BARRIERS TO THE ADOPTION OF ALTERNATIVE DISPUTE RESOLUTION WITHIN THE IRISH CONSTRUCTION INDUSTRY: A SYSTEMATIC LITERATURE REVIEW

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The Construction Contracts Act 2013 introduced statutory adjudication to the Republic of Ireland's construction industry. Since the legislation became operative in 2016, uptake of adjudication has admittedly been slow. This research aims to identify the barriers that may cause the non-utilisation of newly introduced alternative dispute resolution (ADR) methods. To address this, a systematic literature review (SLR) is conducted. The search comprises of research documents containing the terms "alternative dispute resolution", "construction", and "Ireland", published between the years 2004-2024. Of the initial 77 documents, 20 are eligible for inclusion in this study. Following this, an exhaustive list of potential barriers is extracted and documented. 16 barriers are identified, including cost of ADR for clients, and third-party's capability, among others. The contribution of this research is to highlight the barriers facing newly introduced ADR methods, a finding that may garner the attention of policy makers, and subsequently enable them to begin addressing the barriers identified. Resultantly making newer methods, such as adjudication in Ireland's construction industry, more accessible and feasible to those they are intended to assist.

Keywords: adjudication; alternative dispute resolution; arbitration; conciliation; Construction Contracts Act 2013

INTRODUCTION

The Construction Contracts Act 2013 (hereafter referred to as “the Act”) is the statutory legislation for adjudication employed in the Republic of Ireland (hereafter referred to as “Ireland” and "Irish"). Adjudication is a method of alternative dispute resolution, or "ADR" as it is more commonly referred to. ADR is any method by which a set of practices are utilised to resolve a dispute privately, other than negotiation or litigation in a public court (Kumar 2021). ADR is valuable because it offers alternatives that are less expensive and time-consuming than traditional litigation. The adjudication procedure is a formal process in which an outside neutral third party decides on behalf of two or more disputing parties. Prior the

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implementation of the Act the consensus amongst representatives of various professional bodies interested in adjudication, was that 150 disputes would be referred to adjudication annually (Hussey 2019). However, annual reports on the performance of the Act reveal that 81 applications for adjudicator referral is the largest number received in a one-year period to date, 2021-2022 (Gogarty 2021). The purpose of this research is to provide an insight on what factors could potentially be perceived as "barriers" to the utilisation of newly introduced ADR methods, such as adjudication in Ireland's construction industry. To achieve this aim, this paper conducts a systematic literature review (SLR). Whilst the authors acknowledge the existence of studies on the barriers to the adoption of ADR within the Irish construction industry; the value of this SLR is that currently there is no conciliated overview of this information. In the context of this study, the term "barrier" refers to any factor that results in ADR not being used.

The outcome of the review is an exhaustive list of "potential barriers", identified by academia. Note, the findings of this research cannot be conclusive in terms of what potential ADR users perceive as barriers, as these factors have been identified by authors and not directly by industry. Hence the expression "potential barriers". Nevertheless, the findings of this research should prove valuable to the Oireachtas (Irish Parliament). The primary function of the Oireachtas is to enact legislation for Ireland. The list provides the Oireachtas with a starting point, from which they can determine the relevance of these factors, and subsequently address the barriers that are truly hindering the utilisation of new ADR methods. Doing so should make newly introduced procedures such as adjudication, more approachable to prospective users. In summary, this paper's aim is to answer the research question, what barriers are causing the non-utilisation of newly introduced ADR methods within the Irish Construction industry according to the literature? Answering this question helps lay the foundations for a future investigation into the industry's opinion.

METHOD

Traditional literature reviews are flawed as they are often limited to major studies or research consistent with the author's own findings, making them rarely comprehensive (Nightingale 2009). Whether inadvertent or intentional, a lack of detail with regards research selection or methods can result in researcher bias. Furthermore, the SLR method is recognised as a scientific and effective approach to methodically gathering, reviewing, and synthesising research findings on a particular topic. The compiling of findings can reveal gaps in research. Thus, SLRs can serve as a platform for the future studies (Palmatier *et al.,* 2018). Above all, the SLR method strengthens the methodological rigor of research, by providing analytical objectivity, transparency, and replicability (Wuni and Shen 2020). For these reasons, the study adopts a SLR method.

This SLR follows the guidelines developed by the Preferred Reporting Items for Systematic Reviews and Meta-Analyses (PRISMA) group. The PRISMA 2020 guidelines recommend following a three-stage procedure: identification, screening, and inclusion (Page *et al.,* 2021). At the identification stage, the information sources are selected. To enhance coverage of the included research, it is advised that an SLR make use of various databases (Wuni and Shen 2020). This study uses Elsevier's Scopus, Web of Science, and Lexis+ UK in its database search. Elsevier's Scopus is selected due its library of scholarly literature across various disciplines along with its easy-to-use format (Boyle and Sherman 2006). Additionally, Web of Science is

utilised as according to Bramer *et al.,* (2017), the extensive database of Web of Science can be beneficial, particularly in cases when research questions are interdisciplinary. Finally, Lexis+ UK is included in the search as the database houses a wealth of legal research including legislation, case law and journal articles from the United Kingdom (UK), United States of America (USA) and European Union (EU). Despite the quality of the selected databases, the relevance of the findings is dependent on the "search terms" or "keywords". These keywords are used to build a query known as a "search string". Hence, the study's topic of interest must be reflected in the keywords (Sayers 2008).

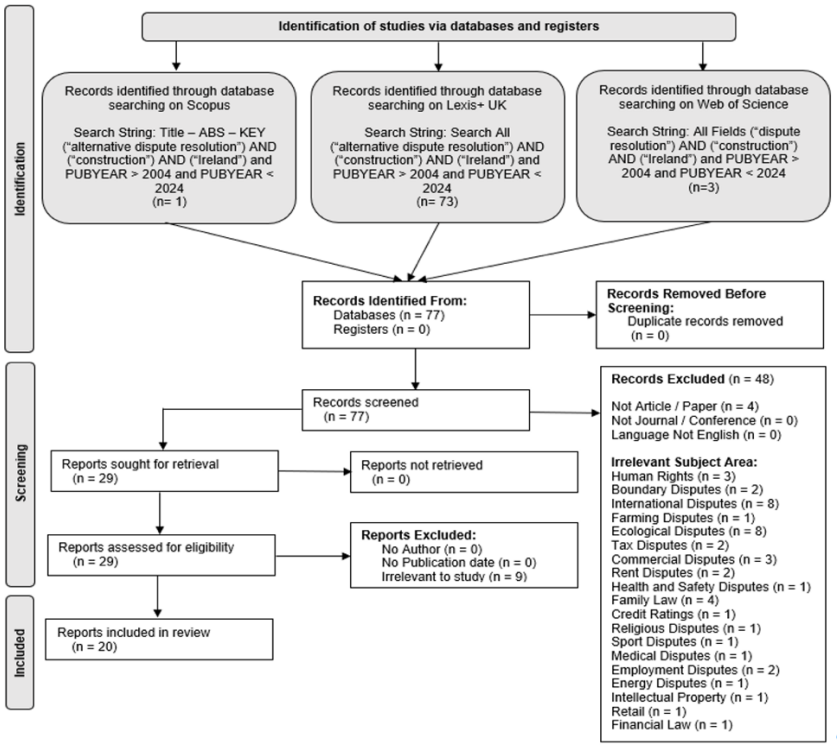

Figure 1: PRISMA flow diagram

As the research question concerns ADR, it is necessary to include "alternative dispute resolution" in the study's search string. Note "alternative dispute resolution" is selected over "ADR" to avoid confusion, as "ADR" is an abbreviation for many things. Note, the terms "adjudication" or "statutory adjudication", nor any other ADR technique such as "mediation" have not been selected. These terms are too restrictive considering that this research is focused on ADR used in the Irish construction industry, collectively. The Irish court system requires that an effort is made to resolve issues before taking legal action, leading to the use of ADR methods in various sectors. Thus, it is necessary to clarify that the scope of this research only extends to the construction sector. ADR is used all over the world in both developed and developing countries, thus, practices associated with the same ADR method differ greatly from country to country (Kumar 2021). For example, a factor recognised as a barrier to adjudication in Australia will likely have no relevance in Ireland. Thus, "Ireland" is included in the search string. A search across all three databases of the keywords "alternative dispute resolution" AND "construction" AND "Ireland", between the years 2004-2024, yields twenty eligible documents as of March 2024. Note, the initial search on the Web of Science database generated no results. Resultantly, "alternative dispute resolution" was replaced with the synonym "dispute resolution". Books are excluded from the search, as books generally do not undergo

the same peer-review process as journal articles and conference papers (Lin and Nather 2015). Note, the SLR is tested, a colleague used the search string independently. The test produces the same results of seventy-seven records, as of March 2024. Figure 1 graphically represents the interconnected stages of the SLR.

FINDINGS AND DISCUSSION

Despite the timeframe spanning from 2004-2024, the earliest date in which an eligible study was published was 2008. No eligible documents have been published in 2024, as of March. Peer-reviewed research on the ADR practices of the construction industry is scant. Upon accessing the full text documents, references to the non-utilisation of ADR are noted. These notes are extracted and complied using Microsoft Excel. Each note is assigned a code. A new code is made for each new barrier recognised by authors from the literature. Notes relating to the same barrier are given the same code.

Table 1: Potential barriers and associated authors

Potential Barriers	Author (Year)
Other ADR methods	Trushell *et al.,* (2016), Ahmed (2019b), Ahmed (2020)
Client's lack of knowledge	Ilter *et al.,* (2016), Trushell *et al.,* (2016)
Commitment from parties	Spillane *et al.,* (2011), Yao *et al.,* (2023), Qadir *et al.,* (2023)
Third party's capability	Spillane *et al.,* (2011), Trushell *et al.,* (2016), Langford *et al.,* (2023)
Negative perceptions	Owen (2008), Trushell *et al.,* (2016)
Inability to enforce decisions	Saidov (2022), Mohammed and Lintott (2022), Qadir *et al.,* (2023)
Inflexible	Ahmed (2019a), Saidov (2022)
Cost of ADR	Treacy *et al.,* (2016), Kantor and Parrott (2016), Mohammed and Lintott (2022), Qadir *et al.,* (2023)
Contract uncertainty	Kantor and Parrott (2016)
Less judicial precedent	Mulcahy (2022)
Settlement sums	Bange (2014)
Oral contracts	Akintoye *et al.,* (2012)
Unclear legislation	Arnold (2009), Young (2010)
Formality	Kurkchiyan (2012)
Not a private procedure	Owen (2008), Qadir *et al.,* (2023)
Inadequate legislation	Qadir *et al.,* (2023)

This coding procedure has led to the identification of sixteen potential barriers, across the twenty documents, which make up this SLR. Each barrier is acknowledged by authors in a minimum of one document. All the potential barriers and the authors which mentioned them are listed in Table 1.

Each heading of this discussion is a barrier recognised by authors from the literature.

Other ADR Methods

Statutory adjudication in the Irish construction industry has had to compete with pre-existing, popular ADR methods. For example, arbitration has featured in Irish contracts as early as 1955 (Arbitration Act 1954), conciliation since 1995 (Bond 2023), and mediation since 2008 (Spillane *et al.,* 2011). Trushell *et al.,* (2016) explains that the ongoing popularity of established ADR methods proves a "significant barrier" to the utilisation of newer procedures. The Irish Law Reform Commission (LRC) published a consultation paper in 2008, discussing ADR mechanisms used within Ireland. The paper highlighted the success of both mediation and conciliation (Law Reform Commission 2008). The LRC made recommendations, which they

believed would further improve ADR mechanisms used within Ireland, they did not mention adjudication (O'Malley 2020). The popularity of existing ADR methods can cause potential users to resist utilising new procedures (Trushell *et al.,* 2016). Ahmed (2019b) adds that common law jurisdictions have an "established history" of using mediation. Ahmed (2019b) suggests that there is a "judicial mediation bias" that restricts the development of other ADR procedures in these jurisdictions. The Irish's legal system is a common law system. Mediation's popularity is due to its perception of being more economic and practical than other ADR procedures (Ahmed 2019b). The Oireachtas passed the Mediation Act 2017, in late 2017; the legislation commenced on the January 1st, 2018 (Citisens Information Board 2018). Some believe that the Mediation Act 2017, was passed with the aim of endorsing mediation as a mainstream dispute resolution option (Ahmed 2020).

Client's Lack of Knowledge

In some instances, the problems faced by an ADR method is not caused by its procedure or the practitioners that follow said procedure, but the clients instead. When analysing the experiences of clients using ADR methods, Ilter *et al.,* (2016) stated that lack of knowledge in the industry was a "major barrier". It is envisaged that this barrier is more prevalent for more recent ADR techniques. As previously mentioned, Trushell *et al.,* (2016) points out that popular established ADR methods can cause potential clients to resist using new procedures. This lack of use causes the inability of the client to employ the method correctly. Such client related issues include ignorance, narrow-mindedness, and over-confidence (Trushell *et al.,* 2016).

Commitment from Parties

It is essential that clients view the ADR process as a liable option to settle their dispute (Spillane *et al.,* 2011). If the parties do not commit to actively participate, the procedure will be unsuccessful. Furthermore, trust between construction project participants is required to promote ADR approaches that aim for common interests (Yao *et al.,* 2023). But issues observed within project participant relationships include mistrust, adversarial attitudes, and abuse of status (Qadir *et al.,* 2023). According to Qadir *et al.,* (2023), adjudication provides everyone with equal access to justice, which may elicit resistance from those in positions of authority, like employers.

Third Party's Capability

Under the Act, parties to the construction contract can decide either to select an adjudicator themselves, or have one assigned to them by the Chair of the Construction Contracts Adjudication Panel. Trushell *et al.,* (2016) claims that a lack of skilled or experienced practitioners proves to be a significant barrier to the wider use of ADR methods. The quality of a statutory adjudication is dependent on the adjudicators which direct the procedure. Thus, Spillane *et al.,* (2011) maintains that when choosing a third party, the clients need to ensure that the individual(s) they are enlisting are qualified, knowledgeable, and appropriate for the task. According to Langford *et al.,* (2023), holding adjudicators accountable for the correctness of their decisions, and their decision-making consistency, will prevent practitioners from becoming apathetic and guarantee that they pay sufficient attention during the decision-making process.

Negative Perceptions

In Ireland, formal dispute resolution was traditionally viewed as something to be avoided (Owens 2008). Statutory adjudication is a formal procedure, as the client does not decide the outcome of the procedure. Owens (2008) believes that formal

procedures are less likely to proceed to litigation, since their outcomes are a good indication of what a judge's award is likely to be. However, Owen (2008) also predicts that the clients will be less satisfied with the outcome. A study by Trushell *et al.,* (2016) revealed that practitioners believe that the negative perceptions of potential clients is one of the largest barriers to the utilisation of ADR methods.

Inability to Enforce Decisions

Since the introduction of the Act, there have been prominent debates regarding the enforceability of an adjudicator's decision. According to the legislation, the adjudicator's decision is binding on the parties, unless both parties agreed upon an alternative solution; or the decision can be superseded by the outcome of an arbitration or litigation proceeding. Furthermore, if one party refuses to abide by the adjudicator's decision, the other party can have the decision enforced by the Irish High Court. Thus, adjudication under the Act could be criticised for its inability to enforce decisions dependently. Similarly, the ADR method expert determination (ED), has been criticised as for the inability of ED decisions to be enforceable (Saidov 2022). Saidov (2022) claims that this "weakness" is a genuine barrier to the development of ED as a dependable ADR strategy. In addition, Qadir *et al.,* (2023) contend that practitioners lose their interim power because of excessive judicial interference. Hence, excessive court intervention can render an ADR process almost redundant (Mohammed and Lintott 2022).

Inflexibility

Construction adjudication was not created to be flexible (Ahmed 2019a). Only specific issues can be referred to an Adjudicator for determination. For instance, certain legislations, such as the Act, restrict adjudication to matters pertaining to payment (Saidov 2022). Resultantly the Act has been criticised for being "far-reaching", considering that disputes resulting from construction contracts frequently have financial repercussions (Arthur Cox 2019).

Cost of ADR for Clients

Treacy *et al.,* (2016) emphasizes the importance for potential ADR users to consider the continued rising costs of dispute resolution within the built environment. Take adjudication as an example. In accordance with the Act, each party must pay their own legal and other costs incurred in connection with the adjudication. For the unsuccessful party, the costs incurred are a waste (Kantor and Parrott 2016). Considering that the unsuccessful party will be ordered to pay the adjudicated award to the successful party, on top of their half of the external adjudicator expenses, and their own internal legal costs, it is likely that the total bill would be sizeable. Especially considering that there is no regulation that caps adjudicator's fees; and so, their rates are not standardised (Qadir *et al.,* 2023). Consequently, while an adjudicator's decision can be contested through arbitration or litigation, this may be financially unfeasible for an unsuccessful party (O'Malley 2020). Alternatively, some parties may unnecessarily pursue arbitration or litigation to delay the payment of the award, or to avoid the enforcement of the award altogether. The time and money saving benefits that ADR processes are meant to accomplish, are compromised by this activity (Mohammed and Lintott 2022).

Settlement Sums

Settlement sums are often the outcome of ADR, as the unsuccessful party will attempt to mitigate their loss (Bange 2014). These compromised agreements are usually worth less than the sum awarded through ADR. Therefore, by proposing a to pay a

settlement sum to the successful party, the unsuccessful party may avoid further costs that would arise from having the successful party enforce the ADR decision through litigation, while simultaneously lowering the amount they owed. Bange (2014) notes that parties that are unwilling to accept a lesser sum, will still pursue litigation. However, parties on the brink of insolvency, may not have sufficient funds to have the decision enforced in formal proceedings.

Less Judicial Precedent

Mulcahy (2022) argues that ADR procedures could be self-damaging. Mulcahy (2022) explains that case law acts as a precedent, helping individuals avoid unnecessary litigation. However, ADR techniques are intended to reduce the number of cases which progress to litigation. And court proceedings are required to produce judicial precedent (Mulcahy 2022). Therefore, the lack of case law may result in more disputes progressing to litigation, which defeats the purpose of ADR.

Unclear Legislation

Arnold (2009) discusses a court judgement which provided guidance on how to operate statutory provisions successfully. This form of guidance is welcomed, as Arnold (2009) proposes that the statutory provisions are not as straightforward as they initially appear. For example, Young (2010) criticised the Housing Grants, Construction and Regeneration Act 1996 (HGCRA), for being difficult to use, due to the boundaries of the legislation's application being unclear. The HGCRA is a piece of legislation that affects construction contracts in the UK (Young 2010). Some believe that the HGCRA inspired the Act, as both legislations have similar definitions, timetables, and have nearly identical mandatory payment provisions (O'Malley 2020).

Contract Uncertainty

ADR methods that are under statute do not need to be included in the dispute resolution clause of contracts. For example, under the Act, a party to a construction contract can refer for adjudication at any time. Statutory adjudication is a mandatory step, it is impossible to contract out of it. So, if a party fails to acknowledge statutory adjudication when crafting the dispute resolution clause of their contract, this additional layer of dispute resolution may catch them off guard. This would likely disrupt a party's dispute resolution plans, leaving them uncertain in terms of how to proceed (Kantor and Parrott 2016).

Oral Contracts

In line with section 1 of the Act, a "construction contract" does not need to be in writing, it can be partly or wholly oral. According to Akintoye (et al. 2012), this creates several problems, relating to the adjudicator's accessibility to information. For example, how is an adjudicator expected to accurately access the terms of the contract, if they are not in writing? (Akintoye *et al.,* 2012). This can result in a situation where it is one parties' word, against the others. There would be little to no evidence to suggest to the adjudicator which party, if any, is being truthfully.

Formality

Each different ADR procedure has varying levels of formality. Formal procedures have strict rules that must be adhered to. Kurkchiyan (2012) claims that adjudication is unnecessarily formal. Formal procedures can exacerbate the very problem they are meant to solve, due to their cost and lengthy timeframe (Kurkchiyan 2012). Kurkchiyan (2012) recommends that parties opt for informal ADR methods, such as mediation, if they wish to obtain quick and affordable resolutions to their disputes.

Not a Private Procedure

There are scenarios where the outcome of an ADR must be disclosed. In accordance with the Code of Practice Governing the Conduct of Adjudications, any information supplied by the contract parties during an adjudication shall be kept confidential by the adjudicator (Breen 2016). However, the adjudicator must disclose this information if required to do so by law, or pursuant to an order of a court, or with the consent of all the parties to the dispute (Breen 2016). Thus, an adjudicated award can be made known to an arbitrator or judge (Owens 2008). Owens (2008) believes that this requirement causes parties to be more cautious and less open. Consequently, the parties may not feel comfortable raising certain issues with the adjudicator, which may otherwise have been significant to the adjudicator's decision. Additionally, Qadir *et al.,* (2023) acknowledges that parties that have a history of dispute with those in position of authority, may struggle to secure new employment.

Inadequate Legislation

If a legislation is poorly drafted there are likely to be inadequacies that can be taken advantage of. Qadir *et al.,* (2023) recognises inadequacies present within the statutory adjudication process. Such inadequacies include "smash and grab" adjudications. This occurs when the applicant requests payment of the total amount of a payment application, due to the respondent's failure to respond within the allotted time. Qadir *et al.,* (2023) recommends that legislation is upgraded, to eliminate such loopholes.

CONCLUSIONS

The aim of this paper is to identify barriers that are causing the non-utilisation of alternative dispute resolution (ADR) methods, used within the Irish construction industry, according to the literature. To achieve this aim, potential barriers were investigated via a SLR. The SLR identified 16 potential barriers, raised by authors, across 20 journal articles. Naturally some barriers have featured in the literature more than others. This could suggest that barriers that recur more frequently have a more significant effect on ADR utilisation within the construction sector than ones that emerge infrequently. The benefit of this research is twofold. Firstly, the flow-diagram makes it abundantly evident that the existing literature regarding construction ADR procedures is scant. Resultantly, adding to this body of literature helps fulfil a research gap in academia. Also, this research has developed a list of potential barriers to the ADR methods available to the Irish construction industry. Subsequently, to further this research, this list should be presented to ADR practitioners such as mediators, conciliators, adjudicators, and arbitrators. This exercise would aim to determine the relevance of these factors and confirm if they truly hinder utilisation of new ADR methods. Experts may introduce barriers they have observed in practice that are not covered in the literature. In terms of practical ramifications, the findings may enable the Oireachtas to recognise and subsequently start addressing the barriers identified. This could make ADR more accessible and feasible to those it is intended to assist. Note, this study is not without limitations. Future research could expand the SLR, including more or different keywords, databases, and information sources (such as books). This would likely produce a more comprehensive article; however, this study was limited by the template requirements.

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