Collaborative Solutions in Construction: Rising to the Challenges Facing International Construction[1]

Professor Doug Jones, AO[2]

Editor's Note

Professor Jones has, in this article, challenged the legal profession to consider application of a more collaborative approach to resolving construction disputes. At the outset, the author identifies three challenges facing the construction industry, being: human resources; the impact of regional conflicts and sanctions on the industry; and industry supply chain issues. While human resource issues constraints have always existed in construction, the pandemic has both highlighted and exacerbated such problems. With respect to regional conflicts and their effect on the industry, it is not hard to find examples (e.g., the war in Ukraine) where such conflicts have led to sanctions being imposed by the US and other countries, including restrictions regarding transfers of money, goods (such as oil), services, and technology transfers. Regarding supply chain issues, many countries have, during the pandemic, experienced material shortages and industry-wide shock-waves, which in turn have resulted in construction delays on projects. In this context, the author suggests that lawyers consider a best-for-project-outcome approach, in contrast to the best-for-client approach that is currently used. This concept, called 'collaborative law' in the field of family law, has been used with much success. Some models of collaborative law require that the collaborative lawyer mandatorily step out of the process if the collaborative process should fail, to allow more traditional litigators to take over. Professor Jones describes collaborative law as having the potential to function as an inexpensive form of ADR.

It is with these words that American family lawyer Stuart Webb, the founder of 'collaborative family law', described the (often wasted) potential that lawyers have to assist their clients in productive ways. For Webb, this disillusionment with traditional legal practice derived from personal experience of the dissatisfaction felt by clients following

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[1] This article is adapted from a key note speech delivered at the III International Congress on Construction Law in Chile. A recording of the speech may be found at the author's website: <www.dougjones.info>. The author acknowledges the assistance in the preparation of this article of Peter Taurian and Caroline Xu, Legal Assistants, Sydney Arbitration Chambers.

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adversarial family law proceedings; far from resolving their differences, the parties had formed fresh grievances against one another. However, Webb's words ring true beyond the bounds of his personal experience, and that of other practitioners, in family law. His words speak to a dissatisfaction that is felt throughout the world in respect of lawyers who, albeit through no fault of their own, are trained to devote themselves to *winning*, without regard for the damage that they may be causing to all parties, including their own, in the long run.

This article focuses on this problem in the construction industry. The article will begin by exploring the myriad challenges that plague the industry worldwide. Once these issues are understood, it will become clear that traditional methods of adversarial dispute resolution are incapable of responding to these key issues in any meaningful sense, and that more creative, collaborative avenues of dispute resolution need to be considered. This article will then explain the prospect of transforming the role of the lawyer into that of an overseer and facilitator of collaboration between the parties. This author suggests that training lawyers to keep the interests of the *project* at the forefront of their minds, just as collaborative family lawyers devote themselves to the best interests of the *family*, is an approach that has great potential and ought to be explored.

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. . . I don't mean adversarial, contentious lawyering, but the analytical, reasoned ability to solve problems and generate creative alternatives and create a positive context for settlement.[3]

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1. CHALLENGES IN THE CONSTRUCTION INDUSTRY

As highlighted above, the general disillusionment with the capacity of lawyers properly to resolve parties' differences in construction disputes has been exacerbated by a number of problems plaguing the industry. The three challenges that this author wishes to explore are human resources; the impact of regional conflicts and sanctions on the industry; and industry supply chain issues.

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[3] Letter from Stuart G Webb to Justice Sandy Keith, 14 February 1990. The text of the letter may be found at < https://www.collaborativeaustralia.com.au/wp-content/uploads/2022/03/Webb_ltr_-re_Collaborative_Law_1990.pdf > .

1.1 Human Resources

We are currently facing an industry-wide skills shortage, both at the Project Management and Labour levels. We have heard countless reports of continuing global skills shortages, with construction being one of the most acutely affected industries.[4] Contractors are struggling to fill vacancies and manage the resulting delays and uncertainties for project delivery. This chronic labour shortage, coupled with the increasingly growing demand for infrastructure, has also contributed to the rising number of unskilled workers, further resulting in the declining quality of work in construction projects.[5] The question necessarily arises as to what is causing this gap.

The construction industry is acutely impacted by the concurrent trends of retirement of experienced workers, in conjunction with the reduced inflow of younger workers. Construction is facing an ageing workforce, and skilled workers approaching retirement age are departing en masse, their retirement often catalysed by the onset of the pandemic.[6] This problem has been, of course, exacerbated by what is commonly referred to as the 'Great Resignation' during and post-COVID, which has seen unprecedented numbers of workers changing companies, industries, or career paths.[7]

Worsening this crisis is a lack of interest among young people in construction, jeopardizing the prospect of the injection of new talent into the industry. Generally speaking, the younger generation does not view construction as a viable career. Surveys across various jurisdictions indicate low interest in construction as a career among young people,[8] and the numbers of apprentices and trainees across major construction

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4 See, e.g., Catrin Jones, 'How to solve construction's skills shortage', *International Construction* (Web Page, 18 February 2022) < https://www.international-construction.com/news/how-to-solve-constructions-skills-shortage/8018296.article > ; Mark Jones, 'Global Labor Shortage in Construction: Challenges and Solutions', *4castplus* (Web Page, 3 October 2022) < https://4castplus.com/global-labor-shortage-in-construction-challenges-and-solutions/ > ; 'Global Construction Market Outlook', *Turner & Townsend* (Web Page) < https://publications.turnerandtownsend.com/international-construction-market-survey-2022/global-construction-market-outlook > .

5 'Construction Industry Faces Workforce Shortage of 650,000 in 2022', *Associated Builders and Contractors* (Web Page, 23 February 2022) < https://www.abc.org/News-Media/News-Releases/entryid/19255/abc-construction-industry-faces-workforce-shortage-of-650-000-in-2022 > .

6 Garo Hovnanian, Ryan Luby and Shannon Peloquin, 'Bridging the labor mismatch in US construction', *McKinsey* (Web Page, 28 March 2022) < https://www.mckinsey.com/capabilities/operations/our-insights/bridging-the-labor-mismatch-in-us-construction > .

7 Carlos Carrillo-Tudela, Alex Clymo and David Zentler-Munro, 'The truth about the "great resignation": who changed jobs, where they went and why', *The Conversation* (Web Page, 29 March 2022) < https://theconversation.com/the-truth-about-the-great-resignation-who-changed-jobs-where-they-went-and-why-180159 > .

8 See Farzad Minooei, Paul M Goodrum and Timothy RB Taylor, 'Young Talent Motivations to Pursue Craft Careers in Construction: The Theory of Planned Behavior' (2020) 146(7) *Journal of*

markets continue to fall.[9] The declining popularity of construction is in part due to the cultural and societal shift which places value on professional salaried careers, and sees physical trades such as construction as low-value work.[10] Young people typically perceive the industry as low status, dirty, and badly paid, with poor working conditions and job security.[11]

Though there are clearly opportunities to pursue a rewarding career in construction, there are good reasons why young people have a different view. The first is the serious lag in technological innovation within the construction industry, namely the failure to take advantage of new technologies to facilitate construction management and delivery. There are countless examples of new technology which could maximize efficiency and manage cost and schedule overruns: workflow management software, building performance monitoring, automation, and remote monitoring methods, among others. However, uptake of such technologies is slow, with only 12% of construction contractors across eight countries being 'well on their way' to digitizing operations.[12] Construction is therefore one of the least digitized industries around the world. Crucial reasons for this are employee and management hesitance, and a lack of the resources and institutional knowledge necessary to take advantage of new technologies. This lag only reinforces the perception that construction is outdated, ultimately deterring tech-savvy youths from joining and remaining in the industry.[13]

The next reason for the declining appeal of construction is work-life balance, which has been an especially pressing consideration since the onset of the COVID-19 pandemic. Given the demanding nature of the

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Construction Engineering and Management 1; Liz Waters and Robert McAlpine, *Construction as a Career of Choice for Young People* (Report, 2016).

9 Faarea Masud, 'Warning apprentices quitting over quality of schemes', *BBC* (Web Page, 28 November 2022) <https://www.bbc.com/news/business-63762317>; Natassia Chrysanthos, 'Apprenticeships drop by two-thirds amid looming skills shortage', *Sydney Morning Herald* (Web Page, 4 May 2020) <https://www.smh.com.au/national/nsw/apprenticeships-drop-by-two-thirds-amid-looming-skills-shortage-20200401-p54g0g.html>.

10 Sebastian Obando, 'Median age of construction workers is contributing to workforce shortages', *Construction Dive* (Web Page, 9 July 2021) <https://www.constructiondive.com/news/median-age-of-construction-workers-is-contributing-factor-to-workforce-shor/603018/>.

11 Waters and McAlpine *supra* note 8 at 12.

12 'IDC Survey Reveals ANZ Construction Industry Should Implement More Digital Transformation Tools', *Building Connection* (Web Page, 15 September 2020) <https://buildingconnection.com.au/2020/09/15/idc-survey-reveals-anz-construction-industry-should-implement-more-digital-transformation-tools/>; see also KPMG, *Building a technology advantage: Global Construction Survey 2016* (Report, 2016) <https://assets.kpmg.com/content/dam/kpmg/cn/pdf/en/2017/09/global-construction-survey-2016.pdf>.

13 Rajat Agarwal, Shankar Chandrasekaran and Mukund Sridhar, 'Imagining Construction's Digital Future', *McKinsey* (Web Page, 24 June 2016) <https://www.mckinsey.com/capabilities/operations/our-insights/imagining-constructions-digital-future>.

work, the construction industry often involves long hours, low pay, and job insecurity, all of which are major contributors to poor mental health and high suicide rates.[14] Construction practitioner surveys have indicated trends of poor mental health resulting from long working hours, job uncertainty, tight deadlines, financial pressures and working for prolonged periods away from home.[15] It is therefore unsurprising that younger people pursue alternative career paths which allocate greater importance to employee welfare. Young people also value gender diversity, which still requires further meaningful reform, both within the legal profession practicing construction law, but more importantly within the broader sphere of the construction sector. Across most major markets, the percentage of women in the construction industry is approximately 10% or less.[16] There are multiple factors contributing to this outcome, including the perceived physical nature of the work, the remote on-site locations, the social dynamic of working in a very male-oriented environment, and a lack of availability of career paths and flexible working arrangements, among others.[17] These are key obstacles to the meaningful advancement of women's roles in the construction industry, and further contribute to the perception of construction as outdated, given the importance of diverse workplaces to today's progressive youth.

Finally, there is the issue of ESG,[18] which increasingly permeates discussions surrounding corporate social responsibility: environment, social, and governance. As regards environment, the construction industry, being resource and energy-intensive, produces approximately 30% of global greenhouse gas emissions, consumes 32% of the world's

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[14] Tiya Thomas-Alexander, 'Mind Matters: Construction Workers Reply to CN's Mental Health Survey', *Construction News* (Web Page, 23 June 2022) < https://www.constructionnews.co.uk/agenda/mind-matters/mind-matters-is-the-industry-progressing-on-mental-health-23-06-2022/ >.

[15] *Ibid.*

[16] 'Statistics', *National Association of Women in Construction* (Web Page) < https://www.nawic.org/statistics#:~:text=Women%20numbered%2010.9%20percent%20of%20the%20entire%20U.S.%20construction%20workforce%20in%202022.&text=Women%20in%20the%20U.S.%20earn,percent%20of%20what%20men%20make. >; Don Wall, 'Women in trades stats nothing to celebrate, advocates say', *Construct Connect* (Web Page, 7 March 2022) < https://canada.constructconnect.com/dcn/news/labour/2022/03/women-in-trades-stats-nothing-to-celebrate-advocates-say#:~:text=In%20Canada%2C%20BuildForce%20Canada%20estimated,38.5%20per%20cent%20off%2Dsite. >.

[17] Phillippa Carnemolla and Natalie Galea, 'Why Australian Female High School Students Do Not Choose Construction as a Career: A Qualitative Investigation into Value Beliefs About the Construction Industry' (2021) 110(4) *Journal of Engineering Education* 819, 833; Andrew Agapiou, 'Perceptions of Gender Roles and Attitudes Towards Work Among Male and Female Operatives in the Scottish Construction Industry' (2002) 20(8) *Construction Management and Economics* 697, 703.

[18] Environment, Social and Governance (ESG) refers to three non-financial factors that can be used to inform the long-term risk and return of an investment.

natural resources, and generates a third of global waste.[19] In a social context, human rights abuses, physical safety, and labour standards are continuing issues for construction workers in many parts of the world, despite promises of greater safety and working conditions.[20] In addition to the aforementioned concerns regarding mental health and gender diversity within the industry, there is also concern about the impact of construction on local communities, given the disruptive nature of many construction activities. In terms of governance, corruption and unethical business practices have been synonymous with the construction industry throughout the world. Often, there is a lack of transparency in supply chains and subcontracting, which facilitates illegal and unethical behaviour.[21] As younger people are increasingly pursuing employers promoting values aligned with their own,[22] construction is accordingly struggling to attract and retain talent.

1.2 Regional Conflicts and Sanctions

With that introduction to the lack of human resources within the industry, and the reasons driving this scarcity, this article turns to a second category of challenge: regional conflicts and sanctions. The imposition of sanctions has become ubiquitous: Russia, following Crimea and Ukraine, alongside the related sanctions against Belarus; China, with the USA imposing technology transfer sanctions; Myanmar, which has been the subject of significant sanctions due to human rights abuses; Iran; and North Korea, among others. Most sanctions involve a range of financial measures, usually restricting the transfer or payment of money, in addition to limiting the supply of fuel, oil and gas, and other goods and services. Other sanctions target the affairs of particular individuals,[23] or involve severe limitations on technology transfer. These

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[19] 'Construction and demolition waste', *European Commission* (Web Page) < https://environment.ec.europa.eu/topics/waste-and-recycling/construction-and-demolition-waste_en > ; Jessica Turner, 'How should construction adapt to the climate catastrophe?', *Marsh* (Web Page, 23 September 2021) < https://www.marsh.com/us/industries/construction/insights/construction-transforms-to-address-climate-change.html > .

[20] See, e.g., Pete Pattisson and Niamh McIntyre, 'Revealed: 6,500 Migrant Workers Have Died in Qatar Since World Cup Award', *The Guardian* (Web Page, 23 February 2021) < https://www.theguardian.com/global-development/2021/feb/23/revealed-migrant-worker-deaths-qatar-fifa-world-cup-2022 > .

[21] See B K Monteiro, G Masiero and F R de Souza, 'Corruption in the Construction Industry: A Review of Recent Literature' (2022) 22(14) *International Journal of Construction Management* 2474.

[22] Matthew Jenkin, 'Millennials Want to Work for Employers Committed to Values and Ethics', *The Guardian* (Web Page, 5 May 2015) < https://www.theguardian.com/sustainable-business/2015/may/05/millennials-employment-employers-values-ethics-jobs > .

[23] For example, some countries, including the US and Canada, have enacted laws colloquially referred to as 'Magnitsky' legislation, which allows a country to sanction foreign government officials involved in human rights abuses.

sanctions, so far as the industry is concerned, significantly contribute to inflation, an omnipresent concern for commercial industries, especially construction. In addition to creating prolonged delays or halting certain projects altogether, they create increased costs and exacerbate shortages of both material and labour. The resulting uncertainty regarding project delivery makes it very difficult to plan projects and to secure funding, reducing what would normally be very slim profit margins to losses.[24] Accordingly, smaller contractors, who are outsourced work from larger companies, are forced, at the first instance, to absorb these costs and risks to their detriment, leading to the series of insolvencies plaguing construction sectors across major markets.[25]

1.3 Supply Chain Disruptions

The issue of sanctions is related to the third challenge mentioned above: the supply chain ordeal. Supply chain disruptions extend beyond those negative repercussions one feels in one's daily life, such as the rising prices of, and delays in receiving, daily necessities; the construction industry has not been spared from such repercussions. Until the pandemic, economies and businesses, especially the construction industry, had been heavily relying on the just-in-time approach, where materials and components are delivered exactly at the 'right moment' to enable immediate use in the production process.[26] The right materials are supposed to be supplied in the right order, in the right amount, and at the right time. This method of procurement critically depends upon each part of the supply chain fitting together as it was intended to do. However, the supply chain is evidently an enormously complex process in construction, given the frequent use of subcontracting and the large volume of materials required from a multitude of manufacturers.[27] Thus, the impact of a wide range of breaks in the global construction supply chain, due to events such as the pandemic and invasion of Ukraine, has been immense, with flow-on effects for a wide range of other industries such as freight and logistics.[28] The blockages on the supply and demand

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[24] Craig Shepherd and Arnold Hoong, 'Construction Projects and the Impact of Sanctions', *Global Arbitration Review* (Web Page, 27 May 2022) < https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2023/article/construction-projects-and-the-impact-of-sanctions > .

[25] See Andy Desmond, 'Contractor Insolvency: All Change for Construction Companies?', *Marsh* (Web Page, 18 July 2022) < https://www.marsh.com/ie/industries/construction/insights/contractor-insolvency-all-change-for-construction-companies.html > .

[26] Akintola Akintoye, 'Just-in-Time Application and Implementation for Building Material Management' (1995) 13(2) *Construction Management and Economics* 105, 106.

[27] See 'Construction Industry Operating in the Dark Amid Supply Chains Risks', *Consultancy* (Web Page, 7 March 2022) < https://www.consultancy.com.au/news/5076/construction-industry-operating-in-the-dark-amid-supply-chains-risks > .

[28] *Ibid.*

sides have caused industry-wide shockwaves, leading to delays, soaring costs and worsening material shortages — an impact which, again, leads back to the issue of inflation.

Exacerbating this crisis is the fact that there is a very poor understanding of supply chain issues within the construction industry, despite the implications for the fundamental capacity to perform on time and on budget. There is an awareness of the consequence of the supply chain problem, namely delay and extra cost, but the actual understanding of supply chain issues within the industry is less than satisfactory. To illustrate, a 2022 Consultancy practitioner survey revealed that only 11% of participants were fully confident in their organization's ability to name every party in the supply chain and that 50% believed their organization to have unknowingly engaged a supplier who was red-flagged by another part of their organization, among other worrying statistics.[29] Of course, the lack of digitization and capacity to implement offsite manufacturing processes, as already discussed, further hinders the ability of industry participants to pre-empt and adapt to these challenges. This lacuna indicates a pressing need to develop supply chain awareness and resilience.

2. COLLABORATIVE SOLUTIONS

Having presented a rather bleak overview of key macro-challenges facing the industry, this article turns now to the place of lawyers in contributing to the solution to these challenges and focuses in particular on two relatively controversial subjects in this context. The first is collaborative contracting, and the second is a more collaborative approach to the management of construction projects — a contribution that lawyers can make, but have historically refused to make, to the solution to the problem. The key point is that lawyers cannot contribute meaningfully to resolving these problems if they view their role as limited to the dispute resolution stage.[30] While lawyers currently have the potential to resolve disputes collaboratively, the avenue to more enduring and substantial progress would require lawyers fundamentally to change the nature of their involvement with construction projects, at all stages of the project.

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[29] *Ibid.*

[30] The adversarial manner in which most construction disputes are currently approached is largely responsible for the growing preference for non-adversarial forms of ADR: Ian R Macneil, 'The Many Futures of Contract' (1974) 47(3) *Southern California Law Review* 691, 743.

2.1 Collaborative Contracting

First, there is the practice of collaborative contracting. As is well understood, the traditional model of contracting involves the allocation of specific responsibilities to each participant in a project, and, similarly, the allocation of the associated risks.[31] Accordingly, each individual is incentivized with respect to the performance of *their* sub-project only, rather than the project as a whole. While this prioritization of personal economic interests has sound logic in a free market, it must be said that this model results in an adversarial approach to the project, whereby decisions impacting successful project delivery are aligned with individualist goals.[32] Furthermore, the parties' agreement will essentially consist strictly in those terms which they reduce to writing (and any terms implied by law).[33] An obvious problematic corollary of this is that, where individual interests are no longer aligned with the transaction, there is nothing in conventional contracts preventing parties from refusing to carry out their obligations and accepting the consequences, in a phenomenon known as 'efficient breach'.[34]

Collaborative contracting, on the other hand, allows for project-based objectives to be reflected and promoted in the contractual structure — that is to say that those objectives inhere within the contract terms themselves. Distinct from the traditional sequential approach to procurement, collaborative contracts feature elements of early contractor involvement (ECI). Certain models are even such that contractors are engaged by examining potential tender documents and providing feedback on issues such as design, scheduling, risk allocation, and compliance with ESG, during the *pre*-construction phase (i.e., before the contracts are finalized and construction is committed).[35] Under such models, the selection process may even continue after a contractor has

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31 See, e.g., *ibid* at 693.

32 Duncan W Glaholt and R Bruce Reynolds, 'The Collaborative Settlement of Construction Disputes' (2017) 1(2) *American Journal of Construction Arbitration and ADR* 189, 194.

33 Jack Beatson, 'Introduction: From "Classical" to Modern Contract Law' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1997) 3, 11.

34 See, e.g., Daniel Markovits and Alan Schwartz, '(In)Efficient Breach of Contract' in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics: Volume 2: Private and Commercial Law* (Oxford University Press, 2018) 20, 20. Common law courts are broadly uninterested in the reason why parties breach their obligations where damages are a sufficient remedy: *One Step (Support) Ltd. v. Morris-Garner*, [2019] A.C. 649, 673 [35] (Lord Reed); *Mann v. Paterson Constructions Pty Ltd*, [2019] HCA 32, [38] (Kiefel CJ, Bell and Keane JJ).

35 Rather than simply accepting the lowest and most competitive tender: Derek HT Walker and Michael Keniger, 'Quality Management in Construction: An Innovative Advance Using Project Alliancing in Australia' (2002) 14(5) *TQM Magazine* 307, 308. See also Douglas D Gransberg, Eric Scheepbouwer and Michael C Loulakis, 'Alliance Contracting: Evolving Alternative Project Delivery' (Research Paper No 466, National Cooperative Highway Research Program, January 2015) 24.

begun to submit proposals and work collaboratively with the project team, notwithstanding that their procurement will not have been finalized.[36] This allows for an early identification of costs, as well as scheduling and design challenges, which, when supported by open book cost estimates, can assist greatly in the process of project planning and design. Thus, one finds a process developing of progressive tendering, wherein outturn cost — that is, the final cost of the construction project *in toto* — is crystallized in a progressive way, thereby improving confidence and predictability in the guesswork involved in the time and cost of delivery.[37]

Collaborative contracts contain features which are designed to promote cooperation, and which militate against an adversarial approach to project delivery.[38] Such features may consist simply in express obligations to cooperate and act in good faith, but may also be more concrete, such as by way of so-called pain-share/gain-share arrangements, where Key Performance Indicators (KPIs) critical to the project's success are identified, and to which is committed, at least, the profit element of each participant's return.[39] With the appropriate design of KPIs, it is possible to address those issues of concern mentioned above, such as gender equality, ESG, corruption, and worker safety. Accordingly, parties are encouraged to contribute to joint problem solving and to remedy those problems which concern the project itself, rather than blaming one another and withdrawing.[40] This helps also to remove the 'vertical' relationship between client and contractor, and encourage mutual cooperation instead.[41] To use a well-known example, the NEC suite of contracts requires parties to identify at an early stage problems that may be obstacles in the way of successful delivery, and requires there to be penalties associated with the failure to warn of those potential problems for which solutions need to be found.[42]

Beyond such *express* features of such contracts, collaborative contracts also seek *implicitly* to further the relationship between parties.[43] This so-called 'relational' model of contract differs from traditional, transac-

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[36] See David Mosey, *Collaborative Construction Procurement and Improved Value* (Wiley Blackwell, 2019) 113-14.

[37] See further *ibid* at 97-8; Queen Mary University of London, *International Arbitration Survey: Driving Efficiency in International Construction Disputes* (Report, November 2019) 7.

[38] See generally Owen Hayford, 'Collaborative Contracting and Procurement' (Paper, DLA Piper, 2019) 11-19.

[39] Gang Chen et al, 'Overview of Alliancing Research and Practice in the Construction Industry' (2012) 8(2) *Architectural Engineering and Design Management* 103, 104, 108.

[40] Walker and Keniger *supra* note 35 at 309.

[41] Matton Van Den Berg and Peter Kamminga, 'Optimising Contracting for Alliances in Infrastructure Projects' (2006) 23(1) *International Construction Law Review* 59, 60.

[42] See generally Michael Rowlinson, *Practical Guide to the NEC3 Professional Services Contract* (John Wiley & Sons, 2012) 11-12, 38-42.

tional contracts by placing primacy not on the 'measured exchange' of services and payment, but on the eponymous 'relation'.[44] Where the relationship is not delimited by the express terms of the contract, the relational norms sought to be promoted cannot, of course, be enforced by the law, but may be preserved by factors such as the expectation of future deals, and concerns as to market reputation.[45] However, these relational norms have been recognized by courts as having the potential to inform enforceable legal obligations, such as good faith.[46] The goal behind this mode of contracting is, by giving content not to specific exchange obligations but to the relationship between the parties, to minimize the possibility of 'efficient breach' and to anticipate the likely scenario in which parties will wish to make future arrangements beyond the terms of their current agreement.[47]

There is a continuum of collaborative contracting, ranging from less collaborative to more collaborative options, and in this author's view, there is no single correct approach for adopting it. However, the suite of options that are available along this continuum need to be identified, and from them solutions taken for the needs of particular projects. There has been much experience in many markets, including but not limited to the Australian market,[48] of a range of such options.[49] Though it is now losing its relevance, partnering, which emanated originally from the United States, was a common-sense way of fostering open and candid communication throughout the project, especially at the beginning. Further, full scale alliance contracting and integrated project delivery certainly have been used in many complex projects, where fixed price

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43 Ian R Macneil, 'Relational Contract Theory: Challenges and Queries' (2000) 94(3) *Northwestern University Law Review* 877, 879-80.

44 Macneil *supra* note 30 at 721.

45 Pablo Marcello Baquero, 'Collaborative Inter-Firm Innovation in the Frontiers of the Knowledge Economy: Preliminary Marks towards Rethinking Private Law for the New Economy' (Report, 2017) 3.

46 *Yam Seng Pte Ltd. v. International Trade Corp Ltd.*, [2013] EWHC 111 (Q.B.), [141]-[142] (Leggatt J). See further David Jones and Alan Crane, 'The Role of Lawyers' in Rona Westgate, David Jones and David Savage (eds), *Partnering and Collaborative Working* (Routledge, 2003) 83, 84-5, discussing *Birse Construction Ltd. v. St David Ltd*, [1999] BLR 194 (Q.B.).

47 Marie Sanderson et al, 'New Models of Contracting in the Public Sector: A Review of Alliance Contracting, Prime Contracting and Outcome-based Contracting Literature' (2018) 52(5) *Social Policy and Administration* 1060, 1067; Sai On Cheung, Kenneth TW Yiu and Pui Shan Chim, 'How Relational Are Construction Contracts?' [2006] (January) *Journal of Professional Issues in Engineering Education and Practice* 48, 50; CJ Goetz and RE Scott, 'Principles of Relational Contracts' (1981) 67(6) *Virginia Law Review* 1089, 1089-90, 1100.

48 See generally, Marcus Jefferies, Graham John Brewer and Thayaparan Gajendran, 'Using a Case Study Approach to Identify Critical Success Factors for Alliance Contracting' (2014) 21(5) *Engineering, Construction, and Architectural Management* 465; Peter Davis and Peter Love, 'Alliance Contracting: Adding Value through Relationship Development' (2011) 18(5) *Engineering, Construction, and Architectural Management* 444.

49 See generally Owen Hayford, 'Collaborative Contracting' (Paper, PricewaterhouseCoopers, March 2018) 4, 33-4.

contracts were replaced with performance-based remuneration regimes. Under these agreements, there have been created virtual organizations of the key players within the contract delivery structure, and a continuous improvement circle built within that structure.[50] Notably, in contrast to a partnering agreement, which functions merely as a list of guidelines, an alliance agreement is a legally enforceable contract designed to crystallize relational norms in express contractual terms.[51] Alliance agreements may also contain a 'no dispute' clause, whereby the parties agree that no intra-alliance dispute will go to litigation or arbitration.[52] This necessitates an internal, collaborative solution, and helps to foster a culture of 'no fault — no blame'.[53] This clause is not, however, a substitute for genuine cooperation, as too ready reliance on shared responsibility may cause the problem of wilful or efficient breach to return to the fore.[54]

In the author's experience, these models are best suited to projects with complex and unpredictable risks. However, in the context of the challenges we are facing, almost every project can be described as one involving risks that were not foreseen, cannot presently be foreseen to the full extent of their effect, and which need to be solved in the interests of all involved. Remodelling construction contracts to cater for the volatility of the modern world might be a challenge for governments in many jurisdictions. It has certainly been a challenge for private sector entities who are accustomed to wielding lump sum contracts as a negotiating tool, in order, they think, to economically deliver their projects. For governments and the private sector, those who sponsor projects are now needing to find ways *actually* to solve the unpredictability of the risks that the construction industry, with its problems as identified above, is facing.

The surveys so far have indicated an appetite for these types of exploratory, new contract structures,[55] and, in those industries in which collaborative contracts have been trialled, marked improvements in efficiency have been demonstrated.[56]

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[50] See further Sanderson et al, *supra* note 47 at 1065.

[51] Allan J Hauck et al, 'Project Alliancing at National Museum of Australia: Collaborative Process' (2004) 130(1) *Journal of Construction Engineering and Management* 143, 145; Andrew Chew, 'Alliancing in Delivery of Major Infrastructure Projects and Outsourcing Services in Australia: An Overview of Legal Issues' (2004) 21(3) *International Construction Law Review* 319, 328.

[52] Steve Rowlinson et al, 'Alliancing in Australia: No Litigation Contracts: A Tautology?' (2006) 132(1) *Journal of Professional Issues in Engineering, Education and Practice* 77, 79.

[53] *Ibid* at 79. See also Department of Infrastructure and Regional Development (Cth), *National Alliance Contracting Guidelines: Guide to Alliance Contracting* (Report, September 2015) 19.

[54] Van Den Berg and Kamminga *supra* note 41 at 73. This risk may be avoided by excluding the no dispute clause for cases of wilful default: Chew *supra* note 51 at 337. See also Mosey *supra* note 36 at 378-9.

[55] Chen et al *supra* note 39 at 103-4.

However, there are some limitations that need clearly to be identified and understood. Chief among these is a lack of experience and established delivery frameworks for collaborative contracting — any existing models, including precedents used in the industry in standard form contracts, require clear amendment to be adapted to a new form of contracting.[57] Furthermore, any collaborative contracting process will depend on internal governance structures, which currently often limit delegation of authority — widespread organizational culture changes will likely be necessary.[58] Early contractor involvement may require uncertain and long periods of pre-construction work, limiting the capacity to have projects ready at a time that might be needed, politically or otherwise.[59] Finally, there appears to be a general lack of confidence in participants' commitment to the process of collaboration, in which case partnering and alliancing, rather than improving efficiency, may hinder the capacity to project manage effectively.[60] Correspondingly, construction clients have reported that they avoid assigning their best people to alliance contracts, due to the perception that they become de-skilled on how to manage the more hard-edged contracts. These cultural and institutional challenges all need to be understood and appreciated before one attempts to enter into the world of collaborative contracting.

2.2 Collaborative Lawyering

The second part of this section discusses the problems facing the construction industry regarding lawyers. It is trite to acknowledge that lawyers are trained to act for clients and in their clients' best interests. However, this process of acting for clients often involves putting on blinkers, in order not to be accused of taking into account factors which might be adverse to the interests of the lawyer's particular client in question.[61] Our job, we are taught, as lawyers, is to advance the interests

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[56] A 2020 survey reported a '15 to 20 percent improvement in cost and schedule performance compared with traditional contracts': Jim Banaszak et al, 'Collaborative Contracting: Moving from Pilot to Scale-up', *McKinsey & Company* (17 January 2020) < https://www.mckinsey.com/capabilities/operations/our-insights/collaborative-contracting-moving-from-pilot-to-scale-up#/ >.

[57] Mosey *supra* note 36 at 11.

[58] Collaborative contracts may impute obligations for corporations to be represented by individuals with authority to settle, however this possibility is insufficient to overcome the more widespread, cultural issues: Bobette Wolski, 'Collaborative Law: An (Un)ethical Process for Lawyers?' (2017) 20(2) *Legal Ethics* 224, 230.

[59] Ernst & Young, 'Collaborative Contracting in North American Infrastructure: The Big Questions that Leaders are Asking' (Report, 2021) 10.

[60] This is especially true seeing as the effective maintenance of, for example, a construction 'alliance' requires collaboration and a unity of purpose among actors from various different industries, as well as the lawyers: Mosey *supra* note 36 at 11.

[61] On the ethical ramifications of client advocacy and their relationship with collaborative ADR, see

of the side who has engaged us to act for them. It is a binary process that we are trained to undertake. This is why, at the design stage of contract documentation, one so often sees lawyers think of every conceivable way to protect their client's interests, in order to produce a risk matrix, which, when analysed in the words of the contract, often looks entirely commercially unrealistic. Correspondingly, as far as issue resolution is concerned, that is where lawyers are best equipped to deploy the skills for which they are trained so thoroughly, and, in doing so, fight for the client, without regard to the outcome that might be impacting on the project.[62]

This author proposes that, instead of necessarily accepting the role of the lawyer as the prime proponent of the adversarial feature of the construction industry, we adopt a slightly different approach. It is suggested we consider a best-for-project-outcome approach.[63] In the context of family law, to which lawyers have historically made a questionable contribution as regards the lives of children and families, there has developed a concept of what is called 'collaborative law',[64] which is enshrined in institutions and legislation in some jurisdictions,

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Maxine Evers, 'The Ethics of Collaborative Practice' (2008) 19(3) *Australasian Dispute Resolution Journal* 179, 180-1. See also Wolski *supra* note 58 at 233-4.

62 See generally Connie Healy, *Collaborative Practice: An International Perspective* (Routledge, 2018) 33; Wolski *supra* note 58 at 232; Marilyn Scott and Pauline Collins, 'The Challenges for Collaborative Lawyers in Providing CP Processes' (2017) 31 *Australian Journal of Family Law* 27, 36; Marilyn Scott, 'Collaborative Law: A New Role for Lawyers' (2004) 15(3) *Australasian Dispute Resolution Journal* 207, 211, 213-14.

63 On the concept of a 'project lawyer', see generally Jones and Crane *supra* note 46 at 94-8 ('The Single Project Lawyer').

64 The inception of 'collaborative law' is always identified with a 1990 letter of Minneapolitan family lawyer, Stuart Webb, in which he envisioned a new species of lawyering to minimize the destructive, adversarial qualities associated with typical, family law litigation: see, e.g., John Lande, 'A Survey of Early Dispute Resolution Movements' (2022) 40(4) *Alternatives to the High Cost of Litigation* 57, 64; Hayley R Goodman, 'Divorcing Partners and Fighting Siblings: Using the Collaborative Law Model to Resolve Disputes in Family Businesses' (2021) 30(1) *University of Miami Business Law Review* 1, 10; Brendan Forrest, 'Collaborative Law' (2021) 44(2) *Manitoba Law Journal* 121, 121; Nigel Nicholls, 'Collaborative Practice: ''A New Wrinkle''' [2017] (June) *Australian Alternative Dispute Resolution Law Bulletin* 38, 38; Ralph Peeples and John Sarratt 'Sinn Féin Amháin: Taking Collaborative Law Beyond Divorce' (2017) 52 *Wake Forest Law Review* 139, 144; Johannah O'Connell, 'Don't Settle for the Devil You Know: The Benefits of Using Collaborative Law Rather than Litigation to Resolve Employment Disputes' (2016) 49 *Indiana Law Review* 533, 536; Henry Kha, 'Evaluating Collaborative Law in the Australian Context' (2015) 26(3) *Australasian Dispute Resolution Journal* 178, 178; Harry L Tindall and Elizabeth G Wood, 'Uniform Collaborative Law Act: An Introduction' (2014) 48(1) *Family Law Quarterly* 53, 54; Luke Salava, 'Collaborative Divorce: The Unexpectedly Underwhelming Advance of a Promising Solution in Marriage Dissolution' (2014) 48(1) *Family Law Quarterly* 179, 179; Scott *supra* note 62 at 207; Robert McClelland, Attorney General, 'Launch of Law Council of Australia's Collaborative Practice Guidelines for Lawyers' (Media Release, 24 March 2011) 2—3; Family Law Council (Australia), *Collaborative Practice in Family Law* (Report, December 2006) 15 [3.3]. The text of the letter itself, which was dated on 14 February 1990 and addressed to Justice Sandy Keith, may be found at < https://www.collaborativeaustralia.com.au/wp-content/uploads/2022/03/Webb_ltr_re_Collaborative_Law_1990.pdf > .

such as the United States,[65] United Kingdom,[66] Canada,[67] Ireland,[68] Italy,[69] and Australia.[70]

In those jurisdictions, practitioners in the family law context are committed to practicing collaborative law — that is, where a lawyer will offer solutions to the *family*, rather than to the individuals who are in dispute. If that collaborative process should fail, there have been developed models whereby the collaborative lawyer mandatorily steps out of the process to allow more traditional family law litigators to take over. Specifically, at the first meeting between parties and their lawyers, a participation agreement is signed,[71] which, *inter alia*,[72] contains a disqualification provision, whereby the collaborative lawyer cannot represent their clients in any subsequent litigation should the attempts at negotiation fail.[73] Ultimately, collaborative law is a kind of interest-

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[65] See, e.g., *Collaborative Family Law Act*, Tex Fam Code, ch 15. See also Goodman *supra* note 64 at 10. The most notable legislative advancement was the drafting of the Uniform Collaborative Law Act, which has of yet been enacted, in some form, in 22 states of the United States and the District of Columbia: National Conference of Commissioners on Uniform State Laws, *Uniform Collaborative Law Rules and Uniform Collaborative Law Act (Last Revised or Amended in 2010)* (12 October 2010), published in (2014) 48(1) *Family Law Quarterly* 55. For a list of enactments in the United States, see Uniform Law Commission, 'Enactment History', *Collaborative Law Act* (Web Page, Last viewed 3 March 2023) < https://www.uniformlaws.org/committees/community-home?CommunityKey = fdd1de2f-baea-42d3-bc16-a33d74438eaf > .

[66] Family Law Council (Australia), *Collaborative Practice in Family Law supra* note 64 at 21 [3.27]-[3.29]. See also Salava *supra* note 64 at 185.

[67] Julie Macfarlane, 'The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases' (Research Report, Department of Justice Canada, 2005) 13-14.

[68] Healy *supra* note 62 at 64-72. See also Family Law Council (Australia), *Collaborative Practice in Family Law supra* note 64 at 21-2 [3.30].

[69] See, e.g., Marina Petrolo, 'La Crisi Separativa e il Sistema Legale: Procedure in Alternative Dispute Resolution e Interdisciplinarietà' (2020) 124 *Terapia Familiare* 238, 239.

[70] Nicholls *supra* note 64 at 38; Family Law Council (Australia), *Collaborative Practice in Family Law supra* note 64 at 27-32. However, collaborative law reform has not gained traction in Australia: Joint Select Committee on Australia's Family Law System, Parliament of Australia, *Improvement in Family Law Proceedings* (Interim Report, October 2020) 301 [12.97]; Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Report No 135, March 2019) 256; Family Law Council (Australia), *Collaborative Practice in Family Law supra* note 64 at 2-3. See also Daye Gang, 'Collaborative Practice and Poverty: Contextualising the Process and Accommodating the Market' (2016) 27(3) *Australasian Dispute Resolution Journal* 158, 158; Kha *supra* note 64 at 179, 183-4.

[71] Healy *supra* note 62 at 30-1.

[72] Common provisions include:

- Provisions for the maintenance of confidentiality and privilege: Wolski *supra* note 58 at 228; Salava *supra* note 64 at 179, 190-1; Healy *supra* note 62 at 63-4.
- Provisions for parties to act honestly, cooperatively and in good faith: Wolski *supra* note 58 at 226; Nicholls *supra* note 64) 39; Family Law Council (Australia), *Collaborative Practice in Family Law supra* note 64 at 11 [2.6], [2.8]. See, e.g., *Hillam v. Barrett*, [2019] FamCA 193, [26] (Wilson J).
- Though unenforceable per se, an undertaking to settle the matter and not to take it to court: Irwin J Kuhn, 'The Tennessee Supreme Court's Newest Rule' (2019) 55 (September) *Tennessee Bar Journal* 17, 20; Wolski *supra* note 58 at 225, 228; O'Connell *supra* note 64 at 538; Kha *supra* note 64 at 178; Australian Law Reform Commission, *Family Law for the Future supra* note 70 at 255.

based negotiation,[74] and the disqualification provision is designed to incentivize[75] parties seriously to consider their interest in achieving a settlement of their dispute.[76] This practice has been extremely successful in reducing the level of harm which lawyers have historically done to families as they seek to find the solution to their dispute.[77]

Construction law is not, however, family law, and it is clear that the construction industry has associated with it an entirely different attitude and culture.[78] Further, whereas it shares various elements with other forms of ADR used in other spheres, collaborative family law practices sit largely in a niche of their own, and may not be readily applicable to other contexts;[79] it was created to be used in family law and has overwhelmingly been used in that area alone.[80] Benefits cited by practitioners, such as an atmosphere of 'dignity', 'respect' and 'healing' in divorce or custody proceedings,[81] and the ability to make arrangements beyond the jurisdiction of a judge,[82] are relatively uninteresting so far as commercial parties are concerned. Moreover, it has historically been difficult to expand the practice of collaborative law to other areas.[83] This is because it typically relies on a practice group,

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[73] Wolski *supra* note 58 at 226; Nicholls *supra* note 64 at 39; Kha *supra* note 64 at 178.

[74] Peeples and Sarratt *supra* note 64 at 140; Nicholls *supra* note 64 at 39; Kha *supra* note 64 at 180; Tindall and Wood *supra* note 64 at 53; Family Law Council (Australia), *Collaborative Practice in Family Law supra* note 64 at 12 [2.13].

[75] Or rather, according to an exceedingly common criticism of collaborative law, 'pressure' parties into settling: Peeples and Sarratt *supra* note 64 at 149; Judy Gutman, 'Legal Ethics in ADR Practice: Has Coercion Become the Norm?' (2010) 21(4) *Australasian Dispute Resolution Journal* 218, 222; Scott *supra* note 62 at 211; Healy *supra* note 62 at 35, 55; Family Law Council (Australia), *Collaborative Practice in Family Law supra* note 64 at 56 [9.8], 57 [9.14].

[76] Peeples and Sarratt *supra* note 64 at 141; Kha *supra* note 64 at 180; Scott *supra* note 62 at 211, 213-14; Family Law Council (Australia), *Collaborative Practice in Family Law supra* note 64 at 11 [2.8]. The provision is a contractual bar that cannot be waived, the breach of which may ground an estoppel: Kuhn *supra* note 72 at 19-20; *Hillam v. Barrett*, [2019] FamCA 193, [26] (Wilson J).

[77] Empirical data points specifically to a high rate of settlement and level of efficiency in collaborative law processes: Healy *supra* note 62 at 87; Salava *supra* note 64 at 184; Forrest *supra* note 64 at 126-7. Its overall success, however, has been disputed: Anne Ardagh, 'Evaluating Collaborative Law in Australia: A Case Study of Family Lawyers in the ACT' (2010) 21(4) *Australasian Dispute Resolution Journal* 204; Kha *supra* note 64, cited in Australian Law Reform Commission, *Family Law for the Future supra* note 70 at 256.

[78] It has historically been difficult to expand the practice of collaborative law to other areas: Goodman *supra* note 64 at 27.

[79] Lande *supra* note 64 at 66; Goodman *supra* note 64 at 11; Peeples and Sarratt *supra* note 64 at 141-2, 148.

[80] Indeed, certain jurisdictions that have regulated collaborative law have done so exclusively with respect to disputes arising between family members: Joshua M Kershenbaum and Zanita A Zacks-Gabriel, 'Through the Labyrinths: Using Collaborative Practice and Special Needs Counsel to Help Parents of Children with Special Needs Restructure Their Families' (2022) 93 *Pennsylvania Bar Association Quarterly* 47, 52; Forrest *supra* note 64 at 132-3. See also Healy *supra* note 62 at 54.

[81] Salava *supra* note 64 at 188. This is an especially prominent concern in cases involving such sensitive issues as sexual abuse, domestic violence and mental disorders, which do not arise in commercial contexts: Peeples and Sarratt *supra* note 64 at 142-3; Salava *supra* note 64 at 189.

[82] Forrest *supra* note 64 at 125-6; Healy *supra* note 62 at 39.

[83] Goodman *supra* note 64 at 27.

and at the very least requires two collaborative lawyers in order to commence collaborative law dispute resolution.[84] Unless these two individuals are already familiar with one another, it is difficult to build the requisite trust required for collaborative practice.[85]

However, collaborative law has, despite these difficulties, been applied to other contexts,[86] where it has been ascribed the umbrella term of 'civil collaborative law'.[87] These contexts include patent infringement suits,[88] employment law,[89] consumer rights,[90] and, what is of particular interest, construction law.[91] Certain advantageous features of collaborative law are clearly of interest to commercial parties in the construction industry.[92] When collaborative law is successful,[93] it has the potential to be a quick and cheap form of ADR.[94] The parties are likely also to benefit from the ease of scheduling meetings, which is more flexible than in mediation or arbitration.[95]

A collaborative law approach, led by lawyers that keep the 'project' at the front of their minds, may be of assistance in the coordination of multiple industry actors in respect of larger projects. In collaborative family law, meetings between the parties and lawyers often[96] see also the participation of jointly appoint experts (or 'allied professionals')[97] for

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84 Kuhn *supra* note 72 at 19-20; Peeples and Sarratt *supra* note 64 at 141-2, 150; Scott and Collins *supra* note 62 at 32.

85 However, this concern regarding the adaptability of collaborative law is arguably less applicable to certain industries such as the construction industry, which already have established specialist bars and practices for the area of law in question: Peeples and Sarratt *supra* note 64 at 155.

86 See generally Gutman *supra* note 75 at 222; Family Law Council (Australia), *Collaborative Practice in Family Law supra* note 64 at 4.

87 Goodman *supra* note 64 at 11; Forrest *supra* note 64 at 131.

88 Katherine McMurtrey, 'The IDEA and the Use of Mediation and Collaborative Dispute Resolution in Due Process Disputes' [2016] *Journal of Dispute Resolution* 187, 198.

89 O'Connell *supra* note 64 at 546.

90 Forrest *supra* note 64 at 132.

91 Goodman *supra* note 64 at 11; Peeples and Sarratt *supra* note 64 at 142; Sherrie Abney, 'Moving Collaborative Law Beyond Family Disputes' (2014) 38(2) *Journal of the Legal Profession* 277, 290-2; Ardagh *supra* note 77 at 204; Anne Ardagh and Guy Cumes, 'The Legal Profession Post-ADR: From Mediation to Collaborative Law' (2007) 18(4) *Australasian Dispute Resolution Journal* 205, 210.

92 See generally Forrest *supra* note 64 at 132; Peeples and Sarratt *supra* note 64 at 142; O'Connell *supra* note 64 at 534.

93 When it is unsuccessful, the time and expense necessitated by the requirement to dismiss collaborative lawyers and hire separate litigators is often highlighted by both scholars and judges: Forrest *supra* note 64 at 130; Kha *supra* note 64 at 182; Gutman *supra* note 75 at 222; *Farleigh v. Wills*, [2011] FamCA 431, [31] (Cronin J); *Sigley v. Cullen [No 3]*, [2015] FamCA 825, [4] (Cronin J). See also Australian Law Reform Commission, *Family Law for the Future supra* note 70 at 256.

94 This relies, however, on the initiative of the lawyers in efficiently managing the dispute. The concern that lawyers might lack this initiative (and benefit therefrom) has led to ethical challenges being raised of collaborative law: Kha *supra* note 64 at 182; Ardagh *supra* note 77 at 212-13; Family Law Council (Australia), *Collaborative Practice in Family Law supra* note 64 at 56 [9.5].

95 Goodman *supra* note 64 at 11-12; O'Connell *supra* note 64 at 548; Abney *supra* note 91 at 282.

96 For a recent example, see *Fortnum v. Tamplin [No 2]*, [2022] FedCFamC1F 209, [8] (Kari J).

97 Pauline Collins and Marilyn Scott, 'The Essential Nature of a Collaborative Practice Group for

the use and benefit of both parties.[98] Given the ubiquity of this practice, collaborative law is consistently described as a 'multidisciplinary'[99] or 'interdisciplinary'[100] form of ADR, and is increasingly being termed 'collaborative practice' to reflect this.[101] These experts are to be strictly neutral — party-appointed experts are not permitted.[102] Central to the coordination of these meetings is an undertaking to provide full, honesty and timely disclosure of all information that may be relevant,[103] possibly even voluntarily without request.[104] This disclosure is made informally at these meetings, allowing for the immediate scrutiny of the evidence's trustworthiness and probative value.[105] Given the importance of expert opinions to commercial parties in dispute, a robust interdisciplinary 'team', coordinated by a 'project lawyer' to oversee and manage the ideological differences between designers, contractors and owners,[106] may be a means of coordinating the various expert fields pertinent to the project.[107] To a certain extent, some partnering agreements have already experimented with this possibility, by allowing for the formation of a core group of representatives to regularly review performance, communicate, and pre-empt any disputes.[108] The notion of a distinct, representative group at the centre of the project exists also in some alliancing contract negotiations, where there have been appointed lawyers to the 'alliance', to build the alliance in the interests of all the participants (though the participants have no doubt kept their own lawyers in the background to assist them).[109]

Successful Collaborative Lawyers' (2017) 28(1) *Australasian Dispute Resolution Journal* 12, 12; Evers *supra* note 61 at 182-3.

98 Wolski *supra* note 58 at 226; Scott *supra* note 62 at 215-16; Family Law Council (Australia), *Collaborative Practice in Family Law supra* note 64 at 12 [2.12].

99 See, e.g., Forrest *supra* note 64 at 123; Gang *supra* note 70 at 158; Family Law Council (Australia), *Collaborative Practice in Family Law supra* note 64 at 13 [2.18].

100 See, e.g., Kershenbaum and Zacks-Gabriel *supra* note 80 at 53; Goodman *supra* note 64 at 9; Forrest *supra* note 64 at 123; Nicholls *supra* note 64 at 39; Salava *supra* note 64 at 179; Scott *supra* note 62 at 209.

101 See generally Healy *supra* note 62. See also Lande *supra* note 64 at 64; Collins and Scott *supra* note 97 at 12; O'Connell *supra* note 64 at 536.

102 Peeples and Sarratt *supra* note 64 at 144-5; O'Connell *supra* note 64 at 540.

103 Lee A Schwartz and Carolyn M Zack, 'Family Lawyers as ADR Facilitators' (2022) 44 *Pennsylvania Lawyer* 18, 23; Wolski *supra* note 58 at 226; Kha *supra* note 64 at 178.

104 David A Hoffman and Andrew Schepard, 'To Disclose or Not to Disclose? That is the Question in Collaborative Law' (2020) 58(1) *Family Court Review* 83, 83; Kuhn *supra* note 72 at 17; Wolski *supra* note 58 at 226; Abney *supra* note 91 at 279.

105 Peeples and Sarratt *supra* note 64 at 144.

106 Adam K Bult et al, 'Dispute Avoidance and Alternative Dispute Resolution' in Paul Levin (ed), *Construction Contract Claims, Changes, and Dispute Resolution* (American Society of Civil Engineers, 3rd ed, 2016) 354.

107 Forrest *supra* note 64 at 132; Abney *supra* note 91 at 287.

108 Cyril Chern, *The Law of Construction Disputes* (Routledge, 3rd ed, 2020) 37; Bult et al *supra* note 106 at 347.

109 Jones and Crane *supra* note 46 at 96-7. Similarly, where obligations of good faith exist as between parties to an alliance, the duty of good faith will direct itself towards the *project* and its completion,

The application of collaborative law to commercial disputes requires, in each case, a fair amount of careful consideration as to how it might work.[110] Certain features of the process are likely to have undesirable consequences for certain parties. Whereas open disclosure may improve the efficiency of the collaborative process, the automatic disclosure of confidential information may be unattractive to commercial parties where it involves revealing information to marketplace competitors.[111] The disqualification provision, collaborative law's most controversial feature,[112] is something that lawyers and parties alike should be aware of,[113] especially seeing as this disqualification may extend beyond the individual collaborative lawyer to their entire firm, by a doctrine known as 'imputed disqualification'.[114] This is particularly unattractive to corporations that have in-house counsel or frequently engage the same lawyers (however the failure of one set of collaborative proceedings does not prevent the use of the same lawyers in future, unrelated disputes).[115] One risks also the undesirable situation whereby a party to collaborative proceedings can effectively dismiss the other party's counsel by terminating and insisting on the disqualification.[116] Finally, collaborative law conventionally makes no allowance for any unilateral recourse to a court, meaning that court assistance in obtaining securities is typically incompatible with collaborative law.[117]

However, more important than the procedural innovations which collaborative law has proposed and put into practice is the attitude which it seeks to foster. Put simply, practitioners of (and participants in) collaborative law appreciate that serving the interests of the parties to a

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rather than the transactions between the parties in general: Department of Infrastructure and Regional Development (Australia), *National Alliance Contracting Guidelines supra* note 53 at 19-20.

110 An essential antecedent to collaborative law is, in any case, a process of 'screening', whereby the prospective collaborative lawyer assesses the suitability of collaborative law to their client: Lande *supra* note 64 at 64-5; Healy *supra* note 62 at 29-30, 56; Scott and Collins *supra* note 62 at 35; Family Law Council (Australia), *Collaborative Practice in Family Law supra* note 64 at Appendix A, 74 [1.3].

111 Hoffman and Schepard *supra* note 104 at 96-7.

112 Peeples and Sarratt *supra* note 64 at 149; Scott and Collins *supra* note 62 at 41; O'Connell *supra* note 64 at 535; Kha *supra* note 64 at 182; Ardagh *supra* note 77 at 211.

113 Healy *supra* note 62 at 29; Peeples and Sarratt *supra* note 64 at 151; Wolski *supra* note 58 at 225, 237-8; McMurtrey *supra* note 88 at 200.

114 Healy *supra* note 62 at 33; Peeples and Sarratt *supra* note 64 at 152.

115 Goodman *supra* note 64 at 12; Healy *supra* note 62 at 61-2.

116 Healy *supra* note 62 at 145.

117 Petrolo *supra* note 69 at 240; Peeples and Sarratt *supra* note 64 at 149; Family Law Council (Australia), *Collaborative Practice in Family Law supra* note 64 at 11 [2.5]. Note, it remains possible to enforce collaborative law settlements in a court: *Hillam v. Barrett*, [2019] FamCA 193, [28] (Wilson J). Cf Wolski *supra* note 58, who sees it as possible to commence collaborative law measures even after proceedings have commenced: at 226. Cf O'Connell *supra* note 64, who argues that only arbitration is truly exclusive of court proceedings: at 541.

dispute is not necessarily the same as vindicating their legal rights, especially when there is something larger and more important (i.e., the family unit or the construction project) at stake.[118] By way of response to the controversy surrounding collaborative law and its disqualification provision, there has developed a process known as 'cooperative law', which purports to share all features with collaborative law but for the disqualification provision.[119] Though this alternative to collaborative law lacks the latter's most important feature, cooperative practice still enjoys a high rate of settlement, and its relative palatability to commercial parties may better enable the expansion of collaborative practices into fields outside family law.[120]

In terms of the construction industry, the relevant question is simply whether it is conceivable that a construction lawyer might stand back and, upon reflection, commit to the success of the project, in a capacity of lawyer *to the project itself*, rather than merely to a single client. It is suggested that this is conceivable, and that there are ways in which, even within the adversarial context, lawyers can contribute to solutions best for the project at hand. Further to that, there could also be a way of developing a role for lawyers as individuals contributing to the project itself, leaving aside the roles of the individual lawyers acting for the project participants — lawyers who might bring home the reality to everyone, legally translated, that a massive arbitration at the end of the project is less desirable to finding solutions proactively and collaboratively.

3. CONCLUSION

When properly and carefully considered and implemented, collaboration in the construction industry can do more than serve merely as a means of promoting the quick and efficient resolution of disputes. As stressed above, collaboration throughout all stages of a construction project has the potential to refocus attention onto the project itself and improve the prospects of its timely delivery. However, a more widespread adoption of collaborative techniques can go even further — just as collaborative processes in family law are designed to minimize the potential harm to the familial relationships which hang in the balance,[121] so too can collaborative processes encourage the establishment of long-term, productive relationships between industry entities,[122] where adversarial

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[118] Nicholls *supra* note 64 at 38; Wolski *supra* note 58 at 229; Ardagh and Cumes *supra* note 91 at 210.
[119] Lande *supra* note 64 at 63; Healy *supra* note 62 at 145; Wolski *supra* note 58 at 240; Salava *supra* note 64 at 190.
[120] Healy *supra* note 62 at 146-7.
[121] Wolski *supra* note 58 at 229.

legal interactions may currently be contributing to the 'fragmentation' of the industry.[123]

With these concerns and possibilities in mind, our objective should be innovation, digitization, self-reflection, and collaboration.

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[122] Goodman *supra* note 64 at 17-18; Forrest *supra* note 64 at 131; Peeples and Sarratt *supra* note 64 at 142; McMurtrey *supra* note 88 at 198; Abney *supra* note 91 at 282.

[123] Cheung, Yiu and Chim *supra* note 47 at 54.