

Mediation practice in the South African construction industry

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Abstract

Dissatisfaction with the traditional methods of litigation and arbitration for settling disputes has led to an increase in the growth of alternative dispute resolution (ADR) processes. Presently mediation is the ADR process most frequently used for settling disputes that arise within the South African construction industry. This paper presents the findings of an investigation into the practice of mediation in the South African construction industry. The main findings of the investigation were that the mediators are more intent on resolving the dispute for the parties, than assisting the parties in seeking their own settlement to the dispute. The majority of the respondents place greater emphasis on the importance of their technical expertise, authority and their understanding of the matter in dispute rather than on moving the parties towards an in depth understanding of each other's perspectives on the matter in dispute. Finally, it is concluded that the process being employed by mediators in the South African construction industry is not consistent with the generally accepted principles of the mediation process.

Keywords: construction disputes, dispute resolution, mediation

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Abstrak

Ontevredenheid met die meer tradisionele metodes van geskilbeslegting, naamlik litigasie en arbitrasie, het tot gevolg dat geskilbeslegtingsmetode aan die toeneem is. Mediasie is huidiglik die geskilbeslegtingsmetode wat meeren deels gebruik word vir die oplossing van geskille wat uit die Suid Afrikaanse boubedryf voortspruit. Hierdie referaat lê die bevindinge van 'n ondersoek na die praktyke in mediasie, soos in die boubedryf toegepas, voor. Die mees opvallende bevindinge van die ondersoek toon dat mediators 'n geneigdheid het om die geskille namens die partye op te los, eerder as om hul by te staan in die proses van oplossing of te wel skikking van die dispuut. Die meerderheid van die respondente het eerder groot nadruk op hul eie tegniese bedreweheid, bevoegdheid en begrip van die aangeleentheid wat aan hul voorgelê is, geplaas eerder as om 'n raadgevende rol in te neem en die partye te ondersteun in hul onderskeie perspektiewe en begrip van die geskil. Die gevolgtrekking is dus dat die meerderheid van die ondervraagde bemiddelaars wat gemoed is met die bemiddeling van geskille in die Suid Afrikaanse boubedryf, die proses uitvoer op 'n manier wat teenstrydig is met die algemeen aanvaarde grondbeginsels van die mediasieproses.

Sleutelwoorde: konstruksiegeskille, geskilbeslegting, mediasie

1. Introduction

Although the potential for dispute is inherent in any contractual relationship, given the unique and complex nature of a construction contract, disputes in construction are both inevitable and a common occurrence (Hibberd & Newman, 1999; Chan, 1998; Delmon, 1998; Clegg, 1992). Few role players in the construction industry would disagree with Sir Michael Latham's view (1995: 87) that the best solution to the problem is to prevent and so avoid disputes. However, despite everyone's best efforts, disputes will arise, with the successful completion of a project often relying on the expeditious resolution of disputes.

The search for alternative methods of dispute resolution (ADR) was originally generated in the United States of America (USA) (Marston, 1999) as a result of the dissatisfaction with the traditional methods for settling disputes. This dissatisfaction was based on the perception that litigation and arbitration were formal, time-consuming, expensive, traumatic, complex and adversarial. Worldwide attention and growing awareness of ADR resulted in the evolution of various ADR approaches, adapted in attempts to avoid or at least minimize the disruptive and costly impact of the more traditional methods of dispute resolution, arbitration and litigation. The ADR technique most frequently referred to in literature on ADR is mediation (Gould, 1999: 575).

Historically the processes of negotiation, mediation and adjudication are the main alternatives to arbitration and litigation for settling construction disputes in South Africa. Mediation has been used in the construction industry for settling disputes for the past two decades, with a mediation clause introduced into the General Conditions of Contract for Works of Civil Engineering Construction (GCC) in 1982, and more recently in 1991 into the Principal Building Agreement (PBA) published by the Joint Building Contracts Committee (JBCC). However, with the increase in the use of the internationally accepted Fédération Internationale des Ingénieurs-Conseils (FIDIC) and New Engineering Contracts (NEC) contract documents, Dispute Review Boards and contractual adjudication were introduced into the industry (van Langelaar, 2001: 215), culminating in the inclusion of adjudication as a first course of action in the JBCC 2005 PBA and as an option in the GCC 2004 agreement.

2. ADR, with specific reference to mediation research in the construction industry

A substantial amount of research and literature exists on mediation as it is employed by mediators and lawyers worldwide and in various fields of dispute resolution. However, research and literature on the mediation of disputes within the South African construction industry is limited and generally found to be of an advisory or anecdotal nature within works on arbitration or construction law. Empirical research into mediation, as a dispute resolution mechanism for use in the construction industry, has however, received some attention in other countries. Such research was generally aimed at establishing the perceptions, attitudes and experiences of industry participants towards mediation as an ADR mechanism (Brooker & Lavers, 2000; Gould, 1999; Stipanowich & Henderson, 1992).

The 1991 American Bar Association (ABA) Forum on the Construction Industry survey into mediation and mini-trial of construction disputes in the USA represents one of the first empirical investigations into non-binding dispute resolution in the construction field. Stipanowich & Henderson (1992) concluded that although settlement-orientated processes such as mediation and mini-trials are less well understood than arbitration, the collective experience of the construction bar might encourage optimal use of such alternatives.

ADR in the UK is seen to be in its formative stages (Brooker & Lavers, 2000: 289). The first major survey into dispute resolution in the UK construction industry was conducted in 1994 (Gould, 1999). The research found that less than 30% of the respondents had actually been involved in an ADR process and that the UK construction industry lacked an understanding of the principles of ADR. A second survey by Gould reported an increase in mediation experiences but concluded that 'formal mediation', defined by Gould (1999: 579) as a "private, informal process in which parties are assisted by one or more third parties in their efforts towards settlement", was rarely employed.

Brooker & Lavers' research into the processes, perceptions and predictions regarding dispute resolution in the UK construction industry, found that, on balance, a negative experience with dispute resolution related to arbitration and litigation, while all other dispute resolution processes produced positive results (Brooker & Lavers,

2000). Negotiation produced the greatest level of positive experience, closely followed by mediation.

Respondents from both UK surveys predicted that, of the dispute resolution processes in the UK, the use of adjudication would make the most significant increase in the UK construction industry over ADR processes such as mediation or expert determination.

South African research into ADR in the construction industry includes Schindler's (1989) research into the role of mediation and arbitration as dispute resolution mechanisms in the construction industry and Barth's (1991) investigation into the suitability of arbitration as a dispute settling mechanism in the construction industry. Schindler's (1989) research focused on the awareness, experience, attitudes and perceptions of architects, engineers and contractors to mediation and arbitration. Schindler (1989) concluded that these participants had little experience in mediation and yet had negative attitudes and perceptions about the process. Barth (1991), in investigating the suitability of arbitration as a dispute settling mechanism in the construction industry, found that mediation was considered a more suitable dispute settling mechanism than litigation or arbitration by the industry participants (including attorneys). Watson (1996) analysed 44 different disputes with a view to establishing the effectiveness of the different dispute resolution processes utilised. Watson (1996) established that 85% of the cases were resolved through the mediation process at a fraction of the cost and in a fraction of the time involved in a number of arbitrations on similar issues.

3. Principles of the mediation process

Mediation and or conciliation are the best-known forms of ADR in international construction (Lavers, 1992: 12; Mackie, 1992: 304). However, while some authors distinguish between conciliation and mediation (Hibberd & Newman, 1999: 57; Jones, 1999: 377; Butler & Finsen, 1993: 10) others choose to use the terms interchangeably (Chan, 1998: 271; Gould, 1999: 579). This debate, as to the difference between mediation and conciliation, is not restricted to mediation in the construction industry, see for example: Brown & Marriott, 1993: 191 and Boulle & Rycroft, 1997: 62.

In spite of the debates and differences, as well as the continuous evolution of the mediation process, accepted principles, processes

and practices of mediation emerge from the literature on mediation. These principles and objectives are often used as the basis for comparing mediation to other forms of dispute resolution, in particular arbitration and litigation. Principles that find resonance throughout the literature are that mediation is voluntary, non-binding, flexible, informal, confidential and involves a third party, but it is the parties who are responsible for the outcome (Hibberd & Newman, 1999: 62; Boulle & Rycroft, 1997: 33; Kwayke, 1993: 2; Butler & Finsen, 1993: 14; Bevan, 1992: 27; Pretorius, 1993: 8).

While most authors acknowledge that mediation is not easy to define, they agree with the core features of the process, namely, that mediation is an extension of the negotiation process involving the services of a third party engaged by the disputants to assist them in reaching agreement on the issues in dispute. There are various approaches that describe the different degrees of intervention by the mediator into the process, see for example: Moore, 1986; Silbey & Merry, 2001; Brown & Marriott, 1993; Riskin, 2001; Folger & Jones, 1994.

In order to deal with some of the definitional problems in the field of mediation, various models of mediation have been proposed (Hibberd & Newman, 1999; Boulle & Rycroft, 1997; Love, 2001; Riskin, 2001; Menkel-Meadow, 2001; Brown & Marriott, 1993). Notwithstanding the diversity in the models of mediations, most of these authors concluded that this diversity should not pose problems for parties or mediators as long as the parties understand the roles and different approaches to mediation (Boulle & Rycroft, 1997: 6; Butler & Finsen, 1993: 11; Hibberd & Newman, 1999: 59; Menkel-Meadow, 2001: 228).

It is generally accepted that the role and functions of the mediator are linked to the approach used in the mediation, i.e. either evaluative or facilitative (Riskin, 2001: 137; Hibberd & Newman, 1999: 63; Cooper, 1992: 293). Boulle & Rycroft (1997: 113) use the term 'roles' to define the overall aim and objectives of the mediator. They describe the roles of the mediator as being to create the optimal conditions for the parties to make effective decisions and to assist the parties to negotiate an agreement. They see the role descriptions as operating at a high level of generality and so do not disclose much about what the mediator does. Instead they use the term 'functions' to refer to the more specific tasks and behaviours of mediators which contribute to the overall achievement of their role, such as, developing trust and confidence, establishing a framework for co-operative decision making, analysing the conflict and

designing appropriate interventions, promoting constructive communication, facilitating negotiation and problem-solving, educating the parties, empowering the parties, imposing pressure to settle, promoting reality, advising, evaluating and terminating the mediation (Boulle & Rycroft, 1997: 116).

A number of authors have divided the mediation process into different stages or phases for the purpose of analysis (Hibberd & Newman, 1999: 67-97; Boulle & Rycroft, 1997: 86; Murray *et al.*; 1996: 301; Nupen, 1993: 41-49; Brown & Marriott, 1993, 121-150; Cooper, 1992: 289; Moore, 1986).

Murray *et al.*, (1996: 301) proposed that the steps involved in the classical 'form' of mediation are applicable to all forms of mediation. Their description of the following six stages in a classical mediation, generally mirror those described by the other authors, namely: introductory remarks by mediator; a statement of the problem by the parties; information gathering; problem identification; problem solving including gathering options and bargaining, and finally, writing the agreement.

Problem-solving is central to the mediation process, with negotiation, bargaining and decision-making normally occupying most of the time during mediation (Boulle & Rycroft, 1997: 96). Much of the literature on mediation endorses the problem-solving or interest-based approaches to negotiation however both positional and problem-solving negotiations are encountered in mediation practice.

Authors on mediation are in broad agreement that the mediator's role and function must be complemented by a set of skills and techniques commensurate with the role he/she takes on (Riskin, 2001: 156; Boulle & Rycroft, 1997: 139; Murray *et al.*, 1996: 304; Butler & Finsen, 1993: 13; Mackie, 1992: 304; Cooper, 1992: 295). Bowling & Hoffman (2000) cite empirical studies that consistently show high rates of settlement, as well as high levels of mediation participation satisfaction regardless of the mediation styles or philosophical orientations of the mediator e.g. evaluative vs. facilitative or transformative vs. problem-solving. Instead it was found that techniques were important and that mediation training is most important in enhancing skills and techniques. In his examination of the 1991 ABA Forum on the Construction Industry survey, Brooker & Lavers (2000: 287) citing Henderson (1996) report that he found that the quality of the mediator was a significant factor affecting the settlement rate.

Furthermore, that Henderson (1996) found that the more techniques the mediator used, the more likely settlement was to be achieved. In other words, mediators who used a combination of interventions, such as caucusing, consulting records or experts, or visiting job-sites, increased the chance of a successful mediation. More importantly, he found that fewer settlements were reached in mediations where the skills of the mediator were seen as weak.

4. The Survey

4.1 Focus of the study

Specific objectives included: establishing the type and level of professional training and experience of the respondents; establishing the nature and level of training and experience in mediation of the respondents; exploring the perceptions of the respondents regarding the role and functions of a mediator of a construction dispute; determining the procedural steps and activities that the mediators follow during the mediation process; and establishing the extent of the mediators' knowledge, and use of skills and technique associated with mediation.

4.2 Methodology

Primary data were collected by way of 63 questionnaires received from the 206 posted to mediators recognised nationally by the South African Institution of Civil Engineers (SAICE) and the South African Association of Consulting Engineers (SAACE), as well as from mediators listed by the Western Cape Branch of the Association of Arbitrators of Southern Africa (AASA). The questionnaire responses were analysed using basic descriptive statistics.

4.3 Survey results

4.3.1 Professional training and experience of mediators

The research indicated that the majority of the respondents were male, consulting engineers over 60 years of age. Nearly one quarter (24%) of this majority were retired, but continued to offer their services to the industry. Ninety seven percent (97%) of the respondents were in possession of a tertiary qualification, with qualified engineers (75%), both Bachelors and Masters, dominating the group. As ex-

pected, the academic qualifications of the respondents corresponded closely with the nature of business of the respondents, where consulting engineers and civil engineering contractors made up 70% of the group.

Although the majority of the respondents have engineering backgrounds, as opposed to an architectural, surveying or law background, this finding cannot be interpreted to mean that the majority of the mediators of construction industry disputes have engineering backgrounds as the surveyed sample was a non-probability, convenience sample. Instead, the findings of the survey should be seen against this background. However, no significant differences in the views or opinions on research issues were found to exist between the two groups, that is, those with an engineering background and those with other backgrounds.

The literature review indicated that internationally dispute resolution, including mediation, is the domain of the legal fraternity (Menkel-Meadow, 2000; Gould, 1999; Boule & Rycroft, 1997; Stipanowich & Henderson, 1992; Mackie, 1991 and 1992; Bevan, 1992). The dominance of the legal sector in construction mediations was confirmed by an ABA Forum on the Construction Industry survey, where Stipanowich & Henderson (1992: 323) found that most mediators (64,5%) were attorneys and 21,4% were retired judges. Design professionals, contractors, claims experts and professors were employed far less frequently.

In South Africa the situation appears to be different, in that mediators are drawn mainly from the professions in the construction industry, with minimal involvement from lawyers. This tendency echoes the SAACE (1993) general philosophy that disputes arising in the execution of engineering works can best be settled by engineer mediators. However, Butler & Finsen (1992: 24) noted that lawyers were becoming more active within the AASA, which also acts as a source of mediators.

4.3.2 Training and experience in mediation

The respondents reported significant experience in mediation with 29% having been involved in the mediation of disputes for more than 20 years and a further 32% for between 10 and 20 years. This experience was cited by the majority (95%) of the respondents as their main source of knowledge of the mediation process, with

44% citing 'workshops and seminars'; 43% 'practice notes, journals and other literature' and 40%, 'formal training', as the main sources of knowledge.

The majority (97%) of the respondents considered their knowledge of the mediation process to be, at the least, average (rating ≥ 3 of 5) with approximately one third of the respondents considering it to be substantial (a 5 of 5 rating) and a further third considering it to be adequate (a 4 of 5 rating).

4.3.3 The initiation of the mediation process

Sixty percent (60%) of the mediation cases described by the respondents were initiated by the parties themselves, either jointly or by one of the parties. The mediator was appointed by a party other than the disputing parties, such as the President of the SAICE or AASA in 40% of the cases, with the parties jointly approaching the mediator in 32% of the cases and one party approaching the mediator in 27% of the cases.

Nearly two thirds (67%) of the mediations were initiated in terms of a clause in a contract, although not all the clauses made mediation compulsory. Fifty nine percent (59%) of the cases were also voluntary.

The most significant finding was that in 41% of the cases, the parties to the mediation signed an agreement binding themselves to the mediator's opinion until otherwise ordered in arbitration or litigation proceedings. This finding is highly significant in light of the generally accepted view that a mediator does not make a binding decision; instead the parties are encouraged to reach their own settlement by which they can agree to be bound.

Mediation is not characterised as a 'binding' process in the sense that a third party adjudicates and imposes a decision or solution on the parties in dispute. Instead, the intended principle behind mediation is for the parties to agree to a settlement on the issues in dispute and for that agreement to be binding, as with any written agreement. The fundamental difference between these two approaches lies in the ownership of the process. In mediation, even if the parties do not control or manage the process, they are empowered, in terms of the principles of the process, to control the outcome and are therefore entitled to accept or reject the outcome. In contrast herewith, the more evaluative types of dispute resolution, such as litigation, arbitration and contractual adjudica-

tion, empower the third party with the control and management of the process as well as of the process outcome.

Many other ADR processes are discussed in the literature review in which the role of a third party is to make a binding decision (final or interim), however it is clear that mediation was never intended to be one of this group. A possible reason for the introduction of such a condition as part of mediation could be found in the response of the contractors surveyed in the UK (Brooker & Lavers, 2000: 292) who believed that in order for an ADR process to succeed, it had to be binding, as the non-binding feature was seen as a delaying tactic. However, it must be noted that this same group of respondents were found to have very little understanding of the principles and aims of mediation.

It was also found that 62% of these binding agreements occurred in compulsory mediations while 39% applied to voluntary mediations. No significant relationship could be found between the initiation of the mediation and the agreement to be bound by the contract. It is however argued that a process, where the parties agree to be bound by a third party's opinion or decision prior to the commencement of the process, as in 41% of the cases analysed, cannot be called mediation. Instead one would need to look to other forms of third party intervention in order to describe such a process, such as expert determination or contractual adjudication.

Although most authors maintain that 'mandatory mediation', in which the parties are compelled to participate, undermines the integrity of mediation, Boulle & Rycroft (1997: 15) argue that while entry into the process may be compulsory as long as the outcome of the mediation is voluntary, there need not be a contradiction in terms. Notwithstanding this argument, Stipanowich & Henderson (1992: 326) found that where parties agreed to mediation, settlement or partial settlement occurred in most cases (63% and 9% respectively), however, when the parties were required to use mediation by contract or by the court, only 57% were settled.

4.3.4 The procedural steps of the mediation process

The majority of the mediation cases described by the respondents comprised the following main activities:

- Preliminary or preparatory matters (9% of total mediation time);
- Obtaining information (43% of total mediation time);
- Problem solving (20% of total mediation time); and
- Drafting the final decision/opinion/agreement (27% of total mediation time).

On average, it appears that the respondents allocated only one fifth (20%) of the total mediation time to solution-seeking activities. The majority of the time was allocated to gathering information on the dispute (43%) and drafting the final decision/opinion/agreement (27%).

Generally, the first contact between the mediator and the parties was personal, with only a quarter of the respondents preferring to communicate with the parties in writing. In most cases, this first contact was in the form of a personal telephone call for the purpose of organising a meeting with the parties at which the mediators outlined the procedure and programme to be followed.

When obtaining information, the respondents relied predominantly on written sources of information on the dispute, either in the form of existing documentation and correspondence between the parties or from written presentations. Oral presentations supplemented the written documentation and presentations in 64% of the cases.

In considering the role of problem solving during the process, it is significant that in a process aimed at assisting parties in dispute to reach agreement, indications were that only one fifth (20%) of the total time of a mediation was allocated to problem-solving discussions. Furthermore, no solution-seeking discussions took place in 58% of the cases, since after the information on the dispute had been obtained, the onus was placed on the mediator to suggest or submit an opinion or decision on the dispute, without any further party involvement. Boulle & Rycroft (1997: 96) view the problem-solving phase of the mediation as the "core part of the process that will normally occupy most of the time in a mediation." Furthermore, the research shows that negotiations between the parties

took place through the mediator rather than directly between the parties themselves. From this result it could be inferred that, although the mediator facilitated the joint solution-seeking discussions between the parties, his/her level of intervention was high.

As could be expected, negotiations dominated cases where the mediator facilitated joint solution-seeking discussions between the parties but played a lesser role in mediations where the mediator offered an opinion or solution.

4.3.5 Use of published guidelines on mediation

The research showed that that nearly one quarter (25%) of the respondents did not use any of the guidelines published by the SAICE, SAACE and AASA, while one third of the respondents (33%) used a combination of these guidelines and 33% used one of the three guidelines only.

The relative frequencies of use of the three published guidelines were calculated as 28% for the SAICE guidelines, 29% for the AASA guidelines and 21% for the SAACE guidelines, with no significant relationship found to exist between the discipline of the respondents (engineer or non-engineer) and the guidelines to which they referred. From these findings it could be implied that the respondents did not place great reliance on any particular published guideline, instead they relied on a combination of guidelines together with their own tried and tested experiences, in deciding the procedure.

Brooker & Lavers (2000: 288) found that those mediations, which used prescribed rules developed by professional bodies or the court, were less likely to settle than when the parties had constructed their own procedures. Stipanowich & Henderson (1992: 323) found that the major sources of mediation procedures were party-developed rules (34%), rules of the court (27%) and the AASA mediation rules (20%).

Although the abovementioned guidelines advise the mediator to consult with the parties on the procedure, the respondents did not consider the parties' input into the process to be of much importance. The results showed that the disputants have a substantial (≥ 4 of 5 rating) input into the determination of the procedure in only 16 (25%) of the 63 cases, while in 28 (44%) of the cases their input was limited (≤ 2 of 5 rating).

4.3.6 General

Responses elicited on the attitudes and perceptions of the respondents regarding the importance of different aspects of the mediation process on the outcome of the mediation showed that, although the respondents rated the parties' willingness to participate in the mediation process and to reach a consensual settlement as important to the outcome of the mediation, they did not rate the parties understanding of the nature of the process as highly, nor did they rate the parties control of the process and its outcome as important. Instead the respondents were almost unanimous in their opinion that the mediator's expertise and authority on the matter of the dispute played the most important role in determining the outcome of the mediation process, while the mediator's expertise in the mediation process was of lesser importance.

These attitudes corresponded to the respondents' attitudes regarding the parties' degree of input into the determination of the mediation procedure, where it was found that 45 of the 63 respondents (71%) rated this input to be ≤ 3 (a fair amount to not much).

In the majority (81%) of the cases, the parties did not make use of witnesses, while only 20% of the mediators sought outside advice.

4.3.7 The role of the mediator

Of the four roles suggested to the respondents, persuading the parties that the mediator's proposed settlement was fair, reasonable and in everyone's best interests was cited most frequently (32%) by the respondents as being the role of the mediator; persuading the parties that the mediator's opinion of the outcome would be within the range of a likely court/arbitration ruling was considered 28% of the time; with facilitating constructive dialogue between the parties and encouraging the parties to negotiate their own settlement cited 21% of the time. Considering the information and evidence gathered and giving a decision based thereon, for or against the claimant, was cited less frequently (18%) as the role of the mediator.

The surveyed data on the perceived role of the mediator was analysed from three different perspectives. Firstly, according to the role that technical experience and expertise played in the process. This being the case, evaluation of the dispute based on subject expertise was considered 79% of the time, with facilitative skills being

the determining factor in the remaining 12% counts. Secondly, according to the mediator's actions in moving the parties towards settlement. This being the case, persuasion was considered 60% of the time, facilitating discussion, 21% and decision-making, 18% of the time. Thirdly, according to the mediator's approach to the parties' interests and rights. This being the case, interest-based approaches were considered 53% of the time, and rights-based approaches, 47% of the time.

The above results reflected the differences in the views and opinions of the respondents on the mediator's role, showing a reasonable diversity in the perception of the mediator's role. However, it could generally be said that of the different roles of the mediator indicated, the evaluative approach appeared to dominate the facilitative approach. This proposition was supported by the analysis of the functions the respondents considered to be important.

4.3.8 The functions of the mediator

Analysis of the perceived importance of ten suggested functions of the mediator indicated that the respondents considered evaluative mediator-orientated functions to be of more importance than party-orientated or process-orientated functions.

By grouping the functions according to the rating each function received from the majority (75%) of respondents, two distinct groupings were observed. The first group of functions all rated as substantially (4) to very important (5), by the majority, were:

- The development and preservation of the trust and confidence of the parties;
- Evaluating the dispute and giving a reasoned opinion or decision;
- The creation of an environment conducive to discussion and co-operation at meetings; and
- Assisting the parties in identifying common ground and isolating the really contentious issues.

The second group of functions, rated as fairly (3) to very important (5), by the majority, were:

- Educating the parties as to the mediation process;
- Facilitating face-to-face discussions between the parties;
- Assisting the parties in analysing and prioritising the issues, then designing an appropriate plan of action;
- Encouraging the parties to reflect on the consequences of their not settling the dispute themselves;
- Promoting constructive communication and active listening; and
- Encouraging the parties to explore possible solutions and settlement proposals.

In analysing the results pertaining to the function of the mediator, it is interesting to note that seventy five percent (75%) of the respondents perceived the development and preservation of the trust and confidence of the parties in the mediators' role to be very important. Furthermore, sixty-one percent (61%) of the respondents' perceived the evaluation of the dispute and giving a reasoned opinion and decision as very important. Lastly, educating the parties as to the mediation process was generally not considered as important as the other functions with only 40% of the respondents rating this function as substantially to very important.

4.3.9 The skills and techniques of the mediator

Although the majority of the respondents agreed that the mediator should possess skills specific to the mediation process and different to those required by an arbitrator or adjudicator, the research indicated that the respondents did not often use specific mediation skills and techniques, but relied mostly on their communication skills. The respondents also relied on the authority of their positions and personal attributes and attitudes in order to develop trust and confidence of the parties. Communication techniques were used to gather information (careful reading and listening) while negotiation techniques were limited to promoting reality by predicting outcomes and assessing the strengths and weakness of the parties' case with a view to proposing a settlement.

Generally the respondents considered 'subject-matter expertise' to be more important than expertise in the mediation process, thus emphasising their evaluative approach to mediation.

4.3.10 Frequency of settlement of disputes using mediation

Sixty two percent (62%) of the respondents reported that disputes were settled by mediation in more than 80% of the cases, that is, final resolution of the dispute was achieved without going to arbitration or litigation. For 32% of the respondents, the process of mediation has been 100% successful, while a further 30% reported a success rate of more than 80%.

5. Conclusions

The research established that the mediators do not generally assist the parties with determining their own settlement; instead the mediation activities centre mainly on the mediator's collection of information on the dispute and the formulation of a solution by the mediator. The research showed that the mediators' knowledge and utilisation of specific mediation process skills and techniques were limited.

Mediation is aimed at assisting disputing parties in reaching agreement and so settling a dispute, finally and conclusively, in order to avoid the cost, time and generation of adversarial attitudes and effects, inherent in arbitration and litigation. These objectives are said to be attainable by virtue of the philosophy underlying the process of mediation, namely that an agreement reached between two disputing parties, where the parties believe such agreement is in everyone's best interest, is a lasting agreement that has the effect of preserving amicable and long-lasting relationships. It is therefore important that an agreement is not imposed on the parties but instead that the parties are skilfully led through a delicate process of perceptual changes and understanding to such an agreement. It is under such circumstances that mediation has the potential to result in a final and conclusive settlement of a dispute.

It is also this feature of obtaining finality of settlement of a dispute inherent in the philosophy of mediation that distinguishes it from other ADR processes such as contractual adjudication. Although the two processes are similar in overall purpose and procedure, mediation is clearly intended to be a means of obtaining final and

conclusive disposal of disputes while adjudication decisions are interim and reviewable through arbitration or litigation.

In an industry, considered by some to be in crisis, where conflict and dispute are regular and common occurrences, every effort should be made to reduce the levels of conflict and dispute or at least settle disputes effectively. As the South African construction industry, despite the enormous contribution it makes to the South African economy, is made up of a relatively small number of interdependent role players, the maintenance of good relationships between these different role players (clients, contractors, suppliers and professionals) is vital to the efficiency and sustainability of the industry. The settlement of disputes by mediation, practiced in accordance with the principles and objectives that underpin the process, has a major role to play in improving the climate of the industry and promoting its sustainability. If this paper were to make a recommendation, it would be that whatever deficiencies have resulted in the practice of mediation having deviated from the generally accepted definition thereof, should be remedied by more attention being placed thereon in the initial education of construction professionals and through Continuing Professional Development.

References

Association of Arbitrators South Africa. 1992. *Guidelines for Mediation under Construction Contracts* (1st ed.). Sandton: AASA.

Barth, B.W. 1991. *An investigation into the suitability of Arbitration as a dispute settling mechanism in the construction industry*. Unpublished Masters research report. Johannesburg: University of the Witwatersrand.

Bevan, A. 1992. *Alternative Dispute Resolution: A lawyer's guide to mediation and other forms of dispute resolution*. London: Sweet & Maxwell.

Bowling, D. & Hoffman, D. 2000. Bringing Peace into the Room: Personal Qualities of the Mediator and their Impact on Mediation. *Negotiation Journal*, 16(1), p. 48-52.

Brooker, P. & Lavers, A. 2000. Appropriate ADR – Identifying features of construction disputes which affect their suitability for submission to ADR. *The International Construction Law Review*, 17(2), p. 276-299.

Acta Structilia 2006:13(1)

Brown, H.J. & Marriott, A.L. 1993. *ADR Principles and Practice*. London: Sweet & Maxwell.

Boulle, L. & Rycroft, A. 1997. *Mediation: Principles, Process, Practice*. Durban: Butterworths.

Butler, D. & Finsen, E. 1993. *Arbitration in South Africa: Law and Practice*. Kenwyn: Juta.

Chan, P. 1998. Resolving Construction Disputes in Singapore – Litigation, Arbitration and ADR. *The International Construction Law Review*, 15(1), p. 259-275.

Clegg, S.R. 1992. Contracts cause conflicts. In: Fenn, P. & Gameson, R. (eds.), *Construction Conflict Management and Resolution*. London: E & FN Spon, p. 128-144

Cooper, C.A. 1992. Mediation, the experience in the United States. In: Fenn, P. & Gameson, R. (eds.), *Construction Conflict Management and Resolution*. London: E & FN Spon, p. 289-297.

Delmon, F.J. 1998. Expert determination and the allocation of costs. *The International Construction Law Review*, 15(2), p. 276-288.

Fédération Internationale des Ingénieurs – Conseils (FIDIC). 1999. *Conditions of Contract for Construction for building and engineering works designed by the employer* (1st ed.). Lausanne: FIDIC.

Folger, J.P. & Jones, T.S. 1994. *New directions in mediation: Communication research and perspectives*. Stage Productions.

Gould, N. 1999. Dispute Resolution in the UK Construction Industry – Processes, Perceptions and Predictions. *The International Construction Law Review*, 16(4), p. 574-587.

Henderson, D. 1996. Successful Mediation: An Empirical Analysis. *Ohio State Journal on Dispute Resolution*, 11(1), p. 105-129.

Hibberd, P. & Newman, P. 1999. *ADR and Adjudication in Construction Disputes*. London: Blackwell Science.

Institution of Civil Engineers (ICE) 2005. *New Engineering Contract*. London: ICE.

Joint Building Contracts Committee. 1991. *Principal Building Agreement*. Johannesburg: JBCC.

Joint Building Contracts Committee. 2005. *Principal Building Agreement*. (Edition 4.1). Johannesburg: JBCC.

Jones, D. 1999. The Dispute Resolution Process in Asia. *The International Construction Law Review*, 16(3), p. 359-416.

Kwayke, A. A. 1993. Alternative Dispute Resolution (ADR) in construction. *Construction Papers*. Ed. P. Harlow. No. 21, Englemere: The Chartered Institute of Building.

Latham, M. 1995. *Constructing the Team, Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry: Final Report*. London: HMSO.

Lavers, A. 1992. Construction conflict: management and resolution – analysis and solutions. In: Fenn, P. & Gameson, R. (eds.), *Construction Conflict Management and Resolution*. London: E & FN Spon, p. 3-20.

Love, L.P. 2001. The Top Ten Reasons Why Mediators Should Not Evaluate. In: Menkel-Meadow, C. (ed.), *Mediation: Theory, Policy and Practice*. Burlington: Dartmouth Publishing, p. 385-396.

Mackie, K.J. (ed.). 1991. *A Handbook of Dispute Resolution: ADR in action*. London: Routledge.

Mackie, K.J. 1992. Alternative dispute resolution and construction disputes. In: Fenn, P. & Gameson, R. (eds.), *Construction Conflict Management and Resolution*. London: E & FN Spon, p. 302-305.

Marston, D.L. 1999. Project-based Dispute Resolution – ADR Momentum Increases into the Millennium. *The International Construction Law Review*, 16(4), p. 588-601.

Menkel-Meadow, C. 2001. The Many Ways of Mediation: The transformation of Traditions, Ideologies, Paradigms and Practices. In: Menkel-Meadow, C. (ed.), *Mediation: Theory, Policy and Practice*. Burlington: Dartmouth Publishing, p. 111-136.

Moore, C.W. 1986. *The Mediation Process*. The Jossey-Bass Social and Behavioural Science Series: Jossey-Bass.

Murray, J.S., Rau, A.S. & Sherman, E.F. 1989. *Processes of Dispute Resolution: The role of lawyers* (2nd ed.). New York: The Foundation Press.

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Nupen, C. 1993. Mediation. In: Pretorius, P. (ed.), *Dispute Resolution*. Cape Town: Juta, p. 39-50.

Riskin, L.L. 2001. Understanding Mediators Orientations, Strategies, and Techniques: A grid for the perplexed In: Menkel-Meadow, C. (ed.), *Mediation: Theory, Policy and Practice*. Burlington: Dartmouth Publishing, p: 137-182.

Schindler, R.D. 1989. *The Roles of Mediation and Arbitration as Dispute Resolution Mechanisms in the Construction Industry*. Unpublished Masters research report. Johannesburg: University of the Witwatersrand.

Silbey, S.S. & Merry, S.E. 2001. Mediator Settlement Strategies. In: Menkel-Meadow, C. (ed.), *Mediation: Theory, Policy and Practice*. Burlington: Dartmouth Publishing, p. 183-208.

South African Association of Consulting Engineers. 1993. Guidelines for the Use of Mediation and Parties concerned with mediation (Advisory Note 93/8). Johannesburg: SAACE.

South African Institution of Civil Engineers. 1990. *General Conditions of Contract for Works of Civil Engineering Construction* (6th ed.). Johannesburg: SAICE.

South African Institution of Civil Engineers. 1994. *Guidelines for Mediation*. Johannesburg: SAICE.

South African Institution of Civil Engineers. 2004. *General Conditions of Contract for Construction Works*. Johannesburg: SAICE.

Stipanowich, T. & Henderson, D.A. 1992. Mediation and mini-trial of construction disputes. In: Fenn, P. & Gameson, R. (eds.), *Construction Conflict Management and Resolution*. London: E & FN Spon, p. 314-327.

Watson, M.J. 1996. Examining the process of contract dispute resolution in South Africa. *The Civil Engineering and Building Contractor*, 13(6), p. 29-32.

Van Langelaar, A. 2001. *The use of Dispute Boards as an Alternative Dispute Resolution Mechanism on Construction Project in Southern Africa*. Unpublished Masters Research Report. Cape Town: University of Cape Town.