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Comparative perspectives on Australian ADR

Inside an outsider's mind: perspectives on Australian ADR

Walther Gottwald

Why look at Australia?

Germany has begun to experiment with court related mediation. According to recent changes in the German Code of Civil Procedure, all German States have the option to introduce mandatory court related mediation as a prerequisite to formally beginning court proceedings with respect to rather small civil matters. Many states have begun to experiment with such schemes in different ways and almost all of the experiments are being evaluated. The new code of civil procedure also provides for court referral to mediation with the consent of the parties.

Within this framework, several States have begun to experiment with voluntary mediation, independent of the amount in dispute. For instance, Lower Saxony has initiated a statewide voluntary court related mediation pilot project. During the three year long project, judges of district and magistrate courts as well as of administrative courts will be able to refer parties whose cases are pending trial to mediation. These judges have been trained for their function as referral agents. The mediators will predominantly be other judges of the respective courts who have been granted a 50 per cent caseload reduction to deal with the mediations and have been trained in facilitative mediation.

The rise of court related mediation in Germany is reason enough to look at Australia, which has experience of more than 10 years in this field. So, what's going on inside an outsider's mind looking at ADR in Australia? Let me offer seven perspectives and observations confining myself to the rather narrow sector of court related mediation.

ADR landscape

When on Australian soil, the first and most curious perspective is certainly: what does the landscape of court related ADR look like? The visitor discovers that ADR — and especially mediation — is to be found in many rooms, in the courts and tribunals, has many forms and shapes, and is sometimes voluntary, sometimes mandatory. To be sure, the use of ADR in general, and court related mediation in particular, is widely accepted and a given.

By comparison, in Germany we remained seated during the standing ovations for mediation in the early years of the movement. For many in the legal profession, mediation in Germany is still a sort of flower of the East in a Harvard bouquet which does not fit into the German legal culture, and mediation education, training and professional development are travelling a long and winding road. However, the past two or three years have seen an outburst of interest in ADR and mediation is eagerly searching for the entrance to the autobahn, with no turning back and no speed limit, led by a hardy but rather inexperienced driver.

Demand for mediation

Surprisingly, given the wide acceptance of ADR in Australia, there seems to be some frustration at the under-utilisation of mediators. NADRAC has indicated that the demand for ADR services such as mediation lags considerably behind the supply of prospective practitioners who have completed training and education programs.¹ Unfortunately, we do not have reliable statistics for Germany. However, in the Netherlands, a country which is in many respects very similar to Germany, the

Netherlands Mediation Institute (NMI) — an umbrella organisation which registers accredited mediators — reports that there are approximately 2500 registered mediators. This number is exorbitant when compared to the total number of mediations, resulting in the situation that every mediator handles on average half a mediation annually. Nevertheless, most training programs are still fully booked.²

No wonder there has been a growing awareness that mediation needs to be driven from the institutional end of the dispute resolution spectrum — that is, from the courts. In this respect, the Australian experiences are very interesting. I was told by judges and court administrators of the Queensland and Federal courts that the introduction of court related mediation has led to a dramatic change in the way disputes are dealt with. Parties and their lawyers are aware that judges may order them to go to mediation. They anticipate this possibility by turning to mediation before even going to court. This is a remarkable change.

Quality of mediation

If German courts are encouraging mediation, they need to take responsibility for the quality of the service provided, the need for quality being even greater where mediation is mandatory. From this perspective, NADRAC's report *A Framework for ADR Standards* is a real treasure. No doubt NADRAC's approach will inspire the German discussion in the coming years, certainly not only in the field of court connected mediation.

In this context, there may be some incentive for NADRAC to have a look at the NMI since NADRAC is discussing a peak body as well as a complaints body. NMI is a private national organisation concerned with quality assessment and benchmarking, hovering about various specialised mediation institutes and professional associations of mediators. NMI maintains a register of accredited NMI mediators and liaises with other institutions and government departments. Through regular surveys, NMI seeks to ascertain the use and 'success' of mediation in a number of practice areas.

Interestingly, when it comes to training and professional development, there seem to be distinct differences between Australia and Germany. First, German mediation training providers follow a specialised approach according to the legal lines. Therefore, there is mediation training in family mediation, commercial mediation, insolvency mediation and so on. The German approach seems to be about making the market fit legal models. Second, although the format of the training programs varies to a large extent, there is a trend towards programs lasting one to two years and consisting of intensive training modules of about 200 contact hours in total with opportunities for clinical practice.

Judges' roles

There are many countries in which judges act as mediators, for instance in the experiments in Holland, Canada or Germany, or in some courts in the US.³ Of course, these judges will not decide the case if mediation fails. What I have learned in Australia is that most judges find it quite unacceptable to combine the roles of judge and mediator. Using judges as mediators, however, conforms to the perception of the judicial role in civil law countries: in the first place mediator, in the second place adjudicator. Using judges as mediators has the advantage that the costs are borne by the justice system, which is important for the development of court related ADR. Outsourcing mediation services has the consequence that the parties have to pay for the mediator. Our friends from finance would certainly love it. However, we certainly must take into account the Australian criticism that the provision of mediation by a judge or registrar represents a threat to public confidence in the courts.⁴

Referral system

Pilot projects in both the Netherlands and Germany are optimistic about developing guidelines that will identify indicators and contra-indicators for allocating disputes to the appropriate ADR forum. Proper assessment should be made about referrals, especially within mandatory settings. I understand that NADRAC is currently working on a similar project for the Federal

Magistrates Service.⁵ My impression, however, is that many cases go to mediation without even having seen the court and a referral agent beforehand. Some judges seem particularly opposed to the idea of discussing the suitability of mediation with the parties. In comparison, the experiments in Holland and Germany require judges to be trained in matching cases with procedures, although at this stage we don't have the ability to positively predict the fit to forum. Here we are very keen to learn more about NADRAC's efforts to identify factors affecting 'ADR-ability', or better suitability for mediation.

Legalisation and judicialisation of ADR

The evolution of mediation in Australia illustrates the unstoppable path towards professionalisation and specialisation. Such a trend certainly follows well known patterns in other professions and occupations that strive to gain ownership of a field of knowledge and autonomy.

The outsider, however, wonders how far legalisation and judicialisation has already gone in Australia. There are numerous court cases involving mediation issues, a development which lawyers certainly welcome. The greater the relevance of legal issues for mediation, however, the more it is that non-lawyers might be excluded from mediation. The 'one stop shop' approach will become an idealistic illusion of the past. In the long run, mediation could inevitably suffer from the same speed bumps and complex traffic regulations that have seen arbitration move to the less travelled roads of dispute resolution. Arbitration, conceived as a speedy and inexpensive procedure, has become so expensive and time consuming that many have been looking for mediation as an alternative to arbitration. Will there be a chance to put the brakes on legalisation?

Interaction of ADR and the judicial system

My final perspective is on the interaction of mediation and the civil justice system. From my conversations with judges as well as with barristers



and solicitors in Queensland I have developed the strong impression that court related mediation has dramatically reduced delay and court congestion in this State because mediation cases settle at an early stage and not at the courthouse door.⁶ The power of the courts to order mediation has led to a preparedness of the parties to go to mediation and that has changed the way the legal profession is working. Apparently there are already some successful barristers in Australia whose work consists almost entirely of commercial mediation; and there are many others who are trained in mediation and represent clients in the process.

Despite this success story, there is considerable concern about an increasing number of unrepresented parties in the Australian courts — perhaps one of the unintended consequences of legal aid favouring mediated settlements. There is also a surprising and somewhat heated debate about restricting adversarial solutions, such as litigation, in Australia in order to reduce the costs and equalise the bargaining power of both parties by removing the disadvantage of being unrepresented.

Has resort to the mechanisms of ADR gone too far, causing an access to justice problem for once-only litigants on the simple ground of its cost? Is there a lesson to be learned for Germany? In comparison to their American and Australian counterparts, German courts are far less expensive due to a different cost structure, the availability of relatively cheap legal insurance and the legal aid system. As a consequence, purely from a cost perspective, mediation is not very attractive. Should the German court system therefore restrict its accessibility for the sake of promoting high use mediation, as some court administrators are already eager to propose? I think we have to be very cautious since mediation can only be truly facilitative where it is structured against the backdrop of an accessible legal system.

Conclusion

Mediation in Australia is mature in the context of international mediation.

Mediation has apparently become the pursuit of a conventional profession, a discovery which will cause some disillusionment for its zealous pioneers.⁷ We may hate reality but it is probably the only place where we can get a good steak, to put it in Woody Allen's words.

My perspectives on Australian court related mediation have attempted to illustrate that European countries like Germany can learn much from Australian pragmatism. Therefore, the ADR movement in Germany will take a keen interest in NADRAC's unique work and the open, self-critical communication and healthy co-operation among stakeholders within the Australian ADR community. ●

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Endnotes

1. National Alternative Dispute Resolution Council (NADRAC) *A Framework for ADR Standards* Canberra 2001 p 24.
2. See Jagtenberg R and de Roo A 'Mediation in the Netherlands: past — present — future' in Alexander N (ed) *Global Trends in Mediation* (forthcoming) Köln 2002.
3. Refer to the national reports in Alexander, above note 2.
4. See Sir Laurence Street 'The courts and mediation — a warning' (1991) *2 Australian Dispute Resolution Journal* 2.
5. NADRAC *Use of Alternative Dispute Resolution in the Federal Magistracy, Part 2: Regulations and Rules of the Court* Canberra December 1999.
6. See de Jersey P (Chief Justice, Supreme Court (Qld)) 'Has mediation eclipsed litigation, and is the statutory minefield still worth negotiating — and by the way, what's happening with the common law' presentation to the Queensland Law Society Inc Continuing Legal Education on 31 May 2002 available at <www.courts.qld.gov.au/publications/articles/articlescj.htm#2002>.
7. See Boule L *Mediation: Principles, Process, Practice* Butterworths Sydney 1996 p 301.