in Figure 6.6 reflects the results of the self analysis relating to the various elements which were identified as requirements for achieving competence in ADR. It shows that responding professionals rated themselves as lacking in the application of the methods, skills and attributes while they are well aware of the advantages offered by the Four Cs relating to the consensual methods of ADR. These results may serve as a basis upon which further research and development can be addressed.



**Figure 6.6: Summary of competence levels of professionals**

Some respondents from the under 30 year age group were inclined to rate themselves higher in knowledge relating to the various elements and attributes, which suggested that there may be a certain degree of response bias. As such, the knowledge of the 30-40 years group is lower than that of the under 30 year group.

At times the qualitative data from the questionnaires in Table 6.3 was contradictory which suggests a lack of understanding of the application of the conciliation and mediation methods.

ADR has been questioned and researched, indicating that the success rates of mediation are high. However, the qualitative data do not correlate with secondary data which indicates that mediators have success rates of 80% as indicated by Povey (2005:4-7). In addition to this, interviewees indicated that they make a decision for the parties suggesting that mediation success rates are based on ineffective mediation practice.

Respondents displayed mixed feelings in regard to the ADR ``process; nonetheless, they believe that there is a need for more intense education and training in ADR. A few respondents were of the opinion that dispute risk management would eliminate the need for ADR; without realising that conciliation is a form of dispute risk management

## **6.6 CONCLUSION**

In conclusion, the application of the basic fundamentals of ADR is expected to create a positive effect where parties can work together to reach mutual consensus and at the same time be in control of the procedure without feeling threatened and pushed into a situation.

The true value of ADR may be achieved by the effective application of the Four Cs. A developed understanding of the methods of ADR and the application thereof may add value to the facilitation process.

Arbitration has supported the evolution of mediation and still remains a back up to ADR where satisfactory end results are not achieved and the dispute may be referred to arbitration as a last resort. It is concluded that the evolution of new procedures in ADR seem inevitable in order to keep pace with the changing, competitive pressure in the industry.

Conciliation as a method of ADR may be applied as a form of risk management to prevent differences on site developing into disputes.

The similarities between the methods of ADR identified in the literature review and the conclusions of secondary data suggest that professionals are not well informed of the procedures and advantages offered by them.

The net effect of the sampling strategy is that the findings of the study will not be able to be generalised to the entire South African construction industry, but will serve as a means of identifying specific issues for future research and inform future development of education and training.

Although the quantitative and qualitative data represents a small percentage of the target population, the data analysis indicates that the competence levels in the South African construction industry are generally low and needs to be addressed.

Practicing professionals are generally not yet competent to facilitate ADR in the South African construction industry, however, this may largely be due to lack of experience.

Mediation in the industry is not applied according to standard practice. The process is based on ineffective mediation practice where decisions are made for the parties to expedite the process and the psychological needs of the parties are considered a waste of time.

Time and cost resources are scarce and with the effective application of the methods, skills and attributes, ADR should become more effective to address the time and cost implications.

Comprehension of the requirements for competence in ADR in the form of skills, techniques and attributes relating to effective practice should increase the competence levels of facilitators as experience is gained in the construction industry. The knowledge will support the methods, skills and the application of the attributes.

The mediation process consists of a facilitative and an evaluative process and as such, with increasing facilitative and expert knowledge through experience and mentor training, may develop and produce competent mediators for the future. Arbitration and adjudication are supported by rules which support the structured development of expert knowledge.

ADR practice in the industry has taken on a hybrid form to suit the needs of the industry. It is clear that only the methods and processes were adjusted and little consideration was given to the knowledge, skills, and attributes for effective application.

Mediation, which was identified as the most common method of ADR when applied by an external mediator, has added cost implications. However, if professionals were competent to

apply conciliation on site in the project environment, a possibility of preventing differences developing into disputes may imply extensive cost savings for the project.

After the practice of mediation was implemented in 1976, it has developed a hybrid form and has been adapted to suit the unique requirements of the construction industry as identified in Chapter 5, the implementation of the set mediation regulations may be the only means of conforming to standard practice however; the process may present a challenge.

It is concluded that experience in the application of ADR in the South African construction industry is lacking and hindering the requirements to achieve competence in ADR practice.

## **6.7 RECOMMENDATIONS**

It is recommended that mentorship of ADR practice be increased. Knowledge and skills education should be emphasised in tertiary institutions and mentoring in ADR in the candidationship in order to develop mediators and facilitators for the future

The role of the principal agent (as identified in Chapters 2 & 3) as quasi-arbitrator is currently revised to a supervisory role. It is recommended that the function of conciliation be emphasised in this role in order to increase the possibility of resolving differences before they develop into a dispute. Should the principal agent have the required expert knowledge to fulfil the role of mediator, the role of mediator should apply in an attempt to minimise the cost implications of an external mediator.

It is recommended that tertiary institutions place more emphasis on the methods, skills, techniques, attributes and the advantages created by the features of the Four C's with the view of developing ADR application in the construction industry.

It is furthermore recommended that institutions consider providing opportunities in the form of Continuous Professional Development for professionals to improve their ADR knowledge,

attributes and skills, placing emphasis on the new developments which are currently taking place in the industry and the application thereof.

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## **ADDENDUM**

## ALTERNATE DISPUTE RESOLUTION FACILITATION QUESTIONNAIRE

### Competence levels of Alternate Dispute Resolution facilitators in the South African construction industry

It will be appreciated if you would afford us the time to complete the attached questionnaire.  
The questionnaire has been designed as part of a research project to determine the development needs of Mediators and Professional Practitioners facilitating ADR in the construction industry.

The questionnaire is intended to gain an overview of the competence levels of ADR facilitators in the construction industry. A group rather than individual response will be recorded. Individual responses will be treated as confidential. A response will be most appreciated within **2 weeks**.

**In appreciation of your co-operation, would you be interested in a copy of your self-analysis?**

YES   NO   E-Mail address:

Please place an **X** in the appropriate box

Where the **Likert** scale of **1-5** is requested, **1 = Low** and **5 = High**.

For the purpose of this questionnaire the response areas are:

**Knowledge and Skills (Application)** are the input competencies which a person brings to the job.

**Personal attributes** are input competencies relating to a person's capabilities to execute the job.

**Experience** relates to the number of interventions you have experienced.

**Example:** Your **knowledge** can be rated **high** at **5** with an **average** level of **application skills** at **3**; you are not aware of your **attributes** at **1** and you have experienced 1 intervention at **2**.

Further explanations of the response to questions are provided in the questionnaire.

### PARTICIPANT INFORMATION:

Name: (optional)..... Date.....

Profession: Architect   Engineer   Quantity Surveyor

Construction Project Manager

Highest qualification: BSc   BSc Hons   Masters   PhD   Other

Have you previously conducted: Arbitration   Adjudication   Mediation

Age group: Under 30years   30 - 40 years   Over 40 years

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Your assistance with this questionnaire is appreciated.

**THANK YOU** for your support

- 1 The concept of the **Four Cs** offers the advantages of satisfactory end results related to **consensus** where the parties jointly decide on the method and approach to be followed, **control**, where parties can control the process and the outcomes, **continuity**, where secure business relationships are retained and **confidentiality** where parties are assured that outcomes are treated as confidential.

In your opinion how **effective** are the **advantages** of the four Cs? (Column 1):1=Low and 5=High  
To what extent have you **experienced satisfactory end results**? (Column 2):1=Low and 5=High

No.	TOPIC	Effectiveness of Advantages					Experienced Satisfactory end results				
1.1	<b>Consensus:</b> As a result of ADR outcomes.	1	2	3	4	5	1	2	3	4	5
1.2	<b>Control:</b> parties are self empowered and in control of the process and outcomes.	1	2	3	4	5	1	2	3	4	5
1.3	<b>Continuity:</b> continuous business relationships as a result of ADR outcomes.	1	2	3	4	5	1	2	3	4	5
1.4	<b>Confidentiality:</b> outcomes and process remain private.	1	2	3	4	5	1	2	3	4	5

**These notes are merely to give direction or move on to next page**

## **EXPERIENCE relating to Questions 2.1 – 2.3**

**ARBITRATION:** how many interventions/ interventions leading to arbitration have you experienced? **Rated: 1-5+**

**ADJUDICATION:** how many adjudication interventions have you conducted? **Rated: 1-5+**

**MEDIATION** - how many mediation interventions have you facilitated? **Rated: 1-5+**

## **EXPERIENCE relating to Questions 2.4 – 2.6, 3, 4 and 5**

**Rating format:**

**1 = 0 interventions**

**2 = 1-5 interventions**

**3 = 6-10 interventions**

**4 = 11-20 interventions**

**5 = 21 + interventions**

**CONCILIATION:** how many conciliation interventions have you facilitated in the project environment?

**NEGOTIATION:** how often have you experienced direct negotiations before a dispute develops in the project environment?

**SKILLS AND TECHNIQUES:** how many interventions have you experienced when applying dispute resolution skills?

**ATTRIBUTES:** how many interventions have you experienced when applying the relevant dispute resolution attributes?

**RULES AND GUIDELINES:** how many interventions have you experienced with rules and guidelines?

## ADR Methods

- 2 What **knowledge** do you have of the following **ADR Methods**? (Column 1):1=Low and 5=High  
 What level of **skill** have you reached in applying these methods? (Column 2):1=Low and 5=High  
 To what extent do your **personal attributes** affect your output (Column 3):1=Low and 5=High  
 How many interventions have you experienced in applying these methods? (Column 4):  
 Rating format:(See previous Page for 2.1-3) 1 =0 interventions, 2 = 1-5, 3 = 6-10, 4 = 11-20 and 5 = 21 +

No.	TOPIC	Level of Knowledge					Level of Skill					Personal Attributes					Interventions Experienced				
2.1	<b>Arbitration:</b> More formal and improved decision making process	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5
2.4	<b>Adjudication:</b> Decision making based on legislation.	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5
2.3	<b>Negotiation:</b> by parties only / unassisted negotiation	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5
2.4	<b>Conciliation:</b> A primary element of the mediation method; improving interaction between the parties and preparing them psychologically for evaluative facilitation.	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5
2.5	<b>Mediation:</b> An evaluative negotiation process where an opinion may be given by the mediator as a way of settlement	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5
2.6	<b>Appropriate Dispute Resolution:</b> Utilising a process which is best suited to a particular situation.	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5

3 **Skills and Techniques** enhance the application of the different ADR methods.

What is your level of **knowledge** regarding the following skills and techniques? (Column 1):1=Low and 5=High

What level of **skill** have you reached in applying these skills and techniques? (Column 2):1=Low and 5=High

To what extent do your **personal attributes** affect your output (Column 3): 1=Low and 5=High

How many interventions have you experienced in applying these skills and techniques?(Column4)

Rating format: 1 =0 interventions, 2 = 1-5, 3 = 6-10, 4 = 11-20 and 5 = 21 +

[illegible]

4 How would you rate yourself in terms of the following ADR Attributes?

How important do you perceive these attributes to be?(Column 1):1=Low and 5=High

What is your level of knowledge of the attribute? (Column 2):1=Low and 5=High

What is your level of skill in the application of these attributes? (Column 3):1=Low and 5=High

How many interventions have you experienced in applying these attributes? (Column 3):

Rating format: 1 =0 interventions, 2 = 1-5, 3 = 6-10, 4 = 11-20 and 5 = 21 +

[illegible]

### Contracts, rules and guidelines

5. How **familiar** are you with the following? (Column 1): :1=Low and 5=High

How many interventions have you experienced **using these in the past?**  
(Column 2)Rating format: 1 =0 interventions, 2 = 1-5, 3 = 6-10, 4 = 11-20  
and 5 = 21 +interventions

		Level of Familiarity					No. of Interventions experienced				
	TOPIC	1	2	3	4	5	1	2	3	4	5
5.1	The JBCC Dispute Resolution Clause 40										
5.2	Adjudication Rules										
5.3	Arbitration Rules										
5.4	Mediation Guidelines										

6. To determine the **most effective** and your **preference** of ADR method.

Place the following **in order** of **effectiveness of settling disputes**  
and **your preference of an ADR method.** (1 -6)

	Effectiveness	Preference
Arbitration	<input type="text"/>	<input type="text"/>
Adjudication	<input type="text"/>	<input type="text"/>
Unassisted negotiation	<input type="text"/>	<input type="text"/>
Assisted Negotiation (Conciliation)	<input type="text"/>	<input type="text"/>
Mediation	<input type="text"/>	<input type="text"/>
Agent resolution	<input type="text"/>	<input type="text"/>

7. There is a certain amount of confusion about **Mediation** and **Conciliation** as methods of ADR.

**In your opinion, are mediation and conciliation:**

(Please select appropriate response by placing an X in the relevant box)

	YES	NO				
7.1 <b>Applied as one method (Interchangeable)</b>	<table><tr><td>1</td><td></td></tr></table>	1		<table><tr><td>2</td><td></td></tr></table>	2	
1						
2						
7.2 <b>Can they be applied as separate methods?</b>	<table><tr><td>1</td><td></td></tr></table>	1		<table><tr><td>2</td><td></td></tr></table>	2	
1						
2						

8. Are your mediation skills learned, inherent or both?

Please select appropriate response by placing an X in the relevant box

8.1 <b>Learned</b>	<table><tr><td>1</td><td></td></tr></table>	1	
1			
8.2 <b>Inherent</b>	<table><tr><td>2</td><td></td></tr></table>	2	
2			
8.3 <b>Both of the above</b>	<table><tr><td>3</td><td></td></tr></table>	3	
3			

9 **Attributes are personal competencies which underlie a person's capabilities to execute a job.**

In terms of your attributes are you:

	YES	No				
9.1 Conscious of your attributes?	<table><tr><td>1</td><td></td></tr></table>	1		<table><tr><td>2</td><td></td></tr></table>	2	
1						
2						
9.2 Aware of personal attributes that may still need to be developed?	<table><tr><td>1</td><td></td></tr></table>	1		<table><tr><td>2</td><td></td></tr></table>	2	
1						
2						

10 In your opinion, if conciliation was applied on site, to what extent would it prevent differences developing into disputes?

**Likert Scale 1-5**

1	2	3	4	5

11 In your opinion, is there a need for education and training of ADR skills, techniques and attributes for more effective application?

Yes	NO				
<table><tr><td>1</td><td></td></tr></table>	1		<table><tr><td>2</td><td></td></tr></table>	2	
1					
2					

12 If you have facilitated mediation, what is your success rate?

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13 Do you believe conciliation on site can reduce the possibility of differences developing into disputes?

YES

1	
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NO

2	
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14 Do you follow a set mediation process?

YES

1	
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NO

2	
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**15 For the purpose of Qualitative Data, please raise your opinion of ADR practice in the Construction Industry.**

[illegible]