AN INVESTIGATION INTO THE MEDIATION OF DISPUTES IN THE SOUTH AFRICAN CONSTRUCTION INDUSTRY

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DECLARATION

I, Althea Lynne Povey, hereby declare that this dissertation is my own, unaided work save in so far as indicated in the acknowledgments and references. This dissertation has not been submitted before for any degree or examination at any other university.

Signed by candidate

Althea Lynne Povey

Signed of this 30th day of August 2002

SYNOPSIS

The construction industry is a unique and complex industry in which numerous different participants depend directly on each other in order to fulfil their separate functions and obligations. Recent years have seen an increase in conflicts and disputes within the industry, such that conflict and dispute are now considered endemic to an adversarial industry. This increase in conflict and dispute, together with the dissatisfaction with the traditional methods of resolving disputes, namely litigation and arbitration, have led to an increase in the growth of alterative dispute resolution (ADR) processes within the industry. The dispute resolution process most frequently referred to in literature on ADR is mediation.

The process of mediation, while being flexible and informal, is underpinned by definite principles and objectives. In principle, mediation is a voluntary, non-binding and confidential process involving a neutral third party who assists the disputing parties in reaching a settlement. There are different approaches to mediation, each determined by the degree of intervention into the dispute by the third party. However, no matter the approach taken by the mediator, the main objective of mediation remains for the mediator to assist the parties in reaching an outcome on which they can mutually agree.

Mediation has been used in the South African construction industry for settling disputes for the past couple of decades. However, no certainty exists as to the nature of the actual practice of mediation. This research, therefore, seeks to determine whether the practice of mediation in the South African construction industry is consistent with the principles of the mediation process.

The hypothesis that is tested by the research is that the practice of mediation in the South African construction industry is *not* consistent with the generally accepted principles of the mediation process. In order to test such a broad and complex hypothesis, three sub-hypotheses were developed. The first being, that, construction

industry mediators do not assist the disputing parties in determining their own settlement. The second, that the main stages that characterise the mediation procedure are the collection of information on the dispute by the mediator and the formulation of a solution by the mediator. The third, that the knowledge and utilization of specific mediation process skills and techniques are limited amongst construction industry mediators.

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 and the South African Association of Consulting Engineers, as well from mediators listed by the Western Cape Branch of the Association of Arbitrators of Southern Africa. The questionnaire responses were analysed using basic descriptive statistics, and these results were used to assist with the interpretation of the responses.

The research reports on the occurrence of the practice wherein parties to mediation undertake, prior to the commencement of the mediation, to be bound by the mediator's decision, and concludes that this practice cannot constitute mediation. The research reveals mediation in the construction industry to be a mediator-owned process rather than a party-owned process, and concludes that this tendency is promoted by the terms of certain contract documents and published guidelines. It was also found that the mediators perceive their role as being to resolve the dispute using their own technical knowledge and expertise, rather than using specific mediation skills and techniques.

Finally, it was concluded that the practice of mediation in the South African construction industry is *not* consistent with the generally accepted principles of the mediation process, as, the mediators do not generally assist the parties with determining their own settlement, instead the mediation activities centre mainly on the collection of information on the dispute by the mediator and the formulation of a solution by the mediator. The research showed that the mediators' knowledge and utilization of specific mediation process skills and techniques were limited.

TABLE OF CONTENTS

LIST OF FIGURES

LIST OF TABLES

LIST OF ABBREVIATIONS (in alphabetical order)

AAA	American Arbitrators Association
AA (SA)	Association of Arbitrators (Southern Africa)
ADR	Alternative or Appropriate Dispute Resolution
CEDR	Centre for Dispute Resolution
CIBD	Construction Industry Development Board
DRB	Dispute Review Board
DAB	Dispute Adjudication Board
FIDIC	Fédération Internationale des Ingénieurs - Conseils
GCC	General Condition of Contract for Works of Civil Engineering Construction
ICE	Institution of Civil Engineers
JBCC	Joint Building Contracts Committee
NEC	New Engineering Contract
SAACE	South African Association of Consulting Engineers
SAICE	South African Institution of Civil Engineers
UK	United Kingdom
USA	United States of America

CHAPTER 1: INTRODUCTION

1.1 BACKGROUND

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 and Newman, 1999; Chan, 1998; Delmon, 1998 and Clegg, 1992).

> *"It is a great tribute to the professionalism and integrity of engineers and contractors that most contracts are, <u>despite</u> but not <u>because</u> of the form of contract, successfully completed."* (Hyman,1989:4)

Few role players in the construction industry would disagree with Sir Michael Latham's (1994:87) view that the best solution is to avoid disputes. However, despite everyone's best efforts, disputes will arise. Instead, the successful completion of a project will often rely on the expeditious resolution of disputes.

Traditionally, construction disputes have been settled in the first instance, by the architect or the engineer, appointed and paid by the employer. This dual role has led to an understandable concern on the part of contractors as to the independence and neutrality of the architect or engineer, and the propriety of his/her role in dispute resolution. The dissatisfaction with the engineer/architect's decision and the failure to mutually agree a solution, generally resulted in the submission of the dispute for resolution by either litigation or arbitration. Dissatisfaction with the cost, speed and the generation of adversarial attitudes inherent in arbitration and litigation, together with the adverse effects of these processes on the parties to the dispute, has led to an upsurge of interest in alternative methods of dispute resolution (Kwayke, 1993; Pretorius (ed), 1993; Loots, 1994; Loots, 1995; Hibberd and Newman, 1999; Morgermon, 2002a; Jackman, 2002)

> *"The waste, frustration, cost, disruption to business, and delay caused by litigation, whether by way of arbitration or through the courts, are not always fully appreciated by the lay person and cannot be over emphasized."* (Loots, 1995: xii)

The search for alternative methods of dispute resolution (ADR) was originally generated in the United States of America (USA) (Marston, 1999:588). World-wide 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).

Mediation is a process underpinned by theories, principles and objectives. 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. However, a fundamental principle is that, although there is third person involvement, it is the parties who are responsible for the outcome (Hibberd and Newman, 1999:62; Boulle and Rycroft, 1997:33; Kwayke, 1994:2; Butler and Finsen, 1993:14; Bevan, 1992:27; and Pretorius ed, 1993:8). The main objective of the process is to settle a dispute between the parties, finally and conclusively, so as to avoid the cost, time and generation of adversarial attitudes and effects, inherent in arbitration and litigation.

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; Brown and Marriott, 1993; Folger and Jones, 1994; Silbey and Merry, 2001 and Riskin, 2001.

Local and international research into mediation definitions, origins, ideologies, practices and policies, amongst others, is plentiful, while research pertaining to mediation in the construction industry appears to be limited to investigating familiarity with, perceptions of, and experience of the different industry participants in the process.

Brooker & Lavers (2000:283) noted that much of the literature written on mediation was by those promoting its use, while only a limited amount of empirical research into mediation and other ADR processes for construction disputes existed.

Research into the use of ADR, in particular mediation, in the construction industry in the USA (Stipanowich and Henderson, 1992) and in the United Kingdom (Gould, 1999), found that the participants in these construction industries generally lack an understanding of the principles of mediation and ADR.

Similarly, in South Africa, Schindler's (1989) research focused on the awareness, experience, attitudes and perceptions of architects, engineers and contractors to mediation and arbitration. He concluded that these participants did not have much 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's (1996) research analysed 44 different disputes with a view to establishing the effectiveness of the different dispute resolution processes utilized. He found 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.

Presently the processes of negotiation and mediation are the main alternatives to litigation and arbitration for settling construction disputes in South Africa. Mediation has been used in the construction industry for settling disputes for the past couple of 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 published by the Joint Building Contracts Committee (JBCC).

However, with the increase in the use of the internationally accepted Fédération Internationale des Ingeniéurs-Conseils (FIDIC) contract documents, contractual adjudication and Dispute Review Boards (van Langelaar, 2001:215) are slowly being introduced into the industry. The FIDIC documents still provide for the settlement of disputes by mediation, as do most of the more commonly used domestic forms of contract, such as the GCC (90) Contract, the Major Contracts Committee Contract (MCC), the JBCC 2000 Contract, the Building Industries Federation of South Africa (BIFSA) Domestic Subcontract and the Committee of Land Transport Officials (COLTO) contract. Furthermore, even if there is no mediation clause in a contract, the parties may agree, in the event of a dispute arising, to refer the dispute to mediation rather than arbitration or litigation.

McKenzie (1994:174) in describing mediation within the context of the South African construction industry, states:

> "*Mediation is a term which means different things to different people.*"

while, Loots (1995:1011) has found that:

> "*Although 'mediation' is regularly used in resolving disputes in the construction industry in South Africa, there is confusion in the minds of many in the industry as to what mediation actually involves, and even a tendency to regard it as a sort of 'informal arbitration'*"

The above statements are not surprising in view of the variety of activities that fall within the broad definition of mediation, but confusion does create difficulties when people try to determine whether to participate in mediation without knowing the nature of the process the mediator will conduct.

1.2 PROBLEM STATEMENT AND SUB-PROBLEMS

Having described the role of mediation in the settlement of disputes in the construction industry and the uncertainty that exists within the industry regarding the nature of the process, the problem to be addressed in this dissertation can be stated as:

> **Is the practice of mediation in the South African construction industry consistent with the principles of the mediation process?**

The above problem statement represents a complex set of issues that can best be expressed by fragmenting the statement into the following sub-problems:

1.2.1 Sub-Problem 1:

What do mediators perceive their role to be?

1.2.2 Sub-Problem 2:

What stages take place during the mediation of construction disputes in South Africa?

1.2.3 Sub-Problem 3:

What specific mediation skills and techniques do mediators use during mediation?

Information and data will be collected in order to answer the above research questions and so offer a solution to the problem.

1.3 JUSTIFICATION FOR THE RESEARCH

Many professionally qualified persons, architects, planners, engineers, quantity surveyors, lawyers, bankers and insurance brokers, are involved in the construction industry, as well as building and engineering contactors, specialist subcontractors and

suppliers. The industry's clients vary from private developers to the Local Authorities and Government Departments, who also regulate the industry's activities.

The South African government acknowledges the *"enormous contribution and indispensable role"*, the construction industry makes to the economy of the country (RSA, 1999:3), with the extent of this contribution indicated by the South African Reserve Bank's estimate of the annual turnover of construction work for 2001 as approximately R 40,7 billion (SARB, 2002).

The government has also indicated its position regarding the resolution of disputes in the construction industry:

> *"The public sector will promote the use of ADR within the industry"*
>
> *(RSA, 1999:19)*
>
> *"Mediation and other ADR methods suitable to the circumstances of small and emerging enterprises will be introduced in public-sector contracts"*
>
> *(RSA, 1999:30)*

A focus group, established by the Minister of Public Works to draft best practice guidelines for the public sector, aimed at reducing litigation and the resultant costs to contractors and ultimately to the public sector, based its recommendations on the Latham report. Latham (1994:91) recommended that a system of adjudication, underpinned by legislation, be introduced within all the Standard Forms of Contract used by the UK construction industry, except where comparable arrangements already existed for mediation or conciliation.

However, in assessing the performance of the Domestic Building Tribunal of Victoria (DBT) in Australia, Davey (1998:224) found that at least 66% of all the cases referred to mediation, settled at mediation. Brooker and Lavers (2000:280) reported an overall settlement rate of 62% in the analysis of 160 mediations in the UK, while an American Association of Arbitrators study indicated that 85% of construction mediations lead to mutual agreement (Cooper, 1992:296).

Similar statistics have been quoted for the South African construction industry. Finsen (1993:185) cites the South African Association of Consulting Engineers (SAACE) in reporting that *"mediations are successful in about 80 percent of instances"*, while Watson (1996) reported that in 87% of the mediation cases he studied, the disputes were resolved during or as a result of the mediation.

Although it is acknowledged by the South African construction industry that mediation is regularly used in the settlement of disputes, there is confusion in the minds of many as to what mediation involves (Butler and Finsen, 1993:10-11; Loots, 1995:1011 and McKenzie, 1994:174). Yet, as discussed in Section 1.1 above, limited research exists regarding the nature of the mediation process employed by the South African construction industry with only anecdotal reports on the activities and approaches employed by mediators of construction disputes.

Thus, it can be seen, that research into mediation in the construction industry, is not only important, but also necessary to the cause of ensuring its effective use.

1.4 RESEARCH OBJECTIVES

The main objective of this research is to determine the nature of the mediation process employed by mediators in the South African construction industry.

The specific objectives of the research are:

- To establish the type and level of professional training and experience of the respondents;
- To establish the nature and level of training and experience in mediation of the respondents;
- To explore the perceptions of the respondents regarding the role and functions of a mediator of a construction dispute;
- To determine the procedural steps and activities that the mediators follow during the mediation process; and
- To establish the extent of the mediators' knowledge, and use of skills and techniques associated with mediation.

1.5 RESEARCH HYPOTHESES

This research is aimed at collecting and analysing data which, upon interpretation, will allow the acceptance or rejection of the following hypothesis, embodied in the abovementioned objectives:

> **The practice of mediation in the South African construction industry is *not* consistent with the generally accepted principles of the mediation process.**

In order to test such a broad and complex hypothesis, three sub-hypotheses, which correlate to the sub-problems in Section 1.2, were developed:

1.5.1 Sub-hypothesis 1:

Construction industry mediators do not assist the disputing parties in determining their own settlement.

1.5.2 Sub-hypothesis 2:

The main stages that characterise the mediation process are the collection of information on the dispute by the mediator and the formulation of a solution by the mediator.

1.5.3 Sub-hypothesis 3:

Construction industry mediators' knowledge and utilization of specific mediation process skills and techniques are limited.

1.6 METHODOLOGY

A detailed description of the methodology followed in the collection of data, is given in Chapter 3.

An investigation and review of existing literature (secondary material) on mediation was carried out, and updated during the course of the research. Interviews and discussions were also carried out with various role players in order to obtain further information and insight into the practice of mediation in the South African construction industry.

From the literature review it was evident that the mediators themselves rather than the disputants, generally determine and manage the mediation process. For this reason it was decided that the mediators of construction industry disputes were the primary source of data on mediation in the construction industry of South Africa.

Enquiries into the existence of mediators within the numerous organizations representative of the main role players within the construction industry, namely, the Master Builders' Association (MBA), the South African Association of Consulting Engineers (SAACE), the South African Institution of Civil Engineers (SAICE), the South African Federation of Civil Engineering Contractors (SAFCEC), the South African Institute of Architects (SAIA), the South African Association of Quantity Surveyors (ASAQS) and the Association of Arbitrators of Southern Africa AA(SA), revealed that only the SAICE, SAACE and AA(SA) had databases of mediators. National lists of mediators were obtained from the SAICE and SAACE as well as a list of the Western Cape members of the AA(SA).

Primary data were collected from a survey by way of a structured questionnaire mailed to persons listed nationally by the SAACE and SAICE and to the Western Cape members of the AA(SA).

The descriptive survey method, used successfully by both Schindler (1989) and Barth (1991), was the method found to best suit the nature of this research, allowing both quantitative and qualitative analysis. This research will, therefore, not attempt to prove or disprove the hypothesis and sub-hypotheses on a statistical basis, instead the 'validity' or otherwise of the hypotheses will be determined hermeneutically in keeping with the qualitative nature of the research (also refer Schindler, 1989:51).

1.7 SCOPE AND LIMITATIONS

The research problem described in Section 1.2 refers to "mediators" and the "South African construction industry". The research findings are limited by the scope of these two concepts.

The construction industry in South Africa comprises both building and engineering sectors. These two sectors of the industry are generally dominated by different professionals, the engineering sector by engineers, and the building sector by architects and quantity surveyors. In order to collect data representative of the industry, it was necessary to identify mediators active in both sectors of the industry.

As described in Section 1.6, questionnaires were mailed to mediators identified from the South African Institution of Civil Engineers (SAICE) national list of mediators and arbitrators; the South African Association of Consulting Engineers (SAACE) President's list of mediators, and the Association of Arbitrators in Southern Africa AA(SA) Western Cape list of members. Both the SAICE and SAACE are predominantly represented by engineers (consulting and contracting). The AA(SA) has a varied membership of persons with expertise in *arbitration*, including architects, engineers, attorneys, quantity surveyors and insurance brokers. Some AA(SA) members also offer their services as mediators.

It was assumed that the members of these different associations would be representative of the different sector professionals.

Most of the literature reviewed is of a legal nature, however this research is not a legal treatise.

The research is not aimed at:

- investigating the nature and cause of conflict;

- investigating the effect of the nature and/or size of the dispute on the outcome of the mediation;
- arguing the merits of mediation;
- determining the rate of success of mediation; or
- comparing mediation to other ADR processes.

1.8 DISSERTATION FORMAT

This chapter, **Chapter One**, introduces the core research problem by outlining the broad field of study of dispute resolution in the construction industry and then narrowing the focus down to the mediation process and the research questions associated with mediation in the South African construction industry. Chapter One also gives a broad overview of the methodology, structure and limitations of the dissertation.

Chapter Two reviews the literature relating to mediation generally and in the construction industry in particular.

Chapter Three describes the development of the research methodology adopted to collect the data and test the research hypotheses.

Chapter Four presents, analyses and summarises the results obtained from the data collected, in both quantitative and qualitative formats.

Chapter Five states the conclusions of the research, based on the results of Chapter Four.

A list of **references** and various **appendices** are attached in support of the dissertation.

CHAPTER 2: LITERATURE REVIEW

2.1 CONFLICT, DISPUTE AND THE CONSTRUCTION INDUSTRY

Construction conflict management and resolution were the focus of the First International Construction Management Conference held at the University of Manchester (UMIST) in September 1992. The majority of the opinions expressed in the papers presented at the conference (Fenn and Gameson, ed. 1992) by leading practioners, academics and others, were, that conflict in the construction industry is inevitable.

Many involved in the construction industry share this view believing that the nature of the construction process makes conflict inevitable in some form and to some extent (Hibberd & Newman, 1999:1; Chan,1998:275; Delmon 1998:277; Davies,1992:59; Cree,1992:47; Zikmann, 1992:54).

Smith (1992:28) states categorically that construction conflicts are endemic in the industry. Baden Hellard (1992:36) agrees that "*conflict is a particular feature of construction*", while Clegg (1992:142) refers to the tendency of contracts to generate dispute because of the 'externality' of interpretation making it rational for them to cause conflict. Langford *et al.* agree that conflict between contracting parties may be inevitable.

Lavers (1992:7) cites numerous authors on conflict in the industry as being in broad agreement with the proposition that understanding conflict is fundamental to an ability to identify disputes at a stage when it is possible to prevent or manage their development.

Different approaches exist for resolving either a conflict or a dispute, however, agreement on the precise nature of the difference between the concepts of 'conflict' and 'dispute' is hard to find.

Hibberd & Newman (1999:1) argue that, in a contractual situation, there is a significant difference between a dispute and a conflict. As some contracts provide for both 'disputes' and 'differences' to be referred for determination, they argue that a difference of view between two parties does not necessarily mean there is conflict, but it does constitute a dispute. They acknowledge that conflict could naturally follow, depending on the behaviour of the parties involved in the dispute (Hibberd & Newman, 1999:2).

Hibberd & Newman (1999:2) maintain that a conflict between two parties to a contract cannot necessarily be determined by the dispute resolution processes prescribed in the contract, instead, they advocate that every effort should be made to prevent or control a conflict situation. In summary, they believe that you can have conflict without a dispute and a dispute without conflict, and by understanding the particular situation, the problem should be tackled in the best way.

Moore (1986), Schindler (1989) and Barth (1991) distinguish between conflict and dispute by describing the evolution of a disagreement or potential conflict situation into a dispute. Moore (1986:4) describes the development of a dispute out of an initial disagreement as follows:

> *"Disagreement and problems can arise in almost any relationship. The majority of disagreements are avoided because the issue is not that important, because a party does not have the power to force a change, or because the parties do not believe that a change for the better is possible. If however tensions become so strong that the parties can no longer avoid the disagreement, they usually resort to informal problem solving discussions to resolve their differences. At this stage, when the parties are unable and/or unwilling to resolve their disagreements, a dispute is said to exist."*

Schindler (1989:7) distinguishes between conflict and dispute based on the view that "*once cognition and personalisation of a potential conflict has taken place and it results in an overt dysfunctional conflict, it will be referred to as a dispute*". Schindler (1989) defines the outcome of a conflict as dysfunctional when the performance of all groups, party to the conflict, is hindered or destroyed.

Barth (1991:10) notes the conceptual difficulties associated with proposing a comprehensive definition of conflict as a result of the many definitions that have been proposed. He views a dispute as a conflict that was not resolved by one of the primary conflict resolution modes and therefore required another mode of resolution, namely dispute resolution. He identifies the conflict resolution modes as "*those aspects which would fall under the negotiation phase of dispute resolution*", thus implying that at least one of these modes will be implemented before "*any dispute is declared to heard by a third party.*"

A study of the structure of the clauses relating to the settlement of disputes in the GCC (1990) and JBCC (2000), two commonly used South African construction contracts, indicates that a *disagreement* between an employer and a contractor becomes a *dispute* when either party disputes the Engineer's or Principal Agent's decision or ruling on the disagreement.

Most construction contracts clearly distinguish between disagreements and disputes. They require that attempts must first be made to resolve dissatisfactions or disagreements and only when these resolution processes are unsuccessful, can a dispute, by definition, be created. The contracts then set out the resolution processes for settling the declared dispute.

The distinction between conflict and dispute is not universally held (Hibberd & Newman, 1999:2). 'Conflict' and 'dispute' are often used interchangeably, while some view a dispute as one type of conflict. Pretorius (1993:1), for example, defines dispute resolution as:

> "*the field of practice and study which concerns the selection, design and application of a process that best deals with a particular dispute or conflict and is best suited to the requirements of the parties involved*".

Van Langelaar (2001:11) concludes that disputes in the construction industry are conflicts, which are generally not deep-rooted and do not centre around threats to

fundamental human needs, but that it is not uncommon for conflicts of interest to escalate into conflicts of value. Brown & Marriott (1993: 418) define conflict as:

> *"a state of incompatibility of interests, objectives or positions between people or groups. It may include a dispute, which is a form of conflict that is justicable"*

and dispute as:

> *"a disagreement about an issue or issues which are capable of being decided upon by a third party, that is to say, they are justicable."*

These authors acknowledge that the distinction between behavioural conflict and justicable dispute is not always clear, but that the distinction is relevant because of the different approaches that may have to be adopted to resolve the dispute.

Despite the theoretical arguments regarding the distinction between a conflict, a disagreement and a dispute, all the abovementioned authors are of the opinion that different approaches exist for solving the different situations.

2.2 CONFLICT AND DISPUTE RESOLUTION

2.2.1 Views on conflict

The inevitability of conflict is the basis of the *behavioural or contemporary view* on conflict, one of the three views that have evolved about conflict (Verma, 1995: 88-90 and Schindler, 1989: 4).

The behavioural view, which dominated ideas on conflict from the late 1940's until the mid-1970's, accepts conflict as a natural and inventible phenomenon. This view recognises that conflict may have either a positive effect or a negative effect on projects and that it should be effectively managed.

The *traditional view*, dominant during the late 19th Century until the mid-1940's, assumes that conflict is to be avoided as it is dysfunctional and has a negative impact on projects.

The current view on conflict, the *interactional view*, assumes that conflict is necessary in order to increase performance and is therefore to be encouraged and maintained at an optimal level.

Conflict is also classified as functional or dysfunctional (Smith, 1992:29; Gardiner and Simmons, 1992:110). Smith (1992:30) summarises the difference as:

> *'Functional conflict is essentially a construction community problem, when it is an inescapable consequence of our trading relationships. Dysfunctional conflict may have arisen if the actions of the parties have gone beyond what we recognise as a functional conflict.'*

2.2.2 Sources of conflict and dispute

The sources of an individual conflict vary according to the situation, project and players. Moore's (1986) categorisation of the following five major sources of conflict has found general acceptance, namely:

- *Interest conflicts* caused by actual or perceived competition over substantive, procedural or psychological interests.
- *Structural conflict* caused by unequal control, ownership or distribution of resources or by environmental or time constraints.
- *Value conflicts* caused by differing ideologies, religious beliefs, cultural norms and ethnicity.
- *Data conflicts* caused by differential access to information, or misunderstanding or differences over the interpretation or relevance of data.
- *Relationship conflicts* caused by different expectations of each other (spoken or unspoken), breakdowns in interpersonal acceptance, liking, communications and understanding.

More specific, project related, causes of conflict such as those listed by Verma (1995:99), Rahim (1992:369) and Barth (1991:8) include: scarcity of resources

(manpower, equipment, facilities, capital); structural imbalances; ambiguity (role and task uncertainty); differing goals (time horizons); interpersonal relationships, and communication problems.

From research carried out by Harding in 1991 and Dodd and Langford in 1990, Langford *et al.* (1992:66) were able to identify three variables that influence the form and extent of conflict within traditional procurement contracts, namely, ambiguity of roles, interpersonal skills of key players and responsiveness to change.

Revay (1992:201), Davies (1992:6) and Houghton (1992:298) also looked to the nature and language of the construction contract used for procurement as a source of possible disputes.

Hibberd and Newman (1999:11) describe the causes of construction disputes as ranging "*from gaps in information to deliberate changes, from ground conditions to unforeseeable event.*"

Watts and Scrivener (1992:218) found a similar range in their review of building litigation cases in New South Wales and Victoria, Australia. The most frequent sources of disputes were found to be the determination of the agreements (15%), claims arising from variations (12%), claims of negligence in tort (11%), claims of delay (9%) and claims for extension of time (7%).

Bishop (1992:378), Hancock (1992:400) and Davies (1992:61) suggest that perhaps shortcomings in the training and education of construction industry professionals, where the focus is on technical expertise rather than contractual and management skills, play a role in the causes of disputes. While Gale (1992:416) takes this argument one step further with the proposition that "*the construction industry is conflictual because it has a male culture*". Gale argues that the departments of construction in the education system and their courses, act as gate keepers to the construction industry culture, maintaining and promoting values, images and practices that are axiomatic of construction culture. Similarly Hancock (1992:401) believes that many of the problems

and conflicts within the construction industry are the result of misunderstandings and a lack of perception founded on the education of construction professionals.

The sources of construction industry conflict, claims and disputes are clearly varied and numerous and have been subject to significant research (refer Kumaraswamy and Yogeswaran (1989:145) and Hibberd and Newman (1999:11) for further references).

2.2.3 Conflict resolution processes

According to Leeds (1992:152) various American scholars, since the 1940's, have favoured a five style model in relation to handling interpersonal conflicts, while Mastenbrook believed in a four style approach and the French have adopted a two style approach. Rahim's (1992:372) five styles; avoiding, obliging, dominating, compromising and integrating, are reflected in Verma's (1995:118) classification of the following conflict resolution processes:

- Withdrawing/avoiding – retreating from or ignoring an actual or potential conflict.
- Smoothing/accommodating – an appeasing approach that emphasises areas of agreement rather than disagreements.
- Forcing/compelling – using a position of power to resolve the conflict.
- Compromising – this approach involves searching and bargaining for solutions that bring some degree of satisfaction to both parties.
- Collaborating/confronting/problem-solving (negotiating) – this approach treats conflict as a problem to be solved resulting in a mutually acceptable solution.

Verma (1995:118) notes that some authors suggest that there is a subtle difference between *collaborating* and *confronting/problem-solving*. Where confronting/problem-solving seeks an ultimate resolution by examining alternative solutions to the problem, collaborating provides a long-term resolution by seeking consensus and commitment.

While some authors concentrate their commentary on managing and controlling conflict, others such as Hibberd & Newman (1999:13) and Baden Hellard (1992:44), advocate the prevention of conflict, and the consequential reduction in the potential for disputes, by appropriate decision-making with regards to: allocation of risk, procurement and tendering processes, selection of the team charged with responsibility for delivering the project, documentation (including the formation of the contract and especially the inclusion of pre-emptive remedies), and communication.

Latham (1994:87) concurs with this view:

> *"The best solution is to avoid disputes. If procedures relating to procurement and tendering are improved, the causes of conflict will be reduced. If a contract document is adopted which places the emphasis on teamwork and partnership to solve problems, that is another major step."*

2.2.4 Dispute resolution processes

Dispute resolution is defined as any process aimed at settling disputes. Dispute resolution processes therefore include litigation, arbitration, mediation, negotiation and all other processes whereby disputes are resolved.

Goldberg *et al.* (1990) view dispute resolution on a continuum running from consensual resolution (negotiation and mediation) at one end to formal binding third party adjudication (litigation and arbitration) at the other. In between they describe a myriad of variations and hybrid methods that do not fit either of the former models, such as rent-a judge, fact-finding, mini-trial, ombudsman, pre-trial conference and med-arb.

Pretorius (1993:3) regards negotiation, mediation, arbitration and litigation as the primary methods of dispute resolution and believes that all other dispute resolution methods are derived, to some extent, from these processes.

Pretorius (1993:3) gives a comprehensive list of dispute resolution processes and mechanisms within four categories:

- Methods involving private decision-making by the parties, such as informal discussion and problem-solving, negotiation, mediation, conciliation, facilitation and the mini-trial;
- Methods involving adjudication by a third party, such as arbitration, a commission of enquiry and fact-finding;
- Hybrid forms of dispute resolution such as Med-Arb and Arb-Med; and
- Relationship-building initiatives

Brown and Marriott (1993), simplify this view by grouping litigation and arbitration into the generic term "adjudication" and describe three primary dispute resolution processes; negotiation, mediation/conciliation and adjudication. They include the processes of private judging (rent-a-judge), administrative or statutory tribunals and expert determination under adjudication processes and also describe "hybrid forms" of dispute resolution that have developed in recent years; the mini-trial, Med-arb and Arb-med, a neutral fact-finding expert, a summary jury trial (adapted in USA from the mini-trail), ombudsman and court-annexed arbitration.

Jones (1999: 363-396) describes three main groups of dispute resolution mechanisms and techniques based on his experience in the Asian construction industry. He divides the processes according to whether they are administrative, non-binding and binding, as shown in the Table 1 below.

Loots (1995:1007-1014) adopts a simplified version for categorising the different dispute resolution procedures found typically in South African construction. He defines three processes, firstly, processes aimed at avoiding disputes and quasi-arbitration, such as certification, the engineer as quasi-arbitration, and dispute resolution boards; secondly, mediation and conciliation type procedures and thirdly, arbitration.

Table 1: Categories of dispute resolution

DISPUTE RESOLUTION MECHANISMS & TECHNIQUES		
ADMINISTRATIVE	**NON-BINDING**	**BINDING**
▪ Traditional determination of claims by Contract Administrator ▪ Truly independent certifier ▪ Appeal from decisions of contract administrator to independent adjudicator ▪ Dispute Review Boards (DRB) ▪ Partnering ▪ Dispute Resolution Advisor (DRA)	▪ Negotiation ▪ Mediation/conciliation/ facilitation ▪ Non-binding expert appraisal ▪ Mini-trial/senior executive appraisal	▪ Arbitration ▪ Expert determination ▪ Litigation

(Adapted from Jones (1999:363-396))

Siedel (1992:354) adopts a broader view and describes the alternatives to litigation under the three broad headings of dispute prevention, dispute management and dispute resolution. He labels the processes involved in dispute resolution as ADR.

Brief descriptions of the some of the dispute resolution processes and mechanisms used in the construction industries worldwide can be found in Appendix C.

2.2.5 Alternative dispute resolution (ADR)

All forms of dispute resolution, other than litigation or adjudication through the courts, are generally defined as 'alternative' or 'appropriate' dispute resolution (ADR) processes. There is, however, a notable trend, when describing alternative dispute resolution processes, to exclude arbitration from the ADR discussion.

Kwakye (1994:2) defines ADR as "*a non-confrontational technique, which may resolve disputes without resorting to traditional litigation or arbitration*". Similarly, Brown and Marriott (1993:9) define ADR as:

> *"a range of procedures which serve as alternatives to the adjudicatory procedures of litigation and arbitration for the resolution of disputes, generally but not necessarily involving the intercession and assistance of a neutral third party who helps to facilitate such resolution"*

Although arbitration has long been the accepted, even the preferred means, of resolving disputes in the construction industry, an increased dissatisfaction with the process has emerged worldwide. This dissatisfaction is based on the perception that arbitration is as formal, time-consuming, expensive, traumatic, complex and adversarial as the litigation process it aimed to avoid.

Although ADR in the construction industry is widely discussed in the literature, the discussions are mainly anecdotal with limited existing empirical research. The 1991 American Bar Association (ABA) Forum on the Construction Industry survey into mediation and mini-trial of construction disputes in the USA represented one of the first empirical investigations into non-binding dispute resolution in the construction field. Stipanowich & Henderson (1992: 314-327), in reporting these results, confirmed the speed and success of non-binding dispute resolution in the USA construction industry. They also found that the views on mediation and the mini-trial often portrayed in the literature did not correspond with the actual experiences of construction lawyers. They 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, 1999:578). 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 Fenn and Gould (Gould, 1999:579) reported an increase in mediation experiences but concluded that 'formal mediation', defined by Fenn & Gould 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 and Lavers' research (Brooker & Lavers, 2000:298) into the processes, perceptions and predictions regarding dispute resolution in the UK construction industry, found that, on balance, negative experience with dispute resolution related to arbitration and litigation, while all other dispute resolution processes produced positive results. 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. He concluded that these participants did not have much 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 disputes resolution processes utilized. He found 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.

More recently, Van Langelaar (2001) undertook research into the use of Dispute Boards (DBs) as an ADR mechanism on construction projects in South Africa. He found, amongst other things, that although DBs were not widely used in South Africa, there was some disillusionment with the concept as a result of the high proportion of recommendations in favour of the contractor.

2.3 DISPUTE RESOLUTION PROCESSES AND SOUTH AFRICAN CONSTRUCTION CONTRACTS

2.3.1 Construction Contracts

Most construction projects are performed in accordance with terms of a contract. A construction contract may be defined as a contract in terms of which one party, called the builder or contractor, agrees to carry out building or engineering operations for another (McKenzie, 1994:1).

Construction contracts contain specific clauses that have become more or less standard over the years. McKenzie (1994:2) lists these clauses as:

a) Clauses dealing with the time of completion, the extension of such time and the penalty for delay.
b) Clauses dealing with extras and variations.
c) Clauses dealing with when and how payment is made.
d) Clauses dealing with the rectification of defects.
e) Clauses dealing with prime costs and provisional sum items.
f) Clauses dealing with the right of either the employer or the contractor to determine the contract.
g) Clauses dealing with the adjustment of the contract price.
h) Clauses dealing with the manner in which disputes should be resolved.

Currently there are as many standard forms of contract circulating within the South African construction industry, as there are disciplines and employers in the industry. As a result, the Construction Industry Council's Procurement Forum (Inter-ministerial Task Team on Construction Industry Development, 2000: 1) has recommended that the following contract documents be used, with minimal project specific amendments, for procuring engineering and construction works in South Africa:

- General Conditions of Contract for Works of Civil Engineering Construction (6^{th} ed. 1990)
- The JBCC Principal Building Agreement.
- FIDIC (1999): Conditions of Contract for Construction for Building Engineering Works designed by the Employer.
- The Engineering and Construction Contract (known as the NEC).

2.3.2 Dispute resolution processes in construction contracts

The FIDIC and NEC contracts have only recently been introduced for use into the South African construction industry. With these contracts has come the introduction of adjudication as a dispute resolution process.

The NEC, published by the Institution of Civil Engineers (ICE) in the UK, provides for the resolution of disputes by adjudication with the right to have the adjudicator's decision reviewed by a tribunal. The employer is required to identify the tribunal in the contract data as 'arbitration', 'the courts', 'expert determination', 'DRB' or other such forum, but never a named individual. Adjudication was introduced into the NEC as it was felt that adjudication could reduce the frequency of disputes and the time and cost associated with arbitration.

The new FIDIC 1999 Suite of Documents, having been endorsed by major funding organisations such as the World Bank, is assuming an increasingly dominant position in the hierarchy of international and domestic contracts. FIDIC has traditionally supported the concept of arbitration, however the new FIDIC 1999 Suite of Contracts, taking account of recent legislative developments in the construction industry in the UK, introduces adjudication as a mandatory procedure to precede arbitration or litigation.

The FIDIC contract also advocates the use of amicable settlement prior to deciding on arbitration. FIDIC's "Guidance for the Preparation of Particular Conditions" states that *Sub-Clause 20.5: Amicable Settlement,* is intended to encourage the parties to settle a

dispute amicably, without the need for arbitration, utilising the processes of direct negotiation, conciliation, mediation or other forms of alternative dispute resolution. The authors also note that amicable settlement procedures often depend, for their success, on confidentiality and on both parties acceptance of the procedure, thus requiring that neither party should seek to impose the procedure on the other party.

The GCC 90 and JBCC 2000 contracts are widely utilised domestic contracts, governing civil engineering works and building construction respectively. Both these contracts were originally modelled on prototypes introduced from the UK half a century ago. As the UK construction contracts embodied provisions requiring differences between parties to be resolved by arbitration, so has the South African construction industry had a long reliance on arbitration, as an alternative to litigation (Finsen in Pretorius, 1993:177).

Mediation, as a dispute resolution process, was introduced into the GCC in 1982 and into the JBCC Building Agreement in 1991. Loots (1985) explains the introduction of mediation into GCC 82 as follows:

> *" As the procedure of arbitration has become progressively more formal, so it has been supplanted by the process of mediation. Mediation has gained increasing popularity due to the generally positive results of its application in practice".*

Although the mediation clauses in the GCC 82 and JBCC 1991 contracts bound the parties to the mediator's opinion unless the parties took steps to refer the matter to arbitration within a certain period, the updated edition of GCC 90 allowed that the mediator's opinion would only become binding to the extent that it received the parties written acceptance. (Butler and Finsen, 1993:11). The JBCC2000 contract, on the other hand, made mediation optional.

Both Clause 61(2) of GCC 90 and Clause 40.4 of the JBCC 2000 contract describe:

a) The selection of the mediator, either by mutual agreement or, in the case of GCC 90, failing such agreement, the parties may agree that a mediator be nominated by the President of the SAICE.

b) The mediator's obligation to submit a written record of any agreement reached between the parties during the mediation.

c) The conditions under which the written agreement becomes binding.

There are, however, notable differences in role of mediation in the two contracts. GCC 90 obligates disputants to mediate prior to proceeding to arbitration or litigation, while mediation, in terms of the JBCC 2000 contract, is optional. Secondly, GCC 90 obligates the mediator to submit a written opinion on the dispute to the parties, while this is not a requirement of the JBCC 2000 mediator. A third difference lies in the description of the procedures to be followed. GCC 90 leaves the procedure to be followed to the discretion of the mediator, while JBCC 2000 directs that the parties meet with the mediator to decide the procedures for the mediation process.

Copies of the dispute resolution clauses in the four abovementioned contracts are included in Appendix E with a review of the basic sequence of procedures described in Table 2 below.

Table 2. Dispute resolution procedures in specific contracts

GCC Works 1990	JBCC 2000	FIDIC (1999)	NEC (1998)
Clause 61: Settlement of disputes	*Clause 40: Settlement of disagreements and disputes*	*Clause 20: Claims, disputes and arbitration*	*Clauses 90 – 93*
Engineer gives **written decision**	Principal agent determines disagreement by **written decision**	Engineer **approval or disapproval** of contactors claim	**Adjudication**
Mediation	**Mediation**	**Adjudication** by DAB (1 or 3 persons)	**Review by Tribunal:** arbitration, the courts, expert determination, DRB or other such forum
Arbitration/litigation	**Arbitration**	**Amicable Settlement**	
		Arbitration	

(Compiled from GCC 90, JBCC 2000, FIDIC and NEC contracts)

2.3.3 ADR and the CIDB

A review of the construction industry dispute resolution processes in South Africa would be incomplete without mentioning the Construction Industry Development Board (CIDB). The CIDB was established by an Act of Parliament in November 2000 to implement an integrated strategy for the reconstruction, growth and development of the construction industry and to provide for matters connected therewith.

In 1997, the Minister of Public Works appointed an Inter-ministerial Task Team, an interim body, whose primary purpose was to drive the establishment of the statutory CIDB as a permanent vehicle for public/private-sector cooperation on construction industry development programmes. In 1998, nine Focus Groups were established to refine specific outputs generated by the Task Team.

The objective of Focus Group 7 was to draft best practice guidelines for the public sector aimed at reducing litigation and the resultant costs to contractors and ultimately to the public sector. In 1999, after reviewing the current dispute resolution mechanisms in public-sector contracts, the Focus Group produced a draft document entitled, '*Proposed ADR Guidelines for Public Sector Contract*'.

The Focus Group using the Latham report (Latham, 1994) as a point of departure, proposed 12 ADR principles, which are expected to guide the formulation of ADR guidelines for all public-sector contracts (Inter-ministerial Task Team on Construction Industry Development, 1999). Central to the recommendations is that ADR clauses should be mandatory in all Public Sector contracts and that the contract documents should allow contracting parties to choose jointly the ADR procedures to be used in the course of execution of the contract.

The procedure of dispute resolution proposed by the Focus Group (Inter-ministerial Task Team on Construction Industry Development, 1999) appears to be a combination of the dispute resolution procedures prescribed in the FIDIC and NEC contract documents, with the following exceptions: only 'negotiation' is considered under the

description 'amicable settlement', and, it is recommended that the parties shall attempt to settle the dispute amicably before the commencement of adjudication, whereas FIDIC require that the parties shall attempt to settle the dispute amicably before the commencement of arbitration but after adjudication.

The influence of the Latham report on these recommendations is apparent in the description of the proposed ADR steps, namely, negotiation, adjudication, implementation of adjudication award with arbitration/or litigation on project completion.

Sir Michael Latham was tasked by the British government to investigate the problems being encountered by the UK construction industry. The enquiry led to a report entitled 'Constructing the Team' (Latham, 1994). In the report Latham (1994:87-92) recommended that a system of adjudication, underpinned by legislation, be introduced within all the Standard Forms of Contract, except where comparable arrangements already existed for mediation or conciliation.

The UK Housing Grants, Construction and Regeneration Act (1996), which came into force on the 1st May 1998, resulted in a statutory right to a 28-day adjudication to settle disputes over payment. (Cottam *et al.*, 2002:32). The aim of the Act is to keep construction projects moving by resolving disputes quickly, by means of provisional decisions made by an adjudicator. These decisions can be challenged later in litigation or arbitration (Lightburn, 2000:204).

Generally, the legislation was not favourably received. Cornes, (1998:342) stated:

> "*Mediation is a success story. Why try to supplant it by what appears to be an ill-conceived statutory scheme for adjudication?*"

Lightburn, (2000:204) also expressed his doubts:

> "*It is too early to tell whether this new approach will work well in practice. The timetable is too precipitate.... and an outsider is called upon to intervene in*

decision-making whereas in true mediation the mediator is neutral and does not decide or comment directly on the merits of the case".

However, despite these misgivings, Cottam *et al.* (2002:37) concluded that it appears as if adjudication will remain the main option for the resolution of construction disputes in the UK for many decades to come.

Bentley (1992:199) argues the following distinction between these two processes. He views the two processes as similar in overall purpose and procedure, but points out that mediation is usually intended to be a means of obtaining final and conclusive disposal of disputes while adjudication decisions are interim and reviewable through arbitration or litigation.

2.4 MEDIATION AND THE CONSTRUCTION INDUSTRY

2.4.1 Mediation in general

Murray *et al.* (1996:293) suggest that mediation is ancient and probably predates the formal creation and enforcement of law. They describe the view of the Confucian Chinese that "litigation" was a "second best" solution to dispute with the "first best" and socially proper way, used by "superior man", being mediation. They also describe the tribal "moots" in African societies - an informal mediation process where disputes were resolved by consensus about future conduct, rather than by assigning blame retrospectively.

Whilst the origins of mediation may be ancient and eastern, the recent more formalised technique has principally developed in the USA (Gould, 1999:575).

Murray *et al.* (1996, 293-300) describe the development of mediation as starting in the 19th century with the mediation of labour disputes in both the UK and US. During the 1930's American divorce courts began recommending mediation to the parties and slowly family law mediation grew. Community mediation was the next significant development in the USA taking place during the 1960's and 1970's.

Concern in the late 1970 over a "litigation boom" led to the introduction of the "settlement promotion" movement to relieve court congestion. Initially this movement focused on ADR processes other than mediation such as mini-trials, summary jury trials, court-annexed arbitration and mediation-arbitration hybrids. However, mediation proved more popular than had been anticipated and so became the principal ADR process invoked by institutions and courts. These developments resulted in a change in the nature and style of the mediation, with a more directive and evaluative kind of mediation emerging.

Problem-solving had always been part of the traditional mediation model but during the 1980's some mediators began making problem-solving the central role of mediation. The catalyst for this development was the introduction of collaborative management methods, from Japan, with the rejection of the traditional competitive approach to negotiation in favour of "principled negotiation". According to Fisher and Ury, (Murray *et al.,* 1996: 299), principled negotiation attempts to discover mutual *interests & solutions* for mutual gain. Although "interest-based" negotiation was not new to mediation, the "win-win" approach was seen as new and captivating. One critique of co-operative problem-solving came from Baruch Bush & Folger (Murray *et al.,* 1996: 300) proponents of transformative mediation. Transformative mediators view mediation as an opportunity to transform the parties by "engineering moral growth". This approach views the emphasis or problem-solving as too heavy-handed and as robbing the parties of the moral autonomy to confront each other and devise their own forms of resolution of their conflict.

A new form of mediation, evaluative mediation, emerged during the late 1980's and 1990's, a result of the dramatic influx of lawyers into the ranks of trained mediators (Murray *et al.,*1996:300). This action was sparked when court annexation of ADR created a need or opportunity for mediators and other third party neutrals, with a background in the legal issues. Some lawyers relied on their legal knowledge and experience to "reality test", with the parties, the strength of their cases and to predict court outcomes, rather than adopting the traditional non-directive style of mediation.

Menkel-Meadow (2000:xxviii) discusses the present day propagation and mutation of mediation in some arenas as well as the criticisms in others, such as in family law, domestic violence, employment discrimination and mandatory use in courts. She describes the growing recognition, in the increased use of peer mediation as a process taught in US schools, in the recognition that mediation may have its place in resolving issues in the use of new technologies, and in increased attention to problem-solving, negotiation, mediation and dispute resolution education in law schools, that conventional legal problem-solving in the form of adversarial adjudication is not adequate for all our modern needs.

In South Africa the practice of mediation has undergone uneven development, having been extensively used only in the fields of labour, community and family relations and only more recently in commercial and environmental disputes (Pretorius, 1993:39). Boulle and Rycroft (1997:255) describe mediation in South Africa during the 1980s and 1990s as being in its first phase, during which it has been uncritically promoted by central government, agencies and individuals together with the 'exaggerated claims' of the mediation movement. However, they conclude that a measured understanding of mediation is emerging together with a growing acceptance of the system.

2.4.2 Mediation in the construction industry

Mediation and or conciliation are the best-known forms of ADR in international construction (Lavers, 1992:12; Mackie, 1992:304).

The debate into the distinction between conciliation and mediation is seen by Hibberd & Newman (1999:57) to be not purely academic, as they maintain that it is important for parties to understand into what process they are entering. Hibberd & Newman (1999:59) suggest that mediation is best used as a generic description with conciliation reserved for a particular aspect of mediation, in the same way as negotiation. Jones (1999:377) takes a similar approach, using the term 'mediation' collectively for the three processes, mediation, conciliation and facilitation. He sees each term as referring to a negotiation process assisted by a third party neutral. He believes the

distinction between the three terms to be of little importance, and instead emphasises an appreciation of the different levels and types of involvement of the third party neutral.

Some authors choose to use the terms interchangeably (Chan 1998:271; Gould, 1999:579), but although Gould uses the two terms interchangeably in his research, he does distinguish between facilitative and evaluative mediation, depending on the level of intervention from the third party. Gould (1999:579) explains that in the UK construction industry, mediation most frequently refers to a facilitative process while conciliation is more evaluative with the conciliator recommending a settlement. Hibberd & Newman (1999:57-59) and Gould (1999:582) describe the varying use of the terms by different construction industry organisations in the UK.

Butler & Finsen (1993:10) describe mediation and conciliation as two basic types of mediation procedures, depending on whether or not the mediator is expected to recommend a solution if he fails in his attempts to guide the parties to an agreed solution. According to Butler and Finsen, where the third party is not expected to make a recommendation, he is referred to as a conciliator, and where he gives a non-binding opinion at the end of the proceedings, he is called a mediator.

Loots (1995:1011) points out that the use of the terms 'conciliator' and 'mediator' are not consistent with their use in other fields in South Africa, where the mediator tries to bring the parties together ~~without making a recommendation~~ and it is the conciliator, who will suggest a solution if the parties cannot reach a settlement themselves.

The SAICE, SAACE and AA(SA) all define mediation differently. Mediation is described in the SAICE guidelines as a "*form of appeal against a prior decision given or deemed to have been given by the Engineer in a dispute between two parties.*" The mediator is described as "*an independent person with the necessary competence, engaged jointly by the parties to provide them with an opinion on a matter in dispute arsing from the contract...*". The SAACE guidelines define mediation as "*simply the settlement of an argument between two parties by acceptance on the part of each of the Mediator's opinion.*"

The SAACE views the mediator's principal objective being to achieve a mutually acceptable settlement to the dispute, by recommending a solution and having this accepted by the parties concerned and his function as being to assist the disputing parties to find common grounds. While the AA(SA), defines mediation, as "*a process that seeks, by means of the intervention of a neutral third party, to bring about the resolution of disputes between parties who are unable to resolve these disputes unaided.*" The resolution of the dispute is voluntarily accepted by the parties, and is not imposed upon them, as is the case with litigation or arbitration. The parties are deemed to have willingly agreed to mediation, by agreeing to the mediation provisions incorporated in the contract.

The debate as to the difference between mediation and conciliation is not restricted to mediation in the construction industry. Boulle and Rycroft (1997:62) acknowledge the extensive debate on the differences and similarities between the two processes and find that in all versions of this debate there are many areas of overlap between mediation and conciliation, for example in relation to their flexible procedures and the fact that the third parties involved cannot impose binding decisions in either process. They record the view of other commentators that maintain that there are differences of definition, and that conciliation should be positioned on the mid-point of a spectrum, with mediation at one end and arbitration at the other.

Similarly, Brown and Marriott (1993:191), define mediation as a process by which disputing parties engage the assistance of a neutral third party as a mediator - a facilitating intermediary – who has no authority to make a binding decision, but who uses various procedures, techniques and skills to help the parties to resolve their dispute by negotiating agreements without adjudicating. They note that conciliation is a term sometimes used interchangeably with mediation, and sometimes used to distinguish between one of these processes (often mediation) involving a more pro-active mediator role, and the other (conciliation) involving a more facilitative mediation role. They also acknowledge that there is no consistency in such usage.

After considering the above discussion, the reason for the confusion as to what 'mediation' actually involves, becomes apparent. Is it a form of 'conciliation' and if so what is the definition of conciliation? Is it a contractual adjudication? Or, is it a sort of "informal arbitration" as defined by McKenzie's (1994:171):

> "*Mediation in the construction industry in South Africa is a procedure in which a neutral party seeks to resolve a dispute by conducting an enquiry, similar to but less formal than an arbitration hearing, and giving a non-binding opinion.*

Boulle and Rycroft (1997:3) provide the following four reasons for this difficulty in defining mediation:

a) The flexibility and open interpretation of terms such as 'voluntary' and 'neutrality', often used in the definition of mediation, but which can never provide certainty and clear boundaries.

b) Mediation has yet to develop a coherent theoretical base and an accepted set of core features, which enable it to be differentiated from other similar dispute resolution processes.

c) The term mediation is used in different senses by different users.

d) There is a wide diversity in the practice of mediation. It is used for different purposes and operates in different social and legal contexts. There are also great differences in mediator's background, training, levels of skill and operational style.

Because of the problems of definition and because of the diversity in mediation practice, various models of mediation have been developed.

2.5 MODELS OF MEDIATION

In order to deal with some of the definitional problems in the field of mediation, Boulle and Rycroft (1997:26), distinguish between four models of mediation, the *settlement, facilitative, therapeutic* and *evaluative.* They see these as paradigm models which are not distinct alternatives to one another and which do not conform exactly to types of mediation practice, so that mediation may commence in the *facilitative* mode but later transform into the *evaluative* model. Boulle and Rycroft differentiate between the four models by describing the main objective of each. Settlement mediation is described as being to encourage incremental bargaining towards a compromise, facilitative mediation as interest based and problem-solving mediation, therapeutic mediation as a process of dealing with the underlying causes of the parties' problem with a view to improving their relationship as a basis for resolution of the dispute, and evaluative mediation as mediation aimed at reaching a settlement according to the legal rights and entitlements of the parties within an anticipated range of court outcomes.

Of the four models, Boulle and Rycroft describe settlement mediation and evaluative mediation as being applicable to commercial disputes and commercial, trade practices and property disputes, respectively, while facilitative mediation is indicated as being applicable to community, family, environmental and partnership disputes.

Menkel-Meadow (1995:228) in describing eight models of mediation that practitioners, rather than theorists, had developed for themselves defines facilitative mediation as the 'purest' form of mediation, where the third party neutral helps the parties arrive at their own solution; and evaluative mediation as the 'newest' form of mediation, a hybrid of mediation and arbitration, where, although the solution remains technically in the hands of the parties, the mediator may provide evaluative information on possible legal outcomes, offer financial advice or provide negotiation training, as well as suggest possible outcomes or solutions. She also describes transformative, bureaucratic, open/closed, activist, community and pragmatic mediation.

Menkel-Meadow's description of eight models of mediation emphasises the diversity that exists in mediation practice. But, as with Boulle and Rycroft (1997:6), Butler and

Finsen (1993:11) and Hibberd and Newman (1999:59), Menkel-Meadow concludes that this diversity should not pose problems for parties or mediators as long as the parties understand the roles and different approaches to mediation.

Riskin (2001:137-181) provides a comprehensive system for describing the various approaches to mediation practice in an attempt to "facilitate clear thinking about processes that are commonly called mediation". The system describes mediations by reference to two related characteristics, each of which appears along a continuum. The one continuum concerns the goals of the mediation and measures the scope of the problem that the mediation seeks to address from broad to narrow. The other concerns the mediator's activities and measures the strategies and techniques that the mediator employs in attempting to address the problem.

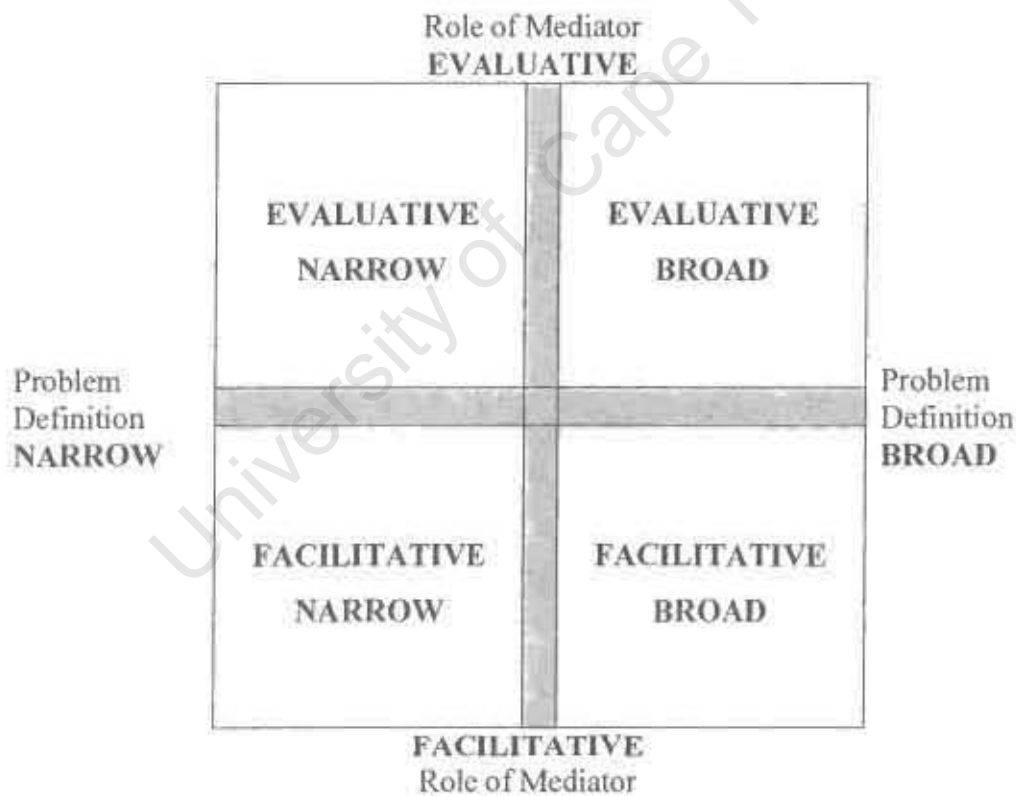


Figure 1: Mediator Orientations
Source: Riskin, 1996:155

Love (1997: 385-396) differentiates between an 'evaluative' mediator and an 'evaluation'. She argues that Riskin's definition of an 'evaluative' mediator as one that gives advice, makes assessments, states opinions, including opinions on the likely court

outcome, proposes a fair or workable resolution to an issue or the dispute, or presses the parties to accept a particular resolution, describes activities inconsistent with the role of a mediator. She continues by listing ten reasons why mediators should not evaluate, amongst these, that the roles and related tasks of evaluators and facilitators are at odds as each uses different skills and techniques and requires different competencies, training norms and ethical guidelines to perform their respective functions. She also stresses that evaluation abounds in the form of litigation and arbitration, and mediation is intended as an alternative paradigm to these forms of dispute resolution.

Brown and Marriott (1993:115) also distinguish between facilitative and evaluative mediation. They note the view of some ADR practitioners, who believe that a mediator's only proper role is facilitative and that a mediator has no business undertaking evaluation, while at the other end of the spectrum, other mediators take an evaluative approach right at the outset. Some take midway positions, considering that a mediator may start by attempting the facilitative approach first, and moving to the evaluative if necessary; or vice versa.

Gould & Fenn's 1994 research into the UK construction industry (Gould, 1999:582) indicated that these two distinct mediation approaches exist in the UK construction industry. The industry distinguishes between an evaluative form of 'mediation' (called conciliation) and a facilitative form that is referred to as mediation. The UK's Centre for Dispute Resolution (CEDR) has adopted the facilitative form and the Institution of Civil engineers (ICE) the evaluative form. In the facilitative style of mediation, the mediators often use the initial stages of the mediation to explain the process and reinforce the philosophy that they will not evaluate the dispute and it is for the parties to settle it themselves. The mediators do not, therefore, openly express their views on the issues. The research found that the parties and often their advisors were unsure of the most appropriate tactic to use during such a mediation. The ICE, on the other hand envisages a process after which the 'mediator', called a conciliator, makes a recommendation as to a settlement should the parties fail to reach agreement. Here Gould & Fenn's research shows the parties' tactic is often to persuade the conciliator that their view should prevail. A third form of mediation, 'informal mediation', was also found to exist. This 'informal mediation' developed when the parties themselves approach a neutral who they

mutually trust and respect. The process then develops depending on the neutral's assessment of how best to reach a settlement. In some instances the facilitative role continues until the parties are brought together for the final settlement, on other occasions, the neutral makes some form of recommendation that the parties accept. Gould (1999:579) concluded that in the UK construction industry, mediation most frequently refers to a facilitative process while conciliation is more evaluative with the conciliator recommending a settlement.

Hibberd and Newman (1999:59) maintain that both the evaluative and facilitative approaches to mediation exist in the construction industry. However, the authors point out that there are also variations of each in terms of process and also in terms of the mediator's role. The facilitative and evaluative approaches described by Hibberd and Newman (1999:60) have very similar characteristics as those in Riskin's (2001:155) and Boulle and Rycroft's (1997:27) models.

Hibberd and Newman acknowledge that there are a range of views as to what the mediator should be doing and which is the right way to conduct mediation. They discuss the nature of the intervention by the mediator as being a distinguishing factor between facilitative and evaluative mediation. As it is possible, in both approaches, for the mediator to offer solutions, rather than rely on the parties to find their own, the basis of such a solution distinguishes the two approaches. In the facilitative approach the mediator bases his proposed solution on the best interest of the parties, whereas in the evaluative approach, the proposal would be based on an assessment of the rights of the parties.

2.6 THE ROLE AND FUNCTIONS OF THE MEDIATOR

Boulle and 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 and Rycroft, 1997:116).

The functions of mediators have been classified in different ways. Moore (1986:25) refers to contingent and non-contingent functions, where non-contingent functions are general activities the mediators undertake, such as chairing the mediation meetings, and contingent functions are more specific moves which mediators make in response to problems, such as caucusing or brainstorming. Kressel and Pruit (1985:179) in turn describe three types of mediator behaviour; reflexive, substantive and contextual.

Cooper (1992:294) categorises the functions of the mediator as they relate to matters of procedure, communication or substantive issues. As to the substantive functions, Cooper (1992) stated that the AAA (American Association of Arbitrators) found that although a mediator is unfamiliar with the subject matter of the dispute, he may be able to facilitate a settlement, someone trained in mediation skills who also has subject matter expertise can more easily facilitate a settlement. Cooper acknowledges that this is an unscientific conclusion.

Cooper (1992:293) maintains that the role of the mediator flows from the model of negotiations between the parties and enhances those negotiations. The main task of the mediator being to see that the parties achieve a settlement of the dispute – in doing so he is required to play different roles to ensure the success of the parties, such as, interpreter and translator of the different motivations and outlooks of each party to the other, facilitator of the re-establishment effective communication between the parties, agent of reality and a resource expander (expanding the number of options which the parties can use to create their own settlement).

Mackie (1991:89) describes the role of the mediator as taking the parties out of a deadlock in their discussions and forward onto constructive agreement by performing a variety of functions. He describes the functions of the mediator as similar to those required for principled negotiation, namely separating the people from the problem, exploring and explaining interests more neutrally, inventing option for mutual gain and ably representing and raising objective criteria. Anstey (1993:30) provides for a similar approach in describing a framework for understanding alternative negotiation theories.

Riskin (2001:137) links the role of the mediator to the approach used in the mediation, i.e. either evaluative or facilitative. He describes an evaluative mediator as one whom assumes that the participants want and need the mediator to provide some direction as to the appropriate grounds for settlement – based on law, industry practice or technology assuming that the mediator is qualified to give such direction by virtue of experience, training and objectivity. The facilitative mediator on the other hand assumes the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than either their lawyers or the mediator, thus assuming that his principal mission is to enhance and clarify communications between the parties in order to help them decide what to do.

Hibberd and Newman (1999:63) followed Riskin's approach and maintain that the functions of the mediator are partly affected by whether the facilitative approach or evaluative approach to mediation is to be followed. They describe the functions of a facilitative mediator and an evaluative mediator as being similar (Hibberd and Newman, 1999:64) but for the following distinct functions discrete to the evaluative approach only:

- Analyse the problem and provide or procure the relevant analytical skills;
- Establish an education of the dispute;
- Expressing an evaluation of the dispute;
- Get the parties to think actively about settling along the lines of this evaluation and the consequence of having to adopt an alternative means of settlement; and

- Negotiate or persuade the parties to formulate settlement proposals based on the evaluation.

Boulle and Rycroft (1997:117) describe eleven definite functions which mediators undertake in the performance of their overall roles all of which correspond to the different stages of the mediation process. The functions they list include facilitation, negotiation and problem-solving, educating the parties, imposing pressure to settle, promoting reality, advising and evaluation.

2.7 THE MEDIATION PROCESS

2.7.1 Stages in the Mediation Process

Despite the variability of the mediation process, a number of writers have managed to divide the process into a number of stages or phases for the purpose of analysis (Hibberd and Newman, 1999:67-97; Boulle and Rycroft, 1997:86; Murray *et al,* 1996:301; Nupen, 1993:41-49; Brown and Marriott, 1993, 121-150; 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. They define 'classical' mediation as:

> *"a process by which the parties assisted by a neutral third person, attempt to systematically isolate points of agreement and disagreement, explore alternative solutions and consider compromises for the purpose of reaching a consensual settlement of the issues relating to their conflict".*

Their description of the following six stages in a classical mediation, generally mirror those described by the other authors; 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.

Boulle and Rycroft (1997: 85) describe three sequential stages in a standard mediation process, which incorporate most of the stages proposed by other authors. They describe a preparatory stage involving the initiation of the mediation and the mediator entry,

screening, information gathering and exchange; the mediation meeting (problem-defining and problem-solving); and then post-mediation activities, which sometimes include the ratification and review of the agreements, reporting and monitoring the mediated agreement and its implementation.

Albertyn (1992:1) provides a succinct description of the four stages, he believes, should occur in any mediation procedure: the opening session and clarifying the issues; exploring the options; bargaining; and, closing.

Nupen (1993:42) notes that the entry of the mediator into the dispute system of the parties can be problematic and so requires care and diplomacy. Boulle and Rycroft (1997:86) believe that the way in which the mediator enters into the dispute is important in securing the parties' commitment to mediation and also provides an opportunity for the mediator to develop the trust and acceptability of the parties. Boulle and Rycroft (1997:86) describe three ways in which mediation can be initiated, each of which require varying degrees of diplomacy and tact. They describe contractual mediation (where the parties jointly approach the mediator) as the least problematic as the parties can be presumed to have some understanding of the process, on the other hand when the mediation is initiated by one party or by someone other than the disputing parties, care has to be taken to persuade and inform all the parties involved of the nature of the procedure.

Problem-solving is central to the mediation process, with negotiation, bargaining and decision-making normally occupying most of the time in a mediation (Boulle and Rycroft, 1997:96). Much of the literature on mediation endorses problem-solving or interest-based approaches to negotiation, however both positional and problem-solving negotiations are encountered in mediation practice. While problem-solving (principled-negotiation) is at the heart of the facilitative model of mediation, evaluative mediation often reflects a positional bargaining approach. Boulle and Rycroft argue that only problem-solving negotiations are compatible with the philosophical underpinnings of the mediation movement as it is the function of the mediator to assist the parties to

make the transition from positional to problem-solving negotiations (Boulle and Rycroft, 1997:49).

Cooper (1992:289) describes a classical model of the process used by mediators working under the rules of the American Arbitration Association (AAA). This process consists of the filing and exchange of pre-mediation papers by the parties. These papers discuss the facts and the law of the dispute as viewed by each party. The mediation itself begins with the expression in a joint session, of the position and interest of each party. Generally the other parties and the mediator are allowed to ask clarifying questions. Often a discussion arises between the parties, which helps to educate both parties in the facts of the dispute. The joint session continues until the mediator judges that progress is diminishing. He or she will then move to a period of separate caucuses with each party. In these private meetings, the mediator will ask more direct questions in an effort to understand more fully the nature of the dispute and the underlying interests of each of the participants. It is generally toward the end of the period of caucusing that the mediator is given authorisation by the parties to begin carrying offers of settlement between the parties. There may be many rounds of caucusing both before and after this point in the mediation is reached. A successful mediation ends with a written and signed document setting forth all of the necessary points of agreement.

Watson (1996) found that the most effective process used in the mediations he studied, utilised written submissions with counter-submissions, the claimant submitting two and the respondent one in reply to the claimant's first submission, and on occasion, a second in reply to the claimant's second submission. The documents in all cases were prepared by the parties, in some cases with professional assistance, but in all cases without legal assistance. Most of the mediations he studied were carried out in terms of the ICE conditions of contract.

2.7.2 Guidelines for Mediation Procedure

"There are no set procedures for mediation. ADR organisations often have guidelines or codes of practice but seldom impose a tight procedure to be followed." (Hibberd and Newman, 1999:66).

Although parties and/or the mediator may choose their own mediation procedure, either the contract clause or the parties, of their own choice, may define the procedures to be adopted or refer to a standard mediation procedure, such as those published by the SAICE, SAACE or the AA (SA).

Brooker & Lavers (2000:287) reported that in his examination of the 1991 American Bar Association (ABA) Forum on the Construction Industry survey, Henderson found that the most influential factor for predicting settlement was the source of mediation rules (other factors included the length of the mediation, the occurrence of discovery, the quality of the mediator). Henderson also found that those mediations which used prescribed rules developed by professional bodies or the court were found to be less likely to settle than when the parties had constructed their own procedures. Henderson suggested that the very process of agreeing on the rules may be a critical beginning to the actual mediation. He concluded that the relevance for construction mediations is that the procedure is of the utmost importance and because many construction disputes often involve large financial sums, the parties require that the process is fair and that the mediator will attempt a "diversity of interventions".

A number of guidelines have been published by numerous international bodies involved in dispute resolution and in mediation. Three organisations have published guidelines on mediation specifically for use by the South African construction industry, the SAICE, the SAACE and the AA(SA). Copies of these guidelines are bound as Appendix D.

a) *"Guidelines for mediation"* published by the SAICE

The SAICE published the first edition of *"Guidelines for mediations"* in 1988, a few years after mediation was introduced into the 1982 edition of the GCC contract. The guidelines were amended in 1994.

These guidelines propose a process in which the parties provide the mediator with relevant, adequate and sufficient information and evidence for him to *adjudicate* the dispute and give direction in his *written opinion*.

Therefore, according to the guidelines, in order for a party to succeed in a mediation, the party must convince the mediator that his view is contractually correct and that the view advocated by the other party is not.

The function of the mediator is *"to adjudicate on matters in dispute and by the reasonableness of his adjudication to lead the parties to accept his adjudication or to be so influenced by it as to reach settlement without going to arbitration or court."*

The guidelines acknowledge that there are no statutory Rules for Conduct of Mediations and suggest a flexible step-by-step procedure. The mediator is advised to decide on the procedure to be followed for a particular dispute, after consulting with the disputing parties. The first step of the procedure is the appointment of the mediator. The guidelines then recommend that the mediator hold a preliminary meeting with the parties, during which the terms of the mediator's appointed are agreed and signed. The guidelines state that the agreement must also include an undertaking by both parties to be bound by the mediator's opinion in all aspects, unless one or other of the parties decides, subsequent to the mediator's opinion being made known, to proceed to arbitration. The guidelines recommend that the mediator and parties should agree on the form of presentation of arguments, as either written or oral, or preferably, in writing supplemented where necessary with oral presentations.

b) "*Guidelines for the use of mediators and parties concerned with mediation*" published by the SAACE

The SAACE published, "*Guidelines for the use of mediators and parties concerned with mediation*" as an advisory note to members in 1993.

The underlying philosophy of these guidelines is that engineer mediators can best settle disputes for other engineers. Mediation is viewed as an informal and amicable method of resolving disputes rather than being characterised by "mortal combat" as in arbitration or litigation.

The essential requirement of any mediation procedure is to allow each party a fair opportunity to put its case, as well as its response to the case of the other, to the mediator. The Mediator should in his discretion determine whether the reference to him is to be made in the form of written or oral representations or both, in consultation with the disputing parties. The guidelines advise that a combination of both systems should prove to be most effective and describe four basic procedures.

c) "*Guidelines for mediation under construction contracts*" published by the Association of Arbitrators

The Association of Arbitrators (AA) issued the first edition of "*Guidelines for mediation under construction contracts*" in June 1992, a year after mediation was introduced into the JBCC Principal Building Agreement. The JBCC 1991 clause, Clause 37.2, differed from the present clause as contained in the JBCC 2000. In terms of the 1991 contract, the parties were required to submit written representation to the mediator and the mediator was required to give a written opinion on the matter. Prior to giving his opinion, the mediator was entitled, at his discretion, to convene a hearing of the parties and their witnesses, or hold discussions with either or both parties, with the objective of reconciling the opposing views of the parties. The mediator was deemed to be acting as an expert in giving his opinion and not as an arbitrator.

The AA guidelines propose a process in which the mediator is the negotiator of a settlement between the parties, and only where the parties fail to reach agreement does he assume the role that has become traditional for mediators in the construction industry.

The guidelines describe mediation as a process that does not seek to establish the legal rights of the parties, as do arbitration and litigation, but "*seeks rather a dispensation that is acceptable to both parties*", and will probably require each to compromise on its legal rights. As such, any mediation in which the parties require the mediator to formulate a resolution of the dispute which will be final and binding upon them will not, strictly speaking, be a mediation but a *de facto* arbitration, and the mediator/arbitrator may have to modify procedures to suit the wishes of the parties and the requirements of the Arbitration Act.

In certain circumstances, where on a particular issue neither party is able to accept the other's point of view or to make a concession that the other may accept, the mediator may make a proposal which he considers might be acceptable to both. The proposal that he makes should be formulated to conform not with what he himself may consider correct in the circumstances but with what he thinks may have the best chance of acceptance by both parties. The mediator should be prepared to modify any proposal if so doing would increase its chance of mutual acceptance.

Where parties appoint a mediator because they desire his advice and guidance based on his superior knowledge and experience, the mediator is obliged to express his own opinion. In doing so, he should express his opinion clearly and argue and motivate it fully, so that a party who finds it hard to accept may be persuaded of its logic. The mediator should be prepared to adjust and modify his opinion if doing so would make it easier for both parties to accept it, his concern should be to express an opinion which both parties can accept rather than one which he himself consider is most correct.

Any agreement between the parties, even if its does not dispose of all the matters in dispute, should be reduced to writing and signed by the parties.

It is emphasised in each of the abovementioned guidelines, that the guidelines are not mandatory but merely a guide to implementing mediation in a simple and more uniform way. Each acknowledges the flexibility of the procedure and the desirability for each mediator to conduct the process in the way he considers will produce the most effective result. It is commonly recognised that the flexibility of the procedure is a fundamental strength, and that the procedure will depend on the basic approach adopted by the parties and the mediator.

2.8 MEDIATOR SKILLS AND TECHNIQUES

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. Boulle and Rycroft (1997: 139) believe that the skills and techniques used by a mediator, depend on their training, experience and personal attributes.

Moore (1986) discusses six common techniques mediators can initiate to generate settlement options; brainstorming, utilizing nominal group processes, discussion groups or subgroups, developing a hypothetical plausible scenario, the development of a single text negotiating document, and using outside resources.

In Figure 2, hereafter, taken from Riskin (2001:156-165), particular skills are matched to a particular mediation approach. He notes that many mediators employ strategies and techniques that make it difficult to fit their practices neatly into a particular quadrant. Reasons given for this difficulty are the fact that some mediators deliberately try to avoid attachment to a particular orientation, instead they emphasises flexibility and attempt to develop their orientation in a given case based on the participants needs. There are also mediators who have a predominant orientation, but do not always behave consistently with it but deviate from their presumptive orientation in response to circumstances arising in the course of a mediation, while other mediators may seek to foster a dominant approach using a technique associated with another approach.

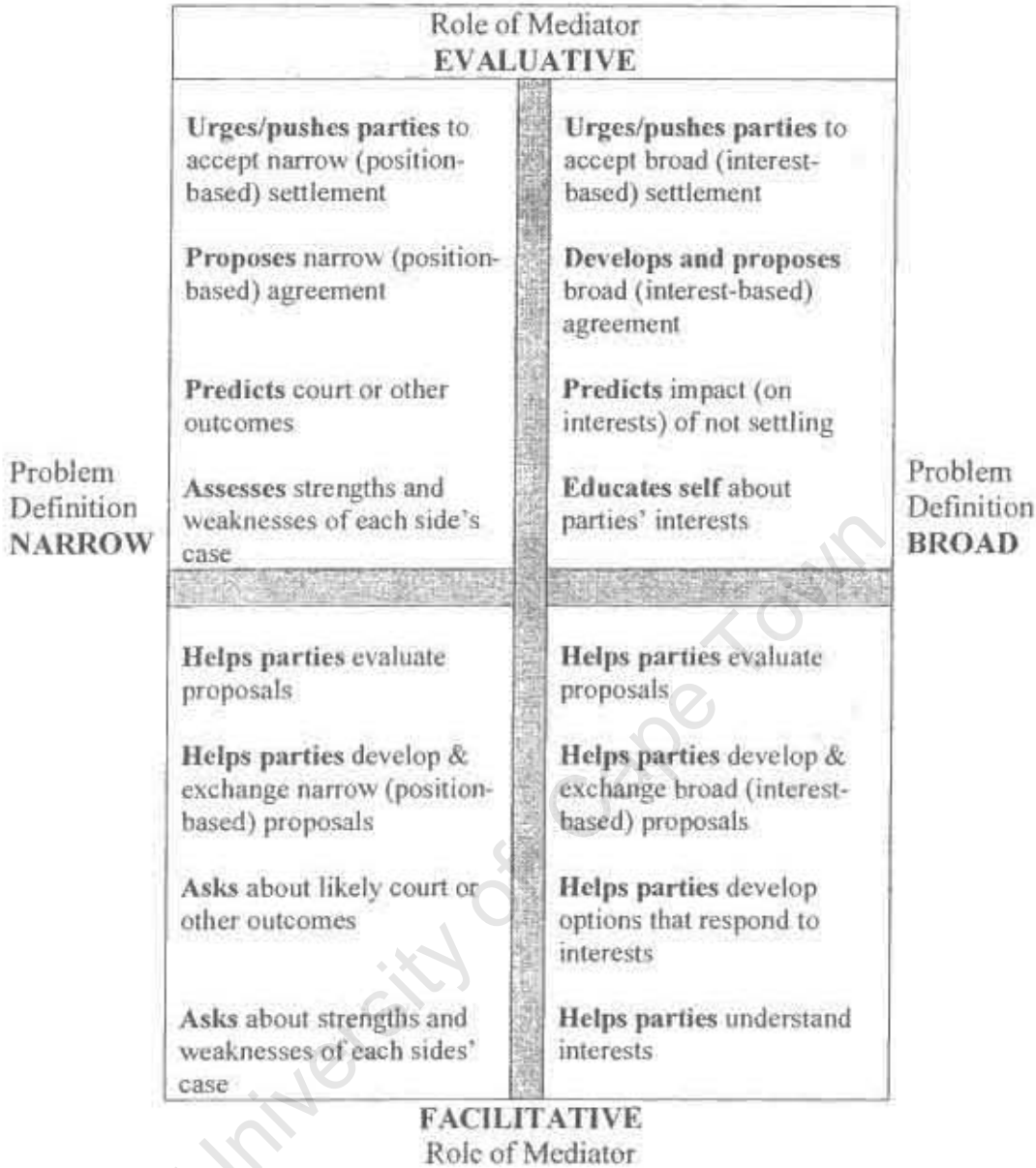


Figure 2: Mediator Techniques
Source: Riskin, 1996:165.

Boulle and Rycroft (1997: 140-167) group a selection of skills and techniques that a mediator may use to assist the mediation into four categories: organizational; facilitation; negotiation; and communication skills and techniques. In discussing the negotiation skills and techniques, Boulle and Rycroft (1997: 148) point out that as mediators do not negotiate directly with the parties, they do not practice the negotiation skills directly, but rather should transfer some of their negotiation expertise to the parties.

Riskin (2001:176) maintains that the need for subject-matter expertise (a substantial understanding of the legal, customary practices or technology associated with the disputes) increases in direct proportion to the parties' need for the mediator's evaluation, while, where parties feel capable of understanding their circumstances and developing potential solutions, a mediator with great skill in the mediation process would be preferable. He concludes that the relative importance of 'subject-matter expertise' compared to expertise in the mediation process depends on the mediator's approach.

Like Riskin, Boulle and Rycroft (1997:139) acknowledge Brown and Marriott's (1993) view that each skill and technique should further one or other of the functions of mediator, while Murray *et al.* (1996: 304) propose that a skillful mediator can enhance the different stages of the mediation process.

Bowling and Hoffman (2000) cite empirical studies that consistently show high rates of settlement, as well as high levels of mediation participation satisfaction. The studies found that these favourable results occur regardless of the mediation styles or philosophical orientations of the mediator e.g. evaluative vs. facilitative; transformative vs. problem-solving. 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 American Bar Association (ABA) Forum on the Construction Industry survey, Brooker & Lavers (2000:287) reported that Henderson found that the quality of the mediator was a significant factor affecting the settlement rate. He 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.

Cooper (1992:295) notes that many people have inherent mediation skills which they are unable to put to use because they have not organised the skills in a way which

produces results. He concluded from his experience with the AAA, that mediators should be individuals who are intelligent, quick thinking, sensitive listeners and who are able to challenge others in ways which still allow him/her to maintain the relationship.

Mackie's (1991:89) list of interventions that a mediator can use in fulfilling his role in helping the parties in reaching agreement correspond closely to Boulle and Rycroft. Mackie (1992:304) also asserts that there is evidence that most mediations conducted by skilled neutrals are successful in achieving agreement. He concluded that it is vital that the mediators have sufficient training and experience to understand the process.

Comparing arbitration and mediation, Butler and Finsen (1993:13) agree that a mediator, as a result of his facilitating role, needs different or additional abilities to those of an arbitrator. They maintain that the mediator requires 'people skills' in addition to some understanding of the field out of which the dispute has arisen. The people skills required by a facilitator to settle a dispute by negotiation are more complex than those required to settle it by adjudication. Butler and Finsen (1993:13) go on to cite Trollip (1991) on the abilities required by a mediator, inter alia, honesty, integrity, impartiality, politeness, tact, a sympathetic nature, a commitment to the process and parties an even-temperedness, patience, good listening skills, self-confidence and the ability to communicate

2.9 SUMMARY

This chapter began with a discussion on the inevitability of conflict in the construction industry, which led almost immediately to a debate on the different opinions regarding the definitions of 'conflict' and 'dispute'. In order to explore these concepts further, different views on conflict, the sources of conflict and the different conflict and dispute resolution processes were investigated. From the literature review it was evident that these theoretical arguments regarding the definition of these two terms will continue, however, most authors were in agreement with the notion that conflicts and or disputes must be approached in different ways depending on the nature of the matter.

The literature review revealed the existence of a vast array of dispute resolution processes, ranging from negotiation at one end of the spectrum to formal litigation at the other. It was also evident that the majority of the alternative dispute resolution processes (alternative to litigation and arbitration) originated and are practiced in the USA. The literature review showed mediation to be the most widely and frequently used form of ADR.

As each field of activity, in which disputes occur, has its own traditions, culture and ways of dealing with conflict and dispute, the literature on mediation deals with different applications of mediation such as divorce and family mediation, industrial and labour mediation, mediation of international conflicts, mediation of community and criminal disputes, mediation of public issues and social conflicts and finally, civil and commercial mediation. A fairly large amount of research exists on these forms of mediation, however research on mediation (and ADR) in the construction industry is limited, with only a few empirical studies reported and the remainder anecdotal.

Worldwide reports on mediation in the construction industry conclude that, where mediation is used in resolving disputes, it is often successful in approximately 80% of the cases.

A debate, similar to that on the distinction between a conflict and a dispute, exists when discussing mediation and or conciliation. There appears, however, to be agreement that the difference in terminology is unimportant as long as the parties understand the process they are entering.

A wide variety of activities fall within the broad, generally accepted definition of mediation. However, despite the room for flexibility, most authors remain adamant that there is no place in mediation for imposing solutions on parties. The use of the term 'mediation' may suggest one consistent uniform procedure, but mediation clearly comes in different models and allows the mediator to adopt different procedures. This trend is seen in the description of mediation by the two largest sources of mediators to the construction industry in South Africa. The SAICE advocates that mediators use

persuasion to convince the parties to accept their opinion as being the best way of avoiding the time and cost associated with arbitration or litigation, while the AA(SA) recommends a more classical form of mediation, that in which the mediator assists the parties in reaching their own agreement.

It is also evident that the role, functions, interventions, and qualities of the mediator are central to the mediation process. Research has shown the mediator's skills and techniques to be of utmost importance in determining the successful outcome of a mediation case.

CHAPTER 3: METHODOLOGY

3.1 INTRODUCTION

This chapter describes and justifies the major methodology used to collect the data that will be used to answer the research problem detailed in Chapter 1.

Perry (1996:8) considers that there will usually only be one major methodology that suits the research problem and associated research gaps uncovered in the literature review. Other methodologies could be used in a secondary role in formulating research issues or in extending or generalising the findings of the main method.

Like Perry, Leedy (1993:139) believes that the research problem dictates the research methodology, but considers the nature of the data to be as important in the determination of the methodology: *"the nature of the data and the problem for research dictate the research methodology"*. Based on this axiom, Leedy (1993) postulates that all research methodologies can be classified under one of two categories: *qualitative* methodology if the data are verbal, and *quantitative* methodology, if the data are numerical.

Similarly, Allan and Skinner (1991:177) believe that the contrast between "qualitative" and "quantitative" methodologies lies in the way the research-problem is formulated, the research agenda specified and in the data-processing procedures.

A third, hybrid methodology, known as triangulation, has also developed. Allan and Skinner (1991:179) cite Denzin (1970) in describing triangulation as using different methods cumulatively to compensate for the biases of any one. Perry (1996) sees the use of a combination of methods as providing for a multi-faceted perspective on the phenomena being studied. Perry acknowledges that, increasingly and in many theses, several methods are being used to provide more perspectives on the phenomena being

studied. He believes that time and other constraints dictate only one methodology, which suits the problem.

Yin (1994:4) distinguishes between five different research methods that are used in the social sciences: experiments, surveys, archival analysis, histories, and case studies. He bases the distinction between these five methods on three conditions. Firstly the type of research question posed, secondly, the extent of control an investigator has over the actual behavioural events and thirdly, on the degree of focus on contemporary, as opposed to historical, events.

The research methods, discussed by Leedy (1993:145) and Perry (1996:9), were also considered. Perry (1996:9) discusses case study or action research as a suitable methodology for qualitative research, with survey or experiment methodologies suited to quantitative research. While Leedy (1993:145) considers qualitative research, where the data are principally verbal, to include descriptive studies, historical studies, case studies and survey studies, and describes experimental and statistical-analytical studies, where the data are principally numerical, as quantitative research methodologies.

Serious consideration was given to the case study approach. To this end, an interview was conducted with a well-known construction industry mediator, Mr Alwyn du Toit. The aim of the interview was to test the possibility of utilising a case study methodology to answer the research question. In the researcher's opinion, although this approach would provide data rich in detail, the data would not reflect the existence of any variability in the way in which mediation is being employed by the construction industry mediators. Data on a wider range of views, practises and approaches was preferred to an in-depth account of a limited number of randomly chosen cases.

All things considered, a qualitative approach, using the descriptive survey study method or normative survey, described by Leedy (1993), appears to be the most appropriate methodology for answering the research question. This approach *"looks with intense accuracy at the phenomena of the moment and then describes precisely what the reseacher sees ...."* (Leedy, 1993:185).

3.2 THE POPULATION AND SAMPLE

The survey population is the mediators associated with the construction industry.

Both Schindler (1989:54) and Barth (1991:54), in identifying the construction industry population for their research, divided the construction industry into two main groups; those involved in the building industry and those involved in civil engineering works.

Schindler's (1989) sample frame comprised the following four sub-frames:

a) Consulting engineers – members of the *South African Association of Consulting Engineers*, Johannesburg: Directory of Firms 1983
b) Architects – members of the *Transvaal Institute of Architects*, 1989
c) Civil engineering contractors – members of the *South African Federation of Civil Engineering Contractors*, 1989
d) Building contractors: members of the *Master Builders' Association*, 1989

While Barth (1991) added two further groups to his sample frame:

e) Arbitrators – members of the Panel of arbitrators, *Arbitration Association of South Africa*, 1989
f) Attorneys – firms shown under Johannesburg and Pretoria, *Guidelines to Attorneys Services*, 1988

Consideration was given to following the sampling methods used by Schindler (1989) (proportionally, stratified, simple, random sampling) and Barth (1991) (random sampling). However, an analysis of the responses received to their questions regarding the respondents' involvement in mediation, as a mediator or an involved party, indicated rates of 8,5% and 14,9% respectively. In order to obtain responses from as many practicing mediators as possible, it was considered necessary to target the group directly.

From enquiries at the South African Institute of Architects (SAIA) and the Association of South African Quantity Surveyors (ASAQS), it was established that members wishing to mediate generally list with the AA(SA). Civil engineers and contractors practising mediation are generally listed by the SAICE and/or AA(SA), with building contractors and attorneys registered with the AA(SA).

It was established that mediators experienced in the resolution of disputes in the construction industry are listed with the following three organisations:

- The South African Association of Consulting Engineers (SAACE): The Association represents consulting engineers from various disciplines; electrical, mechanical, structural and civil.

- The South African Institution of Civil Engineers (SAICE): The Institute represents civil and structural engineers from all disciplines; consulting, contracting and the public service.

- The Association of Arbitrators (Southern Africa) (AA(SA)): The Association represents any person, including engineers, architects, quantity surveyors, attorneys, insurances brokers etc., who have expertise in arbitration.

The year 2002 lists of mediators were obtained from the abovementioned bodies. The SAICE national list contained 120 names, the SAACE national list, 39 and the AA (Western Cape), 95 names. Certain names appeared on more than one list, resulting in a total of 206 mediator names and addresses.

Considering the method of selection of the sample, it is best described as non-probability, convenience sampling, that is, there is no way of forecasting, estimating or guaranteeing that each element in the population is represented in the sample (Leedy 1993:200).

3.3 DATA COLLECTION – THE QUESTIONNAIRE

A postal questionnaire was distributed to 206 mediators.

The decision to use a self-completion questionnaire as opposed to telephonic interviews was based on considerations of time and finance. The use of a self-completion questionnaire would also serve to eliminate interviewer bias.

It must be noted that, as data in descriptive survey research are known to be particularly susceptible to distortion through the introduction of bias into the research design (Leedy 1993:187), every effort has been made to avoid having data contaminated by bias.

The initial questionnaire was critiqued and comprehensively revised. The major change being the reduction in the number of open-ended questions with a subsequent reduction in the length of the questionnaire. The open-ended questions were replaced with multiple choice and dichotomous (yes/no) questions. Allowing room for comments mitigated the disadvantages of using closed-type questions.

A trial or pilot of the survey was then carried out on a small group of conveniently selected professionals. No problems were encountered and no further changes were made to the questionnaire.

A self-addressed envelope and covering letter of introduction and explanation, accompanied the questionnaire. A copy of the covering letter and questionnaire is included as Appendix A.

The questionnaire was designed to take account of the characteristics of the respondents, the nature and volume of data to be collected, the format of data gathering and the plans for analysis.

The questionnaire was divided into four main sections:

- Section I: Background, training and experience of respondents
- Section II: The mediation procedure
- Section III: The role, functions, skills and techniques of the mediator
- Section IV: General comments

The rationale for each section is detailed in Chapter 4.

3.4 DATA ANALYSIS

Research into the analysis of qualitative data revealed that "*although a great deal has been written in the research literature about the practicalities and politics of qualitative research, there is surprisingly little information on how to analyse such qualitative data*" Allan and Skinner (1991:186). It was therefore decided to adopt both qualitative and quantitive approaches in the analysis of the data.

The nature of the survey data does not lend itself to complex statistical analysis. Since most of the questions deal with the attitudes and perceptions of the respondents, simple statistical analysis using the computer programs *STASTICA for Windows* (1995) and Microsoft EXCEL, were used to assist with the interpretation of data.

Finally the research design was tested for construct validity, internal validity, external validity and reliability.

Due to the qualitative nature of the research, the testing was guided by Yin's (1994) views; namely:

a) Yin (1994:35) discusses tactics available for increasing *construct validity* such as multiple sources of evidence, and chain of evidence. These tactics were utilised during the data collection stage.

b) Yin (1994) maintains that *internal validity* is only a concern in explanatory studies and is not applicable to descriptive or exploratory studies concerned with making casual statements.

c) According to Yin (1994), when the research relies on analytical generalisations, i.e. generalising a particular set of results to one broader theory, such is the case in this research, rather than statistical generalisation of a "sample" to a larger population, the problem of *external validity* is not applicable.

d) As the goal of *reliability* is to minimise the errors and biases in a study, this problem has been overcome by documenting the procedures followed in detail.

3.5 CONCLUSION

This chapter has argued and justified the choice of research methodology adopted to gather and analyse the primary and secondary data. A description was also given of the method and procedures followed in gathering the primary and secondary data. The selection of the population sample was described and justified. The following chapter discusses the findings of the survey and analyses these with reference to the research questions and objectives.

CHAPTER 4: DATA ANALYSIS

4.1 INTRODUCTION

This chapter presents, analyses and interprets the data collected, as described in the previous chapter. The conclusions drawn from this analysis are presented in Chapter 5.

4.2 RESPONSES TO THE MAILED QUESTIONNAIRE

80 questionnaires were returned from the 206 questionnaires posted. This represents a response rate of 38,8%. However, 17 of these responses were not considered for use as the respondents returned the questionnaire but stated that they had never been appointed as a mediator of a construction dispute, despite being listed as a mediator on one of the three mediator databases.

Refer to Appendix A for a copy of the questionnaire.

A further 8 questionnaires were returned marked "address unknown", while notification was received on behalf of two respondents, unable to complete the questionnaire as a result of ill health.

As the non-response rate for a mailed questionnaire is generally expected to be high, with a 15% to 25% response considered to be good (Schindler, 1989:52 and Barth, 1991:65), the resultant usable response of 63 out of 206 questionnaires, constituting an effective response rate of 30,5%, was acceptable.

The questions are analysed individually per section using basic statistical analysis. The collected and processed data, as generated by 'Statistica', is included in Appendix B1. Responses to open-ended questions are documented in Appendices B2 to B5.

4.3 BACKGROUND, TRAINING AND EXPERIENCE OF RESPONDENTS

This section, Section I of the questionnaire, was designed to acquire general information regarding the respondents' backgrounds, professional qualifications and experience as well as information on their experience and training in mediation.

The section is divided into two parts, Question 1 deals with the professional training and experience of the respondents, and Question 2, with the training and experience of the respondents in mediation.

Although it is not the intention of this research to compare and analyse the differences in the approaches of mediators from different strata within the construction industry, knowledge of the backgrounds of the respondents was deemed necessary for the contextualisation of the results.

4.3.1 Professional Training and Experience (Question 1)

a) *Question 1.1: What is/was the primary nature of your business?*

Table 3. Primary nature of respondents business

PROFESSION	COUNT	%
Consulting Engineer	39	61,9
Architect	5	7,9
Attorney	2	3,2
Contractor (Civil Engineering)	5	7,9
Contractor (Building)	1	1,6
Quantity Surveyor	6	9,5
Other (please specify):	5	7,9
TOTAL	**63**	**99,9**

From Table 3, it can be seen that the largest portion of the group, 61,9%, practice or have practiced as consulting engineers. The next largest discipline in the group is that of quantity surveyors (9,5%), then architects (7,9%), followed by "others" (7,9%), civil

engineering contractors (7,9%), attorneys (3,2%), and lastly building contractors (1,6%).

The respondents who designated "other" included a labour-relations consultant, two local government engineers, a professor of engineering and a manufacturer of building supplies.

15 respondents (23,8%) indicated that they had retired from formal employment.

b) *Question 1.2: Please indicate your age in one of the following categories.*

Table 4 depicts the age profile of the respondents.

Table 4. Age profile of respondents

AGE GROUP	COUNT	%
Under 40 years	2	3,2
41 – 50 years	8	12,7
51 – 60 years	13	20,6
Over 60 years	40	63,5

Nearly two-thirds (63,5%) of the respondents were over 60 years of age with only 15,9%, 50 years or younger. Analysing this result together with the number of respondents who indicated that they had retired (Question 1.1), reveals that 32,5% of the "over 60 years" age group have retired. Two of the respondents in the "51-60 years" age group had also retired from formal employment.

c) *Question 1.3: Please indicate your gender.*

Only 2 or 3,2% of the respondents were female.

d) *Question 1.4: What are your academic qualifications?*

Where a respondent indicated both a Bachelor and Masters degree in engineering, only the Masters degree has been taken into account in the analysis shown in Table 5.

Table 5. Academic Qualifications of Respondents

QUALIFICATION	COUNT	%
B.Sc (Eng) or B Eng	40	63,5
M.Sc	7	11,1
B.Arch	4	6,3
B.Sc(QS)	3	4,8
Other	7	11,1
None	2	3,2
TOTAL	**63**	**100**

96,8% of the respondents are in possession of a tertiary qualification, with qualified engineers (74,6%), both Bachelors and Masters, dominating the group. As expected, the academic qualifications of the respondents correspond closely with the nature of business of the respondents presented in Question 1.1, where consulting engineers and civil engineering contractors make up 69,8% of the group.

18 (28,6%) of the respondents indicated that they had more than one academic qualification. These qualifications included: PhD (4), MBA (3), LLB (2), Bluris (2), MBL, MPlan, MPA, MPhil, B.Admin, BSc (QS) and an electrical engineering qualification from MIT.

The qualifications listed by the respondents grouped as "other" are detailed in Table 6.

Table 6. Qualifications of "Others".

NO. OF RESPONDENTS	NATURE OF BUSINESS	QUALIFICATIONS	DIPLOMA IN ARBITRATION
2	Quantity surveyors	MBA/Dipl. QS	Yes
1	Labour-relations	BA (Hons)	Yes
2	Attorneys	BCom/BA LLB	No
1	Architect	Dipl. Arch	Yes
1	Manufacturer	Dipl. Arch and Eng.	Yes

Just over one third (35%) of the respondents are in possession of either a law degree (6) or an arbitration diploma (16). 29,8% of the respondents with engineering degrees also have law or arbitration training, while 50% of the non-engineering respondents have law or arbitration training.

e) Summary of findings on professional training and experience (Question 1)

The research indicated that the majority of the respondents are male, consulting engineers over 60 years of age. Nearly one quarter of this majority are retired, but continued to offer their services to the industry. Although the majority of the respondents have engineering backgrounds, as opposed to 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 dispute resolution, including mediation, is mainly the domain of the legal fraternity, while literature on claims and conflict within the industry emanate from construction industry professionals or academics (Kumaraswamy and Yogeswarn, 1998; Hibberd, 1999; Finsen, 1993, Bently, 1992; Gale, 1992; Gardiner, 1992; Scrivener, 1992; Revay, 1992; Watts, 1992; Zikmann, 1992; and Hancock, 1992). A large portion of the literature on mediation in general, as well as the mediation of construction disputes is written by authors with legal backgrounds, either practicing as lawyers, barristers, solicitors or judges or associated with the law faculties at various universities (Menkel-Meadow, 2000; Gould, 1999; Newman 1999; Butler, 1993; Boulle and Rycroft, 1997; Stipanowich and Henderson, 1992; Mackie, 1991 and 1992; and Bevan, 1992). The dominance of the legal sector in construction mediations was confirmed by the ABA Forum on the Construction Industry Survey, where Stipanowich and 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's (1993) general philosophy that disputes

arising in the execution of engineering works can best be settled by engineer mediators. However, Butler and Finsen (1992:24) noted that lawyers were becoming more active within the Association of Arbitrators, which also acts as a source of mediators.

4.3.2 Training & Experience In Mediation (Question 2)

a) *Question 2.1: For how many years have you been actively involved in the mediation of disputes?*

The analysis of the response to this question, presented in Table 7 below, indicates that the respondents have had significant experience in mediation with 28,6% having been involved in the mediation of disputes for more than 20 years and a further 31,7% for between 10 and 20 years.

Table 7. Active Experience In Mediation

YEARS ACTIVE EXPERIENCE	COUNT	%
Less than 5 years	7	11,1
5 – 10 years	17	27,0
10 – 20 years	20	31,7
More than 20 years	18	28,6
No response	1	1,6
TOTAL	**63**	**100**

b) *Question 2.2: Please rate your knowledge of the mediation process on a scale of 1 (minimal) to 5 (substantial).*

The response to this question, depicted in Table 8, overleaf, indicates that the majority (96,8%) of the respondents consider their knowledge of the mediation process to be, at the least, average (rating ≥ 3) with approximately one third of the respondents considering their knowledge of the mediation process to be substantial (a 5 rating) and a further third considering their knowledge of the process to be adequate (a 4 rating).

Table 8. Rating of Knowledge of Mediation Process

RATING	DESCRIPTION	COUNT	%
1	Minimal	0	0
2	Limited	1	1,6
3	Average	17	27,0
4	Adequate	22	34,9
5	Substantial	22	34,9
No response		1	1,6
	TOTAL	**63**	**100**

c) *Question 2.3: How did you acquire your knowledge of the mediation process?*

Having obtained information on the respondents' views on their measure of knowledge of the mediation process in Question 2.2, this question was aimed at obtaining information on how this knowledge was acquired.

Figure 3 shows that nearly two thirds (63,4%) of the respondents attribute their knowledge of the mediation process to a combination of the choices presented to them.

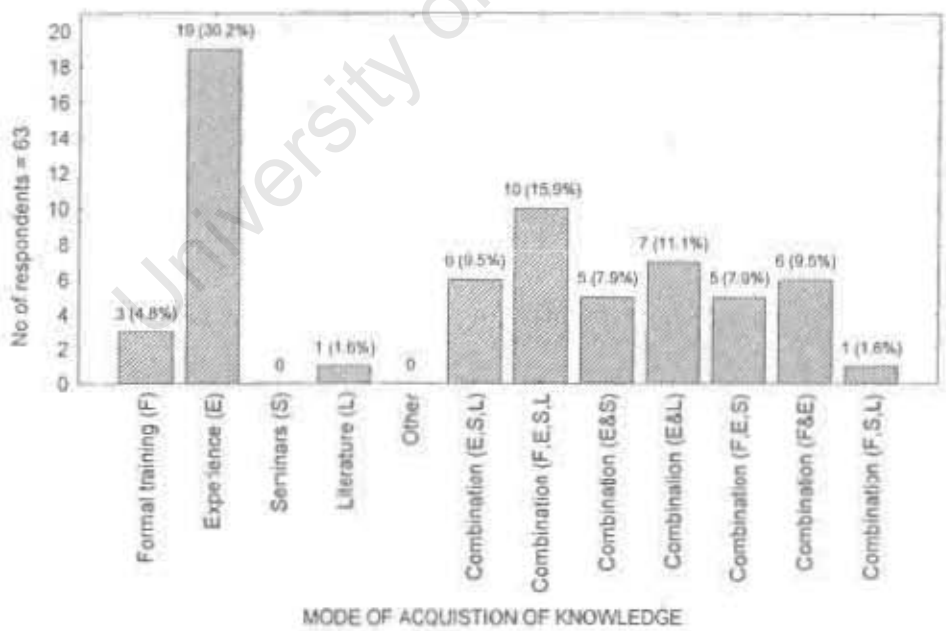


Figure 3. Acquisition of Knowledge of the Mediation Process

Table 9. Relative frequencies of acquiring knowledge on mediation

MODE OF ACQUISITION	YES (%)	NO (%)	TOTAL
Formal training	25 (39,7)	38 (60,3)	63 (100)
Experience	60 (95,2)	3 (4,8)	63 (100)
Workshops/seminars	28 (44,4)	35 (55,6)	63 (100)
Practice notes, journals and other literature	27 (42,9)	36 (57,1)	63 (100)
TOTAL	140 (55,6)	112 (44,4)	252

From Table 9 it can be seen that of the four choices presented to the respondents, '*experience*' was cited as the source of knowledge on the mediation process by 95,2% of the respondents; knowledge from '*workshops and seminars*' by 44,4%; from '*practice notes, journals and other literature*' by 42,9% and from '*formal training*' by 39,7%.

There is strong evidence to support the inference that the respondents who indicated formal training in mediation, relate to those in possession of a diploma in arbitration ($p = 0,000$, $df = 1$, $\chi^2 = 22,3$).

d) *Question 2.4: How many times have you been appointed as a mediator of a construction dispute?*

Figure 4, showing the frequency of the respondents' appointments as mediators, indicates that 39,7% of the respondents have been appointed as a mediator less than 5 times.

A chi-squared test to determine whether a relationship exists between the frequency of appointments (Question 2.4) and the number of years experience reported by the respondents (Question 2.1) showed that such a relationship existed ($p = 0,0029$, $df = 9$, $\chi^2 = 25,074$).

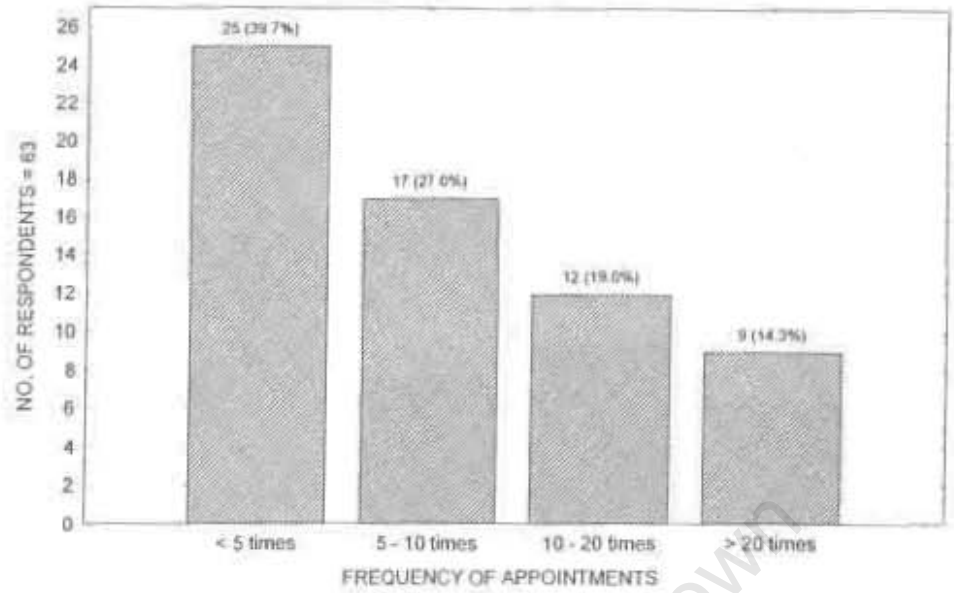


Figure 4. Frequency of Appointments

e) Summary of findings on training and experience in mediation (Question 2)

The respondents reported significant experience in mediation with nearly two thirds indicating involvement in mediation for more than ten years. This experience is cited by the majority of the respondents as their main source of knowledge of the mediation process. Generally the respondents all believe their knowledge of the mediation process to be more than adequate. The question of mediation knowledge and training will be addressed later in this chapter together with the analysis of the responses to the questions on mediation skills and techniques.

4.4 THE MEDIATION PROCESS

This section of the questionnaire was designed to determine the procedural stages of the mediation process favoured by the respondents. As the flexibility of the mediation process results in the procedure varying from case to case, the respondents were requested to respond to the questions with their most recent mediation in mind. Further reasoning for this request was that memory of the most recent case would be most salient and bias of the respondent selecting a "successful" case would be reduced.

The section is divided into two parts, Question 3 deals with the initiation of the mediation process, and Question 4 with the procedural steps of the mediation process.

4.4.1 The initiation of the mediation process (Question 3)

The purpose of the questions in this section was to determine the conditions under which the mediator entered the dispute situation.

a) *Question 3.1: How was the mediation initiated?*

Table 10 shows a fairly equal spread between the three primary actions used to initiate the mediation, namely, the mediator being appointed by a party other than the disputing parties, such as the President of the SAICE or AA(SA) (39,7%), the parties jointly approaching the mediator (31,7%), and, one party approaching the mediator (27,0%).

Table 10. Mode of initiation of mediation process

INITIATION OF MEDIATION BY:	COUNT	%
Parties jointly	20	31,7
One party	17	27,0
A party other than the disputing parties	25	39,7
No response	1	1,6
TOTAL	**63**	**100**

b) *Question 3.2: Was the mediation initiated in terms of a clause in a Contract Agreement?*

Two-thirds (66,7%) of the respondents indicated that their most recent mediation had been initiated in terms of a clause in a Contract.

c) *Question 3.3: In terms of the clause in the particular contract, was the mediation compulsory (parties obligated in terms of the contract to mediate before referring the dispute to arbitration or litigation) or a voluntary option?*

This question was selected in order to obtain further details regarding the nature of the contract clause referred to in Question 3.2.

The data obtained and depicted in Table 11 show that 58,7% of the mediations described by the respondents were voluntary mediations, and 39,7% were compulsory in terms of a clause in a contract.

Table 11. The relationship between the obligation to mediate and a contract clause.

INITIATION OF MEDIATION	NO. OF MEDIATION CASES (%)		
	COMPULSORY	VOLUNTARY	TOTAL
In terms of a contract	25 (59,5)	17 (40,5)	42 (66,7)
No contract	0 (0)	20 (100)	20 (31,7)
No response	-	-	1 (1,6)
TOTAL	**25 (39,7)**	**37 (58,7)**	**63 (100)**

d) *Question 3.4: Did the parties sign an agreement prior to the commencement of the mediation binding themselves to the mediator's opinion until otherwise ordered in arbitration or litigation proceedings?*

This question was selected to ascertain the extent of the practice that parties often agree to be bound by the mediator's decision prior to the commencement of the "mediation".

An analysis of the data revealed that 26 (41,3%) of the mediations conducted by the respondents were conditional to such an agreement, while 57,1% were not.

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.

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 and Laver, 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.

Analysing the "binding" responses to this question together with Question 3.2 and Question 3.3 reveals that 61,5% of these binding agreements occurred in compulsory mediations while 38,5% applied to voluntary mediations. No significant relationship could be found between the initiation of the mediation (Question 3.1) and the agreement to be bound by the contract (Question 3.4) ($p = 0,355$, $df = 2$, $\chi^2 = 2,072$).

e) Summary of findings on the initiation of the mediation process (Question 3)

60% of the mediation cases described by the respondents were initiated by the parties themselves, either jointly or by one of the parties. Nearly two thirds of the mediations were initiated in terms of a clause in a contract, although not all the clauses made mediation compulsory. 60% of the cases were also voluntary. The most significant finding was that in 42% 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.

An overview of the responses to Question 3 indicates the existence of six different types of mediation agreements, presented in Table 12 below, depending on whether the mediation was based on a clause in a contract, was compulsory or voluntary and whether it was binding or not.

The prominence of mediation in the settlement of dispute clauses of the South African construction contracts, and to a lesser degree in the international contracts, was discussed in Chapter 2. The obligation or option to utilise the process in terms of some contracts, for example GCC 90 or JBCC2000 respectively, was also noted. Therefore, the finding that mediation is being initiated in terms of a contract clause, with cases in

which the process is compulsory and others where the process is optional or voluntary, is not surprising – refer items 1 to 4 in Table 12 hereafter.

Table 12. Different mediation agreements observed.

ITEM	DESCRIPTION	COUNT	%
1	Clause in contract, Compulsory and binding	16	25,4
2	Clause in contract, Compulsory and non-binding	10	15,9
3	Clause in contract, Voluntary and binding	3	4,8
4	Clause in contract, Voluntary and non-binding	13	20,6
5	No contract clause, Voluntary and binding	7	11,1
6	No contract clause, Voluntary and non-binding	13	20,6
	No response	1	1,6
	TOTAL	**63**	**100**

Although it is argued that 'mandatory mediation', in which the parties are compelled to participate, undermines the integrity of mediation, Boulle and Rycroft (1997:15) argue that although 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 and Henderson (1992:326) found that where parties *agreed* to mediation, settlement or partial settlement occurred in most cases (63,1% and 9,1% respectively), however, when the parties were *required* to use mediation by contract or by court, only 57% were settled.

The practice of introducing a contract binding the parties to the mediator's decision is highly significant and appears to occur irrespective of whether the mediation was compulsory or voluntary, or in terms of a contract or not – refer items 1,3 and 5 of Table 12. It could be argued, however, that a process, where the parties agree to be bound by the a third party's opinion or decision prior to the commencement of the process, as in 41,3% 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.

4.4.2 The procedural steps of the mediation process (Question 4)

a) *Question 4.1: Describe your first contact with the parties, after finalising the terms of your appointment.*

This question was selected in order to ascertain the nature of the first contact between the mediator and the parties prior to the mediation meeting.

Table 13. First contact with parties

MODE OF CONTACT	COUNT	%
Each party contacted telephonically	17	27,0
Each party contacted in writing	14	22,2
Separate meetings held with each party	4	6,3
Joint meeting held	16	25,4
Other	0	0
More than one response	10	15,9
No response	2	3,2
TOTAL	**63**	**100**

Ten of the respondents (15,9%) marked more than one answer to this question. This response was not used, as these respondents had not understood the question clearly. 27,0% of the respondents indicated that their first contact with the parties was telephonically, 25,4% by way of a joint meeting with both parties, 22,7% in writing, with 6,3% meeting the parties for the first time in separate meetings.

The majority (58,7%) of the respondents' first contact with the parties was therefore personal (telephonically or in a meeting).

The responses to this question are more meaningful when analysed in conjunction with Question 4.2.

b) *Question 4.2: What was the purpose of this first contact?*

This question was selected in order to determine the purpose of the respondents' first contact with the parties.

Table 14. Purpose of first contact with parties

PURPOSE	COUNT	%
To arrange the time and venue of a meeting with the parties	18	28,6
To outline the procedure & programme to be followed	11	17,5
To hear oral presentations from both parties	6	9,5
To request written information/presentations from the parties	6	9,5
Other	0	0
More than 1 response	20	31,7
No response	2	3,2
TOTAL	**63**	**100**

Twenty of the respondents (31,7%) marked more than one answer to this question. 28,6% of the respondents indicated that the purpose of the contact was to arrange the time and venue of a meeting with the parties, 17,5% to outline the procedure & programme to be followed, 9,5% to hear oral presentations from both parties and 9,5% to request written information/presentations from the parties.

The responses to this question together with those to Question 4.1 are presented in Table 15 overleaf.

An analysis of the data in Table 15 shows:

i) 76,5% of the respondents who contacted the parties telephonically, did so in order to arrange a meeting with them.

ii) Of the respondents that contacted the parties in writing, 28,6% did so in order to arrange a meeting outlining the procedure and programme, while 21,4% notified the parties of the procedure and programme in writing.

iii) Where separate meetings were held with the parties these were generally for the purpose of hearing oral presentation from the parties (50,0%).

iv) In 43,8% of the cases where a joint meeting was the first contact between the respondents and the parties, this meeting was for the purpose of outlining the procedure and programme to be followed. In 18,8% of the cases the joint meeting was to hear oral presentations and in 18,8% of the cases this meeting was to request written information.

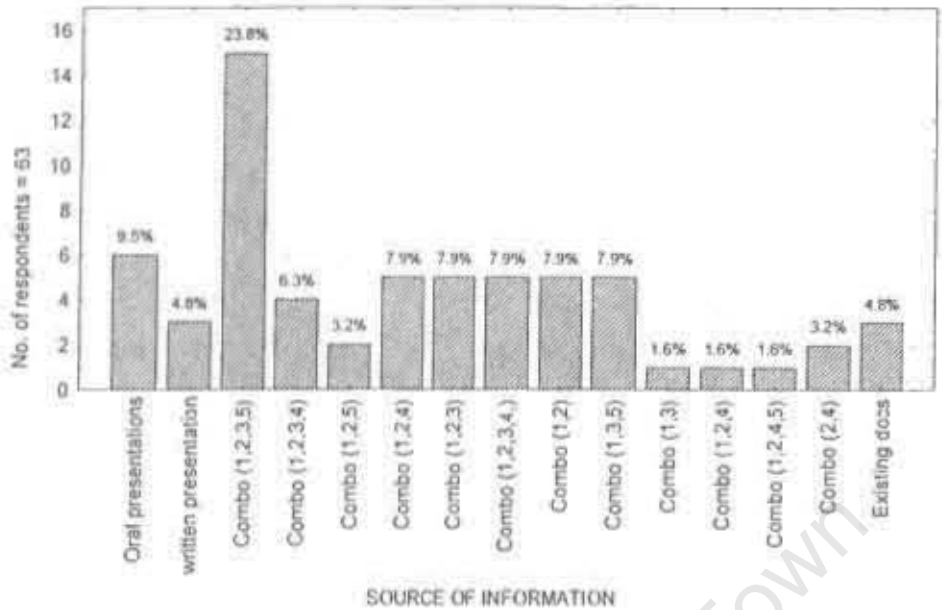
Table 15. Matrix of relative frequencies of first contact: type v purpose

First contact	NO. OF RESPONDENTS						
Purpose	Arrange meeting	Outline procedures	Oral presentations	Written presentations	More than 1 response	No resp	TOTAL
Telephonic	13	0	0	1	3	0	17
In writing	4	3	0	1	6	0	14
Separate	0	0	2	1	1	0	4
Joint	0	7	3	3	3	0	16
More than 1 response	1	1	1	0	7	0	10
No resp	0	0	0	0	0	2	2
TOTAL	18	11	6	6	20	2	63

c) *Question 4.3: From what source did you gather information on the dispute?*

Figure 5 shows that the majority (80,9%) of the respondents used more than one method of gathering information. Only 4,8% used either the existing documentation between the parties only, or written presentation by the parties only, while 9,5% relied on oral presentation by the parties only. No respondents indicated using written or oral question and answer sessions as the sole methods of obtaining information. These methods were only used in conjunction with another methods.

The figure shows that 23,8% of the respondents favoured collecting information on the dispute by using a combination of existing documentation and correspondence (Question 4.3.1), written presentations by the parties (Question 4.3.2) and oral questions and answers between the mediator and the parties (Question 4.3.5).



KEY:	
1 = Existing documentation and correspondence	3 = Oral presentations by the parties
2 = Written presentation by the parties	4 = Written questions and answers
	5 = Oral questions and answers

Figure 5. The source of information on the dispute

Individual analysis of each source of information together with the frequency with which the respondents used the different sources of information were calculated and are presented in Table 16 below.

Table 16. Obtaining information on the dispute

Source of information	Counts	Frequency of use by respondents	Relative frequency of source
Existing documentation and correspondence between	52	82,5%	28,0%
Written presentations by the parties	48	76,2%	25,0%
Oral presentations by the parties	40	63,5%	21,5%
Written questions (mediator) and answers (disputant)	18	28,6%	9,7%
Oral questions (mediator) and answers (disputant)	28	44,4%	15,1%
TOTAL	186	-	100%

Written documentation (either existing or in the form of presentations) appeared to be the respondents' preferred source of information, being used with highest frequency (62,7%).

d) *Question 4.4: Did either of the parties make use of expert witnesses?*

The majority (81%) of the respondents reported that expert witnesses were not used by either party.

e) *Question 4.5: Was it necessary for you to seek any outside advice, such as legal or expert advice, on any matters?*

79,4% of the respondents reported that they did not seek outside advice on matters pertaining to the mediation. Only three of respondents justified their response for consulting an advisor as follows:

- *"legal check on 'opinion' only."*
- *"I never consider myself to be the ultimate expert on any subject."*
- *"At the request of disputant."*

While only one respondent noted that the reason for not seeking outside advise was: *"…. because I was appointed for matters within my particular field of expertise."*

f) *Question 4.6: What was your next step, after having ascertained the nature of the dispute and the issues on which decisions were needed?*

This question was selected in order to determine the extent to which problem-solving discussions were employed after all information had been obtained prior to decision-making.

There was one non-response to this question while six of the respondents checked more than one response to this question. In each of the six cases, however, the respondents checked Question 4.6.1 and this was the response utilised in the analysis. The rationale for this decision was based on the fact that this question aimed to determine the extent to which problem-solving discussions occurred, whereas the other options related to the expression of a solution or opinion by the mediator without a process of problem-

solving. Therefore, if Question 4.6.1 was checked, it was deduced that problem-solving discussions did in fact take place.

Table 17 shows that in 41,3% of the cases, the respondents facilitated joint problem-solving discussions between the parties.

Grouping the responses to Questions 4.6.1, 4.6.2 and 4.6.3, together reveals that in 68,3% of cases, discussions regarding solutions and opinions took place, while in the remainder of the cases (30,1%), the mediator submitted an opinion or decision without any discussions.

Table 17. Extent of problem-solving procedure utilised during the mediation

ACTIVITY	COUNT	%
Facilitation of joint solution-seeking discussions between the parties	26	41,3
Suggestion of a possible solution for further discussion with the parties	7	11,1
Submission of an opinion (written or verbal) for further discussion	10	15,9
Submission of a written opinion to the parties, for their acceptance	12	19,0
Submission of a binding written decision to the parties	7	11,1
No response	1	1,6
TOTAL	**63**	**100**

g) *Question 4.7: Please indicate the proportion of time, as a percentage, spent on the following (listed) activities.*

This question was selected in order to obtain an overall impression of the relative importance the mediators placed on the different stages of the mediation procedure. There were two non-responses to this question.

The results, presented in Table 18, overleaf, show that:

i) The majority of the respondents (more than 80%) allocated most of their time to four activities, namely: preparatory matters (8,5%) obtaining information

(written and oral) (43,1%) and drafting the final decision, opinion or agreement (27,0%).

ii) 66,7% of the respondents indicated that time was spent negotiating solutions. This activity accounted for 16,4% of the total mediation time.

Table 18. Analysis of percentage time spent on different mediation activities

ACTIVITY	FREQUENCIES	
	PER CASE (%)	PER TOTAL TIME (%)
Preparatory matters e.g. signing agreements, programme, venue, etc.	82,5	8,5
Obtaining information on the dispute in written form	82,5	21,9
Obtaining information on the dispute in oral/verbal form	85,7	21,2
Negotiating solutions	66,7	16,4
Bargaining	27,0	3,5
Drafting the final decision/opinion/agreement	88,9	27,0
Other	11,1	1,5
	TOTAL	**100**

iii) Only 27,0% of the respondents reported that time was spent bargaining solutions with the parties. This activity accounted for only 3,5% of the total time spent on the mediation.

iv) The following "other" activities were listed by the respondents:

- Five respondents reported spending between 5% and 10% of their time on "*winding-up*" the mediation.
- One respondent spent 25% of his time spent on "*inspections in loco*"
- One respondent spent 8% of his time "*travelling*".

h) *Question 4.8: If negotiation or bargaining took place during the mediation process, please describe how these activities took place.*

This question was selected in order to determine how the negotiating/bargaining activities occurred. 67,8% of the respondents indicated that bargaining and/or negotiation took place. This result corresponds well to the response to Question 4.7 where it was found that negotiation took place in 66,7% of the cases and bargaining in 27% of the cases.

Bargaining and negotiation took place in 42 of the cases, in 28,6% of these, respondents reported that negotiation/bargaining took place openly between the disputants, while in 59,5%, the respondents reported that the parties' negotiated/bargained through the mediator. In 11,9% of the cases both activities occurred.

Analysis of the responses to Question 4.6 together with the responses to this question shows that negotiation played a role in 57% of the cases, where joint solution-seeking discussions between the parties occurred. While negotiation only occurred in 19% of the discussions on the mediator's opinion and 17% on the mediator's possible solution to the problem.

i) *Question 4.9: Various institutions and associations have published guidelines for mediation of construction industry disputes. Which guidelines did you refer to during the mediation?*

This question was selected in an attempt to ascertain the extent to which published guidelines on the mediation process are utilised as references by the respondents. The following figure represents the results obtained.

Figure 6, below, shows that nearly one quarter (25,4%) of the respondents did not use any published guidelines, 33,2% used a combination of the different published guidelines and 33,4% used one of the three listed guidelines only.

The relative frequencies of use of the three published guidelines were calculated as 27,5% for the SAICE guidelines, 28,6% for the AA(SA) guidelines and 20,9% 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.

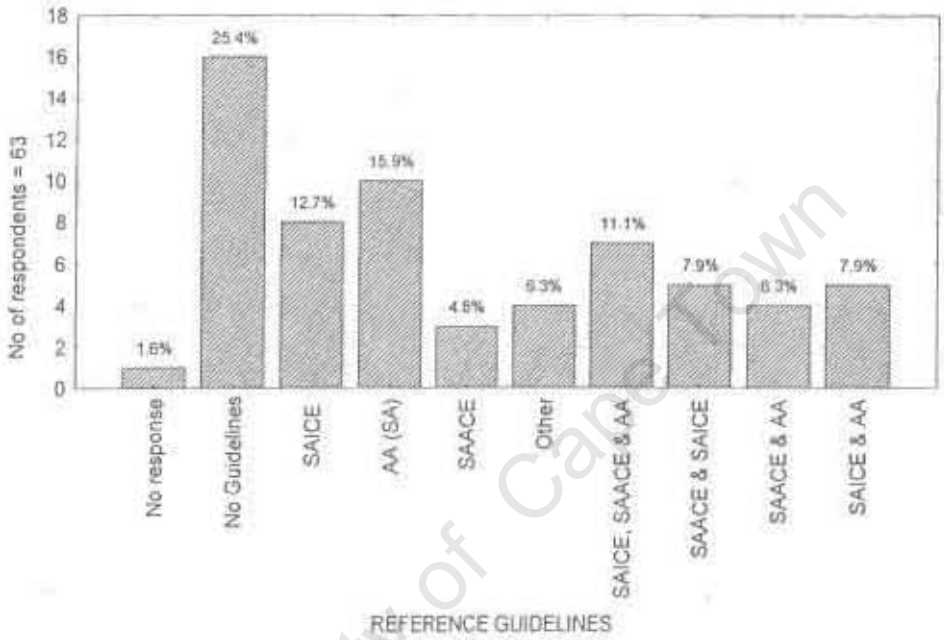


Figure 6. Utilisation of Reference Guidelines

These findings imply that the respondents do not place great reliance on any particular published guideline, instead they rely on a combination of guidelines together with their own tried and tested experiences, in deciding the procedure. Brooker and 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 and Henderson (1992:323), found that the major sources of mediation procedures were party-developed rules (34,1%), rules of the court (27,4%) and the AAA mediation rules (20,1%).

Four of the respondents justified not using any of the published guidelines as follows:

- *"Used procedure developed by experience over the years – did not adhere strictly to SAICE guidelines"*
- *"Arbitration in South Africa – Butler and Finsen"* (This book describes an arbitration procedure).
- *"ADR course guidelines"*
- *"Law of Construction - Loots"*

j) *Question 4.10: What were your primary considerations when determining the procedure to be followed?*

90,5% of the respondents submitted comments. A transcript of these comments is given in Appendix B2.

An analysis of the responses indicates that approximately 40,4% of the respondents determined the procedure of the mediation in accordance with their role in the process.

Such responses included:

- *"obtain a solution"*
- *"to resolve as many issues as possible by agreement prior to presenting a formal opinion"*
- *"to facilitate settlement"*
- *"seeking solution to impasse"*
- *"to come up with the best solution to the problem and then persuade the parties to accept it"*
- *"to do justice"*

25,4% of the respondents commented on the importance of fairness, reasonableness and equity in determining the procedure. As stated by one respondent:

"My primary considerations were that each party had equal opportunity to put their cases to me and also equal opportunity to comment on the other party's case".

Ensuring that the mediator fully understood the facts and/or views of the parties, was considered by some respondents in determining the procedures (17%). Comments included:

- *"To establish fact from fiction"*
- *"to arrive at an understanding of the true cause of the problem"*
- *"to ascertain the facts of the case".*

Some respondents considered the "nature of the dispute" to be the consideration in determining the procedure (10%). Comments included:

- *"The procedure had to be appropriate to the nature of the dispute...."*
- *"To determine the nature of the dispute, i.e. is it mostly fact or law or both".*

Time, costs and speed played a role in the determining of the procedure in some cases as did the attitude of the parties, and the necessity of conforming to procedures stipulated in the contract document and guidelines:

- *"Cost and time efficiency"*
- *"to avoid unnecessary expenditure"*
- *"Followed a recommended published procedure agreed to by the parties"*
- *"to conform to procedures stipulated in the contact documents and guidelines"*
- *"following the GCC90 of SAICE procedures as provided by the contract".*

k) *Question 4.11: What input did the disputants have into the determination of the procedure followed?*

This question aimed to establish the degree of input that the disputants had into the determination of the procedure employed.

The results showed that in only 16 (25,4%) of the 63 cases did the disputants have a substantial (≥ 4 rating) input into the determination of the procedure, while in 28 (44,4%) of the cases their input was limited (≤ 2 rating).

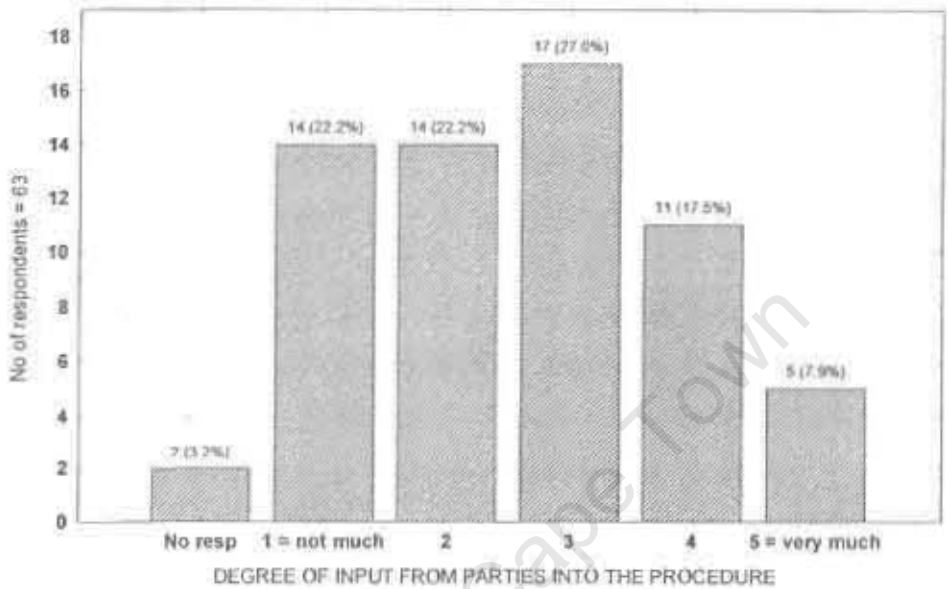


Figure 7. Input from parties into the mediation procedure

l) *Question 4.12: Please indicate the extent to which, you believe, the aspects listed below, affected the outcome of the mediation process, on a scale of 1 (minor importance) to 5 (major importance) with U = unsure.*

This question was designed to elicit the attitudes and perceptions of the respondents regarding the importance of different aspects of the mediation process on the outcome of the mediation.

Each aspect is listed in Table 19 together with the frequency of the rating each received from the respondents. The mean of each aspect has been calculated and the mode of the distribution has been highlighted for emphasis.

Table 19. The importance of various aspects of the mediation procedure on the outcome of the process

	ASPECT	No. of respondents per rating						No resp	Total	Mean
		1	2	3	4	5	U			
1	Parties' willingness to participate in the mediation process	2	3	6	17	**32**	0	4	63	4,3
2	Parties' willingness to reach a settlement	1	4	6	19	**29**	0	4	63	4,2
3	Parties' understanding of the nature and process of mediation	5	13	**17**	16	7	0	5	63	3,2
4	Mediator's neutrality	1	1	3	8	**47**	0	3	63	4,7
5	Mediator's expertise in the process of mediation	2	1	14	16	**25**	0	5	63	4,1
6	Mediator's expertise and authority on the matter of the dispute	2	0	5	**28**	25	0	3	63	4,2
7	The confidentiality of the process	6	8	15	13	**17**	0	4	63	3,5
8	Parties' control over the process and its outcome	12	**16**	14	7	9	0	5	63	2,7
9	The consensual nature of the resolution (as opposed to an imposed solution)	3	3	9	**24**	14	4	6	63	3.5

KEY:
1 = minor importance 2 = limited importance 3 = fairly important
4 = important 5 = major importance U= unsure

From Table 19 it can be seen that the following four aspects of the mediation process are rated as being substantially important to the outcome (mode = 5, mean ≥ 4):

- Parties' willingness to participate in the mediation process;
- Parties' willingness to reach a settlement;
- Mediator's neutrality;
- Mediator's expertise and authority on the matter of the dispute.

The respondents rated the following aspects to be, at least, fairly important (mode ≥4, mean ≥ 3):

- Mediator's expertise in the process of mediation;

- The confidentiality of the process;
- The consensual nature of the resolution (as opposed to an imposed solution).

Low ratings were given to the following two aspects:

- Parties' control over the process and its outcome (mode = 2, mean = 2,7);
- Parties' understanding of the nature and process of mediation (mode = 3, mean = 3,2.)

These results correspond to the respondents' attitudes regarding the amount of input of the parties into the determination of the mediation procedure (Question 4.11). This question found that 45 of the 63 respondents (71,4%) rated this input to be ≤ 3 (a fair amount to not much).

Four respondents indicated an "unsure" response. All four responses were to Question 4.12.9 - the importance of the consensual nature of the resolution (as opposed to an imposed solution).

m) Summary of findings on the procedural steps of the mediation process (Question 4)

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

- Preliminary or preparatory matters (8,5% of total mediation time)
- Obtaining information (43,1% of total mediation time)
- Problem solving (19,9% of total mediation time)
- Drafting the final decision/opinion/agreement (27% of total mediation time)

On average, it appears that the respondents allocated only one fifth (19,9%) of the total mediation time to solution-seeking activities. The majority of the time was allocated to

gathering information on the dispute (43,1%) and drafting the final decision/opinion/ agreement (27%).

i) Preliminary or preparatory matters: 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.

ii) Obtaining information: The respondents relied predominantly on written sources for obtaining 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 63,5% of the cases.

iii) Problem solving: It is significant that in a process aimed at assisting parties in dispute to reach agreement, indications are that only *one fifth* (19,9%) 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 and 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 the other problem-solving activities, such as where the mediator offered an opinion or solution.

Generally the parties to the mediation did not have any substantial input into the determination of the mediation procedure as the majority of the respondents indicated that this aspect was not of much importance to the process and its outcome. A quarter (25,4%) of the respondents did not use any published guidelines, while 38% used a combination of published guidelines.

The guidelines given in the three documents published by the SAICE, SAACE and AA(SA) were used as references on mediation in 66,6% of the cases. Although these guidelines advise the mediator to consult with the parties on the procedure, the responses to Questions 4.11 and 4.12.8 reveal that the respondents did not consider the parties' input into the process to be of much importance.

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

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 plays the most important role in determining the outcome of the mediation process, while the mediator's expertise in the mediation process is of lesser importance.

4.5 THE MEDIATOR

This section of the questionnaire was designed to elicit the attitudes and perceptions of the role (overall aim and objective) and functions (specific tasks and behaviours) of the mediator as well as to determine the skills and techniques that the respondents themselves use during the mediation of a construction industry dispute.

The section was divided into two parts, Question 5 deals with the role and functions of the mediator, and Question 6 with the skills and techniques of the mediator.

4.5.1 The Role and functions of the Mediator (Question 5)

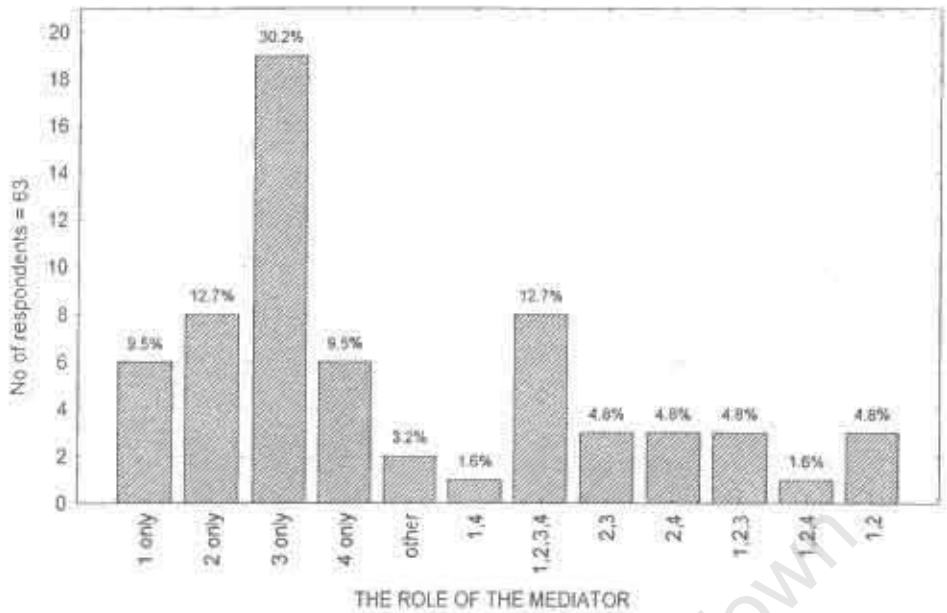
a) *Question 5.1: What do you think the role of a mediator is?*

This question was selected in order to ascertain the respondents' perception of the role of a mediator.

36,5% of the respondents checked more than one answer to this question as shown in Figure 8, resulting in a total of 103 responses.

Two respondents justified these multiple choices as follows:

- "*All the above. The essence is to satisfy the parties as 5.1.3.* [to provide professional expertise on the content of the dispute and persuade the parties that the settlement you propose is fair, reasonable and in everyone's best interests.] *The approach depends on the matter and the parties and must be flexible to a point.*"
- "*Mediation might involve any of the first three, or any combination of them. 5.1.4* [to consider the information and evidence gathered, and give a decision based thereon, for or against the claimant] *better described arbitration than mediation.*"



KEY:
1 = facilitate dialogue; 2 = persuade to accept opinion (court outcome); 3 = persuade to accept opinion (interest based); 4 = make decision; 5 = other.

Figure 8: Perceptions of the role of the mediator

Two respondents checked the "other" option and indicated the following reasons for this action:

- *"Can be all of above depending on type of mediation"*
- *"The mediator's role involves all of the above in reality. In contract only 5.1.1* [to facilitate constructive dialogue between the parties and encourage the parties to negotiate their own settlement] *is the strict role of mediation."*

The respondents made the following additional comments:

- *"to encourage the parties to conduct further negotiation should the mediator's opinion be unacceptable to one of them".*
- *"5.1.4 is more the duty of an arbitrator than of a mediator."*
- *"Facilitate constructive dialogue ... ...based on opinion given by mediator."*

- *'The SAICE and SAACE guidelines assume 5.1.4, i.e. mediation is an informal arbitration. I think 5.1.1, 5.1.2* [to provide professional expertise on the content of the dispute and persuade the parties that your opinion of the outcome would be within the range of a likely court/arbitration ruling] *and 5.1.3 should be encouraged. Each dispute has to be assessed in relation to the attitude of the parties towards negotiation. An 'opinion' is almost always essential."*

Table 20. Relative frequencies of the perceived roles of the mediator.

Ques.	ROLE OF MEDIATOR	COUNT	FREQUENCY
5.1.1	To facilitate constructive dialogue between the parties and encourage the parties to negotiate their own settlement.	22	21,4%
5.1.2	To provide professional expertise on the content of the dispute and persuade the parties that your opinion of the outcome would be within the range of a likely court/arbitration ruling.	29	28,2%
5.1.3	To provide professional expertise on the content of the dispute and persuade the parties that the settlement you propose is fair, reasonable and in everyone's best interests.	33	32,0%
5.1.4	To consider the information and evidence gathered, and give a decision based thereon, for or against the claimant.	19	18,4%
	TOTAL	103	100%

Of the four roles suggested to the respondents and listed in Table 20, persuading the parties that the mediator's proposed settlement is fair, reasonable and in everyone's best interests is 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 is considered 28,2% of the time; with facilitating constructive dialogue between the parties and encouraging the parties to negotiate their own settlement cited 21,4% of the time. Considering the information and evidence gathered and giving a decision based thereon, for or against the claimant, was cited less frequently (18,4%) as the role of the mediator.

The data on the perceived role of the mediator can be analysed from three different perspectives. Firstly, according to the role that technical experience and expertise play

in the process. This being the case, evaluation of the dispute based on subject expertise was considered 78,6% of the time, with facilitative skills being the determining factor in the remaining 12,4% counts.

Secondly, according to the mediator's actions in moving the parties towards settlement. This being the case, persuasion was considered 60,2% of the time, facilitating discussion, 21,4% and decision-making, 18,4% 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 53,4% of the time, and rights-based approaches, 46,6% of the time.

The above comments reflect 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.

b) *Question 5.2: Please rate the following on a scale 1 (not important) to 5 (very important) in terms of your perception of the importance of these functions of a mediator.*

This question was selected in order to determine the degree of importance the respondents attributed to various functions of a mediator. The results are summarised in Table 21 hereafter.

The listed functions could be divided into two groups based on the rating the function received from the majority (75%) of respondents.

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.

Table 21. Relative frequency (count and %) of the importance of the functions of a mediator

	FUNCTION OF MEDIATOR	Not important to very important					No resp
		1	2	3	4	5	
1	Develop and preserve the trust and confidence of the parties in your role.	0 (0)	0 (0)	2 (3)	13(21)	**45(71)**	3 (5)
2	Educate the parties as to the mediation process.	5 (8)	13(21)	**18(29)**	11(17)	13(21)	3 (5)
3	Facilitate face-to-face discussions between the parties	2 (3)	7 (11)	13(21)	**20(32)**	15(24)	6(10)
4	Create an environment conducive to discussion and co-operation at meetings.	1 (2)	1 (2)	12(19)	**27(43)**	18(29)	4 (6)
5	Assist the parties in analysing and prioritising the issues, then designing an appropriate plan of action.	0 (0)	3 (5)	13(21)	**26(41)**	16(25)	5 (8)
6	Assist the parties in identifying common ground and isolating the really contentious issues.	0 (0)	2 (3)	9 (14)	22(35)	**27(43)**	3 (5)
7	Encourage the parties to reflect on the consequences of their not settling the dispute themselves.	6 (10)	5 (8)	11(17)	17(27)	**20(32)**	4 (6)
8	Promote constructive communication and active listening.	3 (5)	3 (5)	14(22)	19(30)	**21(33)**	3 (5)
9	Encourage the parties to explore possible solutions and settlement proposals.	4 (6)	4 (6)	14(22)	**20(32)**	19(30)	2 (3)
10	Evaluate the dispute and give a reasoned opinion or decision	2 (3)	2 (3)	2 (3)	18(29)	**38(60)**	1 (2)

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.

The following results are noteworthy:

i) 75% of the respondents perceive the development and preservation of the trust and confidence of the parties in the mediators' role to be very important.

ii) 61% of the respondents' perceive the evaluation of the dispute and giving a reasoned opinion and decision as very important.

iii) Educating the parties as to the mediation process is generally not considered as important as the other functions with only 40% of the respondents rating this function as substantially to very important.

c) Summary of findings on the role and functions of the mediator (Question 5)

As the role of the mediator generally flows from the way the mediator approaches the process, the findings regarding the attitude and perceptions of the respondents to the role of the mediator are consistent with the findings regarding the procedures the respondents followed during the mediation cases described in Question 4.

The analysis of the different roles of the mediator indicates that the evaluative approach appears to dominate the facilitative approach. This proposition is supported by the analysis of the functions the respondents considered to be important. Analysis of the perceived importance of various functions of the mediator indicates that the respondents consider evaluative mediator-orientated functions to be of more importance than party- or process-orientated functions.

4.5.2 The Skills and Techniques of the Mediator (Question 6)

a) *Question 6.1: Please indicate the frequency with which you utilise the following mediation techniques, on a scale of 1 (never) to 5 (always) with U = the term is unfamiliar to me.*

This question was selected in order to ascertain the frequency of use of the listed mediation techniques. The results are presented in Table 22 hereunder.

Table 22. Relative frequency of use of various mediation techniques

		FREQUENCY OF USE OF TECHNIQUE (%)						
Item	**Technique**	**No resp**	**Never 1**	**Rare 2**	**Some-times 3**	**Often 4**	**Always 5**	**U**
1	Pre-planning of seating arrangements	9,5	27,0	19,0	22,2	7,9	12,7	1,6
2	Caucusing	7,9	25,4	11,1	20,6	14,3	15,9	4,8
3	Linked bargaining	6,3	25,4	17,5	15,9	17,5	3,2	14,3
4	Brainstorming options	4,8	19,0	20,6	19,0	20,6	7,9	7,9
5	Reframing or repackaging issues	4,8	14,3	9,5	22,2	28,6	11,1	9,5
6	"Shaming"	4,8	52,4	11,1	0,0	3,2	0,0	28,6

An analysis of Table 22 indicates that the respondents surveyed do not often use the mediation techniques listed. The technique most often used, namely, reframing or repacking issues, was only used 'often' by 42,2% of the respondents while 55% of the respondents have never used the technique of shaming. The technique of shaming was unknown to 30% of the respondents.

b) *Question 6.2: Please list any other techniques you use.*

Six techniques used, to varying degrees, by mediators were listed in Question 6.1. This question was selected in order to establish any other techniques that the respondents used.

Comments were submitted by 47,6% of the respondents. A transcript of these comments is given in Appendix B3.

A large number of respondents listed 'attitude' and other personal traits as useful techniques:

- *"I try to maintain an attitude of impartiality."*
- *"...be open, professional and supportive"*
- *"convey sincerity in trying to understand different parties' points of view"*
- *"try and have the patience of Job and the wisdom of Solomon"*
- *"experience and own personality which is diffident and retiring – be one's self"*
- *"calm but thorough investigation..".*

Communication techniques that fall into the categories of careful reading and listening, and, diligent and effective questioning were also mentioned by the respondents together with *"diffusing animosity"* and *"in joint meeting get parties to put other side's argument in their own words and crosscheck".*

Caucusing and promoting reality were mentioned by a few respondents in the following ways:

- "*Discussing each party's case with him individually and trying to convince him of the benefit of settlement"*
- "*in separate meetings establish the real causes of irritations/hurt/ obstacles"*
- "*try to inform the parties what the outcome would be if the dispute had to go to arbitration*"
- "*try to set out the consequences of choices as clearly as possible*"
- "*what if*"
- "*quoting legal authority*"
- "*pointing out downside of litigation*".

Site visits and "*experience*" were listed as techniques as were "*following the guidelines issued by the SAICE*", and "*getting both parties to realise that as a mediator I have the technical skills to apply to disputes – as well as arbitration qualifications*".

Some respondents gave a brief summary of the procedures they followed during the mediation in response to the question.

c) *Question 6.3: Do you believe that a mediator should possess specific and particular skills, i.e. different to those required by an arbitrator or adjudicator?*

45 (71,4%) of the respondents indicated that they believed that a mediator should possess skills, specific and particular to the mediation process, while 17 (27%) did not. There was one non-response.

d) *Question 6.4: If YES (to Question 6.3), please list the most important skill a mediator should possess.*

Respondents who had indicated that they believed that a mediator should possess specific and particular skills, that is, skills different to those required by an arbitrator, in Question 6.3, were requested to list the most important skill a mediator should possess

47,6% of the respondents submitted comments. A transcript of all these comments is given in Appendix B4.

28,1% of the respondents stipulated that they believed the most important skill, differentiating a mediator from an adjudicator or arbitrator, was his/her technical knowledge, experience and subject expertise in the matter of the dispute.

Communication skills (15,8%) such as good listening as well as negotiation skills (8,8%), facilitation skills (3,5%) and conciliation skills (1,8%) were considered important to some respondents.

The characteristics of honesty, sincerity and supportiveness were listed together with, "*obtaining empathy*", "*being trusted by the parties*", "*creating and atmosphere in which, calm, reasoned and logical discussions can take place*" and "*knowing when to start suggesting compromises as the mediation unfolds*", "*both parties should trust you – this requires confidence*".

e) Summary of findings on the skills and techniques of the mediator (Question 6)

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.

4.6 GENERAL

4.6.1 The Rate of Resolution of dispute by Mediation (Question 7.1)

Question 7.1: How many of the disputes, which you have mediated, have been resolved by the mediation and have not gone to arbitration or litigation for resolution?

This question was selected in order to determine the success rate of mediation in settling disputes, that is, finding a final resolution for the dispute without going to arbitration or litigation. Table 23 shows that, for 31,7% of the respondents, the process of mediation has been 100% successful, while a further 30,2% report a success rate of more than 80%, that is, 61,9% of respondents report a success rate of more than 80%.

Table 23. Frequency of settlement of disputes using mediation

ACTIVITY	COUNT	%
Less than 50%	8	12,7
More than 50 % but less than 80%	16	25,4
More than 80% but less than 100%	19	30,2
100%	20	31,7
TOTAL	**63**	**100**

These findings confirm that mediation is being used within the construction industry to settle disputes with the majority of the respondents reporting a settlement rate of greater than 80% of their cases.

4.6.2 General comments on the preferred approach to mediation (Question 7.2)

This section afforded the respondents an opportunity to comment on their preferred approach to the mediation of disputes in the construction industry.

Approximately forty nine percent (49,2%) of the respondents submitted comments. A transcript of these comments is given in Appendix B5.

Thirty five and a half percent (35,5%) of the respondents used the opportunity to comment on mediation generally, rather than on their preferred approach to mediation. These comments included:

- *"The documentation must be complete. The people involved in presenting the problem must be technically competent"*
- *"Very good if parties are prepared to negotiate"*
- *"I feel that mediation has been used too frequently to compromise the employer"*

- *"I feel mediation should carry more weight. I almost get the feeling that people see mediation as a step to arbitration if they do not get the result they are after."*
- *"I like to feel on resolution that each party is equally dissatisfied."*

Only two respondents commented on the introduction of adjudication into the industry, one of which stated:

> *"Mediation is being fast replaced by dispute review boards and or adjudications"*

A group of 4 respondents, making up 12,9% of the responses, indicated a preference for adjudication or arbitration rather than mediation. These comments included:

- *"I try to get the parties to understand at an early stage that the procedures to be followed will be formal, almost as in arbitration"*
- *"I favour using either adjudication or a process which yields a legally enforceable award"*
- *"I would prefer to see a direct arbitration process with the summary procedure rules being used to come to a quick and final result"*
- *"I have had greater success with the parties each putting their cases to the mediator and he giving his opinion which is accepted as final with not further facility for recourse."*

The remaining 16 respondents' comments could be divided into two groups, those who approach mediation with the view to facilitating a settlement or solution (22,6% of total responses) and those who take a more evaluative approach aimed to submitting their opinion on the dispute to the parties (29% of total responses).

The "facilitating" responses included:

- *"getting the parties to reach an agreement without having to give a formal 'mediator's opinion'";*

- *"amicable solution";*
- *"It is not what the mediator prefers but what is likely to be effective, that is important."*

The "evaluative" approaches were described as:

- *"written submission followed by a reasoned opinion";*
- *"The function of the mediator and of mediation is to, as part of the negotiation process, give a professional, unbiased, independent, impartial and highly expert view....."*;
- *"I prefer consensual mediation where the mediator does not rule or provide an opinion but gets parties to agree to a suggested solution."*

The above comments reflect the differences in the views and opinions of the respondents on the mediator's role, showing a similar diversity in the perception of the role as previously seen in the responses to Question 5.1.

CHAPTER 5: CONCLUSION

5.1 INTRODUCTION

The aim of this research was to determine whether "*the practice of mediation in the South African construction industry is consistent with the generally accepted principles of the mediation process.*" This was done by reviewing literature relating to mediation in its broadest sense - as a process of solving problems and settling disputes - and then by reviewing literature on mediation within the construction industry.

Accepted principles, processes and practices of mediation emerged from the literature, despite the continuous evolution of the mediation process. A fair amount of literature exists on mediation as it is employed by mediators and lawyers world-wide and in various fields of dispute resolution. However, literature on the mediation of disputes within the South African construction industry is limited. Literature on the mediation process was generally found within works on arbitration or construction law and was usually advisory or anecdotal. However, empirical research into mediation, as a dispute resolution mechanism for use in the construction industry, has 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 alternative dispute resolution mechanism.

In order to determine whether the practice of mediation in the South African construction industry is consistent with the fundamental principles of the mediation process, data were collected using a questionnaire mailed to 206 respondents representing a sample of the population of mediators. 63 responses, representing a response rate of 30,5%, were received and analysed using basic descriptive statistics. The quantitative results were then used to assist with the qualitative interpretation of the responses.

The findings generated from the analysis and interpretation of the results of the survey, summarised in Chapter 4, will determine whether the research hypotheses developed in Chapter 1 can be accepted or rejected.

5.2 TESTING THE HYPOTHESES

5.2.1 Sub-hypothesis 1

Sub-hypothesis 1 was stated as:

> *"Construction industry mediators do not assist the disputing parties in determining their own settlement."*

In Sections 4.4 and 4.5 it was argued that mediators were more intent on resolving the dispute *for* the parties, than assisting the parties in *seeking their own* settlement to the dispute. Furthermore, the findings in Section 4.5.1 revealed that the majority of the mediators appear to see their role as seeking either a rights-based or interests-based solution to the dispute, based on the information they obtain from the parties.

This hypothesis is also supported by the findings in Section 4.5.2, where it was found that the respondents placed more emphasis on the importance of *their* technical expertise and authority on the matter in dispute and *their* clear 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. Further support for this hypothesis is found in the analysis of the data in Section 4.4.2, where the respondents attribute a lack of importance to the inclusion of the parties in determining the mediation procedure. Similarly, the findings reported in Section 4.5.1 indicated that the mediators did not place much importance on ensuring the parties' understanding and control over the mediation process and outcome.

Based on the aforegoing, this hypothesis may be accepted as true.

5.2.2 Sub-hypothesis 2

Sub-hypothesis 2 was stated as:

> *'The main stages that characterise the mediation process are the collection of information on the dispute by the mediator and the formulation of a solution by the mediator."*

In light of the respondents' perceived role of a mediator in a mediation, namely that of seeking a solution *for* the parties, it is not surprising that in the majority of the mediation cases described in Section 4.4.2, the respondents consider the collection of information on the dispute to be fundamental to the mediation process. The collection of information formed the basis for the mediator's evaluation and subsequent opinion or decision as to a resolution to the dispute. A great deal of time and thought would be required for the drafting of such a solution in order to convince the parties that it is worth accepting. This trend was clearly demonstrated in the responses. Furthermore, although problem-solving discussions, negotiation and bargaining, occurred in some cases, such interactions did not play a prominent role in most of these cases.

This hypothesis can therefore be accepted as being true.

5.2.3 Sub-hypothesis 3

Sub-hypothesis 3 was stated as:

> *"Construction industry mediators' knowledge and utilization of specific mediation process skills and techniques are limited."*

The majority of the respondents based their knowledge of mediation on their experience as mediators and believed this knowledge to be more than adequate. The majority of the respondents agreed that the mediator should possess skills specific to mediation and different to those required by an arbitrator or adjudicator. However, an assessment,

detailed in Section 4.5.2, of the various mediation skills and techniques used by the respondents revealed that the respondents made little use of specific mediation skills and instead relied on their expertise and authority on the matter in dispute, together with the necessary communication skills required for assessing the facts on the case and for drafting the proposed solution. This hypothesis is therefore accepted as true.

5.2.4 Hypothesis

The research hypothesis was stated as:

> *"The practice of mediation in the South African construction industry is not consistent with the generally accepted principles of the mediation process."*

Considering the acceptance of the sub-hypotheses, discussed above, the hypothesis, that the practice of mediation in the South African construction industry is *not* consistent with the generally accepted principles of the mediation process, can be accepted as true. The research found 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 utilization of specific mediation process skills and techniques were limited.

5.3 CONCLUDING REMARKS

5.3.1 In considering the appropriateness of the methodology used in the research, the following conclusions can be drawn:

- The descriptive survey method produced a comprehensive, yet detailed set of findings, reflecting the variety of different approaches to the practice of mediation in the South African construction industry. In contrast a case study methodology, where fewer cases would have been considered, would not have revealed the diversity in approaches.

- The questions aimed at establishing the procedural stages that the mediators followed during the mediation were initially more open-ended. In retrospect, although the analysis of such responses are complex, this approach may have been more appropriate In other words, instead of the questionnaire leading the respondents through the procedural stages and discussing the problem-solving stages of negotiation and bargaining, an open-ended question approach may have yielded slightly different data.

5.3.2 Mediation is not 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 adjudication, empower the third party with the control and management the process as well as the process outcome.

The reported practice of underwriting the mediation process with an agreement to be bound by the mediator's decision, is therefore contradictory to the fundamental principles of mediation. As nearly 40% of the cases reported in this research were subject to such an agreement, one needs to question the parties' intention. No construction contract agreement could be found in which the mediator's decision or opinion is in itself binding on the parties – instead, the agreement reached mutually by the parties is held to be final and binding.

The practice of signing an agreement, undertaking to be bound by the mediator's decision prior to the commencement of the mediation and before any discussions or negotiations, is not mediation and should rather be referred to as contractual adjudication.

5.3.3 Most contract documents used within the South African construction industry advocate the *option* of using mediation to settle a dispute before taking the dispute to arbitration or litigation, with the exception of the GCC 90. The GCC 90 document, while making mediation compulsory, retains the voluntary nature of mediation by means of a convoluted clause allowing the parties to withhold agreement on the mediator's opinion. Although the literature shows many instances of mandatory mediation, it could be argued that the nature of the mediation process described in the GCC90 contract adds to the confusion regarding mediation in the industry. Similarly, the guidelines formulated by the SAICE, to assist mediators with mediation, advocate a mediator-owned process rather than a party-owned process, unlike the guidelines published by the AA(SA). Considering the differences in approach by these two bodies, arguably the largest sources of construction industry mediators, it is not surprising that there is confusion within the industry regarding the process of mediation.

5.3.4 The mediators surveyed perceive the fulfilment of their role and functions to be primarily dependent on their technical knowledge and experience on the matter of the dispute. Problem-solving is a central part of mediation, however it appears as if the respondents rely on their own technical knowledge and expertise to solve the problem, rather than invoking alternative forms of problem-solving. Mediation, by definition, is an extension of the negotiation process. Inevitably, the reason the parties engage a third party is because their own attempts at negotiation have failed. The third party enters the dispute system with the role of assisting the parties in restarting the negotiations. In order to achieve this, the mediator requires the necessary skills and knowledge of specific techniques. In the same way that it is generally accepted that not everybody is a skilful negotiator, so it can be argued that not everybody is a skilful mediator.

Mediators require specific training and education in the process in order to acquaint themselves with the necessary skills and techniques. Although the respondents agree with the proposition that the skills and techniques required by a mediator differ from those required by an arbitrator or adjudicator, the research

shows that the respondents have limited knowledge of these skills and techniques.

5.3.5 In an industry, considered by some to be in crisis, where conflict and dispute are regular occurrences, every effort should be made to reduce the levels of conflict and dispute. 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 key 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.

It has been acknowledge that the introduction of mediation into the construction industry was primarily in response to the industry's dissatisfaction with the traditional and adversarial dispute resolution processes of litigation and arbitration. It is also argued that mediation is aimed at preserving amicable long-lasting relationships. 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. The agreement is not forced on the parties but instead the parties are led through a delicate process of perceptual changes and understanding to such an agreement. It is under such circumstances that mediation results in final and conclusive settlement of a dispute.

5.4 AREAS FOR FURTHER RESEARCH

The following areas of research on mediation in the construction industry warrant further research:

- A replication of Stipanowich and Henderson's (1992:314) research, carried out on a national basis in South Africa. Such research would be aimed at addressing the attitudes and experiences of all construction industry participants towards

mediation and would build on the regional findings of Schindler (1989). The perceived differences between mediation, contractual adjudication and expert determination/appraisal should also be addressed.

- The statistical determination and verification of the settlement rate of the different styles of mediation being practiced in the industry.

- The identification of the determinants for successful mediation.

oOo

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APPENDIX A

COVERING LETTER AND QUESTIONNAIRE

UNIVERSITY OF CAPE TOWN

Department of Construction Economics
and Management

University of Cape Town, Private Bag Rondebosch 7701

Dear Sir/Madam

MEDIATION IN THE CONSTRUCTION INDUSTRY

This letter and the attached questionnaire have been specifically addressed to you as one of a select group of construction industry mediators.

It is generally acknowledged that "mediation" means different things to different people within the construction industry in South Africa. Descriptions of mediation include "quasi arbitration"; "defacto arbitration"; a facilitative, evaluative or conciliatory process; amicable settlement etc. However, despite the lack of certainty regarding the actual process, statistics obtained from the SAICE indicate that approximately 80% of the disputes, in which the SAICE have nominated the mediator, have been resolved by mediation. This evidence suggests that the industry has developed a "mediation process" that appears to meet its needs.

The purpose of the questionnaire is to assist with the collection of data that describes the approach of construction industry mediators to the mediation of disputes within the South African construction industry. Your responses to the questions will be the primary source of information for my research at the University of Cape Town, in partial fulfillment of a MPhil degree. My supervisor at UCT is Associate Professor Keith S. Cattell (+021-650 2452).

Enclosed, please find a self-addressed and stamped envelope for returning your completed questionnaire at your earliest convenience. All information will be treated in the strictest confidence and your anonymity will be respected.

Thanking you in anticipation of your response.

Yours sincerely

ALTHEA POVEY PrEng.
(office tel: +021-683 3633)

RESEARCH QUESTIONNAIRE:

MEDIATION AND THE SOUTH AFRICAN CONSTRUCTION INDUSTRY

Your responses to this questionnaire will be treated as strictly confidential. All responses will be aggregated and analysed only for this research. Please indicate your responses by means of a cross "X" or provide a brief note, as required.

SECTION I: GENERAL DETAILS

1 PROFESSIONAL TRAINING AND EXPERIENCE

1.1 What is/was the primary nature of your business?

- 1.1.1 Consulting Engineer ☐
- 1.1.2 Architect ☐
- 1.1.3 Attorney ☐
- 1.1.4 Contractor (Civil Engineering) ☐
- 1.1.5 Contractor (Building) ☐
- 1.1.6 Quantity Surveyor ☐
- 1.1.7 As indicated above, now retired ☐
- 1.1.8 Other (please specify): _____

1.2 Please indicate your age in one of the following categories:

- 1.2.1 Under 40 years ☐
- 1.2.2 41 – 50 years ☐
- 1.2.3 51 – 60 years ☐
- 1.2.4 Over 60 years ☐

1.3 Please indicate your gender:

- 1.3.1 Male ☐
- 1.3.2 Female ☐

1.4 What are your academic qualifications:

- 1.4.1 B.Sc. (Eng) or B. Eng ☐
- 1.4.2 M. Sc (Eng) or M. Eng ☐
- 1.4.3 Dip. Arb or H. Dip. Arb. ☐
- 1.4.4 B. Arch. ☐
- 1.4.5 B. Sc (QS) ☐
- 1.4.6 Other (please specify): _____

2. TRAINING AND EXPERIENCE IN MEDIATION

2.1 For how many years have you been actively involved in the mediation of disputes?

- 2.1.1 Less than 5 years ☐
- 2.1.2 5 – 10 years ☐
- 2.1.3 10 – 20 years ☐
- 2.1.4 More than 20 years ☐

2.2 Please rate your knowledge of the mediation process on a scale of **1 (minimal)** to **5 (substantial)**:

Minimal.....				.....Substantial
1	2	3	4	5

2.3 How did you acquire your knowledge of the mediation process?

2.3.1 Formal postgraduate training (diploma, certificate etc.) .....
2.3.2 Experience .....
2.3.3 Workshops or seminars .....
2.3.4 Practice notes, journals and other literature .....
2.3.5 Other (please specify):

_____

2.4 How many times have you been appointed as a mediator of a construction dispute?

2.4.1 Never .....
2.4.2 Less than 5 times .....
2.4.3 5 – 10 times .....
2.4.4 10 – 20 times .....
2.4.5 More than 20 times .....

SECTION II: THE MEDIATION PROCESS

*Please base your responses to the questions in this section **ON YOUR MOST RECENT MEDIATION**, irrespective of whether the dispute was resolved or not.*

3 THE INITIATION OF THE MEDIATION PROCESS

3.1 How was the mediation initiated?

3.1.1 The parties approached you jointly. .....
3.1.2 You were approached by one party to invite the other party to mediation. .....
3.1.3 You were approached by the President of an organisation, such as the SAICE or AA, on behalf of the parties. .....
3.1.4 Other (please specify):

_____

3.2 Was the mediation initiated in terms of a clause in a Contract ..... YES | NO

3.3 In terms of the clause in the particular contract, was the mediation *compulsory* (parties obligated in terms of the contract to mediate before referring the dispute to arbitration or litigation) or a *voluntary* option?

3.3.1 Compulsory .....
3.3.2 Voluntary .....

3.4 Did the parties sign an agreement prior to the commencement of the mediation binding themselves to the mediator's opinion until otherwise ordered in arbitration or litigation proceedings ..... YES | NO

4. THE PROCEDURAL STEPS OF THE MEDIATION PROCESS

4.1 Describe your first contact with the parties, after finalising the terms of your appointment:

- 4.1.1 Each party contacted telephonically. ☐
- 4.1.2 Each party contacted in writing. ☐
- 4.1.3 Separate meetings held with each party. ☐
- 4.1.4 Joint meeting held. ☐
- 4.1.5 Other (please specify): _____

4.2 What was the purpose of this first contact?

- 4.2.1 To arrange the time and venue of a meeting with the parties ☐
- 4.2.2 To outline the procedure & programme to be followed ☐
- 4.2.3 To hear oral presentations from both parties ☐
- 4.2.4 To request written information/presentations from the parties ☐
- 4.2.5 Other (please specify): _____

4.3 From what source did you gather information on the dispute? (More than one box may be crossed).

- 4.3.1 Existing documentation and correspondence between the parties ☐
- 4.3.2 Written presentations by the parties ☐
- 4.3.3 Oral presentations by the parties ☐
- 4.3.4 Written questions (mediator) and answers (disputant) ☐
- 4.3.5 Oral questions (mediator) and answers (disputant) ☐
- 4.3.6 Other (please specify): _____

4.4 Did either of the parties make use of expert witnesses? YES | NO

4.5 Was it necessary for you to seek any outside advice, such as legal or expert advice, on any matters? YES | NO

4.6 What was your next step, after having ascertained the nature of the dispute and the issues on which decisions were needed?

- 4.6.1 Facilitation of joint solution-seeking discussions between the parties ☐
- 4.6.2 Suggestion of a possible solution for further discussion with the parties ☐
- 4.6.3 Submission of an opinion (written or verbal) for further discussion ☐
- 4.6.4 Submission of a written opinion to the parties, for their acceptance ☐
- 4.6.5 Submission of a binding written decision to the parties ☐
- 4.6.6 Other (please specify): _____

4.7 Please indicate the proportion of time, as a percentage, spent on the following activities:

- 4.7.1 Preparatory matters e.g. signing agreements, programme, venue, etc. ☐
- 4.7.2 Obtaining information on the dispute in written form ☐
- 4.7.3 Obtaining information on the dispute in oral/verbal form ☐
- 4.7.4 Negotiating solutions ☐
- 4.7.5 Bargaining ☐
- 4.7.6 Drafting the final decision/opinion/agreement ☐
- 4.7.7 Other (please specify): _____ ☐

100%

4.8 If negotiation or bargaining took place during the mediation process, please describe how these activities took place:

4.8.1 Parties negotiated/bargained openly with each other 'across' the table .....
4.8.2 Parties negotiated/bargained with each other through the mediator .....
4.8.3 No negotiation or bargaining took place .....

4.9 Various institutions and associations have published guidelines for mediation of construction industry disputes. Which guidelines did you refer to during the mediation?

4.9.1 I did not refer to any published guidelines .....
4.9.2 SAICE: *Guidelines for mediation, March 1988, amended 1994* .....
4.9.3 Association of Arbitrators: *Guidelines for mediation under construction contracts, 1st ed. June 1992* .....
4.9.4 SAACE: *Guidelines for the use of mediators and parties concerned with mediation, Advisory Note 93/8* .....
4.9.5 Other published guidelines (please specify):

_____

4.10 What were your primary considerations when determining the procedure to be followed?

_____
_____
_____
_____
_____
_____
_____
_____
_____

4.11 What input did the disputants have into the determination of the procedure followed?

Not much .....Very much				
1	2	3	4	5

4.12 Please indicate the extent to which, you believe, the aspects listed below, affected the outcome of the mediation process, on a scale of **1 (minor importance)** to **5 (major importance)** with **U = unsure**:

		Minor.....Major					U
4.12.1	Parties' willingness to participate in the mediation process	1	2	3	4	5	U
4.12.2	Parties' willingness to reach a settlement	1	2	3	4	5	U
4.12.3	Parties' understanding of the nature and process of mediation	1	2	3	4	5	U
4.12.4	Mediator's neutrality	1	2	3	4	5	U
4.12.5	Mediator's expertise in the process of mediation	1	2	3	4	5	U
4.12.6	Mediator's expertise and authority on the matter of the dispute	1	2	3	4	5	U
4.12.7	The confidentiality of the process	1	2	3	4	5	U
4.12.8	Parties' control over the process and its outcome	1	2	3	4	5	U
4.12.9	The consensual nature of the resolution (as opposed to an imposed solution)	1	2	3	4	5	U

SECTION III: THE MEDIATOR

5. THE ROLE AND FUNCTIONS OF THE MEDIATOR

5.1 What do you think the role of a mediator is?

5.1.1 To facilitate constructive dialogue between the parties and encourage the parties to negotiate their own settlement. ..... ☐

5.1.2 To provide professional expertise on the content of the dispute and persuade the parties that your opinion of the outcome would be within the range of a likely court/arbitration ruling. ..... ☐

5.1.3 To provide professional expertise on the content of the dispute and persuade the parties that the settlement you propose is fair, reasonable and in everyone's best interests. ..... ☐

5.1.4 To consider the information and evidence gathered, and give a decision based thereon, for or against the claimant. ..... ☐

5.1.5 Other (please specify):

_____

_____

5.2 Please rate the following on a scale **1 (not important)** to **5 (very important)** in terms of your perception of the importance of these functions of a mediator:

		Not.....Very				
5.2.1	Develop and preserve the trust and confidence of the parties in your role.	1	2	3	4	5
5.2.2	Educate the parties as to the mediation process.	1	2	3	4	5
5.2.3	Facilitate face-to-face discussions between the parties.	1	2	3	4	5
5.2.4	Create an environment conducive to discussion and co-operation at meetings.	1	2	3	4	5
5.2.5	Assist the parties in analysing and prioritising the issues, then designing an appropriate plan of action.	1	2	3	4	5
5.2.6	Assist the parties in identifying common ground and isolating the really contentious issues.	1	2	3	4	5
5.2.7	Encourage the parties to reflect on the consequences of their not settling the dispute themselves.	1	2	3	4	5
5.2.8	Promote constructive communication and active listening.	1	2	3	4	5
5.2.9	Encourage the parties to explore possible solutions and settlement proposals.	1	2	3	4	5
5.2.10	Evaluate the dispute and give a reasoned opinion or decision.	1	2	3	4	5

6. SKILLS AND TECHNIQUES OF THE MEDIATOR

6.1 Please indicate the frequency with which you utilise the following mediation techniques, on a scale of **1 (never)** to **5 (always)** with **U** = the term is **unfamiliar** to me.

	Technique	Never..... Always					U
6.1.1	Pre-planning of seating arrangements	1	2	3	4	5	U
6.1.2	Caucusing	1	2	3	4	5	U
6.1.3	Linked bargaining	1	2	3	4	5	U
6.1.4	Brainstorming options	1	2	3	4	5	U
6.1.5	Reframing or repackaging issues	1	2	3	4	5	U
6.1.6	"shaming"	1	2	3	4	5	U

6.2 Please list any other techniques you use:

_____

_____

_____

_____

6.3 Do you believe that a mediator should possess specific and particular skills, i.e. different to those required by an arbitrator or adjudicator?..... | YES | NO |

6.4 If YES, please list the most important skill a mediator should possess:

_____

_____

_____

SECTION IV: GENERAL COMMENTS

7.1 How many of the disputes, that you have mediated, have been resolved by the mediation and have not gone to arbitration or litigation for resolution?

6.5.1	Less than 50%	☐
6.5.2	More than 50 % but less than 80%	☐
6.5.3	More than 80% but less than 100%	☐
6.5.4	100%	☐

7.2 Please make any further comments describing your preferred approach to the mediation of construction industry disputes:

_____

_____

_____

_____

_____

_____

_____

_____

7.3 **OPTIONAL**: Please record your details below to facilitate contacting you in the event of a query arising.

NAME: _____ PHONE: _____

e-mail: _____ FAX: _____

I would like to take this last opportunity of thanking you again for your time and effort in assisting in this research

APPENDIX B

B1. Data Analysis Output

B2. Transcript of Responses to Question 4.10

B3. Transcript of Responses to Question 6.2

B4 Transcript of Responses to Question 6.4

B5. Transcript of Responses to Question 7.2

APPENDIX B1

DATA ANALYSIS OUTPUT

APPENDIX B1

DATA ANALYSIS OUTPUT

SECTION I: GENERAL DETAILS

QUESTION 1: PROFESSIONAL TRAINING AND EXPERIENCE

Q1_1: Primary nature of Business (section1.sta)

		Count	Percent
Consulting Engineer (1)	39	61.9	
Architect (2)		5	7.9
Attorney (3)		2	3.2
Civil Contractor (4)		5	7.9
Builder (5)		1	1.6
QS (6)		6	9.5
Other (7)		5	7.9
No response (0)		0	0.0
		63	100.0

Q1_1_7: Retired (section1.sta)

	Count	Percent
not	48	76.2
retired	15	23.8
	63	100.0

Q1_2: Age profile at June/July 2002 (section1.sta)

	Count	Cumul. Count	Percent
<40 years old	2	2	3.2
41 -50 years old	8	10	12.7
51 - 60 years old	13	23	20.6
>60 years old	40	63	63.5

Q1_3: Gender (section1.sta)

	Count	Cumul. Count	Percent
male	61	61	96.8
female	2	63	3.2

Q1_4: Academic Qualification (section1.sta)

	Count	Cumul. Count		Percent
B Eng (1)	40	40		63.5
M Eng (2)	7	47		11.1
none (3)	2	49		3.2
B Arch (4)	4	53		6.3
BSc (QS) (5)	3	56		4.8
Other (6)	7	63		11.1
No response		0	63	0.0

Q1_4SEC: Second qualification (section1.sta)

	Count	Cumul. Count	Percent
None (0)	45	45	71.4

B.Admin	1	46	1.6
MPhil	1	47	1.6
PhD	2	49	3.2
Bluris	2	51	3.2
D Eng	1	52	1.6
MBA	3	55	4.8
LLB	2	57	3.2
PhD, D S	1	58	1.6
MLB	1	59	1.6
M Plan	1	60	1.6
MPA	1	61	1.6
EE (MIT)	1	62	1.6
BSc (QS)	1	63	1.6

Q1_4ARB: Diploma in Arbitration (section1.sta)

	Count	Cumul. Count	Percent
no	46	46	73.0
yes	17	63	27.0

QUESTION 2: TRAINING AND EXPERIENCE IN MEDIATION

Q2_1: Years involvement in mediation (section1.sta)

	Count	Cumul. Count	Percent
No response	1	1	1.6
<5 years	7	8	11.1
5-10 years	17	25	27.0
10-20 years	20	45	31.7
>20 years	18	63	28.6

Q2_2: Rating of knowledge of mediation (section1.sta)

	Count	Cumul. Count	Percent
No response	1	1	1.6
1	0	0	1.6
2	1	2	1.6
3	17	19	27.0
4	22	41	34.9
5	22	63	34.9

1= minimal, 5= substantial

Q2_2: Descriptive Statistics (section1.sta)

Valid N	Mean	Median	Sum	Minimum	Maximum	Variance	Std.Dev.
63	3.98	4.0	251.0	0.00	5.0	.95	.975

Q2_3: Number of times appointed as a mediator (section1.sta)

	Count	Cumul. Count	Percent
1	3	3	4.8
2	19	22	30.2
4	1	23	1.6
2,3,4	6	29	9.5

1,2,3,4	10	39	15.9
2,3	5	44	7.9
2,4	7	51	11.1
1,2,3	5	56	7.9
1,2	6	62	9.5
1,2,4	1	63	1.6

1 = Formal post graduate training 2 = Experience 3 = Workshops or seminars
4 = Practice notes, journals and other literature 5 = other

Q2_3_1: Acquisition of knowledge of mediation: Formal post graduate training (section1.sta)

	Count	Cumul. Count	Percent
no	38	38	60.3
yes	25	63	39.7

Q2_3_2: Acquisition of knowledge of mediation: Experience (section1.sta)

	Count	Cumul. Count	Percent
no	3	3	4.8
yes	60	63	95.2

Q2_3_3: Acquisition of knowledge of mediation: Workshops or seminars (section1.sta)

	Count	Cumul. Count	Percent
no	35	35	55.6
yes	28	63	44.4

Q2_3_4: Acquisition of knowledge of mediation: Practice notes, journals and other literature (section1.sta)

	Count	Cumul. Count	Percent
no	36	36	57.1
yes	27	63	42.9

Q2_3_5: Acquisition of knowledge of mediation: other (section1.sta)

	Count	Cumul. Count	Percent
no	63	63	100.0

Q2_4: Number of times appointed as mediator (section1.sta)

	Count	Cumul. Count	Percent
Never	0	0	0
< 5 times	25	25	39.7
5 – 10 times	17	42	27.0
10 – 20 times	12	54	19.0
> 20 times	9	63	14.3

SECTION II: THE MEDIATION PROCESS

QUESTION 3: THE INITIATION OF THE MEDIATION PROCESS

Q3_1: Initiation of mediation (section 2.sta)

	Count	Cumul. Count	Percent
Jointly	20	20	31.7
One part	17	37	27.0

Pres	25	62	39.7
No response	1	63	1.6

Q3_2: Mediation in terms of a clause in a contract (section 2.sta)

	Count	Cumul. Count	Percent
Contract	42	42	66.7
No contact	20	62	31.7
No reponse	1	63	1.6

Q3_3: Mediation compulsory or voluntary (section 2.sta)

	Count	Cumul. Count	Percent
compulsory	25	25	39.7
voluntary	37	62	58.7
No response	1	63	1.6

Q3_4: Binding or non-binding (section 2.sta)

	Count	Cumul. Count	Percent
Binding	26	26	41.3
Non-binding	36	62	57.1
No response	1	63	1.6

QUESTION 4: THE PROCEDURAL STEPS OF THE MEDIATION PROCESS

Q4_1: First contact (section 2.sta)

	Count	Cumul. Count	Percent
Tel (4.1.1)	17	17	27.0
Write (4.1.2)	14	31	22.2
Sep meet (4.1.3)	4	35	6.3
Joint meet (4.1.4)	16	51	25.4
more than 1	10	61	15.9
no response	2	63	3.2

Q4_2 : Purpose of first contact (section 2.sta)

	Count	Cumul. Count	Percent
to arrange the time and venue of a meeting (4.2.1)	18	18	28.6
to outline the procedure & programme (4.2.2)	11	29	17.5
to hear oral presentations (4.2.3)	6	35	9.5
to request written information/presentations (4.2.4)	6	41	9.5
more than 1 answer	20	61	31.7
no response	2	63	3.2

Q4_3TOT: Source of information (section 2.sta)

	Count	Cumul. Count	Percent
3	6	6	9.5
2	3	9	4.8
1,2,3,5	15	24	23.8
1,2,3,4	4	28	6.3
1,2,5	2	30	3.2
1,2,4	5	35	7.9

1,2,3	5	40	7.9
1,2,3,4,	5	45	7.9
1,2	5	50	7.9
1,3,5	5	55	7.9
1,3	1	56	1.6
1,2,4,	1	57	1.6
1,2,4,5	1	58	1.6
2,4	2	60	3.2
1	3	63	4.8

1 = Existing documentation between the parties
2 = Written presentation by the parties
3 = Oral presentation by the parties
4 = Written question and answer sessions
5 = Oral question and answer sessions
6 = Other

Q4_3_1: Existing documentation between the parties (section 2.sta)

	Count	Cumul. Count	Percent
no	11	11	17.5
yes	52	63	82.5

Q4_3_2: Written presentation by the parties (section 2.sta)

	Count	Cumul. Count	Percent
no	15	15	23.8
yes	48	63	76.2

Q4_3_3: Oral presentation by the parties (section 2.sta)

	Count	Cumul. Count	Percent
no	23	23	36.5
yes	40	63	63.5

Q4_3_4: Written question and answer sessions (section 2.sta)

	Count	Cumul. Count	Percent
no	45	45	71.4
yes	18	63	28.6

Q4_3_5: Oral question and answer sessions (section 2.sta)

	Count	Cumul. Count	Percent
no	35	35	55.6
yes	28	63	44.4

Q4_4: Parties' use of expert witness (section 2.sta)

	Count	Cumul. Count	Percent
Yes (1)	12	12	19.0
No (2)	51	63	81.0

Q4_5: Mediator's use of outside advise (section 2.sta)

	Count	Cumul. Count	Percent
Yes (1)	13	13	20.6
No (2)	50	63	79.4

Q4_6: Extent of problem solving (section 2.sta)

	Count	Cumul. Count	Percent
1	26	26	41.3
2	7	33	11.1
3	10	43	15.9
4	12	55	19.0
5	7	62	11.1
No response	1	63	1.6

1 = Facilitation of joint solution-seeking discussions between the parties
2 = Suggestion of a possible solution for further discussion with the parties
3 = Submission of an opinion (written or verbal) for further discussion
4 = Submission of a written opinion to the parties, for their acceptance
5 = Submission of a binding written decision to the parties

Q4_7_1: Time on preparatory matters (section 2.sta)

% time	Count	Cumul. Count	Percent
3.0	1	1	1.6
5.0	16	17	25.4
10.0	25	42	39.7
15.0	3	45	4.8
20.0	7	52	11.1
No response	11	63	17.5

Q4_7_2: Time on obtaining information in written form (section 2.sta)

% time	Count	Cumul. Count	Percent
5.0	6	6	9.5
10.0	8	14	12.7
15.0	3	17	4.8
20.0	11	28	17.5
25.0	4	32	6.3
30.0	7	39	11.1
35.0	3	42	4.8
40.0	4	46	6.3
60.0	3	49	4.8
61.0	1	50	1.6
65.0	1	51	1.6
80.0	1	52	1.6
No response	11	63	17.5

Q4_7_3: Time on obtaining information in oral/verbal form (section 2.sta)

% time	Count	Cumul. Count	Percent
5.0	8	8	12.7
10.0	8	16	12.7
12.0	1	17	1.6
15.0	3	20	4.8
20.0	9	29	14.3
25.0	2	31	3.2
30.0	12	43	19.0
35.0	3	46	4.8
40.0	1	47	1.6
50.0	4	51	6.3
60.0	3	54	4.8

No response	9	63	14.3

Q4_7_4: Time on negotiation solutions (section 2.sta)

% time	Count	Cumul. Count	Percent
5.0	2	2	3.2
8.0	1	3	1.6
10.0	9	12	14.3
15.0	2	14	3.2
20.0	10	24	15.9
25.0	3	27	4.8
30.0	9	36	14.3
40.0	2	38	3.2
50.0	2	40	3.2
65.0	1	41	1.6
70.0	1	42	1.6
No response	21	63	33.3

Q4_7_5: Time on bargaining (section 2.sta)

% time	Count	Cumul. Count	Percent
5.0	5	5	7.9
10.0	6	11	9.5
15.0	1	12	1.6
20.0	3	15	4.8
25.0	1	16	1.6
30.0	1	17	1.6
No response	46	63	73.0

Q4_7_6: Time drafting final decision/opinion/agreement (section 2.sta)

% time	Count	Cumul. Count	Percent
5.0	1	1	1.6
10.0	14	15	22.2
15.0	3	18	4.8
20.0	11	29	17.5
25.0	5	34	7.9
30.0	3	37	4.8
35.0	1	38	1.6
40.0	2	40	3.2
45.0	5	45	7.9
50.0	4	49	6.3
60.0	2	51	3.2
65.0	2	53	3.2
70.0	1	54	1.6
78.0	1	55	1.6
80.0	1	56	1.6
No response	7	63	11.1

Q4_7_7: Other (section 2.sta)

% time	Count	Cumul. Count	Percent
5.0	3	3	4.8
8.0	1	4	1.6
10.0	1	5	1.6
25.0	1	6	1.6
30.0	1	7	1.6
No response	56	63	88.9

Q_4_7: Descriptive Statistics: Proportion of time on different activities (section 2.sta)

	Valid N	Mean	Median	Sum	Minimum	Maximum	Variance	Std.Dev.
Q4_7_1	52	10.0	10.0	518.0	3.0	20.0	24.0	4.9
Q4_7_2	52	25.7	20.0	1336.0	5.0	80.0	308.3	17.6
Q4_7_3	54	23.9	20.0	1292.0	5.0	60.0	238.3	15.4
Q4_7_4	42	23.8	20.0	998.0	5.0	70.0	220.7	14.9
Q4_7_5	17	12.6	10.0	215.0	5.0	30.0	59.7	7.7
Q4_7_6	56	29.3	20.0	1643.0	5.0	80.0	394.6	19.9
Q4_7_7	7	12.6	8.0	88.0	5.0	30.0	109.6	10.5

Q4_8: How negotiation/bargaining took place (section 2.sta)

	Count	Cumul. Count	Percent
1	12	12	19.0
2	25	37	39.7
3	20	57	31.7
both	5	62	7.9
No response	1	63	1.6

1 = negotiation/bargaining took place openly between the disputants
2 =parties negotiated/bargained through the mediator
3 = no negotiations

Q4_9: Mediation guidelines (section 2.sta)

	Count	Cumul. Count	Percent
No reponse	1	1	1.6
None	16	17	25.4
SAICE (2)	8	25	12.7
AA (3)	10	35	15.9
SAACE (4)	3	38	4.8
Other	4	42	6.3
2,3,4	7	49	11.1
2,4	5	54	7.9
3,4	4	58	6.3
2,3	5	63	7.9

Q4_11: Ratinginput parties had into determination of mediation procedure (section 2.sta)

	Count	Cumul. Count	Percent
No response	2	2	3.2
1	14	16	22.2
2	14	30	22.2
3	17	47	27.0
4	11	58	17.5
5	5	63	7.9

1 = not much 5 = very much

Valid N	Mean	Median	Sum	Minimum	Maximum	Variance	Std.Dev.
63	2.57	3.0	162.0	0	5.0	1.73	1.316

Q4_12_1: Parties' willingness to participate in the mediation process (section 2.sta)

	Count	Cumul. Count	Percent

1	2	2	3.2
2	2	4	3.2
3	6	10	9.5
4	17	27	27.0
5	32	59	50.8
No response	4	63	6.3

1 = minor importance to 5 = major importance, U = unsure

Q4_12_2: Parties' willingness to reach a settlement (section 2.sta)

	Count	Cumul. Count	Percent
1	1	1	1.59
2	4	5	6.35
3	6	11	9.52
4	19	30	30.16
5	29	59	46.03
No response	4	63	6.35

1 = minor importance to 5 = major importance, U = unsure

Q4_12_3: Parties' understanding of the nature and process of mediation (section 2.sta)

	Count	Cumul. Count	Percent
1	5	5	7.9
2	13	18	20.6
3	17	35	27.0
4	16	51	25.4
5	7	58	11.1
No response	5	63	7.9

1 = minor importance to 5 = major importance, U = unsure

Q4_12_4: Mediator's neutrality (section 2.sta)

	Count	Cumul. Count	Percent
1	1	1	1.6
2	1	2	1.6
3	3	5	4.8
4	8	13	12.7
5	47	60	74.6
No response	3	63	4.8

1 = minor importance to 5 = major importance, U = unsure

Q4_12_5: Mediator's expertise in the process of mediation (section 2.sta)

	Count	Cumul. Count	Percent
1	2	2	3.2
2	1	3	1.6
3	14	17	22.2
4	16	33	25.4
5	25	58	39.7
No response	5	63	7.9

1 = minor importance to 5 = major importance, U = unsure

Q4_12_6: Mediator's expertise and authority on the matter of the dispute (section 2.sta)

	Count	Cumul. Count	Percent
1	2	2	3.2
3	5	7	7.9
4	28	35	44.4
5	25	60	39.7
No response	3	63	4.8

1 = minor importance to 5 = major importance, U = unsure

Q4_12_7: The confidentiality of the process (section 2.sta)

	Count	Cumul. Count	Percent
1	6	6	9.5
2	8	14	12.7
3	15	29	23.8
4	13	42	20.6
5	17	59	27.0
No response	4	63	6.3

1 = minor importance to 5 = major importance, U = unsure

Q4_12_8: Parties' control over the process and its outcome (section 2.sta)

	Count	Cumul. Count	Percent
1	12	12	19.0
2	16	28	25.4
3	14	42	22.2
4	7	49	11.1
5	9	58	14.3
No response	5	63	7.9

1 = minor importance to 5 = major importance, U = unsure

Q4_12_9: The consensual nature of the resolution (as opposed to an imposed solution) (section 2.sta)

	Count	Cumul. Count	Percent
u	4	4	6.3
1	3	7	4.8
2	3	10	4.8
3	9	19	14.3
4	24	43	38.1
5	14	57	22.2
No response	6	63	9.5

1 = minor importance to 5 = major importance, U = unsure

Descriptive Statistics (section 2.sta)

	Valid N	Mean	Median	Sum	Min	Max	Variance	Std.Dev.
Q4_12_1	59	4.27	5.0	252.0	1.0	5.0	1.03	1.01
Q4_12_2	59	4.20	4.0	248.0	1.0	5.0	.99	1.00
Q4_12_3	58	3.12	3.0	181.0	1.0	5.0	1.34	1.16
Q4_12_4	60	4.65	5.0	279.0	1.0	5.0	.64	.80
Q4_12_5	58	4.05	4.0	235.0	1.0	5.0	1.07	1.03
Q4_12_6	60	4.23	4.0	254.0	1.0	5.0	.76	.87
Q4_12_7	59	3.46	4.0	204.0	1.0	5.0	1.74	1.32

Q4_12_8	58	2.74	3.0	159.0	1.0	5.0	1.81	1.35
Q4_12_9	57	3.54	4.0	202.0	1.0	5.0	2.04	1.43

SECTION III: THE MEDIATOR

QUESTION 5: THE ROLE AND FUNCTIONS OF THE MEDIATOR

Q5_1: The role of the mediator (section 3.sta)

	Count	Cumul. Count	Percent
1	6	6	9.52
2	8	14	12.70
3	19	33	30.16
4	6	39	9.52
5	2	41	3.17
1,4	1	42	1.59
1,2,3,4	8	50	12.70
2,3	3	53	4.76
2,4	3	56	4.76
1,2,3	3	59	4.76
1,2,4	1	60	1.59
1,2	3	63	4.76

1 = To facilitate constructive dialogue between the parties and encourage the parties to negotiate their own settlement.
2 = To provide professional expertise on the content of the dispute and persuade the parties that your opinion of the outcome would be within the range of a likely court/arbitration ruling.
3 = To provide professional expertise on the content of the dispute and persuade the parties that the settlement you propose is fair, reasonable and in everyone's best interests.
4 = To consider the information and evidence gathered, and give a decision based thereon, for or against the claimant.

Q5_2_1: Develop and preserve the trust and confidence of the parties in your role. (section 3.sta)

	Count	Cumul. Count	Percent
no resp	3	3	4.8
3	2	5	3.2
4	13	18	20.6
5	45	63	71.4

1 = not important 5 = very important

Q5_2_2: Educate the parties as to the mediation process (section 3.sta)

	Count	Cumul. Count	Percent
no resp	3	3	4.8
1	5	8	7.9
2	13	21	20.6
3	18	39	28.6
4	11	50	17.5
5	13	63	20.6

1 = not important 5 = very important

Q5_2_3: Facilitate face-to-face discussions between the parties (section 3.sta)

	Count	Cumul. Count	Percent
no resp	6	6	9.52
1	2	8	3.17
2	7	15	11.11
3	13	28	20.63
4	20	48	31.75
5	15	63	23.81

1 = not important 5 = very important

Q5_2_4: Create an environment conducive to discussion and co-operation at meetings (section 3.sta)

	Count	Cumul. Count	Percent
no resp	4	4	6.3
1	1	5	1.6
2	1	6	1.6
3	12	18	19.0
4	27	45	42.9
5	18	63	28.6

1 = not important 5 = very important

Q5_2_5: Assist the parties in analysing and prioritising the issues, then designing an appropriate plan of action (section 3.sta)

	Count	Cumul. Count	Percent
no resp	5	5	7.9
2	3	8	4.8
3	13	21	20.6
4	26	47	41.3
5	16	63	25.4

1 = not important 5 = very important

Q5_2_6: Assist the parties in identifying common ground and isolating the really contentious issues (section 3.sta)

	Count	Cumul. Count	Percent
no resp	3	3	4.8
2	2	5	3.2
3	9	14	14.3
4	22	36	34.9
5	27	63	42.9

1 = not important 5 = very important

Q5_2_7: Encourage the parties to reflect on the consequences of their not settling the dispute themselves (section 3.sta)

	Count	Cumul. Count	Percent
no resp	4	4	6.3
1	6	10	9.5
2	5	15	7.9
3	11	26	17.5
4	17	43	27.0
5	20	63	31.7

1 = not important 5 = very important

Q5_2_8: Promote constructive communication and active listening (section 3.sta)

	Count	Cumul. Count	Percent
no resp	3	3	4.8
1	3	6	4.8
2	3	9	4.8
3	14	23	22.2
4	19	42	30.2
5	21	63	33.3

1 = not important 5 = very important

Q5_2_9: Encourage the parties to explore possible solutions and settlement proposals (section 3.sta)

	Count	Cumul. Count	Percent
no resp	2	2	3.2
1	4	6	6.3
2	4	10	6.3
3	14	24	22.2
4	20	44	31.7
5	19	63	30.2

1 = not important 5 = very important

Q5_2_10: Evaluate the dispute and give a reasoned opinion or decision (section 3.sta)

	Count	Cumul. Count	Percent
no resp	1	1	1.6
1	2	3	3.2
2	2	5	3.2
3	2	7	3.2
4	18	25	28.6
5	38	63	60.3

1 = not important 5 = very important

Descriptive Statistics: Q_5_2: Functions of mediator (section 3.sta)

	Valid N	Mean	Median	Sum	Min	Max	Variance	Std.Dev.
Q5_2_1	63	4.5	5	283.0	0	5	1.3	1.13
Q5_2_2	63	3.1	3	194.0	0	5	2.0	1.41
Q5_2_3	63	3.3	4	210.0	0	5	2.29	1.51
Q5_2_4	63	3.8	4	237.0	0	5	1.7	1.29
Q5_2_5	63	3.6	4	229.0	0	5	1.8	1.35
Q5_2_6	63	4.0	4	254.0	0	5	1.5	1.22
Q5_2_7	63	3.4	4	217.0	0	5	2.4	1.55
Q5_2_8	63	3.7	4	232.0	0	5	1.9	1.37
Q5_2_9	63	3.6	4	229.0	0	5	1.8	1.32
Q5_2_10	63	4.3	5	274.0	0	5	1.2	1.09

QUESTION 6: SKILLS AND TECHNIQUES OF THE MEDIATOR

Q6_1_1: Pre-planning of seating arrangements (section 3.sta)

	Count	Cumul. Count	Percent
no resp	6	6	9.5
1	17	23	27.0
2	12	35	19.0
3	14	49	22.2
4	5	54	7.9
5	8	62	12.7
u	1	63	1.6

1 = never .... 5 = always, U = unfamiliar term

Q6_1_2: Caucusing (section 3.sta)

	Count	Cumul. Count	Percent
no resp	5	5	7.9
1	16	21	25.4
2	7	28	11.1
3	13	41	20.6
4	9	50	14.3
5	10	60	15.9
u	3	63	4.8

1 = never .... 5 = always, u = unfamiliar term

Q6_1_3: Linked bargaining (section 3.sta)

	Count	Cumul. Count	Percent
no resp	4	4	6.3
1	16	20	25.4
2	11	31	17.5
3	10	41	15.9
4	11	52	17.5
5	2	54	3.2
u	9	63	14.3

1 = never .... 5 = always, u = unfamiliar term

Q6_1_4: Brainstorming options (section 3.sta)

	Count	Cumul. Count	Percent
no resp	3	3	4.8
1	12	15	19.0
2	13	28	20.6
3	12	40	19.0
4	13	53	20.6
5	5	58	7.9
u	5	63	7.9

1 = never .... 5 = always, U = unfamiliar term

Q6_1_5: Reframing or repackaging issues (section 3.sta)

	Count	Cumul. Count	Percent
no resp	3	3	4.8

1	9	12	14.3
2	6	18	9.5
3	14	32	22.2
4	18	50	28.6
5	7	57	11.1
u	6	63	9.5
0			

1 = never .... 5 = always, U = unfamiliar term

Q6_1_6: "Shaming" (section 3.sta)

	Count	Cumul. Count	Percent
no resp	3	3	4.8
1	33	36	52.4
2	7	43	11.1
4	2	45	3.2
u	18	63	28.6

1 = never .... 5 = always, U = unfamiliar term

Q_61: Descriptive Statistics (section 3.sta)

	Valid N	Mean	Median	Sum	Min	Max	Variance	Std.Dev.
Q6_1_1	63	2.4	2	149.0	0	6.0	2.5	1.58
Q6_1_2	63	2.7	3	173.0	0	6.0	3.0	1.74
Q6_1_3	63	2.8	3	176.0	0	6.0	3.4	1.83
Q6_1_4	63	2.9	3	181.0	0	6.0	2.7	1.63
Q6_1_5	63	3.3	3	206.0	0	6.0	2.7	1.63
Q6_1_6	63	2.6	1	163.0	0	6.0	5.1	2.27

Q6_3: Should mediator posses specific skills (section 3.sta)

	Count	Cumul. Count	Percent
no resp	1	1	1.6
yes	45	46	71.4
no	17	63	27.0

QUESTION 7: GENERAL COMMENTS

Q7_1: Number of disputes settled (section 3.sta)

	Count	Cumul. Count	Percent
< 50%	8	8	12.7
>50<80	16	24	25.4
>80<100	19	43	30.2
100%	20	63	31.7

APPENDIX B2

TRANSCRIPT OF RESPONSES TO QUESTION 4.10

APPENDIX B2

TRANSCRIPT OF RESPONSES TO QUESTION 4.10

1. Realisation that in this case a firm "opinion" was required, incl. Monetary award. It was clear that the Employer in this case, would only accept an award made in his favour –decided it was best to deliver the opinion, and allow the dispute to go to the next stage.

2. Nil

3. Reasonableness, speed

4. To allow both parties a reasonable opportunity to make written submissions.

5. Understand the cause of friction between the parties. Try to convince parties of "my" views having digested and fully understand the "problem".

6. To come up with the best solution to the problem and then persuade the parties to accept it.

7. Each side must be heard. All relevant documents must be perused. The factual and legal position must be understood. The dispute i.e. the position of each party must be understood. Do they overlap i.e. room to negotiate? Common ground established. Advise parties of how mediator sees the position. Debate. Negotiate. Express opinion (general approach).

8. Fairness, unbiased opportunity to present evidence/info must be efficient, cost-effective outcome must be conclusive.

9. The parties had agreed between them that each party would submit their cases to me. Firstly, in written form and then verbally in a hearing and that my opinion would be final and binding. My primary considerations were that each party had equal opportunity to put their cases to me and also equal opportunity to comment on the other party' s case.

10. Affording each party a reasonable opportunity to state its case. An aversion from relying on unsubstantiated matters which might be raised.

11. To assist the parties to reach a solution.

12. To ascertain the facts of the case. To give each party a fair opportunity to present its case, both in writing and orally and to respond to the submissions of the other party. To get complete clarity in my mind by asking questions of the parties –either in writing or during the oral hearing.

13. To be authoritative and fair.

14. Win-win, acceptable to both parties. There is a bigger picture/goal in mind. No one to loose face/preserve dignity.

15. Create clear understandings and gain discussions to determine all facts.

16. Relaxed, dignified atmosphere of trust

17. Following the GCC 90 of SAICE procedures as provided by the contract.

18. That the cost being claimed by the consulting engineer, in this case, for the service being offered, should relate to the normal or usual costs that would be incurred and charged by a Consulting Engineering Firm for the class of work done i.e. design, draughting and reinforcement scheduling for a structural project, which would not normally be done by a senior partner in the firm. In this case it was a one-man consulting practice and in my opinion could not charge at a principals time charge rate for draughting and detailing. Based on this assumption a reasonable face for the work have to have been done by a designer/detailer was estimated by me and accepted by both parties.

19. Amicable fair solution

20. To establish fact from friction. To determine which facts were relevant. To prepare an opinion that was factual, balanced and followed the terms of the contract.

21. To obtain a solution which would be fair to both parties.

22. Primarily I sought to choose a transparent and fair process that neither party would find fault with and that they both understood.

23. Transparency on the part of both parties.

24. Project manager advised that parties preferred not to hold further discussions together.

25. To obtain a clear understanding of the issues in dispute. To obtain a clear view of the parties' contentions of the issues. To identify the main issues that prevented a settlement. To avoid posturing and gamesmanship by the parties. To avoid confrontational meetings. To avoid waste of time with peripheral issues. To force

the parties to deal with the real issues.

26. The nature of the work relating to the dispute as also whether the work was for a government/parastatal or private client.

27. To determine the nature of the dispute i.e. is it mostly fact or law or both, and the habit of the dispute (financial). To get the parties together face to face.

28. The nature of the dispute. The understanding of the parties of their contractual obligation. The value of the disputed amount(s).

29. To arrive at an understanding of the true cause of the problem. To afford each party a fair opportunity to present their view of the problem. To arrive at a fair apportionment of responsibility for the problem.

30. To get the parties to see each other' s point of view.

31. Informal but on legal basis.

32. The procedure had to be appropriate to the nature of the dispute and the changing standpoints of the parties. The procedure was modified as the mediation evolved resulting in both parties accepting the final opinion.

33. Equity and the principle of Audiem alterem partem. Mediation between the contractor' s claim for extras and the client' s intractable representative.

34. Harmony between parties

35. Informality. Simplicity of procedure. Speed. Finality.

36. Fairness. Accuracy.

37. Ensure that both parties had adequate opportunity to state their own views and contentions. Ensure that both parties had adequate opportunity to comment on views and contentious of other party. Ensure that I had as full a statement of pertinent matters as practically possible.

38. Nil

39. Nil

40. To create the best possible opportunity. To finally and amicably settle the matter in issue.

41. To do justice –restorative justice in terms of new cosmological principles by revealing to the disputing parties that they were locked in outdated systems of resolving disputes.

42. Nil

43. Parties required solution. Experiences.

44. Nil

45. Identifying the real dispute and facts related thereto. Ensuring that both parties felt confident that their case was understood and that each party understood the point of view of the other.

46. To conform to procedures stipulated in the contract documents and guidelines.

47. Followed a recommended published procedure agreed to by the parties.

48. For the parties to resolve their dispute in terms of the construction contract signed by the parties.

49. Fair procedure. Equitable. Transparency. Proper consultation and participation of parties plus the contributors (many of the mediators involved 3rd parties "higher" up the chain in both or all (consultant) organisation.

50. Opportunity for parties to state their case and respond. Clarification of issues.

51. To resolve as many issues as possible by agreement prior to presenting a formal opinion.

52. Attitude and animosity between the parties concerned.

53. To be fair and equitable to both party' s w.r.t time hearing points of view and trying to understand points of view.

54. To settle disputes.

55. To ascertain the facts and to arrive at an equitable solution.

56. The nature of the dispute, amount involved and the attitude of the parties.

57. Obtain a solution.

58. To facilitate settlement and avoid unnecessary expenditure.

59. Nil

60. Logic. Fairness. Seeking solution to impasse.

61. Cost and time efficiency. Providing both parties fullest opportunity to state their case.

62. My belief is that unless both parties can adjust their points of view on a matter no lasting solution can be found. My aim was to let both parties search for and find their own solution. With luck, both parties will finally respect each other and there will be no lasting bad feelings. This ideal was not achieved in all cases.

63. That each party vow the opportunity to put his case in writing in a considered way.

TRANSCRIPT OF RESPONSES TO QUESTION 6.2

1. Technique developed over the years: submissions, counter-submissions, questions in writing, hearing, sometimes more than one, opinion, including monetary award if any, if the parties decide to settle during the course of the mediation as sometimes happens - so be it.

2. Nil

3. Site visits

4. Nil

5. Experience and own personality which is different and retiring - be one's self.

6. Making sure that all issues are understood fully by both parties, that the proposed solution is the best and ultimately that they are both happy with this solution.

7. Quoting legal authority. Pointing out downside of litigation (time, cost, reputation etc.)

8. Nil

9. Nil

10. I don't know what "shaming" is!!!!!

11. Nil

12. I try to maintain an attitude of impartiality until all the evidence has been presented to me, after which I then consider it all and form an opinion. If one tries to promote an agreed settlement one risk loosing the attitude of impartiality.

13. Nil

14. "what if", "bigger" picture. Costs of litigation

15. Nil

16. Nil

17. Nil

18. Be open, professional supportive.

19. Diffusing animosity

20. Read and listen carefully. Establish contractual situation in relation to dispute. Discard the irrelevant and establish truth between different viewpoints.

21. The parties must meet on common ground (i.e. not in one or the other's office). Try and have the patience of Job and the wisdom of Solomon.

22. Nil

23. Getting both parties' to realise that as mediator I have the technical skills to apply to the disputes (as I do not undertake mediations outside my specific disciplines) as well as arbitration qualification.

24. Try to set out the rules, rights and consequences of choices as clearly as possible.

25. To persuade the parties to look critically at their own respective cases/contentions - almost to put themselves in the position of the opposite party and evaluate their own claim.

26. Nil

27. Mini-hearing

28. Nil

29. Calm but thorough investigation of the true cause of the problem.

30. Negotiation with the parties

31. Nil

32. Nil

33. Nil

34. Nil

35. Nil

36. Nil

37. Providing preliminary observations as a chopping block.

38. My experience is that few parties are willing to accept a win-win opinion especially if the stakes are high. I therefore prefer to be straight (if the above is the case) and try to inform the parties what the outcome would be if the dispute head to go to arbitration.

39. In separate meetings establish the real causes of irritation/hurt/obstacles. In joint meeting get parties to put the other side's argument in their own words and crosscheck. Point out cost escalation arising out of potential arbitration/litigation should mediation not succeed.

40. Nil

41. To follow the guidelines issued by the SAICE.

42. Nil

43. Nil

44. No particular techniques.

45. See final note

46. Nil

47. Nil

48. Nil

49. Questioning the participants always unearths unlisted aspects central to the problem. Relating personal experience on certain matters in dispute can take an issue off the table.

50. Nil

51. Essentially my approach is that of an award issued an arbitrator on the information provided at a meeting between the parties before recommending a compromise agreement to avoid litigation. Formal opinion follows on outstanding issues.

52. Nil

53. Convey sincerity in trying to understand different parties points of view.

54. Nil

55. Nil

56. Discussing each party's case with him individually and trying to convince him of the benefit of settlement.

57. Nil

58. Nil

59. Nil

60. Nil

61. Settlement zones. Adhoc opinions.

62. Nil

63. Diligent questioning on the critical issues.

APPENDIX B4

TRANSCRIPT OF RESPONSES TO QUESTION 6.4

APPENDIX B4

TRANSCRIPT OF RESPONSES TO QUESTION 6.4

1. Knowledge or experience of the technology of the dispute, and ability to put a number to any award that might have to be made.

2. To listen

3. Specific knowledge of the subject of the dispute

4. Nil

5. Patience, listen much, talk little. Faced with that sounding board parties end up promoting their own settlement very often.

6. Persuasion

7. Patience and negotiation techniques.

8. Listening, effective communication, persuasion

9. Ability to persuade the parties to concede. In conciliatory mediation the parties cannot take all they must be prepared to give as well.

10. To give a reasoned opinion based on substantial facts, and not necessarily on a strict and narrow application of the parties' contractual rights by law.

11. Need to listen. Be persuasive.

12. The ability to obtain the trust of the parties. The parties have to accept the verdict of a judge whether they trust him or not. Knowledge and expertise in the subject of the mediation e.g. and engineers skilled in the particular field –as distinct from arbitration on litigation where the arbitrator/judge may for example be a lawyer or other person without expertise in the relevant field.

13. Understanding the project and the reason for the dispute. Knowing the technical reason for the dispute.

14. Diplomat, negotiator, facilitator

15. Nil

16. Nil

17. Nil

18. Nil

19. Diplomacy

20. Nil

21. Nil

22. Nil

23. Knowledge and experience of the technical issues in dispute.

24. Power of persuasion for parties to compromise.

25. The ability to separate the wheat from the chaff, in other words, to identify the real contentious issues in the most expeditious way.

26. Should have in-depth experience in the work under dispute rather than a purely "legal" approach to the matter.

27. The skill to formulate and articulate his opinion clearly, precisely and in simple language on paper.

28. Expertise both/ then a technical and contractual viewpoint.

29. Patience, calmness, lack of sensitivity to insults, and dogged persistence, coupled with self-confidence in arriving at a true understanding of the problem and a fair apportionment of responsibility.

30. He should not be dictorial. Should be willing to listen to each party and have good negotiating skills.

31. Conciliatory skills

32. He must understand the dynamics, politics and motives of the parties, trying to prevent one or other from losing face is possible.

33. Expertise, understanding of the process and application of principles. Much experience.

34. Nil

35. Nil

36. Nil

37. Ability to facilitate constructive engagement between parties.

38. Expertise and experience of the matters in dispute.

39. More experience/expertise in field under dispute. More patience. More supportive less authorative.

40. Both sides should trust you –this requires confidence and knowledge.

41. Knowledge from experience in the construction industry and conflict resolution

42. Nil

43. Ability to persuade the parties to accept and fairly quick and reasonable solution rather than an expensive hard legal judgement.

44. An ability to persuade people to may suggestions as to a possible way and of the dispute.

45. See note below. Mediator –combination of contractual/legal and technical understanding. Conciliator –technical understanding and negotiating skills with contractual/legal slightly less important.

46. Negotiation

47. Nil

48. Nil

49. Technical knowledge aligned to experience and acceptance as a fair and eminent practitioner.

50. Knowledge. Experience. Concern.

51. He must be regarded by both parties as competent and fair with an understanding of the financial implications if agreement is not reached between the parties. The opinion should bring that out. He should skilfully manoeuvre the parties into realising the importance of reading agreement.

52. Honesty.

53. Communication skills. Sincerity. Expert knowledge.

54. Contractual procedure.

55. Technical knowledge of the construction process.

56. Good listener and negotiator. Persuasive technique with good engineering and legal knowledge.

57. Obtain an agreed solution.

58. Understanding and communication of the real issues.

59. Gaining the trust of the parties, allaying animosity for ill will that might exist and generally creating an atmosphere in which calm, reasoned and logical discussion can take place.

60. To facilitate the process of bringing parties to an agreement or at least as close to agreement as is possible.

61. Knowing when to start suggesting compromises as the mediation unfolds.

62. He should have empathy with both parties and be willing to invest an extraordinary amount of time and be tolerant of frustration caused by both parties.

63. Understanding of people and contracting.

APPENDIX B5

TRANSCRIPT OF RESPONSES TO QUESTION 7.2

APPENDIX B5

TRANSCRIPT OF RESPONSES TO QUESTION 7.2

1. Although the SAICE system is somewhat over-formal, it seems to have worked. The advantage of an independent formal award is that the Employer' s engineer is relived of the charge of giving away the Employer' s money. Negotiation and conciliation could smell of corruption. More suitable in cases of contractor vs subcontractor.

2. Nil

3. Nil

4. Written submissions followed by a reasoned opinion.

5. Nil

6. Get in early before too much damage is done. An early solution is always important, as if it is allowed to go too far it will always be costly. Sometimes there has to be some unhappiness, but –better a bad solution than a good fight, and your first loss is always your best loss. If the fight is not allowed to get properly under way, then there is need to be much loss at all.

7. The step of mediation in the dispute resolution process is an important aid to reduction in litigation. Because parties perceive an approach for amicable settlement as an indication of weakness. If the contract does not require it. Is it legally enforceable as a condition precedent arbitration/litigation. In my view it should be as it forces the parties to address issues which may not have been previously considered.

8. Nil

9. Unless the parties are prepared to concede, they are wasting time and money with a conciliatory mediation. I have had greater success with legal advisors excluded from the process, the parties each putting their cases to the mediator and he giving his opinion which is accepted as final with no further facility for recourse.

10. Avert from relying on matters that was not previously raised during the dispute (i.e. before mediation). Conclude on the basis of my perception of substantiated facts, event/act/circumstances based on in-depth study of the contract mediation and records/research and records applicable at the time when the claims were initially invoked and rejected.

11. Nil

12. I think there should be more emphasis on what I consider "mediating" to mean i.e. getting the parties to reach an agreement without having to give a formal "mediators opinion". However, I' m not sure that if one has tried to persuade the parties to reach agreement, and failed, one is then in a position to give an apparently unbiased formal opinion. That is the difficulty and presumably why SAICE and SAACE guidelines appear to contemplate an "arbitration" like process.

13. The documentation must be complete. The people involved in presenting the problem must be technically competent.

14. Be human –don' t be legal, be correct with regards to the contract, put yourself in the shoes of the "loser" and the "winner", there is life beyond the dispute and the contract.

15. Nil

16. Nil

17. Not necessarily the answer you looking for but it would seem that GCC 90/within mediation clause) is the way out and being replaced by FIDIC/initially settling/DRB) and this NEC (adjudication) as means of settling disputes. I also understand that the new JBCC contract will incorporate adjudication rather than mediation.

18. Nil

19. Remove personal agendas. Create the big picture. Amicable solution.

20. I have only mediated once. From the outset the contractor stated that he could go to arbitration unless he was awarded all that he had claimed. In the event he went bankrupt.

21. Many of my arbitration cases ended in mediation –or at the commencement of proceedings move to mediation.

22. I feel that mediation process should carry more weight –i.e. similar to that of the arbitrator as this would make the job of the mediator easier in that the parties would place more relevance in the discussion of the mediator. I almost get the feeling that people see mediation as a step to arbitration if they do not get the result they are after.

23. I try to get the parties to understand at an early stage that the procedures to be followed will be formal almost as in arbitration, but that there will be some flexibility in this - also that cognisance will be taken of the intentions of both parties. When the dispute arose even though such intentions may not have been

committed to writing.

24. Nil

25. To limit the input and presentations by the parties to what is strictly necessary to determine the real contention issues that prevent a settlement. To get the parties to move away from a "claims" frame of mind, especially where claims consultants are involved. To ban claims consultants from the mediation process as far possible –they are the bain of the construction issue –not all of them, but a large majority.

26. See items 6.1.1 –6.1.6

27. My approach is based on my experience that in most major construction disputes, the disputes is a bona fide difference in interpretation of fact and law. The parties have reached a deadlock, often due to bad advice from their legal and technical experts. The function of the mediator and of mediation is to, as part of the negotiation process, to give a professional, unbiased, independent impartial and highly expert view on both the technical and legal issues in the dispute. Such opinion is mostly sufficient to break the deadlock and to facilitate the consult of further successful negotiation with or without further assistance of the mediator.

28. Mediation is a voluntary and deep way of resolving an incipient dispute. In the UK it has been replaced with adjudication. Because mediation has no legal standing (enforceable), is often used as scare tactics and as a way of delaying proceedings. I favour using either adjudication or a process which yields a legally enforceable award.

29. Nil

30. Nil

31. I like to feel on resolution that each party is equally dissatisfied. I have retired for personal reasons.

32. Nil

33. Nil

34. Requirements: valid contract, mediation agreement

35. Nil

36. Nil

37. Nil

38. I would prefer to see a direct arbitration process with the summary procedure rules being used to come to a quick and final result.

39. See general notes/ideas enclosed.

40. Nil

41. We understand creation in new cosmological terms and this new understanding demands new moral behaviour in all aspects of life including the resolution of disputes.

42. Nil

43. Mediation is being fast replaced by dispute review boards and/or adjudications.

44. I have found it beneficial to keep the parties apart in the early stages; to form my initial opinion from written submissions/supported by documentary evidence. To then meet separately to acquire further information as necessary and to acquaint each party with my opinion, and finally to meet jointly to attempt to broker a solution.

45. I have more experience advising one party than acting as a mediator. I differentiate between mediation as envisaged in the civil contract where an opinion must be given and the parties must accept or reject that opinion - not in my opinion a good system, on the one hand and conciliation –where the conciliator attempts to guide the parties to a settlement and may or may not give an opinion if the conciliation is not successful. The old fashioned civil "mini-arbitration: form of mediation is more often used as a delaying or fact finding exercise - in very few cases was the mediators' opinion accepted as it stood. At best it was the basis for a new round of negotiations.

46. Nil

47. Nil

48. I consider that mediation has been used too frequently to compromise the employer in satisfying contractor' s claims, whether justified or not.

49. Understand the problem - as each party describes it. Consider and apply the mind. Give a firm opinion to each party individually and ask for their response. Evaluate their responses and apply variations. Propose a solution/opinion of the matters. Document the opinion in writing. Press parties for agreement.

50. Nil

51. Nil

52. Nil

53. Nil

54. Nil

55. Nil

56. Very good if parties are prepared to negotiate. A waste of time if one party is reluctant to participate.

57. Nil

58. Remember that the objective is to bring the parties to acceptance of a reasonable settlement and how expensive and time-consuming arbitration or litigation is likely to be. Adapt the approach to the circumstances and the parties involved. It is not what the mediator prefers but what is likely to be effective, that is important. Notwithstanding the above, to the confidence of the parties in the mediators' ability to understand the technical issues and remain impartial, is essential.

59. Nil

60. Nil

61. I prefer consensual mediation where the mediator does not rule or provide any opinion but by providing ongoing adhoc opinions gets parties to agree to a suggested solution.

62. Nil

63. Nil

APPENDIX C

SUMMARY OF DISPUTE RESOLUTION PROCESSES AND MECHANISMS USED IN THE CONSTRUCTION INDUSTRY

SUMMARY OF DISPUTE RESOLUTION PROCESSES AND MECHANISMS USED IN THE CONSTRUCTION INDUSTRY THROUGHOUT THE WORD

1. *Certification by employers' agent*

   Loots (1995) maintains that the procedures of valuation and certification, inherent in a construction contract, are aimed at preventing disputes from arising.

2. *Employer' s agent as quasi-arbitrator*

   A dispute can be prevented when the Principal Agent' s' decision or Engineer' s ruling on a disagreement between the parties is accepted by the parties.

3. *Dispute resolution boards, advisors*

   Independent person(s) appointed at the commencement of a contract to monitor the progress of work and give advice to prevent disagreements from developing into disputes. If a dispute does arise, it is referred to the board/advisor for resolution.

4. *Informal decision-making and problem-solving*

   Pretorius (1993) categorises these processes, together with negotiation as dispute resolution processes, I submit that their primary role is in preventing a dispute from arising.

5. *Negotiation*

   A process whereby parties involved in a disagreement (or dispute) seeks a mutually acceptable settlement by bargaining. It is noted that the Guidelines to the FIDIC Conditions of Contract for Construction for Building Engineering Works designed by the Employer ((1st Edition) 1999), include direct negotiation, together with conciliation and mediation in the list of amicable settlement procedures.

6. *Mediation*

A structured negotiation process where an acceptable, impartial and neutral third party assists the parties in dealing with the dispute and reaching agreement.

7. *Conciliation*

A structured negotiation process where an impartial third party, in addition to mediating, makes a formal recommendation to the parties for settlement of the dispute.

The terms mediation and conciliation are often used interchangeably and there appears to be no consistency in usage worldwide. It can be agreed that both are structured negotiation processes involving the services of an impartial third party. According to Butler & Finsen (1993:10), where a third party is not expected to make a recommendation, he is termed a mediator in the USA and in labour disputes in SA. In the UK and SA construction industry, he would be called a conciliator. Where the third party gives a non-binding opinion at the end of the proceedings, he is termed a conciliator in the USA and in labour disputes in SA, but a mediator in the UK and SA construction industry.

8. *Arbitration*

A form of adjudication where an impartial third party decides the submitted issue after reviewing evidence and hearing argument from the parties. There are various forms of arbitration to which the parties can agree.

9. *Expert determination*

Parties appoint an expert to consider their issues and to make a binding decision or appraisal without necessarily having to conduct an enquiry following adjudicator rules.

10. *The mini-trial* (called an executive tribunal in the UK)

A structured settlement process where the parties present the issues before the senior officials of both parties, who are authorised to settle the matter. An impartial third party may preside over the proceedings and assist with the negotiation of a settlement.

11. *Med-Arb*

Parties attempt to negotiate a settlement to their dispute with the assistance of a mediator. Any unresolved issues are then submitted to a third party who takes on the role of an arbitrator who will adjudicate the issues. In some from the same person serves as both the mediator and arbitrator.

12. *Arb-Med*

Parties submit their dispute for determination to an arbitrator. However, immediately prior to issuing his award, he takes on the role of a mediator and attempts to assist the parties in negotiating a settlement to their dispute.

13. *Rent-a-judge/Judicial appraisal*

The rent-a-judge system is popular in the construction industry in California. The CEDR (Centre for Dispute Resolution) in the United Kingdom has devised a similar system. These systems draw on the expertise of senior counsel and former judges who assess the actual or potential litigant' s case and offer an independent assessment of the case. Parties are then able to go on to better-informed negotiations or to mediate a settlement.

14. *Fact-finding*

A fact-finding proceeding entails the appointment of a person(s), often with technical expertise in the subject matter of the dispute, to evaluate the material presented and to present a report, which establishes the relevant facts.

15. *Contractual Adjudication*

Parties, on entering a contract, agree that all disputes shall be referred to neutral third party, the adjudicator, for a binding decision, which remains effective until replaced by litigation, arbitration or agreement. Sometimes called "interim" or "fast-track adjudication"

16. *Dispute Review Boards (DRB' s)*

A DRB is a panel of experts, existing from the outset of a construction project, which meet together at regular intervals, including site visits, throughout the course of the project so as to develop a familiarly with it, and which hears and resolves disputes as they arise on site. The DRB merely issues a recommendation and the parties are not obligated to implement the recommendation. Advocated by the World Bank.

17. *Dispute Resolution Advisor (DRA)*

A DRA, like a DRB, is appointed at the outset of a construction project and visits the site regularly in order to remain up to date with developments on site. Upon appointment, the DRA holds a series of familiarisation meetings, with the aim of developing the relationships between the personnel on site as well as building their support for the DRA system. The regular site visits are used as an opportunity for the DRA to facilitate the settlement of any disagreement that arises. Any disputes unable to be settled by informal means (negotiation, mediation) are referred to the DRA for a decision which is binding on the parties. The DRA is advocated by FIDIC.

18. *Partnering*

Partnering was developed by the Army Corp of Engineers in USA. Partnering is the creation of an owner-contractor relationship that promotes achievement of mutually beneficial goals. It involves an agreement in principle to share risks involved in completing a project and to establish and promote a nurturing partnership. Parties appoint a neutral facilitator whom they meet at a "Partnering Retreat" to establish goals and milestones for measuring progress toward those goals. If the goals are not being met, the facilitator may lead the parties in fact-finding and work with increasingly higher levels of management on all sides to get the project back on track.

APPENDIX D

D1. AA Guidelines For Mediation

D2. SAICE Guidelines For Mediation

D3. SAACE Guidelines For Mediation

APPENDIX D1

ASSOCIATION OF ARBITRATORS OF SOUTH AFRICA (AA SA)

THE ASSOCIATION OF ARBITRATORS

GUIDELINES FOR MEDIATION UNDER CONSTRUCTION CONTRACTS
1st Edition: June 1992

1. INTRODUCTION

"Mediation" is a term that means different things to different people. In the construction industry in South Africa it generally denotes a procedure in which a neutral third party seeks to resolve a dispute by conducting an enquiry, similar to but less formal than an arbitration hearing, and giving a non-binding opinion. But almost universally elsewhere it denotes a process in which a neutral third party attempts to bring about a reconciliation between disputing parties, in which he seldom, if ever, presents his own opinion.

The procedure recommended here, whilst devised to suit the requirements of the standard form contracts used in the construction industry, recognises the other nature of mediation and proposes a process in which initially the mediation corresponds to the more universally recognised concept, and in which the mediator is the negotiator of a settlement between the parties, and only where the parties fail to reach agreement does he assume the rôle that has become traditional for mediators in the construction industry.

It is hoped that this procedure will not only diminish the difference between the two types of mediation but will also improve the quality of this manner of resolving construction industry disputes.

2. OBJECTIVE OF MEDIATION

2.1 Mediation is a process that seeks, by means of the intervention of a neutral third party, to bring about the resolution of disputes between parties who are unable to resolve these disputes unaided.

2.2 In mediation the resolution of the dispute is voluntarily accepted by the parties, and is not imposed upon them as is the case with litigation or arbitration. By agreeing

to mediation provisions incorporated in standard form contracts, the parties can be deemed to have willingly agreed to mediation.

3. ADVANTAGES OF MEDIATION OVER LITIGATION OR ARBITRATION

3.1 Mediation is quick. If the parties are co-operative, disputes may be resolved by mediation in a matter of hours, days or weeks; whereas arbitration has been known to take months and litigation often several years.

3.2 Mediation is private. Like arbitration, but unlike litigation, mediation is always conducted in private. There is no unwelcome publicity in newspapers and other media, and trade secrets and reputations may be preserved.

3.3 In mediation the parties make peace, not war. The success of a mediation depends upon the ability of each party to see the other's point of view and to accommodate it, whereas in litigation or arbitration each party endeavours to demolish the other's case before the judge or arbitrator.

3.4 Mediation preserves and enhances the relationship between the parties. As each must understand and respect the other's point of view, their relationship is fortified, which is particularly important where the parties must continue to work together in the future. Litigation and arbitration, on the other hand, are confrontational and can be destructive of relationships.

3.5 Mediation produces a "win-win" situation; in a successful mediation each party considers that he has won the best possible deal from the situation commensurate with the costs involved. Litigation and arbitration usually yield a "win-lose" situation and sometimes, when each party feels he has received less than he deserved, a "lose-lose" situation.

3.6 Mediation is usually a comparatively inexpensive way of resolving disputes.

4. QUALITIES OF A MEDIATOR

4.1 The mediator must enjoy the confidence and respect of the parties.

4.2 He should be a good listener and able to understand and appreciate the attitudes of the parties.

4.3 He should be tactful and diplomatic, and able to defuse heated and potentially explosive situations.

4.4 He should be patient and uncritical.

4.5 Whilst he may not necessarily be an expert in the subject matter of the dispute, such expertise may be conducive to an equitable solution.

5. MEDIATION IS NOT AN EXPEDITED ARBITRATION

5.1 Mediation is not a "no frills" type of arbitration from which lawyers are excluded and in which any time-wasting procedures are avoided, but is an entirely different way of resolving disputes, with its own particular procedures.

5.2 It does not seek to establish the legal rights of the parties, as do arbitration and litigation, but seeks rather a dispensation that is acceptable to both parties, which will probably require each to compromise on its legal rights.

5.3 Any mediation in which the parties require the mediator to formulate a resolution of the dispute which will be final and binding upon them will not, strictly speaking, be a mediation but a *de facto* arbitration, and the mediator/arbitrator may have to modify procedures to suit the wishes of the parties and the requirements of the Arbitration Act.

6. AGREEMENT TO SUBMIT TO MEDIATION

6.1 Mediation is a consensual method of resolving disputes, and may be initiated at any time by parties in dispute who mutually agree to avail themselves of this procedure. Parties who are unable to resolve their dispute unaided, and are contemplating litigation or arbitration, are strongly advised to attempt mediation prior to embarking upon litigation or arbitration.

6.2 The agreement to submit a dispute to mediation may be oral but should preferably be in writing; the question of proving or enforcing a mediation agreement cannot arise: the enforcement of a mediation agreement against an unwilling party will be counterproductive, and the reluctant party cannot be expected to co-operate in the mediation proceedings to enable them to succeed.

6.3 The agreement could provide that, if the dispute had not been resolved within an agreed period of time, efforts at mediation would be abandoned and the dispute would be referred to litigation or arbitration. Notwithstanding any such provision, a mediation agreement would terminate as soon as one of the parties decided to withdraw from the proceedings.

7. APPOINTMENT OF THE MEDIATOR

7.1 Ideally the mediator should be appointed by the parties by mutual agreement. If the parties are unable, within a reasonable time, to agree on the appointment of a mediator, it is unlikely that they will be able to agree to any compromise of the dispute under his guidance, and any attempt at mediation should be abandoned.

7.2 Certain standard-form contracts contain provision for mediation in which the mediator is required to be appointed by some designated third party. Notwithstanding any such provision, the parties should endeavour to agree between themselves to appoint a mutually known and respected mediator.

7.3 Where the parties are unable to agree on the appointment of a mediator because they are not acquainted with suitable candidates, the Association of Arbitrators may be consulted for names of possible candidates for selection.

7.4 The appointment of the mediator should be confirmed in writing, possibly by the exchange of letters, and the basis of and liability for his fees should be recorded. It is usual for his fees to be settled equally by the parties, although this arrangement might subsequently be varied in any agreement that resolves the dispute.

7.5 The appointment of a mediator is a personal appointment, and the associated duties must be discharged by the him personally and may not be delegated except with the consent of the parties, nor may he withdraw from his appointment until either or both of the parties agree to release him.

7.6 In theory, a mediator may be liable to the parties for any loss they may sustain due to his negligence or failure to discharge his duties in a proper manner. In practice, it would probably be very difficult to establish the necessary *causal nexus* between any action or inaction on the part of the mediator and the loss alleged by the party.

8. BARS TO MEDIATION

8.1 At the outset the mediator should establish if either party is relying upon a circumstance that would extinguish the other's claim, i.e. that the other's claim has become prescribed, or that the other failed to formulate his claim in the manner prescribed by a contract or agreement, or that the claim was legally unenforceable.

8.2 Where a party alleges that the other's claim has been extinguished or is legally unenforceable, the mediator should require the party making the allegation to confront the other party with the allegation, either orally or in writing, and require the other party to respond. On the basis of the allegation and response, supplemented if necessary by any further evidence or comment that

either party may wish to make, and any independent investigation that he himself may wish to make, the mediator should determine whether or not the allegation is valid.

8.3 Where the mediator is of the opinion that the claim has been extinguished, or is unenforceable, he should advise the parties accordingly and terminate the proceedings.

9. DEFINITION OF THE DISPUTE

9.1 The mediator should require each party to make a statement of his particular perception of the dispute, the facts that give rise to the dispute, the attitude of the other party and the relief that he is seeking. Such statement may be oral or in writing. If oral, it should be made in the presence of the other party; if in writing, a copy should be furnished to the other party.

9.2 Each party should then be requested to respond to the other's statement, either orally or in writing, in which response he may draw attention to different versions of fact or different attitudes based on the facts. If such statements are oral, they should be made in the presence of the other party; if they are in writing, a copy should be furnished to the other party.

10. ESTABLISHMENT OF FACTS

10.1 Where the statements produced in terms of defining the dispute reveal factual discrepancies, and where such facts are relevant to the resolution of the dispute, the mediator should attempt to establish the true factual position.

10.2 He should, if he deems it necessary, convene an informal hearing for the purpose of taking evidence from the parties. Such hearings can become confrontational and are apt to be counterproductive of a settlement, so that the mediator will have to exercise patience and skill in controlling such meeting. The mediator is not bound by the rules of natural justice and the laws of evidence, and

may make whatever investigations he feels are necessary in whatever manner he considers appropriate.

10.3 When he is satisfied that he is in possession of the correct version of the facts, the mediator should endeavour to persuade the party whose version is different to accept the correct situation. The mediator is more likely to succeed if he does this with the party in private; there is no need for the other party to be present.

11. COMPROMISING OF ISSUES

11.1 Having established with the parties the true version of the facts, the mediator should attempt to reconcile opposing views. While this is most expeditiously achieved by getting the parties together, conflicting attitudes may make this procedure inadvisable.

11.2 Whether he has the parties together in the same room or must keep them apart and move from one to the other, the mediator should offer each party the attitude of the other and seek to establish whether each party would accept any part of the other's attitude, either in its original form or adjusted to make it more acceptable. He should also indicate to each party the concession which, if made by that party, might be accepted by the other. In this way, by the making of a series of small concessions and small acceptances, the gap between the attitudes of the parties may be narrowed, or even closed.

11.3 The mediator should not be insistent that the parties meet together if they are reluctant to do so; "arm's length" mediations, although slow, may be very effective and may avoid confrontations. It is likely that, as the differences are eliminated, the parties will be more ready to meet together and expedite the resolution process.

11.4 The mediator should be very slow to express his own opinion on the merits of the dispute, particularly in the early stages of the proceedings. His own opinion, except in special circumstances, is irrelevant. What is relevant are those aspects of the opinion of each of the parties

which the other is prepared to accept, and which will become the ingredients for an ultimate compromise and settlement.

11.5 In certain circumstances, where on a particular issue neither party is able to accept the other's point of view or to make a concession that the other may accept, the mediator may make a proposal which he considers might be acceptable to both. The proposal that he makes should be formulated to conform not with what he himself may consider correct in the circumstances but with what he thinks may have the best chance of acceptance by both parties. The mediator should be prepared to modify any proposal if so doing would increase its chance of mutual acceptance.

12. THE MEDIATOR'S PERSONAL OPINION

12.1 In certain circumstances parties appoint a mediator because they desire his advice and guidance; they are prepared to bow to his superior knowledge and experience. In such circumstances the mediator is free, in fact obliged, to express his own opinion. In doing so, he should express his opinion clearly and argue and motivate it fully, so that a party who finds it hard to accept may be persuaded of its logic. The mediator should be prepared to adjust and modify his opinion if doing so would make it easier for both parties to accept it; his concern should be to express an opinion which both parties can accept rather than one which he himself considers is most correct.

12.2 Mediation provisions in some construction contracts lay down that the mediator's opinion shall become final and binding upon the parties unless either of them, by writing to the mediator within a stipulated period, rejects the opinion. As the lapse of a party's right to reject a mediator's opinion may have serious consequences for him, it is important that the mediator accurately records the date when he delivers his opinion to each party.

13. RECORDING OF AGREEMENT

13.1 Any agreement between the parties, even if it does not dispose of all the matters in dispute, should be reduced to writing and signed by the parties.

13.2 Care must be taken in drafting the agreement to ensure that it is clear, that it accurately reflects the agreement between the parties and that it is free of any uncertainty or ambiguity. Unless the parties, or the mediator, are experienced in legal drafting, it will usually be worthwhile to engage an attorney for the purpose.

13.3 Once an agreement has been reduced to writing and signed, it would, if necessary, be comparatively easy for a party to enforce the agreement against a defaulting party by application proceedings in the Supreme Court.

14. CONFIDENTIALITY OF MEDIATION PROCEEDINGS

14.1 If settlement negotiations in a mediation are to have any chance of success, the parties must feel free to make admissions and concessions which, if the negotiations fail, cannot be used against them to their prejudice in any subsequent proceedings.

14.2 The mediation proceedings must therefore be held to be confidential and without prejudice, so that no party, mediator, witness, representative or any other participant in the mediation proceedings may be called upon, or compelled, to give evidence of anything said or done in such proceedings in any subsequent related arbitration or litigation, nor may any such person disclose anything so said or done in such mediation proceedings to any third person who is interested in or connected with the dispute.

14.3 Where any settlement has been reached by the parties, or where a mediator's opinion has become binding upon them, the terms of such settlement or binding opinion shall not be privileged and shall be with prejudice, but all proceedings leading up to such settlement or binding

opinion shall remain privileged except for the purpose of enforcing it in any legal proceedings.

14.4 No mediator who has acted in a mediation, nor any partner, co-director or spouse of such mediator, may thereafter act as arbitrator, advocate, representative or witness in any subsequent arbitration or litigation proceedings concerning the matters in dispute.

14.5 The parties may jointly consent in writing that anything which is prohibited by this section may be done.

APPENDIX D2

SOUTH AFRICAN INSTITUTION OF CIVIL ENGINEERS (SAICE)

SOUTH AFRICAN INSTITUTION OF CIVIL ENGINEERS

GUIDELINES FOR MEDIATION

1.0 PURPOSE OF GUIDELINES

The Guidelines are intended to assist persons involved in mediations required in terms of the General Conditions of contract for Works of Civil Engineering Construction (GCC) 1990.

When two parties have a difference of opinion or a dispute on a contractual matter which they cannot settle themselves, one of the parties can require the matter to be referred to mediation in terms of GCC clauses 61(1) and 61(2). Mediation can take place while the Works are in progress or after the Works have been completed, but in terms of Clause 61(6)(c) any dispute arising after completion of the contract must be determined by arbitration or court proceeding. Mediation is a form of appeal against a prior decision given or deemed to have been given by the Engineer in a dispute between two parties.

2.0 INTRODUCTION TO MEDIATION

2.1 The Mediator

The mediator is an independent person with the necessary competence, engaged jointly by the parties to provide them with an opinion on a matter in dispute arising from the contract on which the Engineer has already given his decision, or who has been deemed to have given a decision. (See Clause 61(1)(c)(ii).

The Mediator is required to give his opinion on the merits of the case, within the provisions of the contract.

2.2 The parties

The parties are, on the one side the Employer and on the other side the Contractor.
The party raising the claim is called the Claimant.
The party rejecting the claim is called the Respondent.

2.3 Essential Requirement

The essential requirement to be met by the procedures adopted in every case is, that it must ensure that each of the parties is given a fair opportunity to put its case and its responses to the case of the other, fully to the Mediator. Subject to this requirement being fully met, unnecessary costs through needlessly elaborate procedures should be avoided.

The procedures adopted should be those most appropriate for the particular case. The guidelines or procedures which follow are advisory and not mandatory.

3.0 PREPARATION FOR MEDIATION

Certain requirements must have been complied with as follows before mediation can begin:

3.1 Valid Contract

A valid contract must exist, between the parties.

3.2 Mediation Agreement

A mediation agreement must exist, such as is contained in the GCC.

3.3 Requirement

The parties must have followed the procedures set down in the contract leading to the referral of a dispute to mediation. Under the GCC, these procedures are:

3.3.1 The Engineer must have given a ruling or be deemed to have given a ruling in terms of either Clause 51 or Clause 60.

3.3.2 The Contractor must have issued a Dispute Notice disputing the validity or correctness of the whole or a specified part of the ruling in terms of Clause 61(1)(a).

3.3.3 On receipt of the Dispute Notice, the Engineer shall have consulted with the Employer and given the Contractor a reasonable opportunity to present written or oral submissions.

3.3.4 Within 42 days after the receipt of written notice from the Contractor to the Engineer requiring his decision, the Engineer must have given his decision. If the Engineer has not given his decision he is deemed to have affirmed the ruling without amendment in terms of Clause 61(1)(c)(iii).

3.3.5 In terms of Clause 61(1)(d) either the Employer or the Contractor may within 28 days dispute the Engineer's decision, in which event the matter is immediately referred to mediation as per Clause 61(2).

3.3.6 It should be noted in terms of Clause 61(6) - Special Disputes, there are certain disputes which must be determined by arbitration or court proceedings and which, therefore, cannot be referred to mediation.

3.4 Existing Documentation

Properly motivated and documented claims in terms of Clause 51 or disagreements in terms of Clause 60 by the Contractor and well reasoned rulings or decisions by the Engineer, should result in all or most of the documentation required by the Mediator to put himself fully in the picture, being immediately available at his entry into the matter.

3.5 Selection of Mediator (Appendix A)

In terms of Clause 61(2)(a), a Mediator must be selected by agreement between the parties, or, where agreement cannot be reached, be nominated by the President of the South African Institution of Civil Engineers on application of either party.

4.0 MEDIATION IN PROGRESS

4.1 Contractual Correctness

In order to succeed in a Mediation, a party must convince the Mediator that his view is contractually correct and that the view advocated by the other party is not so.

The parties must therefore provide the Mediator with relevant, adequate and sufficient information and evidence for him to adjudicate the dispute and give direction in his written opinion.

4.2 Information and Evidence

All information and evidence used in the mediation must be available to and known to the Mediator, both parties and the Engineer. Submissions to the Mediator must also be sent in copy to the other party and to the Engineer, while communications from the Mediator must be posted, delivered by hand, or made available for collection to both parties and the Engineer. Telephone conversations on administrative matters such as arrangements for meetings should be confirmed in writing to all concerned.

The parties should be aware that they have reasonable latitude in the presentation of their cases, but in the interest of keeping time used for the mediation within reasonable limits, their representatives should confine themselves to matters directly pertinent to the dispute.

4.3 Avoidance of Contact

It is usually considered an ethical, if not a legal requirement, that the "judge" in a dispute should be very careful not to make contact with the parties separately.

This procedure should normally be followed in mediation. It is however, not binding on the Mediator and circumstances may arise where the Mediator considers that he is more likely to reach an acceptable settlement by discussing the problems independently with the parties to the dispute, as provided for in Clause 61(2)(c) of the General Conditions of contract (1990).

4.4 Representation - General

In the interests of a speedy prosecution of the mediation both parties should be persuaded, if possible, to nominate not more than two representatives to the mediation. The categories of these representatives are defined in Clause 61(2)(b). Parties may consult with anyone from whom they wish to receive assistance with the preparation of their arguments, claims, responses and counter-claims. The parties may also call witnesses.

The Mediator may take outside advice including legal advice on relevant matters, provided he has the prior consent of the parties to the costs involved.

4.5 **Adjudication**

Mediation is not a formal legal procedure. The function of the Mediator is to adjudicate on matters in dispute and by the reasonableness of his adjudication to lead the parties to accept his adjudication or to be so influenced by it as to reach a settlement without going to arbitration or to court.

4.6 **Mediation Procedure**

There are no statutory Rules for the Conduct of Mediations but a suggested step-by-step procedure is given in Clause 6 of these Guidelines.

The Mediator will decide on what procedure will be used, after having consulted with the parties. The rules of natural justice must be applied, as both parties must be heard and be required to ask or answer questions.

5.0 **COMPLETION OF MEDIATION**

5.1 **Termination**

5.1.1 Unless the mediation procedure is terminated for other reasons, the mediation is normally terminated by the Mediator expressing his opinion in writing and furnishing each party with a copy thereof. A copy should also be sent to the Engineer.

The Mediator completes his duties when he signs the opinion, but it sometimes happens that one or both parties ask for clarification or further comment from the Mediator. If the Mediator considers that such further responses may encourage the parties to accept his opinion, there is nothing to prevent him from responding, but it is entirely within his discretion as to whether he responds or refuses to do so.

5.1.2 If the Mediator's written opinion is handed to the parties, they should be requested to sign a dated form of receipt for the Mediator. If the opinion is sent by messenger, the latter should obtain a signed note of receipt or if posted, it should be posted by registered post so that evidence shall be available to confirm exactly when it was handed or posted to each party.

5.2 **Mediator's Opinion - Contents**

The Mediator's Opinion should:

5.2.1 Deal with all claims and issues raised in the disputes he has been appointed to mediate. No issue should be left unanswered and no issues must be left to others to decide. No issue, not included by the parties in the mediation, should be included in the opinion.

Should the Mediator wish to give an opinion on a matter of principle which invalidates a quantitative determination made by the Engineer, the Mediator should refer the matter back to both parties before making a final decision.

5.2.2 Give directions which are simple and easy to understand.

5.2.3 Give directions which can be carried out at the time and place to which they refer.

5.2.4 Be written in the suggested standard form for giving the Mediator's opinion or in such form as he may decide. Refer to Appendix B which is attached.

5.3 **Mediator's Opinion - Duration**

The Mediator should as required in Clause 61(2)(e) give his opinion to each of the parties as soon as reasonably practical.

The Mediator has few means to speed up proceedings if one party defaults by acting in an unco-operative manner, repeatedly causing delays.

If the Mediator decides that in such circumstances he is not prepared to continue with the mediation, he may give notice to the parties and the Engineer that, unless he receives a satisfactory response from the defaulting party within a stated period, he will:

5.3.1. Write his opinion on the basis of documents received up to that date.

or

5.3.2 Inform the parties that he is unable to adjudicate the dispute due to lack of relevant information, in which case the only opinion that he will be able to give is that the non-defaulting party is entitled to require the dispute to be referred to arbitration or litigation.

5.4 **Mediator's Opinion - Reasons**

It is essential that the Mediator should give reasons for his opinion. The requirement for a reasoned opinion should be included in the Mediator's letter of appointment. Reasons are necessary, otherwise there is likely to be little encouragement for the parties to accept the opinion.

In a reasoned opinion, the Mediator will normally explain how the opinion has been motivated and how decisions have been arrived at. He should also give references to relevant contract clauses, documents received and legal authorities he has relied upon.

5.5 **Mediator's Opinion-Implementation**

The Mediator's opinion is binding upon both parties in terms of Clauses 61(2)(f) until otherwise ordered in arbitration or court proceedings in terms of Clause 61(2)(g).

If the disputes or any part thereof remain unresolved after receipt of the Mediator's opinion, it shall be determined by arbitration in terms of Clause 61(3) or by court proceedings as per Clause 61(4).

6.0 MEDIATION PROCEDURE (Step-by-Step)

6.1 General

The mediation procedure is very flexible. The procedure for a particular dispute will be decided by the Mediator after consultation with the disputing parties and with guidance received from them as to their common reasonable desire.

In order that a Mediator will be able to assist and guide the disputing parties to a settlement acceptable to both of them, or to express his own opinion as to how such settlement should be reached, the parties should convey to him in terms of Clause 3.4 existing documentation:-

6.1.1 The substance and reason for the dispute.
6.1.2 How they believe that the dispute could or should be settled.
6.1.3 What common cause there is in the case, i.e. what relevant matters are not in dispute.
6.1.4 The terms of agreements such as the contract which the parties made before and after the dispute arose.

Information is conveyed by written or oral presentations as described in Clause 6.4 and 6.5. Normally it is assumed that all statements are made in good faith and that misunderstandings and misinterpretations can be identified and clarified.

Legal, technical and financial points should be kept separate where possible. Presentations should be made with numbered sections and the following format for use by the claimant has been found practical:

(i) Introduction to claim
(ii) Reasons for claim
(ii) Historical background to claim
(iv) Payment demanded - basis, calculations and summary
(v) Additional explanations
(vi) Index to documents attached to claim

Presentations can sometimes be beneficially divided into separate submissions consisting of subheadings (i), (ii) and (iii) or subheadings (iv) and (v), while subheading (vi) is split according to contents.

Such division of a presentation of a claim is appropriate where the Mediator is asked to decide whether or not a contractually valid claim exists in principle for which purpose (iv) and (v) are unnecessary.

The Respondent would be expected to address each and every one of the points raised by the Claimant.

6.2 Mediator's Appointment

The appointment of a Mediator should be carried out in accordance with the procedure in Appendix A. When the parties agree upon the selection of a mediator, the mediation process should be initiated by a letter addressed to him, signed by both parties, asking if he will consider an appointment as Mediator in a certain dispute.

If the Mediator finds that he is not prevented from acting in the case due to his other commitments or his current relationship with the parties and that he is technically qualified to adjudicate the particular dispute, he may accept the appointment provisionally and proceed to arrange a preliminary meeting.

The Mediator must be fully independent of both parties; if in doubt he must reveal any reason for which he could be thought to be biased.

6.3 Preliminary Meeting

It is recommended that the Mediator holds a preliminary meeting with the parties and the Engineer at a convenient time and place.

When deciding on such a meeting, consideration could be given to the urgency of reaching a settlement, the locations of the offices of the parties and the works and also the magnitude of the claims in dispute.

At the meeting the terms of the Mediator's appointment should be agreed and signed by the authorised representatives of the parties. The agreement must also include an undertaking by both parties to be bound by the Mediator's opinion in all aspects, including the payment of monies, unless one or other party decides, subsequent to the Mediator's opinion being made known, to proceed to arbitration, in which case payment need not be made in accordance with the Mediator's opinion, with the exception of the mediator's fees, which must be paid. Both parties must give their names and addresses, telephone and telefax numbers to be used by the Mediator for communications with them.

The terms of the Mediator's appointment should include agreements on the Mediator's fees, expenses and other costs such as hire of rooms, tape recordings and secretarial services. The terms should also state that each party agrees to make payment regarding Mediator's fees prior to the delivery of the Mediator's opinion.

The letter of appointment is a contract enforceable in law.

During the meeting the dispute is briefly presented and the principles of major claims and counter-claims may be stated by the parties.

The Mediator will then outline the procedure he intends to follow and obtain the parties' agreement on this or an amended procedure.

A program must be agreed with the parties indicating earliest start and proposed completion dates.

At the meeting, agreement should be reached between the Mediator and the parties concerned whether presentations to the Mediator will be oral or written. It is recommended that the presentations should be in writing, supplemented where necessary by oral presentations. The venues for submission of presentations should also be agreed at the same time.

If no preliminary meeting is held, the Mediator should prepare in writing the terms of his appointment as Mediator to the parties for their written agreement, together with an outline of the procedure and programme, he proposes to follow. The Mediator should include with the terms of his appointment, his requirements regarding the method of submission of presentations and the venues.

6.4 **Written Presentations**

Depending upon the comprehensiveness of documentation already available from the Engineer's prior dealing with the dispute, letters of presentation should be sent to the Mediator with copies to the other party and the Engineer in the sequence which follows:-

6.4.1 The Claimant submits his presentation to the Mediator.

6.4.2 The Respondent submits his response to 6.4.1 and any counter-claims he may wish to make.

6.4.3 The Claimant responds to 6.4.2 without raising any new matters.

6.4.4 The Respondent responds to 6.4.3 without raising any new matters.

6.4.5 Each statement 6.4.1 to 6.4.4 above should be accompanied by any relevant substantiating documentation not already in the possession of the Mediator.
This may include:

(i) The contract documents, drawings or extracts therefrom.

(ii) Relevant minutes of meetings.

(iii) Relevant correspondence, site instructions, construction diaries, reports, photographs, payment certificates and other documents considered relevant by either of the parties.

6.4.6 When the above presentations have been received by the Mediator, he should decide if he has sufficient information to form an opinion on the dispute or whether he requires additional information, in which case he should request this from the parties.

6.4.7 When he is satisfied that he has all the information he requires, the Mediator will prepare and sign his opinion. He will then advise the parties that the opinion is ready for delivery by hand or registered post and the amounts which are due to him in terms of his letter of appointment.

6.5 **Oral Presentation**

6.5.1 To supplement written presentations, the Mediator may decide to hold further meetings to hear oral presentations. At such meetings, the Mediator should ensure that he has with him all the written documents submitted by the parties. He should also have prepared a list of questions he wishes to ask. Such questions may be kept to himself, handed out at the meeting, or posted to both parties prior to a meeting. A tape recorder may be used to record the discussions and a stenographer may be employed to write down all information obtained. Transcriptions should be made as required.

6.5.2 The procedure for oral presentations should be as follows:-

(i) The Mediator should introduce the discussion and state briefly the procedure he will follow at the meeting. He should then call upon the Claimant to present his case and to raise any additional argument.

(ii) Upon conclusion of the submission made by the Claimant, the Mediator should put to the Claimant such questions as he finds necessary to elucidate any aspect not clear to him or which he considers relevant to the dispute.

(iii) The Mediator should then repeat the same procedure with the Respondent.

(iv) Having heard the Respondent, the Mediator should give the Claimant the opportunity to make any further submission as the Claimant considers necessary. In making his further submission, the Claimant may only deal with the matters contained in his own submission or in the submission of the Respondent. The Claimant should not introduce any new matter save with the express permission of the Mediator, which permission should not be lightly given.

(v) The procedure described in (iv) above should then be repeated with the Respondent.

(vi) Having heard the submissions of the two parties, the Mediator should give the Claimant and the Respondent an opportunity to make a single short oral statement on the dispute. Having done so the Mediator should close the proceedings and inform the two parties that a written opinion will be made available on a certain date.

7.0 COSTS

7.1 Cost of Mediation

The cost of Mediation shall consist of the Mediator's fees and expenses. It shall include any expenses incurred such as the hire of rooms and secretarial services, which should have been agreed prior to the start of mediation.

The Mediator's costs must be borne equally by the parties as per GCC Clause 61(2)(f).

Each of the parties to the dispute is responsible for its own costs.

7.2 Mediator's Fees

The Mediator's fees should be charged in accordance with Appendix C to these Guidelines, and the mediator is entitled to ask both parties to pay a retainer in advance of commencing the mediation.

8.0 ENCLOSURES

8.1 Procedure for the Appointment of a Mediator in terms of Clause 61(2) of the General Conditions of Contract 1990 - Appendix A.

8.2 Standard Form Headings for the giving of the Mediator's Opinion - Appendix B.

8.3 Fees, Rates, Travelling and Subsistence Expenses - Appendix C.

APPENDIX D3

SOUTH AFRICAN ASSOCIATION OF CONSULTING ENGINEERS (SAACE)

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ADVISORY NOTE 93/8

GUIDELINES FOR THE USE OF MEDIATORS AND PARTIES CONCERNED WITH MEDIATION

1. INTRODUCTION

1.1 These guidelines are intended to assist persons appointed as Mediators in terms of General Conditions of Contract where such conditions provide for mediation of disputes which may arise while the works are under construction.

1.2 They are drawn up in the hope of making implementation of the mediation procedure simpler and more uniform, but they are not to be seen as mandatory in any way because it is desirable that each Mediator should feel free to conduct the process in the way he considers will produce the most effective result.

1.3 The relevant clauses of the applicable Conditions of Contract must be observed.

1.4 Mediation can be resorted to at any time and can often produce a quick solution to a dispute at little cost.

2. GENERAL PHILOSOPHY

2.1 To "mediate" is to "intervene - between two persons - for the purpose of reconciling them" (Concise Oxford Dictionary).

2.2 The general philosophy of mediation is that disputes which arise in the execution of engineering works by contract can best be settled by Engineer Mediators for other engineers. This should be the common method of settling such disputes and it is important that the engineering fraternity appreciate that mediation does not have the same characteristics of "mortal combat" as does arbitration or litigation. It is essentially an informal and, hopefully, amicable method of resolving disputes.

2.3 It is also important to understand that Mediation is not a formal legal procedure. Its aim is simply the settlement of an argument between two parties by acceptance on the part of each of the Mediator's opinion and it should be the principal objective of a Mediator to achieve such a mutually acceptable settlement. He should not consider himself an arbitrator or a judge but should see his function as being to assist the disputing parties to find common grounds.

2.4 However, the settlement of the argument should be sought within the terms of the contract and, as far as possible, following legal custom. Where there is a dispute, two parties may sometimes reach a settlement outside the terms of the particular contract, in a way which may even conflict with those terms, but this is entirely their own business. The Mediator is not concerned with a settlement of that nature. His function is to express an opinion within the framework and within the terms of the contract in dispute and to use his best efforts to encourage the disputants to accept the reasonableness of his opinion.

2.5 In an attempt to reconcile the differences, the Mediator may use some discretion and judgement in interpreting the contract, but he should always have regard for its terms. If the Mediator considers it necessary, he may even take legal advice on any legal aspects which seem unclear, with the prior consent of the parties in the dispute.

2.6 The Mediator should take care to explain to both parties at an early stage in the process that his objective is to achieve a settlement of the dispute by recommending a solution and having this accepted by the parties concerned. If necessary, a provisional solution may be suggested and this can be subjected to further argument and reconsideration, if this seems to be the best way of reaching an agreement.

3. GENERAL PRINCIPLES TO BE OBSERVED

3.1 Nearly all disputes which arise in contracts are about money or time and there are usually good grounds for the two parties involved to have opposing opinions. It is therefore seldom possible to make a single logical decision merely by reading the documents carefully and assembling the facts. Some compromise or reasonable engineering assessment is often necessary, after hearing the views of both parties.

3.2 The essential requirement of any mediation procedure is that it must allow each party a fair opportunity to put its case, as well as its response to the case of the other, to the Mediator. However, subject to this requirement, unnecessarily elaborate procedures with concomitant high costs should be avoided.

3.3 Standard General Conditions of Contract generally provide a workable basis for the overall management of the contract and include provisions for disputes to be settled in specific ways. Disputes regularly arise from difficulties encountered in the interpretation of the General Conditions, Specification and/or Schedule of Quantities, particularly with regard to unforeseen circumstances and the measurement and payment clauses. Frequently, standard specifications and standard methods of measurement are not closely adhered to, even when specified in the documents.

3.4 As previously stated, the Mediator should try to persuade the disputing parties to reach a mutually acceptable agreement which can be recorded in his written opinion. Any ~~such agreement~~, even if ~~incomplete~~, having regard to all the items in dispute, ~~becomes binding~~ upon the ~~parties~~ in terms of the contract. (See Civil Engineering GCC 90, Clause 61(2)(f)).

3.5 The Mediator's opinion should be clear, definite, complete and practical. More specifically, the following points should be borne in mind:

(a) The opinion should deal with all the issues raised by the parties. No issue should be left unanswered.

(b) The opinion should be clear and specific. Where an amount is in dispute, it should be fixed; and where any other point is in issue it should be dealt with lucidly, so that the parties know exactly what has to be done.

(c) The opinion on each issue must be capable of being carried into effect in a practical way.

3.6 Unlike an arbitration award, the Mediator must give a detailed set of reasons for his opinion. The objective of mediation is to avoid litigation, either by way of arbitration or in court, and the reasons are necessary in order to convey to both parties the motivation for and the fairness of his opinion.

4. SUGGESTED PROCEDURE

4.1 A mediation normally starts with the receipt by the Mediator of a letter or letters from the parties agreeing to his appointment, or by his nomination by the President of the relevant organisation named in the Conditions of Contract. Without such common consent, a Mediator is not advised to proceed with the case because, if he is unacceptable to one or other of the parties, he starts off with a considerable disadvantage in acting as an "honest broker".

4.2 The Mediator should then implement the following, in consultation with the parties:

(a) The Mediator must ensure that a dispute exists in terms of the relevant clause of the General Conditions of Contract and that his appointment is valid and complete. This should be done by written confirmation from both parties of their agreement to his appointment and detailing the matters on which he is required to give an opinion which should be clearly set out in writing, with suitable references to the appropriate clauses of the contract.

(b) The Mediator must also obtain written confirmation from both parties that they agree to the place of mediation and will accept service of the opinion in the stated form together with their agreement as to payment of the Mediator's fees and related expenses in equal shares, when called upon to do so.

(c) Items (a) and (b) should be in the form of properly certified resolutions of the Board of Directors, if companies are involved:

(d) Both parties should nominate single representatives for communication or discussion and for presenting their cases. The Mediator should not allow formal legal representation, as this is likely to be unhelpful in achieving the reconciliation which is his objective.

4.3 The Mediator should in his discretion determine whether the reference to him is to be made in the form of written or oral representations or both, provided that, in making this determination, he should consult the disputing parties and be guided by their common reasonable desire for the form in which the representations are to be made, bearing in mind the objective of achieving a mutually acceptable settlement.

Normally, a combination of both systems should prove to be most effective.

5. WRITTEN REPRESENTATION

5.1 In the event of written representation being decided upon, the Mediator is advised to proceed as follows:

5.1.1 The Mediator should ask the party who initiated the request for mediation (the claimant) to submit a statement of his case in writing, including quantification of his claim and what he requires of the Mediator.

5.1.2 The Mediator then invites the party defending the dispute (the defendant) to comment on the submission by the claimant.

5.1.3 The Mediator then invites the claimant to comment on the statements made by the defendant under 5.1.2.

5.1.4 Lastly he invites the defendant to reply to the comment made by the claimant under 5.1.3.

5.1.5 Each statement should be accompanied by the detailed data or documentation necessary for the information of the Mediator and substantiation of the case presented in the statement, which could include:

(a) Extracts from the priced contract documents and drawings;
(b) Relevant minutes of meetings;
(c) Relevant correspondence, construction programmes, photographs and payment certificates.

5.1.6 The Mediator should fix reasonable times for the submission of statements or comments by each of the parties in turn.

5.2 Alternatively, the Mediator may use a different procedural sequence to that described in 5.1 above, depending on the nature of the dispute and the Mediator's preference:

5.2.1 He may ask both parties to the dispute to make a written submission to him in the form of a statement, in which the party's view of the dispute, together with argument in support of his view, is set out in detail.

Each party must support his submission and argument with copies of all the relevant documentation. According to the nature of the dispute, such supporting documentation could include:

(i) Employer/Engineer to provide:

(a) Copy of the contract documents and relevant drawings including a priced copy of the Schedule of Quantities;

(b) Minutes of meetings;

(c) Copies of any relevant correspondence which the Contractor could not have reasonably had access to;

(d) Copies of any relevant photographs;

(e) An index of (a) to (d) in duplicate.

(ii) Contractor to provide:

(a) Copies of all relevant correspondence, minutes of site meetings, etc., including copies to which the Employer/Engineer did not have access;

(b) Where relevant, copies of the summaries of all payment certificates;

(c) Where relevant, copies of any programmes and a chronology of the execution of the works;

(d) Copies of any relevant photographs;

(e) An index of (a) to (d) in duplicate.

A reasonable time should be fixed by the Mediator for the return of this information. There is no binding time laid down by law for this procedure, but the parties can normally be persuaded to perform this task in a reasonable fashion.

5.2.2 On receipt of the documents referred to in 5.2.1, the Mediator should send a copy of the statement and index submitted by each party to the dispute to the opposing party and request comments. At this stage, the Mediator will have already considered the initial statement and argument and should specifically request any further information which is required for him to form an opinion. This could, for example, include provision of copies of the full monthly payment certificates. Once again, a reasonable time should be fixed by the Mediator for the return of this information.

(It must be pointed out that the above sequence does not follow the steps in 5.1, which are based on legal procedures. A party who is the defendant could object to making any statement without prior perusal of a statement from the claimant. However, where such a risk is not present, this procedure has been found to be effective).

5.3 On receipt of the documentation referred to under 5.1 or 5.2 the Mediator should decide if he thinks that he is in possession of sufficient information to reach a conclusion. If he is of this opinion, he should write to the parties and inform them that he proposes to suggest an opinion based upon their submissions to date. (This may cause one of the parties to take some further action in argument or submission of information, but it is unlikely).

5.4 Having studied and considered the written representations, the Mediator should then arrange a meeting with the parties and he should suggest a solution to the dispute for further discussion, and if necessary oral representations, in an attempt to achieve an agreed solution.

6. ORAL REPRESENTATION

6.1 If oral representation is agreed upon, the following procedure is suggested:

6.1.1 The submission of basic documents, including the written arguments by each side, should already have taken place.

6.1.2 The Mediator must exercise control over the number of persons attending the representation; preferably not more than two or three persons from each party should attend and these persons should be principals and/or employees of the parties involved, not their legal representatives. It may be necessary for the Employer and the Consulting Engineer to be separately represented.

6.1.3 The hearing should be set down for a fixed date and should commence at a reasonable time, agreeable to the parties.

6.1.4 The Mediator will need to keep his own written record of the proceedings but simple electronic recording or a stenographer can be used if the proceedings are likely to be protracted.

The procedure should be similar to that employed for written representation and may follow one of two alternative sequences:

either

6.2.1 The Mediator introduces the discussion and states briefly how he sees the substance of the dispute. He also explains the procedure which he will follow.

6.2.2 The Mediator then requests the party who initiated the request for mediation (the claimant) to present his case and to give additional elaboration or argument as he may consider necessary. Whilst the party is to presenting his case the other party may not interrupt or comment on the submission being made. The Mediator makes such notes as he may consider necessary.

6.2.3 Upon conclusion of the submission made by the claimant, the Mediator puts to the claimant such questions as he may consider necessary to elucidate any aspect not clear to him or which may be relevant to the dispute.

6.2.4 The Mediator next requests the party defending the dispute (the defendant) to present his case, together with such additional elaboration or argument as he may consider necessary. Again the presentation must be made without interference from the other party and, upon conclusion, the Mediator puts such questions to the defendant as he may consider relevant to the dispute.

6.2.5 Having heard the defendant, the Mediator then gives the claimant the opportunity to make such further submission as he may consider necessary. In making his further submission, the claimant should only deal with any matter arising out of the submission of the defendant; he should not introduce any new matter not contained in his own submission or in the submission of the defendant, save with the express permission of the Mediator, who should agree only if he feels this would serve to assist in reaching an agreement. The Mediator may put questions on the further submission made by the claimant.

6.2.6 Upon having heard the further submission of the claimant, the Mediator must permit the defendant to make a further submission which should likewise be confined only to such new matter as the claimant in his further submission may have raised. The Mediator may put questions on the further submission made by the defendant.

6.2.7 Having heard the submissions of the two parties, the Mediator should then or at a subsequent meeting, suggest a solution to the dispute for further discussion, in an attempt to achieve an agreed solution. He must be prepared to support his view on a recommended settlement with carefully considered arguments in order to persuade the parties to reach agreement.

or

6.3.1 The hearing should open with a statement from the Mediator covering the description of the dispute as he sees it and an explanation of the procedure he will follow. He will then present a list of questions for which he requires answers. It is not necessary that these questions should have been communicated to the parties prior to the meeting.

6.3.2 If any outside witnesses, whether they are employees of one of the parties or not, are required to give evidence on certain points, these should be placed on standby for questioning by the Mediator. However, this should rarely be necessary having regard to the type of dispute normally involved.

6.3.3 At the end of the questioning the Mediator should give each party an opportunity to cross question the other in turn and thereafter to make a statement in summary of his case.

6.3.4 In respect of such statements the Mediator should give each party some reasonable latitude in his presentation but he should warn the persons involved that, in the interests of saving time, they should confine themselves to matters directly pertinent to the dispute.

6.3.5 The Mediator's hearing can be extended, or adjourned and a subsequent hearing held, if this should prove helpful in promoting a settlement.

6.3.6 Having heard the submissions of the two parties the Mediator should suggest a solution to the dispute for further discussion, in an attempt to achieve an agreed solution, and he must be prepared to support his views by reasoned argument in order to persuade the parties to agree.

7. OPINION

Whether an agreed settlement is reached in whole or in part, the Mediator must finally express his opinion in writing. This should include a description of the reasons for the opinion. The Employer, Engineer and Contractor must each be furnished with a copy thereof by hand or by registered post. It should be noted that the opinion must be delivered to these three parties before the service is effective. The Mediator must specifically record any aspects of the dispute about which the two parties have already come to an agreement, as any such agreement becomes binding upon the parties.

Appendix A provides a suggested standard form for the presentation of the Mediator's opinion to the parties to the dispute.

8. CONTACT WITH PARTIES TO THE DISPUTE

8.1 It is usually considered ethical, if not actually a legal requirement, that the judge in a dispute should be careful not to make personal contact with the parties to the dispute, unless they are both together.

8.2 Although the Mediator's function is not the same as a judge, it is suggested that this procedure should preferably be followed in mediation. However, it cannot be considered to be binding on the Mediator and circumstances may well arise where the Mediator considers that he is more likely to achieve an acceptable settlement by discussing the problem separately with the parties to the dispute. In such event, he should inform both parties that he intends to proceed on this basis, and his reasons therefore, but he must at all times take care to present and maintain an unbiased position.

9. FEES

9.1 The costs of the mediation have to be borne equally by the parties; the Mediator may not give any opinion on this but he should bring it to the attention of the parties.

9.2 Fees should be charged in accordance with the latest recommendations of the SAACE. Out-of-pocket and travelling expenses should be refunded at cost or in accordance with current recommendations.

10. APPENDICES

10.1 Appendix A contains a suggested standard form for the giving of the Mediator's Opinion to the parties to the dispute.

10.2 Appendix B contains details of proposed fees for Mediators.

10.3 Appendix C comprises a comparison between Mediation and Arbitration in order to highlight the differences.

11. REFERENCES

11.1 Some useful references are:

11.1.1 "The Law of Arbitration in SA" - Jacobs (Juta and Co Ltd, Johannesburg) 1977.

11.1.2 "Hudson's Building and Engineering Contracts" - Tenth Edition 1970 - I N Duncan Wallace - plus first Supplement 1979. (Sweet and Maxwell).

11.1.3 "Engineering Construction Contracts" - A Hyman (Butterworths, Durban) 1992.

11.1.4 "Notes on Mediation" - L Dison (SAFCEC) 1990

APPENDIX E

CONTRACT MEDIATION CLAUSES FROM:

E1. **General Conditions of Contract 1990 (GCC 90)**

E2. **Joint Building Contracts Committee (JBCC 2000)**

E3. **Fédération Internationale Des Ingeniéurs-Conseils (FIDIC)**

E4. **New Engineering Contract (NEC)**

APPENDIX E1

EXCERPT FROM:

GENERAL CONDITIONS OF CONTRACT 1990 (GCC 90)

(PAGES 39 – 41)

(b) having his estate sequestrated (provisionally or finally) or, being a company or close corporation, going into liquidation (provisionally or finally), or

(c) assigning the Contract without the consent in writing of the Contractor,

the Contractor may, by written notice to the Employer, cancel the Contract.

(2) Upon such cancellation,

Removal of materials, etc. and payment to Contractor

(a) all the provisions of the Contract, including this Clause, shall continue to apply for the purpose of

(i) resolving any dispute, and

(ii) determining the amounts payable by either the Employer or the Contractor to the other of them;

(b) the ownership of unused materials, brought upon the Site by the Contractor and for which the Employer has not made any payment, shall revest in the Contractor and he shall with all reasonable despatch remove from the Site such materials and all Constructional Plant and Temporary Works, without prejudice to his lien on the Employer's property;

(c) the Employer shall be under the same obligations to the Contractor with regard to payment as if the Contract had been cancelled under the provisions of Clause 57 but, in addition to the payment specified in Clause 57(5), the Employer shall pay to the Contractor the amount of any additional loss or damage to the Contractor arising out of or in connection with or in consequence of such cancellation.

Other rights of Contractor

(3) Nothing in this Clause contained shall prejudice the right of the Contractor to exercise either in lieu of or in addition to the rights and remedies specified in this Clause any other rights or remedies to which the Contractor may be entitled under the Contract or common law.

Notices to trustee/ liquidator

(4) If the estate of the Employer shall have been sequestrated (provisionally or finally) or if the Employer, being a company or close corporation, shall be placed in liquidation (provisionally or finally), any notice referred to in this Clause shall be delivered to the trustee or provisional trustee or the liquidator or provisional liquidator and all rights vesting in or binding on the Employer shall vest in or be binding on the estate under sequestration or liquidation.

Notice of disagreement

60.(1) In respect of any matter not required to be dealt with in terms of Clauses 51 or 61(6), the Contractor shall have the right by written notice to the Engineer to require him to consider any disagreement which he raises with the Engineer provided that the said written notice shall be given within 21 days after the cause of disagreement has arisen.

Engineer to rule on disagreements

(2) The Engineer shall give a ruling on the disagreement in writing to the Employer and the Contractor, referring specifically to this Clause, which ruling he may give at any time after his receipt of the written notice referred to in Sub-Clause (1), but he shall do so by not later than 14 days after his receipt of a written request from the Contractor requiring him to do so, failing which he shall be deemed to have given a ruling dismissing all the Contractor's contentions.

Settlement of disputes

61.(1) (a) The Contractor shall have the right to dispute any ruling given or deemed to have been given by the Engineer in terms of Clause 51 or Clause 60;

Provided that, unless the Contractor shall, within 42 days after his receipt of a ruling or after a ruling shall have been deemed to have been given, give written notice

(hereinafter referred to as a "Dispute Notice") to the Engineer, referring to this Clause, disputing the validity or correctness of the whole or a specified part of the ruling, he shall have no further right to dispute that ruling or the part thereof not disputed in the said notice.

(b) All further references herein to a ruling shall relate to the ruling, or part thereof, specified in the Dispute Notice, as varied or added to by agreement between the Contractor and the Engineer or by the Engineer's decision in terms of paragraph (c) or by the Mediator's opinion to the extent that it has become binding in terms of Sub-Clause (2)(f).

(c) The Engineer

(i) shall, before giving his decision on the dispute, consult the Employer thereon and give the Contractor a reasonable opportunity to present written or oral submissions thereon;

(ii) shall deliver his decision in writing to the Employer and to the Contractor;

(iii) may give his decision at any time after his receipt of the Dispute Notice but shall do so by not later than 42 days after his receipt of a further written notice from the Contractor requiring him to do so, failing which, he shall be deemed to have given a decision affirming, without amendment, the ruling concerned.

(d) Unless either the Employer or the Contractor, hereinafter referred to as "the parties", shall, within 28 days after his receipt of notice of the decision in terms of paragraph (c)(ii) or after the decision is deemed to have been given in terms of paragraph (c)(iii), have given notice in writing to the Engineer, with a copy to the other party, disputing the Engineer's decision or a specific part thereof, he shall have no further right to dispute any part of the ruling not specified in his said notice.

(e) If either party shall have given notice in compliance with paragraph (d), the dispute shall be referred immediately to mediation in terms of Sub-Clause (2).

(f) Notwithstanding that the Contractor may, in respect of a ruling, have given a Dispute Notice, the ruling shall be of full force and carried into effect unless and until otherwise agreed by both parties in terms of Sub-Clause (2) (f) or as determined in an arbitration award or a court judgement.

(2) (a) The mediation referred to in Sub-Clause (1)(e) shall be conducted by a Mediator selected by agreement between the parties or, failing such agreement within 7 days after a written request by either party for such agreement, nominated on the application of either party by the President for the time being of the South African Institution of Civil Engineers. Mediation

(b) Neither party shall be entitled to be represented at any hearing before or at any meeting or in any discussion with the Mediator except by

(i) the party himself, if a natural person,

(ii) a partner in the case of a partnership,

(iii) an executive director in the case of a company,

(iv) a member in the case of a close corporation,

(v) the Engineer,

(vi) a bona fide employee of the party concerned,

(vii) a professional engineer appointed for the purpose by the party concerned.

Such limitation shall not be construed as preventing any person from giving evidence as a witness.

(c) The Mediator shall, as he deems fit, follow formal or informal procedure and receive evidence or submissions orally or in writing, sworn or unsworn, at joint meetings with the parties or separately or from any person whom he considers can assist in the formulation of his opinion;

Provided that

(i) each party shall be given reasonable opportunities of presenting evidence or submissions and of responding to evidence or submissions of the other party, and

(ii) each party shall be given full details of any evidence or submissions received by the Mediator from the other party or any other person otherwise than at a meeting where both parties are present or represented.

(d) The Mediator shall have the power to propose to the parties compromise settlements of or agreements in disposal of the whole or portion of the dispute.

(e) The Mediator shall, as soon as reasonably practical, give to each of the parties his written opinion on the dispute, setting out the facts and the provisions of the Contract on which the opinion is based and recording the details of any agreement reached between the parties during the mediation.

(f) The Mediator's opinion shall become binding on the parties only to the extent correctly recorded as being agreed by the parties in the Mediator's written opinion or otherwise as recorded in writing by both parties subsequent to the receipt of the Mediator's opinion.

(g) The dispute on any matter still unresolved after the application of the provisions of paragraph (f) shall be resolved by arbitration or court proceedings, whichever is applicable in terms of the Contract.

(h) Save for reference to any portion of the Mediator's opinion which has become binding in terms of paragraph (f), no reference shall be made by or on behalf of either party, in any proceedings subsequent to mediation, to the Mediator's opinion, or to the fact that any particular evidence was given, or to any submission, statement or admission made in the course of the mediation.

(i) Irrespective of the nature of the Mediator's opinion,

(i) each party shall bear his own costs arising from the mediation, and

(ii) the parties shall in equal shares pay the Mediator the amount of his expenses and the amount of his fee based on a scale of fees as agreed between the Mediator and the parties before the commencement of the mediation.

(3) If the Contract provides for determination of disputes by arbitration and if a dispute is still unresolved as provided in Sub-Clause (2)(g) or the dispute is one to which Sub-Clause (6) refers. **Arbitration**

APPENDIX E2

EXCERPT FROM:

JOINT BUILDING CONTRACTS COMMITTEE (JBCC 2000)

(PAGE 28)

DISPUTE

40.0 SETTLEMENT OF DISAGREEMENT AND DISPUTES

40.1 Should any disagreement between the employer or his agents on the one hand and the contractor on the other arise out of this agreement, the contractor may request the principal agent to determine such disagreement by a written decision to both parties. On submission of such a request a disagreement in respect of the issue detailed therein shall be deemed to exist.

40.2 The principal agent shall give a decision specifically in terms of 40.1 to the employer and the contractor within ten (10) working days of receipt of such request. Such decision shall be final and binding on the parties unless either party disputes the same in terms of 40.3

40.3 Should the principal agent fail to give a written decision within ten (10) days or either party dispute the decision in terms of 40.2 by notice to the other and the principal agent within ten (10) working days of receipt thereof a dispute shall be deemed to exist. Such dispute shall be submitted to arbitration in terms of 40.5 or, for a government contract, to litigation in terms of 40.6 where so stipulated in the schedule. Such submission shall be deemed to have been on the date of existence of the dispute.

40.4 A dispute may, in the first instance, be submitted to mediation as follows:

40.4.1 The parties shall, within fifteen (15) working days of the date on which the dispute was declared, agree on an appoint in writing the person to act as mediator.

40.4.2 The parties shall meet the mediator to decide the procedures, representation and dates for the mediation process. Thereafter the mediator may meet the parties together or individually to help reach a settlement of the dispute.

40.4.3 Where the parties reach settlement of the dispute or any part thereof, the mediator shall record such agreement in writing and on signing thereof by the parties, the agreement shall be final and binding on the parties unless either party disputes the same.

40.4.4 The mediator may and the mediation at any time should he conclude that further efforts would not contribute to a resolution of the dispute or any part thereof. The mediator shall in any event and the mediation where the parties have not agreed by the parties. The mediator shall record the ending of the mediation and furnish each party with a copy thereof within ten (10) working days.

40.4.5 The mediation process shall be privileged and held without prejudice to either party other than on those issues on which the parties agree.

40.4.6 Whether or not mediation resolves the dispute, the parties shall initially bear their own costs concerning the mediation and equally share the mediator's and related costs, although these costs may be subject to a later arbitration award.

40.5 Where the dispute is submitted to arbitration:

40.5.1 The arbitration shall be conducted according to the rules stated in the schedule.

40.5.2 The arbitrator shall be the person appointed by the parties in terms of the schedule or within ten (10) working days of the date of submission of the dispute to arbitration. Where the parties make no such appointment the arbitrator shall be appointed by the body stated in the schedule.

40.5.3 The arbitrator shall have the power to open or revise any certificate, opinion, decision, requisition or notice relating to such dispute as if no such certificate, opinion, decision, requisition or notice had been issued or given.

40.5.4 The parties, unless otherwise agreed, shall request the arbitrator to give a reasoned award.

40.6 Where the dispute is submitted to litigation institution of the action shall be commenced and process served within one hundred and eighty (180) calendar days of the date of submission to litigation, failing which the dispute shall lapse.

40.7 Reference of the dispute to mediation, arbitration or litigation shall not relieve the parties from liability for the due and timeous performance of their obligation in terms of this agreement.

40.8 The cancellation of this agreement shall not affect the validity of this clause 40.0.

APPENDIX E3

EXCERPT FROM:

FÉDÉRATION INTERNATIONALE DES INGENIÉURS-CONSEILS (FIDIC) (PAGES 58 – 62)

(d) the Cost of removal of Temporary Works and Contractor's Equipment from the Site and the return of these items to the Contractor's works in his country (or to any other destination at no greater cost); and

(e) the Cost of repatriation of the Contractor's staff and labour employed wholly in connection with the Works at the date of termination.

19.7

Release from Performance under the Law

Notwithstanding any other provision of this Clause, if any event or circumstance outside the control of the Parties (including, but not limited to, Force Majeure) arises which makes it impossible or unlawful for either or both Parties to fulfil its or their contractual obligations or which, under the law governing the Contract, entitles the Parties to be released from further performance of the Contract, then upon notice by either Party to the other Party of such event or circumstance:

(a) the Parties shall be discharged from further performance, without prejudice to the rights of either Party in respect of any previous breach of the Contract, and

(b) the sum payable by the Employer to the Contractor shall be the same as would have been payable under Sub-Clause 19.6 [*Optional Termination, Payment and Release*] if the Contract had been terminated under Sub-Clause 19.6.

20 Claims, Disputes and Arbitration

20.1

Contractor's Claims

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply.

The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.

The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Engineer to inspect all these records, and shall (if instructed) submit copies to the Engineer.

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

(a) this fully detailed claim shall be considered as interim;

(b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and

(c) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.

The Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [*Extension of Time for Completion*], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

20.2 Appointment of the Dispute Adjudication Board

Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*]. The Parties shall jointly appoint a DAB by the date stated in the Appendix to Tender.

The DAB shall comprise, as stated in the Appendix to Tender, either one or three suitably qualified persons ("the members"). If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons.

If the DAB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman.

However, if a list of potential members is included in the Contract, the members shall be selected from those on the list, other than anyone who is unable or unwilling to accept appointment to the DAB.

The agreement between the Parties and either the sole member ("adjudicator") or each of the three members shall incorporate by reference the General Conditions of Dispute Adjudication Agreement contained in the Appendix to these General Conditions, with such amendments as are agreed between them.

The terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom the DAB consults, shall be

mutually agreed upon by the Parties when agreeing the terms of appointment. Each Party shall be responsible for paying one-half of this remuneration.

If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion. Neither Party shall consult the DAB on any matter without the agreement of the other Party.

If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace (or to be available to replace) any one or more members of the DAB. Unless the Parties agree otherwise, the appointment will come into effect if a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment.

If any of these circumstances occurs and no such replacement is available, a replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone. Unless otherwise agreed by both Parties, the appointment of the DAB (including each member) shall expire when the discharge referred to in Sub-Clause 14.12 *[Discharge]* shall have become effective.

20.3

Failure to Agree Dispute Adjudication Board

If any of the following conditions apply, namely:

(a) the Parties fail to agree upon the appointment of the sole member of the DAB by the date stated in the first paragraph of Sub-Clause 20.2,
(b) either Party fails to nominate a member (for approval by the other Party) of a DAB of three persons by such date,
(c) the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DAB by such date, or
(d) the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment,

then the appointing entity or official named in the Appendix to Tender shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.

20.4

Obtaining Dispute Adjudication Board's Decision

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.

For a DAB of three persons, the DAB shall be deemed to have received such reference on the date when it is received by the chairman of the DAB.

Both Parties shall promptly make available to the DAB all such additional information, further access to the Site, and appropriate facilities, as the DAB may require for the

purposes of making a decision on such dispute. The DAB shall be deemed to be not acting as arbitrator(s).

Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [*Failure to Comply with Dispute Adjudication Board's Decision*] and Sub-Clause 20.8 [*Expiry of Dispute Adjudication Board's Appointment*], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties.

20.5 Amicable Settlement

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

20.6 Arbitration

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

(a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
(b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
(c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [*Law and Language*].

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute. Nothing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons

for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Engineer and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

20.7

Failure to Comply with Dispute Adjudication Board's Decision

In the event that:

(a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*],
(b) the DAB's related decision (if any) has become final and binding, and
(c) a Party fails to comply with this decision,

then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [*Arbitration*]. Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply to this reference.

20.8

Expiry of Dispute Adjudication Board's Appointment

If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:

(a) Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply, and
(b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [*Arbitration*].

APPENDIX E4

EXCERPT FROM:

NEW ENGINEERING CONTRACT (NEC)
(PAGES 23 – 24)

isputes and termination

Settlement of disputes **90**

90.1 Any dispute arising under or in connection with this contract is submitted to and settled by the *Adjudicator* as follows.

ADJUDICATION TABLE

Dispute about:	Which Party may submit it to the *Adjudicator*?	When may it be submitted to the *Adjudicator*?
An action of the *Project Manager* or the *Supervisor*	The *Contractor*	Between two and four weeks after the *Contractor's* notification of the dispute to the *Project Manager*, the notification itself being made not more than four weeks after the *Contractor* becomes aware of the action
The *Project Manager* or *Supervisor* not having taken an action	The *Contractor*	Between two and four weeks after the *Contractor's* notification of the dispute to the *Project Manager*, the notification itself being made not more than four weeks after the *Contractor* becomes aware that the action was not taken
Any other matter	Either Party	Between two and four weeks after notification of the dispute to the other Party and the *Project Manager*

90.2 The *Adjudicator* settles the dispute by notifying the Parties and the *Project Manager* of his decision together with his reasons within the time allowed by this contract. Unless and until there is such a settlement, the Parties and the *Project Manager* proceed as if the action, inaction or other matter disputed were not disputed. The decision is final and binding unless and until revised by the *tribunal*.

The adjudication **91**

91.1 The Party submitting the dispute to the *Adjudicator* includes with his submission information to be considered by the *Adjudicator*. Any further information from a Party to be considered by the *Adjudicator* is provided within four weeks from the submission. The *Adjudicator* notifies his decision within four weeks of the end of the period for providing information. The four week periods in this clause may be extended if requested by the *Adjudicator* in view of the nature of the dispute and agreed by the Parties.

91.2 If a matter disputed under or in connection with a subcontract is also a matter disputed under or in connection with this contract, the *Contractor* may submit the subcontract dispute to the *Adjudicator* at the same time as the main contract

submission. The *Adjudicator* then settles the two disputes together and references to the Parties for the purposes of the dispute are interpreted as including the Subcontractor.

The *Adjudicator* **92**

92.1 The *Adjudicator* settles the dispute as independent adjudicator and not as arbitrator. His decision is enforceable as a matter of contractual obligation between the Parties and not as an arbitral award. The *Adjudicator*'s powers include the power to review and revise any action or inaction of the *Project Manager* or *Supervisor* related to the dispute. Any communication between a Party and the *Adjudicator* is communicated also to the other Party. If the *Adjudicator*'s decision includes assessment of additional cost or delay caused to the *Contractor*, he makes his assessment in the same way as a compensation event is assessed.

92.2 If the *Adjudicator* resigns or is unable to act, the Parties choose a new adjudicator jointly. If the Parties have not chosen a new adjudicator jointly within four weeks of the *Adjudicator* resigning or becoming unable to act, a Party may ask the person stated in the Contract Data to choose a new adjudicator and the Parties accept his choice. The new adjudicator is appointed as *Adjudicator* under the NEC Adjudicator's Contract. He has power to settle disputes that were currently submitted to his predecessor but had not been settled at the time when his predecessor resigned or became unable to act. The date of his appointment is the date of submission of these disputes to him as *Adjudicator*.

Review by the *tribunal* **93**

93.1 If after the *Adjudicator*

- *notifies* his decision or
- fails to do so

within the time provided by this contract a Party is dissatisfied, that Party notifies the other Party of his intention to refer the matter which he disputes to the *tribunal*. It is not referable to the *tribunal* unless the dissatisfied Party notifies his intention within four weeks of

- notification of the *Adjudicator*'s decision or
- the time provided by this contract for this notification if the *Adjudicator* fails to notify his decision within that time

whichever is the earlier. The *tribunal* proceedings are not started before Completion of the whole of the *works* or earlier termination.

93.2 The *tribunal* settles the dispute referred to it. Its powers include the power to review and revise any decision of the *Adjudicator* and any action or inaction of the *Project Manager* or the *Supervisor* related to the dispute. A Party is not limited in the *tribunal* proceedings to the information, evidence or arguments put to the *Adjudicator*.

Termination **94**

94.1 If either Party wishes to terminate, he notifies the *Project Manager* giving details of his reason for terminating. The *Project Manager* issues a termination certificate promptly if the reason complies with this contract.

94.2 The *Contractor* may terminate only for a reason identified in the Termination Table. The *Employer* may terminate for any reason. The procedures followed and the amounts due on termination are in accordance with the Termination Table.