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Comparative ADR

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'In terms of legal practice and legislative activity, mediation is arguably the fastest growing form of ADR in the world. … Experiencing rapid growth worldwide, mediation is now an integrated part of many common law jurisdictions such as the US, Australia and England. In contrast, civil law jurisdictions such as Germany and Austria have displayed, until recently, a greater reluctance to embrace the practice of mediation to resolve legal disputes.'

In Australia today, ADR processes are recognised not only as a distinct system of dispute resolution, but also as a system that interacts interdependently with the legal system. This is most clearly demonstrated in the context of court-related mediation, which is increasingly seen as an effective way to increase access to, participation in, and satisfaction with the way legal disputes are resolved. Cappelletti categorises ADR as the third wave in the worldwide access-to-justice movement. ADR provides a different approach and a different sort of justice for solving disputes — what Cappelletti labels 'co-existential justice'.[1]

In terms of legal practice and legislative activity, mediation is arguably the fastest growing form of ADR in the world. The primary reasoning behind its rapid expansion and growing acceptance lies in the widespread belief that mediation offers not only quantitative but also qualitative advantages over adjudication and other determinative dispute resolution processes. In addition to the dissatisfaction with the costs and time involved in litigating disputes, and the need to reduce court caseloads, emerging legal and political developments are demanding a different access-to-justice across the globe. Whether it be:

- the recognition of the alienating effects on 'community' that accompany the over regulation and legalisation of disputes;[2]
- the globalisation of law in relation to the internationalisation of consumer and environmental protection laws and of trade;[3]
- the increasing self-regulation of certain industry groups particularly in the banking, financial and commercial sectors;[4] or
- sociocultural changes such as the decline of the culturally homogeneous nation-state, the increasing pluralisation of societal value systems and the emerging role of women in the workplace,[5]

one thing is certain: legal systems need to offer a more diverse and flexible range of dispute resolution methods, including co-operative and interest based behaviour and communication patterns, in decision-making and conflict resolution contexts.

ADR methods, and in particular mediation, aim to do just that — increase the qualitative range of dispute resolution methods available to disputants. Experiencing rapid growth worldwide, mediation is now an integrated part of many common law jurisdictions such as the US, Australia and England.

In contrast, civil law jurisdictions such as Germany and Austria have displayed, until recently, a greater reluctance to embrace the practice of mediation to resolve legal disputes. Compared with the Australian experience, mediation in Germany has travelled, and is still travelling, a more difficult and winding path to recognition as a legitimate and valuable alternative to litigation.[6] It took many years for the German pioneers of mediation to attract any significant attention from practitioners and the wider community. Despite early discussions on the topic, it was not until the latter half of the 1990s that the mediation movement began to enjoy more than academic attention. Over the past five years, a plethora of mediation books and articles have been published, not to mention the many mediation conferences and seminars that have taken place. Current litigation reforms are heavily focused on reducing court waiting lists through court ➢

➢ related mediation schemes.

Such developments indicate that the German mediation movement is repositioning itself from the academic to the practitioner-focused political arena. As a well recognised and practised form of dispute management, mediation in Germany is still waiting in the wings, but it is about to burst onto centre stage.

The German Parliament has recently passed a number of laws creating legal frameworks for the establishment of both voluntary and mandatory court-related ADR schemes.

Effective as of 1 January 2000, the Federal Government of Germany introduced §15a EGZPO (Introductory Law of the Code of Civil Procedure), permitting all German States (Länder) to introduce mandatory court related ADR (ausser-gerichtliche Streitschlichtung) with respect to certain civil disputes. To qualify for mandatory ADR, the disputes must be:

- financial disputes before magistrates courts up to a litigation value of 750 euros;
- neighbourhood disputes; or
- defamation disputes where the alleged defamation has not occurred through the media.

Therefore German State Parliaments may legislate to require participation in an ADR process as a prerequisite to formally beginning court proceedings, where, subject to a number of exceptions, the above criteria are fulfilled.

A number of German States, namely Nordrhein-Westfalen, Bayern, Baden-Württemberg, Hessen and Brandenburg, have already introduced legislative schemes providing for mandatory ADR, while other States are at various stages of drafting or passing legislation within the terms of §15a EGZPO.

§15a EGZPO specifically left the model of ADR open in order to encourage a healthy competition of experimentation between the German States. While the State laws on mandatory ADR differ, for example, in terms of ADR service providers, much criticism has been directed at two elements common to all programs under the umbrella legislation, namely the mandatory nature of ADR and the case characteristic of low monetary value of the dispute as a selection criterion for ADR suitability.[7]

§15a EGZPO does not mention the term 'mediation'. Rather it chooses to use broader terms for consensus based ADR, namely 'Schlichtung' and 'Streitbeilegung'. Nevertheless, all relevant background papers, commentaries, conference discussions and literature suggest that mediation was envisaged, if not as the primary process, at least as one of the ADR processes to be implemented under the legislation.[8] The openness of §15a EGZPO was intended to (and has) encourage(d) experimentation in mediation process design. At the same time, the lack of direction towards a particular philosophy, set of values and process translates to a lack of clarity in process quality and performance standards — a state of affairs that is particularly dangerous in the early days of the German mediation movement. Indications of the challenges that lie ahead include: (1) the use of summary debt recovery procedure (Mahnverfahren), as one of the legislative exceptions to mandatory ADR, to avoid going to ADR;[9] (2) the temptation to 'push' quick settlements in light of flat rate mediator payment schedules with a bonus for settling a dispute;[10] and (3) the ability for States to avoid implementing the mandatory nature of the system by choosing not to enforce penalty provisions for non-attendance at an ADR session.[11]

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In the absence of a particular mediation philosophy or model, it appears that the nature of the dispute resolution process employed will depend on the qualifications and training of the 'mediator'. As neither the federal legislation nor any of the State provisions specify mediator training or qualifications, the mediation on offer will depend largely on the existing qualifications and background of the mediators. In terms of who can qualify as a mediator, the mandatory mediation schemes fall into three categories:

- mediators must be lawyers or notaries, for example the Baden-Württemberg model;
- mediators are existing conciliators (Schiedsleute), for example, the Nordrhein-Westfalen model; or
- mediators are sourced from recognised ADR organisations (Gütestellen), which include conciliators (Schiedsleute) and conciliation and mediation centres, for example the Brandenburg model.

Model 1 is likely to promote a settlement or evaluative mediation model. Model 2 is likely to perpetuate the work of the Schiedsleute tradition, which has enjoyed a strong tradition in a number of German States such as Nordrhein-Westfalen. While Schiedsleute is best translated as 'conciliators', empirical research on their practices reveals a strongly directive ADR model, sometimes reflecting a conciliation model and other times reflecting wise advice giving or early neutral evaluation.[12] Model 3 is essentially a combination model. Organisations or institutions may apply for approval as an 'ADR organisation' and thereby become eligible to mediate under the mandatory scheme. To date approved organisations include lawyer and Schiedsleute organisations, and community mediation centres. Accordingly, a wide spectrum of mediation styles is likely to be ➢

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employed under this model.

More recently, and effective as of 1 January 2002, § 278 IV ZPO (the Federal Code of Civil Procedure) was amended to provide for court referral to ADR (aussergerichtliche Streitschlichtung) with the consent of the parties. Within the framework of this amendment, the Ministry of Justice in Niedersachsen has initiated a statewide voluntary court related mediation pilot project. The Niedersachsen project is unique in Germany in terms of its statewide and multijurisdictional dimensions.

The project is entitled 'Court related mediation as an expanded dispute resolution service' (Gerichtsnahe Mediation als Verfahrensangebot innerhalb der Justiz). It aims to improve the capability of both the judiciary and disputing parties to find more appropriate means of dispute management and resolution and to increase the range of dispute management services offered by the courts. Accordingly, courts in Niedersachsen will be able to refer matters to mediation and, in certain circumstances, other ADR processes to disputing parties whose matters are pending trial. The project will begin in four civil courts, namely two district courts (Landgerichte), two magistrates courts (Amtsgerichte), one administrative court (Verwaltungsgericht) and one court for social security issues (Sozialgericht).

The Niedersachsen Project was initiated by and has ongoing active support from the Ministry of Justice in Niedersachsen and specifically from the Minister for Justice himself, Professor Dr Christian Pfeiffer, a former leading law professor and criminologist, and visionary in the German victim–offender mediation movement. The pilot project will begin in March 2002 and continue until the end of 2004. The early stages of the project in 2002 will be concerned with identification of key stakeholders, strategic planning, initial design, timetabling and set up of the project. Notably, the State Parliament of Niedersachsen has not passed corresponding legislation to §15a EGZPO. It may become the only German State not to do so. This appears to be part of a deliberate policy decision to forge ahead with a statewide voluntary court ADR scheme in an attempt to deeply change the dispute management culture and landscape of Niedersachsen.

A particular challenge for the voluntary mediation pilot in Niedersachsen is the mobilisation of stakeholders in the legal system, primarily the judiciary, the legal profession and the disputants, to utilise mediation. In comparison to their German counterparts, Australian lawyers and judges have embraced ADR in recent years. The German legal profession and judiciary, on the other hand, still have a very narrow understanding of the qualities and potential of mediation.[13] The entire question of mobilising mediation in the shadow of the courtroom is of particular interest within the context of an Australian–German comparison. The mobilisation of mediation in Australia (and, indeed, the US) was a reaction to an impossibly expensive, long and drawn out litigation process. By comparison, the German legal system is significantly more attractive for consumers than the Australian legal system. It is

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➢ less expensive due to the fees and cost structure, as well as the availability of legal costs insurance. Courts have shorter waiting lists and trial time is less. Clients (disputants) of the German legal system have not suffered the same level of inability to access justice as did their Anglo-American counterparts prior to the introduction of court related mediation systems.[14] Current reform discussions in Germany focus on ways to make mediation more attractive than going to court by, for example, increasing court costs and generally changing cost structures. In Germany, it is not necessarily less expensive to mediate a case successfully than to take it to court. German litigation cost structures are not based on hourly rates but rather a percentage of the value of the dispute; on the other hand, there remains uncertainty about the correct payment structures for mediation. There is, therefore, a risk that the transplanting of successful common law mediation referral structures in countries such as Germany may have negative effects on disputants' ability to access German courts.

Current developments in Germany indicate two distinct trends in court related ADR and, specifically, mediation: first, the widespread regulatory trend inherent in §15a EGZPO and its corresponding State laws; and second, the significant efforts in Niedersachsen to challenge and change the existing dispute management culture through the introduction of voluntary court related mediation schemes. And so the voluntary versus mandatory debates begins again, but this time in a country with legal traditions quite different from our own. Let us not be too quick to prejudge the outcome. ●

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Endnotes

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