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Abstract

Alternative dispute resolution (ADR) methods, such as arbitration, are often used instead of litigation to resolve construction disputes, as industry folklore considers litigation overly expensive and time-consuming. But is this actually the case? Do the people most involved in construction dispute resolution agree? What are the real advantages and disadvantages of using litigation or ADR? When, if ever, is litigation the most appropriate way of resolving construction disputes?

To answer these questions, this paper first provides a review of the literature on the use of litigation and ADR for construction dispute resolution. This is followed by the results a survey of construction and legal personnel with moderate to extensive experience of dispute resolution in the Australian South East Queensland construction industry. The main results of this are that, in addition to litigation being more expensive in money and time than ADR methods, the nature of the existing relationship between the parties has an important effect of the resolution process, what happens after an unsuccessful ADR and, if adversarial, is more likely to lead to litigation. The results are then validated and verified by one of the most experienced practitioners in claims and disputes in the whole of Australia**.**

***Keywords*:** Construction disputes, litigation, alternative dispute resolution.

Background

Dispute resolution generally

Dispute resolution involves 'the opportunity to consider, admit, modify or reject a claim, with the open exchange of views in an attempt to resolve it, and the requirement for rejection in clear language or an obvious refusal' (Integritam Construction Consultancy, 2009). It comprises either formal or informal (consensual) processes. With *formal processes* (litigation, arbitration and binding expert determination) the parties pass the responsibility for the solution to a third party so that the outcomes of the dispute/s are generally out of their hands and *very process driven.* In the more *consensual, voluntary processes* approach (e.g., mediation, conciliation, Support, Empower, Advocate, Promote **(**SEAP), Senior Executive Appraisal Mediations (SEAM), structured negotiations and more recently Dispute Resolution Boards (DRBs)), the *parties can generally keep control of the process* and have a high degree of management of the issues and how the processes are run.

Key issues concerning dispute resolution generally are the costs and time involved and effect on long-term relationships (Bonwick and Watts, 1998, 370; Loosemore, 1999a). In obtaining the outcome you want can also mean that you end up losing in the long run (Henry and Lieberman, 1985; Loulakis and Smith, 1992; Goodman, 1999).

Two forms of dispute resolution are available in general, known as *litigation* and *Alternative Dispute Resolution* (ADR). *Litigation* is a formal dispute resolution process involving a 'case, controversy or lawsuit. A contest authorised by law, in a court of justice, for the purpose of enforcing a right' (Lexicon, 2011). In addition to the opposing parties, it involves professional judges, legal advocates (such as barristers, lawyers and solicitors) and the use of technical advisors. The costs involved are difficult to control (Pagone, 2008), so that litigation can be one of the most expensive ways to settle a dispute (Revay, 1993, 57; Jones, 1996), with the costs to litigate often exceeding the value of the dispute and resulting in a negative income for both parties to the dispute (Pagone, 2008). The delays associated with disputes can also be lengthy due to the scheduling of other trials, such as criminal cases (Pagone, 2008), time needed for statements of claim and defence, disclosure, interlocutory proceedings and directions hearings, having to brief experts and waiting for their reports. As a result, litigation is usually not considered to be a viable option to resolve any disputes other than those that involve a very large amount of money, or where the parties already have an adversarial relationship

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and an unwillingness to co-operate or to achieve a resolution (Loosemore, 1999b, 187; Love *et al*, 2008). This means that the importance of winning is significantly increased for both parties (Pagone, 2008).

Alternative dispute resolution (ADR) on the other hand, is defined as 'processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them' (National Alternative Dispute Resolution Advisory Council, 2003, 4). Types of ADR include mediation, arbitration, minitrial, early neutral evaluation and expert determination (Steen, 1994; Stipanowich, 2004), with the most popular being mediation and arbitration (Jahren, and Dammeier, 1990, 44; Hibberd, 2000; Tembo, Ndekugri and Hammond, 2010). In contrast with litigation, depending on the implementation of these methods, most are non-binding, meaning that the decision does not have to be accepted by either party (Harmon, 2003, 196), although it is considered important to ensure the parties are fully committed to accepting the ruling and that it is upheld (Treacy, 1995; Byrne, 2007). The main advantage of ADR is that disputes of a more technical nature can be decided by someone who has sufficient technical knowledge to be able to resolve the dispute effectively (Brunet, 1987, 3, American Arbitration Association, 1994). In addition, ADR methods such as minitrials and expert determinations before court can give parties an indication of the likelihood of success in such a way that they are encouraged to settle their dispute out of court (Wang, 2000; Tan, 2010; Taylor and Carn, 2010). Moreover, it is also generally believed that ADR offers a faster and less expensive alternative to litigation (e.g., Brunet, 1987, 3; American Arbitration Association, 1994; Brown, 1996, 746; Brooker and Lavers, 1997, 521; Braun, 1998). However, if ADR fails to resolve the dispute, parties are likely to look to litigation for an answer (Stephenson, 1987; Miles, 1992), presenting an even greater problem than before (Watts and Scrivener, 1995, 24). There have also been some pushes for ADR to be involved in the court process but it is thought that this would more than likely diminish the opportunity that ADR presents (Wald, 1997, 1450).

Construction industry dispute resolution

The *construction industry'* is defined as 'the sector of the national economy engaged in the preparation of land and construction, alteration and repair of buildings, structures and other real property' (Truitt, 2009, 1) and is highly technical in nature (Wilmot-Smith, 2010). The long-term nature of construction projects, and the many uncertainties involved, make the relationship between the parties (especially that between contractor and client/owners or subcontractors) very important as a good deal of give-and-take is often needed by both sides to ensure a project success. Therefore, adversarial relationships are very much to be avoided. The occurrence of a dispute, however, can lead to such a relationship depending on when and how the dispute arises, how quickly it can be resolved and how the outcome affects each party (Thompson, 1998).

Despite this, the construction industry has, proportionally, the highest level of contract disputes of any industry (Jones, 1996; Gebken, Gibson and Groton, 2005). Construction disputes are usually lengthy (Cheung, 2006, 411), with the majority arising from construction contracts being over payments resulting from scope changes and incomplete or incorrect drawings and documentation, including disputes about the amount of work completed to a set date, work done as part of variations, liquidated damages claims and work done in the defects liability period (Semple *et al*., 1994; Sykes, 1996, 6; Chan and Kumaraswamy, 1997; Kumaraswamy, 1997). Although mainly concerned with contract selection, many construction disputes involve multifaceted technical issues, including design, management and programming and planning matters as well as issues associated with risk and unpredictability (Fenn *et al*., 1997, 515; Byrne, 2007). Changing construction technology and increasingly complex designs make projects exponentially more complicated such that construction disputes from poor contract selection are said to have become 'as much a part of a construction project as is the pouring of the concrete‟ (Adrian, 1993). In addition, sometimes the nature of the relationship, as opposed to the facts of a dispute, can offer a better understanding of the nature of the dispute (Bonwick and Watts, 1998, 370; Loosemore, 1999a). For example, when parties cannot agree on certain matters, an unwillingness to admit a 'mistake‟ can lead to the escalation of a hitherto small disagreement into a full blown dispute (Loosemore, 1999b, 187; Love *et al*, 2008). For both parties, this can mean a negative result for everyone involved, with concomitant detrimental implications for contractual relationships (Thompson, 1998; Pagone, 2008)

In the industry in general, there is a high level of dissatisfaction of dispute resolution by litigation or arbitration (Levin, 1998; Cheung, 1999, 189). Due to the nature of disputes that arise, it can be extremely

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expensive to resolve them in this way (Revay, 1993, 57) and a great deal of money is invested by both parties to try and get their desired result (Cheung, 2006, 411). The amount of complexity involved also makes it unlikely the dispute can be settled by an inexperienced third party (Gibbons, 2007, 3-4).

The main difficulty with the use of litigation for resolving construction industry disputes is said to be lack of technical expertise of judges and other third parties that are involved in the cases (Pagone, 2008). This can result in expert witnesses playing a major role in these cases and the final judgement is often based solely on their opinions and how convincingly they are presented (Handford and Ellum, 1992, 237; Bernstein *et al*., 2003, 327; Aiken, 2010, 2). Also, when construction disputes go before the courts, the role of the expert can be undermined by the efforts of lawyers to interpret the evidence in a way that supports their client's objective. This can lead to a case being damaged through statements being altered by lawyers, significantly compromising the integrity of the case overall (Pagone, 2008, 4).

These issues, together with the notoriously high legal costs and the further cost of delays involved suggest that litigation is not an effective way to resolve a construction dispute in a way that can satisfy both parties (Chan and Kumaraswamy, 1997; Mix, 1997, 463; Gebken *et al*., 2005). It is believed that, except for the largest of cases, the costs associated with litigating can rarely be justified (Levin, 1998; Cheung, 1999, 189), with, in some extreme cases, the cost to litigate exceeding the value of the disputed amount (Watts and Scrivener, 1993, 59). Moreover, it is evident to many writers that litigation generally is an unsatisfactory dispute resolution method and that much of the industry does not have good attitudes or experiences towards use of litigation in dispute resolution (Harmon, 2003, 187; Shariff *et al*., 2009), prompting Cremean (2004) to the conclusion that '[Construction] disputes … are almost untriable in the courts'. As Judge Menhennit observes in *C W Norris & Co Pty Ltd v World Services and Construction Pty Ltd:*

> It is notorious that in many building cases proceedings have been bedevilled by complexity and detail, interlocutory proceedings have been torturous and slow, trials have been long and expensive, the real issues have often emerged only during the course of the trial and parties, often both of them, have been disillusioned (Cremean, 2004)

ADR, in the form of arbitration, has been a feature of construction contracts in countries such as the United Kingdom for a very long time and many countries' construction industries have been turning to this and other forms of ADR in hope of finding a more suitable way than litigation to resolve their disputes (Wall, 1993, 122; Brooker, 1999). This has resulted in ADR being used in construction disputes since the 1980s in Australia and is now widely accepted, in many countries although the majority of processes are still only voluntary (Mackie, 1992; Cheung, 2006, 224).

As much of what has been written of the choice of dispute resolution methods in the construction industry is either highly prescriptive or conjectural, based on industry folklore, some systematic study is needed to clarify the real-world experiences and perceptions of the practitioners involved. This, therefore, constitutes the research aim. This paper undertakes to this through a survey of construction and legal personnel with moderate to extensive experience of dispute resolution in the Australian South East Queensland construction industry. The main result is to show that, in addition to the general experience of litigation being more expensive in money and time than ADR methods as expected, the nature of the existing relationship between the parties also has an important effect on the resolution process and that what happens after an unsuccessful ADR, especially if adversarial, has an important influence on the decision to continue to to litigation. Because of the highly specialised nature of the topic, where individual experiences vary widely making it difficult to detect and confirm underlying trends, the results are then validated and verified by a very experienced practitioner in construction claims and disputes to show that, although our interpretation is generally concurred, several exceptions exist due to the contingent circumstances involved.

Questionnaire survey

Design and data collection

A questionnaire survey of regional practitioners was used as a means of data collection. This comprised a set 12 propositions derived from the factors found in an extensive literature review and operationalised on a Likert 5-point scale from 1(strongly disagree) to 5 (strongly agree) (Table 1). Additional questions concerned

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the respondent's type of organisation, length of professional experience and factors having a negative impact on litigation of construction disputes. A final open question was provided for further comments on the barriers affecting the effective litigation of construction disputes. A pilot study was carried out with five people to trial the questions, identify where accurate could be improved and to test the validity of the questions. This resulted in additional questions being provided concerning the respondent's level of experience with construction disputes and type of workplace, some questions being reworded to be more detail specific and directly related to the propositions, and further questions added to address the issues in more depth.

The survey was aimed at quantity surveyors, construction managers and lawyers, primarily as they have the most relevant experience in the area of this study. Construction dispute resolution is quite a specialist area, with only a small population of potential respondents with sufficient knowledge and experience able to provide authoritative answers. A questionnaire was issued to 50 construction and legal professionals in South East Queensland. The majority of the construction professionals were quantity surveyors as they are the ones most often involved in negotiating construction claims and disputes initially, followed by construction managers and contractor builders and other consultants. A total of 40 (80% response) completed responses were obtained, the majority of which are from quantity surveyors [QS] (25), followed by legal professionals [LP] (7), construction managers [CM] (5), contractor/builders[C/B] (2) and another consultant (1). The majority of respondents work in a consulting role. This is expected as most construction disputes resulting in litigation involve hired experts, expert determinations, legal professionals and other consultants. The majority of respondents (15) have less than five years of experience, followed by respondents with between 5 and 10 or greater than 20 years of experience (10).

To identify those respondents most likely to be able to provide authoritative answers, an open-ended question; 'What is the extent of your involvement in construction disputes?' was asked in order to gauge the level of relevant experience of each respondent. As a result, the respondents with no construction litigation experience were discarded so as to achieve a high quality of data based on actual experience. This results in a reduced sample of 20 respondents – a reasonable number considering the special nature of the topic. Fourteen respondents have extensive experience in construction litigation, with the remaining six only having a moderate amount of relevant experience. Also, there are 11 quantity surveyors and 7 legal professionals in the sample, with 10 of the 11 quantity surveyors working as construction consultants and all 7 legal professionals working as consultants in private law firms. The respondents are therefore most likely to work on disputes that are significant in nature. All respondents judged to have some or extensive experience had at least 5-10 years' experience in their current profession with 10 of the respondents having more than 20 years' experience in their current profession.

Table 1 provides the results for the 12 questions asked. These are described below in terms of the cost and delay of proceedings, nature of the construction industry and barriers associated with the use of ADR.

High cost and delay in proceedings (questions 1, 2 and 3)

Q1 aims to establish the effectiveness of litigation in resolving construction disputes. For respondents with extensive experience, the weighted average is 2.29, while for those with only moderate construction litigation experience, the weighted average is 2.00. It is expected that the responses to this question will be towards the lower end of the scale. The standard deviation for the respondents with extensive experience is high at 1.14 indicating a lack of agreement between respondents. Furthermore, when comparing the average results between the legal professionals and quantity surveyors, the legal professional (3.14) think litigation to be far more effective than the quantity surveyors (1.73).The reason for this disparity in results between respondents from different backgrounds is likely to be that litigation is the normal means of resolving disputes for legal professionals. That they are only slightly above 'neutral' though, suggests its appropriateness for construction disputes may be marginal.

The Q2 weighted average responses of 1.86 and 1.33 for the extensively and moderately experienced respondents respectively indicate that litigation is not cost effective. The difference between the average legal professionals' response (2.14) and the quantity surveyors (1.45) is even greater. It is a widely known fact that losing a dispute in court is very expensive and often both parties ultimately end up losing money.

The weighted averages for Q3 are 4.00 and 3.67 for extensively and moderately experienced respondents

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respectively show that litigation causes longer delays than with ADR methods. The weighted average response from the legal professionals was 4.00, with 3.57 from the quantity surveyors – again reflecting the legal professional's rather more favourable view of litigation.

--- Table 1 here ---

Nature of the construction industry (questions 4 to 8)

Q4 concerns the extent of construction industry personnel's negative attitude to the use of litigation for resolving disputes, with roughly equal weighted averages (3.57 and 3.50) for extensively and moderately experienced respondents indicating some agreement, with, more respondents agreeing/strongly agreeing with the statement than disagreeing/neutral. The average results from legal professionals (4.00) and quantity surveyors (3.45) can also be compared, this time reflecting the quantity surveyors rather more favourable view of the construction world.

Q5 ascertains the effect of multiple experts involved in the litigation process, providing a weighted average of 3.57 and 3.17 and for extensively and moderately experienced respondents respectively (3.71 and 2.91 for legal professionals and quantity surveyors), again suggesting some bias by the quantity surveyors for, and the legal professionals against, construction industry participants in the dispute resolution process.

The Q6 weighted average of 2.71 and 2.83 for extensively and moderately experienced respondents respectively (2.71 and 2.82 for legal professionals and quantity surveyors) indicates that all marginally disagree that overreliance on experts impacts on the effectiveness of litigation.

The responses to questions 7 and 8 indicate the importance of the existing relationship between the parties. For question 7, the weighted average of 4.00 and 4.50 for extensively and moderately experienced respondents respectively (4.00 and 4.09 for legal professionals and quantity surveyors) indicates that all agree that the relationship affects the resolution process. For Q8, the weighted average of 3.93 and 3.33 for extensively and moderately experienced respondents respectively (4.00 and 3.91 for legal professionals and quantity surveyors) indicates that all agree that an established adversarial is more likely to lead to litigation.

Barriers associated with ADR (questions 9 to 12)

The remaining four questions are related to ADR; whether or not it is successful in reducing the amount of litigation and, further, the impact ADR has on litigated disputes that were unable to be resolved by ADR in the first instance. Q9, with a weighted average of 3.57 and 4.00 for extensively and moderately experienced respondents respectively (3.29 and 3.64 for legal professionals and quantity surveyors) indicates that the use of ADR is reducing the number of litigated disputes to some extent, but with the experienced legal professionals a little less convinced of this. That ADR is also proving to be useful to some extent is shown in Q10, with similar a weighted averages of 3.50 and 3.67 for extensively and moderately experienced respondents respectively (3.43 and 3.64 for legal professionals and quantity surveyors).

All respondents are close to neutral on the issue of the unsuccessful use of ADR leading to more difficulties in subsequent litigation, with Q11 producing weighted averages of 2.71 and 3.17 for extensively and moderately experienced respondents respectively (3.29 and 3.00 for legal professionals and quantity surveyors). Q12, with weighted averages of 2.50 and 3.00 for extensively and moderately experienced respondents respectively (2.43 and 2.82 for legal professionals and quantity surveyors), indicate a weak disagreement that an unsuccessful ADR effects the future expectations of the parties.

Additional information

Additional *ad hoc* comments made are:

- Lack of information on disputed claims; gathering information and identifying, locating and interviewing witnesses may take a long time; commonly persons responsible or required may not be working at the

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same company or out of state, or unwilling to help etc.

- Litigation should be avoided at every opportunity. The victories are often hollow and the parties to frequent litigation are often labelled litigious regardless of which party commenced the proceeding. It is becoming increasingly common to research the litigation history of a business prior to engaging with them. A history of litigation can be a potential obstacle to the prospect of being awarded a contract.
- Adjudication (statutory version) e.g. The Building and Construction Industry Payments Act (BCIPA) in Queensland is one of the main reasons for a decline in litigation of construction disputes
- Litigation is dependent upon suitable and accurate documents, reliable evidence and records or proof – however you prefer to term it. By its nature, ADR, which most often covers mediation, conciliation and expert determination, is meant to be a quick process and as such is less dependent on a vast array of documents. Therefore, litigation is not always that effective if the claimant has poor records and cannot dispatch the burden of proof upon it.
- Some forms of ADR can be beneficial in trying to resolve construction disputes. For example, mediation can force parties to accept a more realistic view of their prospects of success and therefore drive a settlement, and expert determination can result in an outcome in a shorter time frame. However, there are limitations. For example, mediation is often unsuccessful unless there is scope for reaching a middle ground but often there is not. Also, expert determination is a poor process for dealing with complex construction disputes with extensive disputed facts. Another crucial issue is that arbitration has become so similar to litigation through the courts that the only meaningful advantage is confidentiality.
- The biggest change and reduction in the litigation of construction disputes has been the introduction of the BCIPA. Since its introduction in 2005, it has dramatically reduced the number of parties in a construction dispute going to litigation. The fast adjudication process means that parties go through the BCIPA process and as a general rule accept the result of an adjudicator and no longer go to litigation.
- Security of payment regimes (which are typically a faster but more imprecise determination of the parties legal rights) have become more popular in the industry resulting in less parties looking to have their rights finally determined (in a court or otherwise), with more being satisfied to settle rather than challenge or revisit the outcome of an adjudicated determination (which is intended to be only an interim determination of monies payable on account).
- In many practioners experience, ADR is only effective when parties to the dispute are willing to participate – otherwise ADR only results in increased costs and delays in obtaining a resolution.

Discussion

The majority of respondents comment on the use of ADR in resolution of disputes and also security of payment regimes that make use of statutory ADR. The consensus seems to be that, although regimes such as BCIPA have been effective in reducing the number of construction disputes that go to litigation, the process is still not considered to be as effective as it could be. Furthermore, as the literature intimates and the respondents generally agree, the intentions of the parties are important in how the disputes are resolved. The highest agreement in the survey is the importance of the relationship between parties leading up to a dispute, how this affects the resolution process (Q7), and that an adversarial relationship is more likely to lead to litigation (Q8). Also of concern is the time taken by litigation (Q3), with the introduction of security of payment regimes and statutory ADR requirements also being a factor affecting the effectiveness of litigating construction disputes.

In contrast with previous work, overreliance on experts during the litigation process is not seen as undermining the integrity of cases (Q6). Similarly, the results are inconclusive on whether litigation becomes more complex when not successful resolved by ADR (Q11) and whether the outcome of a dispute being litigated is biased by an outcome previously decided by ADR (Q12). Also worthy of note is the comment on the difficulty and time taken to prepare the claim and the negative outcome from being involved in extensive litigation.

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Validation of results: interview with expert

Because of the specialised nature of the topic, we took the results of the survey to an extremely experienced practitioner (***E***) in claims and disputes (with 35 years of continual involvement in construction disputes and 20 years in Australia) for further comment on theory, veracity and validity. The question-by-question results of the interview follow.

Question 1: ***E*** agrees that litigation is mostly not the most cost effective way to resolve construction disputes, adding that 'this depends on the cost magnitude of the dispute as some parties can be very nervous about multimillion dollar disputes being placed into an ADR process (except for arbitration), the nature of the issues in dispute (i.e. if the issues are very legal and involve substantial issues of law, then litigation is a far more appropriate vehicle), and whether the issues in dispute contain significant matters affecting public policy'.

Question 2: According to ***E***, litigation is not cost effective for both parties. This is because 'in litigation (and arbitration) there are winners and losers, and costs usually follow the award or decision. So the loser pays a high cost. Obviously if the matter is protracted and involves challenges and appeals then usually both parties lose heavily'.

Question 3: ***E*** confirms that litigation is generally longer than other methods but adds that this can depend on a number of factors and even some ADR process and arbitrations can be very protracted due to various reasons, with both litigation and arbitration being slow. This is 'due to the processes and protocols to be followed, namely: availability of judges and arbitrators, pleadings, statement of claims and defence, interlocutory proceedings, directions hearings, rules of evidence, disclosure requirements, availability of witnesses, witness statements and expert witness reports', all of which 'have made the ADR systems very attractive to disputing parties'.

Question 4: In ***E***'s experience there are certain corporations that use the litigation process extensively although 'in most cases, once an organization has been to court in a large matter they are generally reluctant to go back. Particularly in Australia, where the market is small and corporations cannot afford to fall out too often.' According to E, the responses do not highlight hidden costs 'such as impact and stress on staff of court appearances and cross examination, tying up key personnel in disputes when they could be better employed carrying out the firms business, adverse impact on reputation, and cost to shareholders etc., particularly if they lose'.

Question 5: ***E*** disagrees with the findings of this question as the presence of multiple experts depends on the issues. Instead, the main problem often concerns the quality of the briefing, 'The experts could work much faster if they were briefed properly and given the proper and appropriate documents by the lawyers … time frames are most frequently blown out by the lawyers. It often takes them a very long time to get familiar with the issues and to compile the pleadings and subsequent defence, witness statements take a long time and frequently the issue of experts reports is left to the last minute. Experts are then given a brief which more often than not is poorly prepared, usually because the lawyers do not know the right questions to ask, further being unfamiliar with the technical aspects lawyers then give the experts virtually every document to consider and hence the experts taking a long time to work through all the paper. Then having to produce a report that might have many iterations. Having done this the expert then has to work hand in glove with counsel to get them up to speed on their respective areas of expertise and findings'.

Question 6: According to ***E***, over-reliance is due to the nature of the case not the process of litigation itself. 'In my experience some experts and many lawyers fail to understand why expert opinion is being sought and what the expert's duty is in respect of providing expert evidence', going on to say 'firstly expert evidence is sought when there is insufficient evidence available for the court to make a decision on the issues in dispute or the parties and their respective evidence are so far apart that it needs an expert to inform the court as to what a reasonable expert would say in answer to specific questions. Obviously specialist evidence is required on difficult technical issues and that is common in all forms of litigation not just construction issues. Medical cases have a vast amount of expert opinion. Therefore, the integrity of the case is not undermined by specialist experts and any reliance on what they might say, in many cases there is no other option for the court. It has to decide the case and expert evidence might in some cases be the only option available to arrive at a decision. One issue that is important is that often lawyers like to employ lots of experts where the case might be weak or where they are seeking to blitz the court and the other side with opinion evidence rather than facts.' ***E*** also

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makes the point that expert evidence, irrespective of who employs the expert, is for the benefit of the court or the tribunal and the expert has a duty of impartiality and to advise the court honestly and clearly of their opinion. 'Very often this is all that is available to the judge to make his decision'.

Question 8: ***E*** agrees that the findings of this question are probably correct – 'often if a party has had several wins via litigation then it is more likely to use the process again'.

Question 9: ***E*** also agrees that this might be correct but adding 'the biggest impact in reducing litigation and arbitration since 2005 has been the use of BCIPA'.

Question 10: ***E*** agrees.

Question 11: ***E*** does not agree that use of ADR makes the litigation or dispute more complex. 'In fact it is quite the opposite because it can have the effect of crystallizing the dispute issues and knocking out or even resolving the peripheral issues, which might otherwise bog down the process'.

Question 12: ***E*** agrees.

Additional comments: 'The respondents' comments were very good and useful, and ***E*** agrees with most of them and believes some further work could be done on the basis of these comments and the issues they raise.'

Conclusions

Alternative dispute resolution (ADR) methods, such as arbitration, are often used instead of litigation, as industry folklore considers litigation overly expensive and time-consuming. Further, ADR is private whereas court litigation is not. Little is known of the real advantages and disadvantages of using litigation or ADR in practice, and when litigation is the most appropriate way of resolving construction disputes. This paper provides the results a survey of construction and legal personnel with moderate to extensive experience of dispute resolution in the Australian South East Queensland construction industry. The main results of this are that, in addition to litigation being more expensive in money and time than ADR methods, the nature of the existing relationship between the parties has an important effect of the resolution process, and what happens after an unsuccessful ADR, if adversarial, is more likely to lead to litigation. The results are then validated and verified by one of the most experienced practitioners in claims and disputes in the whole of Australia to show that, although generally correct, several exceptions exist in our interpretation of the results depending on contingent circumstances, and these are highlighted in detail in the paper. Although anchored in a single region of Australia, the results of this study are unlikely to be different from the rest of Australia or most developed countries.

As is pointed out by ***E***, the 11 QSs involved represent the majority of respondents and therefore a lot of reliance has been placed on their input. However, since around 2007, QS involvement in Australian dispute resolution is as BCIPA adjudicators rendering other dispute resolution mechanisms and systems generally alien to them. As a result, they have limited knowledge of major disputes and claims and even less experience and knowledge of the various mechanisms by which major disputes can be and often are resolved. In major disputes, QSs are often employed to provide some technical support, with an engineer or bespoke claims consultant representing the party's interest. Even when QSs are involved as experts, they seldom have a full understanding of the process involved. Similarly, most lawyers, while understanding litigation generally, have a limited understanding of construction issues or the law relating to construction matters and there are few expert construction lawyers in Queensland. This is reflected in the results of the survey where there is occasional evidence of occupational bias. Future research would benefit from a greater contribution from specialist lawyers, claims consultants and expert witnesses from engineering, programming backgrounds and even some architects and arbitrators.

Other implications concern the general *empirical* confirmation of the literature in that litigation is inappropriate for all but the largest of disputes. Also shown is the need for the parties to a construction project to best try avoid developing an adversarial relationship (as fighting over money can cost a lot more money than not fighting over money). This sets up a Prisoner's Dilemma situation that that may well interest future theorists. Finally, there is also a methodological contribution here in our treatment of a small, specialised, population involving occupational bias by bringing in an unbiased practitioner with very extensive relevant

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experience to help better understand and interpret the results of the survey – especially in identifying the contingent issues involved. Worthy of further study is the mechanisms underlying these contingent influences and the extent to which they are measureable and predictable as contextual factors affecting the dispute situations that occur in the construction industry today.

The major limitation of this study is that the sample size is quite small. Although this is because the population size is quite small too because of the degree of specialism needed to be able to provide a knowledgeable and informed response. Future work would benefit from covering a larger area than regional Queensland – perhaps the nation as a whole or even the continent. Of course, international comparions are also possible in developed countries.

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Table 1: Summary of results

Propositions	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree	Mean	Standard Deviation
	1	2	3	4	5		
Q1: Litigation is the most effective way to resolve construction disputes	6	7	4	3	0	2.20	1.056
Q2: Using litigation to resolve construction disputes is cost effective for all parties involved	7	12	1	0	0	1.70	0.571
Q3: Using litigation to resolve construction results in delayed resolutions when compared to using alternative methods	0	1	4	11	4	3.90	0.788
Q4: The construction industry is perceived as having a negative attitude towards litigation and legal proceedings due to ineffectiveness and bad experiences	0	3	5	10	2	3.55	0.887
Q5: The complex and technical nature of construction issues require longer durations to litigate than other types of issues due to the requirements of multiple experts	0	4	4	11	1	3.45	0.887
Q6: Overreliance on experts during the litigation process undermines the integrity of a case due to the specialised nature of disputes	0	9	7	4	0	2.75	0.786
Q7: The relationship between parties to the dispute up to the point where the dispute occurs, affects the resolution process	0	0	1	14	4	4.16	0.553
Q8: Parties to a dispute with an established adversarial relationship are more likely to use litigation to achieve a resolution	0	1	4	14	1	3.75	0.639
Q9: Increased use of Alternative Dispute Resolution (ADR) (e.g. mediation, arbitration, etc.) has led to a decline in the number of construction disputes being litigated as ADR is effective in reaching a finalised resolution	0	1	5	13	1	3.70	0.657
Q10: The use of ADR has a positive impact on resolving construction disputes	0	0	7	11	1	3.55	0.826
Q11: Unsuccessful use of ADR to resolve construction disputes in the first instance results in subsequent litigation becoming more complex	0	8	7	5	0	2.85	0.813
Q12: Unsuccessful use of ADR to resolve construction disputes in the first instance results in parties having an expectation of the outcome as determined previously.	0	8	11	1	0	2.65	0.587

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