

# WHAT'S LAW GOT TO DO WITH IT? MAPPING MODERN MEDIATION MOVEMENTS IN CIVIL AND COMMON LAW JURISDICTIONS

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## Mediation: A Flexible Process in a Procrustean Bed?

In Australia we call it 'Mediation', the French say 'la mediation', and the Germans 'die Mediation'. The term is global, stemming from the Latin, *mediatio*,<sup>1</sup> the process universal, its inherent flexibility transcending historical and national legal norms and systemic differences. Indeed, forms of mediation can be traced back to sources in ancient Greece,<sup>2</sup> the Bible,<sup>3</sup> traditional communities in Asia and Africa,<sup>4</sup> and to the fourteenth Century English 'Mediators of Questions'.<sup>5</sup>

Mediation, however, does not exist in a vacuum. It operates against a backdrop of national dispute management culture and institutional rules and regulations. Accordingly, it is nothing less than misleading to consider mediation as a universal process in isolation from its context. Context determines how mediation is absorbed and applied by mediators, dispute management professionals such as lawyers and clients. Context defines mediation and has a direct impact on how it is practised. National legal contexts reveal historically embedded systemic differences that can

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1 A Kemmann and M Gante-Walter, 'Zur Begriffsgeschichte der Mediation' (2001) 6 ZKM 273-4.

2 Ibid.

3 See Matthäus 5:9-1. Timotheus 2:5-6; Korinther 6:1-4.

4 On the earlier forms of consensus-based dispute resolution, or mediation in traditional communities such as the Nuer in Sudan and the Ndendeuli in Tanzania, see A Holtwick-Mainzer, *Der übermächtige Dritte: Eine rechtsvergleichende Untersuchung über den streitschlichtenden und streitentscheidenden Dritten* (1985) 40; P Gulliver, 'Dispute Settlement Without Courts: The Ndendeuli of Southern Tanzania' in L Nader (ed) *Law in Culture and Society* (1969) 24. On the application of mediation in China and the Asian region, see D Bagshaw, 'China: Mediation in Divorce is an All-In Affair Now' (1995) 2 *Australian Lawyer* 24; H Gallagher, 'The Eastern Approach' (1995) 69 *Law Institute Journal* 64; T Krapp, 'Zivilrechtliche Schlichtung an japanischen Gerichten' in W Gottwald and D Stempel (eds), *Streitschlichtung: Rechtsvergleichende Beiträge zur außer-gerichtlichen Streitbeilegung* (1995) 77.

5 P Dwight, 'Commercial Dispute Resolution in Australia: Some Trends and Misconceptions' (1989) 1 *Bond Law Review* 1.

provide insights into the reasons behind the rapid expansion of mediation in common law jurisdictions, and the comparatively hesitant development of mediation in civil law jurisdictions.

In this article I consider the legal and political forces behind the modern mediation movements in Australia and Germany: two countries that represent the common law and the civil law traditions respectively.

### **The Common Law Context: Australia**

The modern mediation movement began in the 1970s in the United States, and while the curious reader might be forgiven for thinking that the United States may have provided a better comparative subject from the common law perspective, this article focuses on Australia for the following three reasons.

First, Australia's role as a global leader in ADR developments has been recognised on an international level.<sup>6</sup> Court-related ADR exists in every court and tribunal in Australia;<sup>7</sup> community mediation and private mediation exist in all Australian jurisdictions. In other words, mediation has been applied in practice to all types of disputes. Such a broad spectrum of practice can provide invaluable comparative insights for an evolving global context.

Second, much has already been written about the US experience, often to the exclusion of other jurisdictions with valuable, different and cutting-edge comparative experiences, such as Australia.<sup>8</sup> Different insights can be gained from a comparison with the Australian experience. One significant example is the development of the discussion on national standards for mediation. While the United States has moved closer towards national standards through the *Model Uniform Mediation Act*,<sup>9</sup> Australia's National ADR Advisory Council (NADRAC) recently recommended against the development of one set of national mediation standards on the basis that such a development would threaten innovation and diversity in the practice of what is essentially a flexible process.<sup>10</sup>

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6 Australia, NADRAC, *A Framework for ADR Standards*, Report to the Commonwealth Attorney-General (2001) 47.

7 T Sourdin, *Key Issues in Alternative Dispute Resolution* (2001) 12.

8 W Gottwald, 'Mediation in den USA – ein Wegweiser' in M Henssler and Ludwig Koch (eds), *Mediation in der Anwaltspraxis* (2000) 221-222. Gottwald points to the ironic fact that Asian and African countries today 'import' American ADR models, although traditional consensus-based dispute resolution processes from these same Asian and African countries served as models for the development of ADR in the United States.

9 See the Program on Negotiation (PON) at Harvard Law School website [Internet - <http://www.pon.harvard.edu/guests/uma/main.htm> (Accessed 7 February 2002)].

10 NADRAC, above n 6, 10.

Finally, mediation in the Australian legal system has developed, albeit not as the result of a regulatory government approach, in a much more homogenous manner than in the United States. It is much more difficult to speak of the 'American experience' in mediation, because there are so many vastly different dispute resolution cultures. While the Australian mediation movement can be characterised by its high level of innovation and experimentation resulting in an equally high level of diversity, a correspondingly low level of state based regulation has permitted a 'similar' diversity in mediation policy and practice to develop in all Australian jurisdictions. Accordingly, one can speak of the Australian experience in a more holistic way than the American. Therefore, a national cultural context such as the Australian is extremely useful as a basis for international comparative study.

### **The Civil Law Context: Germany**

The German legal system provides a useful example of the civil law tradition for the following reasons.

German mediation developments, like those in other civil law jurisdictions, began to take shape in the 1990s. While each country's mediation movement has developed differently, there are significant similarities between civil law countries and Germany provides a useful case study. Insofar as the European Union has introduced directives relating to mediation, German ADR regulations incorporate these.

Germany is situated in central Europe and is surrounded by civil law traditions of other European countries. In terms of terminology, German is officially spoken in five European countries and principalities: Germany, Austria, Switzerland, Luxembourg and Lichtenstein. Accordingly, some degree of terminological consistency can be achieved for comparative purposes among these countries, as it can among English speaking common law countries such as Australia, New Zealand, the United States, Great Britain and Canada.

### **Six Theses**

While the focus of this article is only on two countries, it is my contention that this comparative case study is a useful reflection on the significant differences existing in the development of mediation in common and civil law jurisdictions generally. At the very least, this case study will serve as a valuable starting point for further research in comparative mediation. I propose six theses for the current differences in mediation practice in Australia and Germany:

1. The German legal culture, steeped in the civil law tradition, restrains the development and acceptance of mediation (the civil law cultural tradition).

2. The highly regulated German legal profession has discouraged lawyers from embracing mediation as an alternative to litigation (the regulation of the legal profession).
3. The time and cost efficiency of the German legal system means that the promise of time and cost savings will not motivate stakeholders (the efficiency of the German legal system).
4. The absence of uniform terminology has led to confusion about the meaning of mediation in Germany (the language of mediation).
5. The settlement function inherent in the judicial role in the German civil tradition has been confused with mediation (the mediative element in the judicial role).
6. The highly theoretical and rigid nature of civil law education in Germany has hindered the integration of mediation skills into law curricula (the theoretical nature of German legal education).

Before launching into a discussion of these theses, I will consider the academic context for this article, and then outline current mediation practice in Australia and Germany.

## Academic Context

Existing research literature on mediation generally falls into four categories:

1. Literature discussing the legal aspects of mediation such as the legal position of mandatory mediation, the nature of confidentiality and mediator liability;<sup>11</sup>
2. Policy papers;<sup>12</sup>
3. Comparative essays on *intra*-national mediation legislation or court-related models;<sup>13</sup> and

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11 For an overview of the legal aspects of court-related mediation, see, for example, L Boule, *Mediation: Principles, Process, Practice* (1996) 259-300.

12 See, for example, Australia, ALRC, *Review of the adversarial system of litigation: rethinking the federal civil litigation system*, Issues Paper 20 (1997); Australia, Australian Law Reform Commission (hereafter ALRC), *Review of the Adversarial System of Litigation: ADR – its role in federal dispute resolution*, Issues Paper 25 (1998) on the variability of objectives of dispute resolution between different courts and tribunals. See also R Macdonald, 'Implicit Law, Explicit Access: Is there Any Point to Redesigning Institutions of Civil Justice?' in Australia, ALRC, *Managing Justice...the Way Ahead for Civil Disputes*, Draft Papers of the ALRC Anniversary Conference (2000) and H Astor, *Quality in Court Connected Mediation Programs* (AIJA, Victoria, 2001).

4. Evaluations or explanations of specific mediation programs.<sup>14</sup>

While much has been written about mediation in general, international comparative literature is scarce. There is a very small number of comparative studies involving civil law countries, no doubt because the mediation phenomenon is still in its infancy in these jurisdictions. Those that do exist focus on the concept and practice of mediation in a common law jurisdiction such as Australia or the United States with a view to analysing the feasibility of introducing the concept and practice of mediation into a civil law country such as Germany,<sup>15</sup> or as a basis for an analysis of mediation on a conceptual level.<sup>16</sup>

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- 13 J Wade, 'Current Trends and Models in Dispute Resolution: Part I' (1998) 9 *Australian Dispute Resolution Journal* 59; J Wade, 'Current Trends and Models in Dispute Resolution: Part II' (1998) 9 *Australian Dispute Resolution Journal* 113; T Altobelli, 'New South Wales ADR Legislation: The Need For Greater Consistency and Co-ordination' (1997) 8 *ADRJ* 200-207. For a comparison of several United States court connected mediation programs, see S Clarke and E Gordon, 'Public Sponsorship of Private Settling: Court Ordered Civil Mediation' (1997) 19 *JSJ* 311. Clarke and Gordon's research indicated that the significant effect of those programs was to make cases that would have settled anyway, settle earlier.
- 14 On Australian research see, for example, N Spigel, 'Australian Lawyer Attitudes to Mediation' (1998) *NLR* 1; M Delaney and T Wright, *Plaintiffs' Satisfaction with Dispute Resolution Processes* (January 1997) 71; Justice Michael Black, 'The Courts, Tribunals and ADR: Assisted Dispute Resolution in the Federal Court of Australia' (1996) 7 *Australian Dispute Resolution Journal* 138; A Love et al, *Federally-Funded Family Mediation in Melbourne: Outcomes, Costs and Client Satisfaction* (1995); J Handley, 'Mediation in the Commonwealth Administrative Appeals Tribunal' (1995) 6 *Australian Dispute Resolution Journal* 6; B Sordo, 'A Law Society Perspective of Law and Lawyers in Mediation' (1995) 2 *Commercial Dispute Resolution Journal* 77; M Dewdney et al, *Contemporary Developments in Mediation within the Legal System and Evaluation of the 1992-3 Settlement Week* (1994); Family Court of Australia, *Evaluation of the Family Court Mediation Service* (1994); Law Institute of Victoria, *Mediation in the Spring Offensive 1992* (1993); C Chinkin and M Dewdney, 'Settlement Week in New South Wales: an Evaluation' (1992) 3 *Australian Dispute Resolution Journal* 93; R Ingelby, *In the Ball Park: Alternative Dispute Resolution and the Courts* (Melbourne, 1991); S Davidson, 'Court-Annexed Arbitration in the Sydney District Court' (1995) 3 *Australian Dispute Resolution Journal* 195-220; Australia, ALRC, *ADR – Its Role in Federal Dispute Resolution*, Issues Paper 25 (1998), Appendix D; R Davis, 'Negotiating Personal Injury Cases: A Survey of the Attitudes and Beliefs of Personal Injury Lawyers' (1994) 68 *Australian Law Journal* 734-751; A Prior, 'What do the Parties Think? A Follow-Up Study of the Marriage Guidance South Australia (MGSA) Family Mediation Group' (1993) 2 *Australian Dispute Resolution Journal* 99-112 and A Zariski, 'Survey Finds Strong Support for ADR' (1997) 17 *Proctor* 29-31.
- 15 For an Australian-German comparison in commercial mediation, see N Alexander, *Wirtschaftsmediation in Theorie und Praxis: Eine deutsch-australische Studie* (Frankfurt am Main, 1999) 15-29. For an Australian-German comparison in family mediation, see H Stintzing, *Mediation - A Necessary Element in Family Dispute Resolution?: A Comparative Study of the Australian Model of Alternative Dispute Resolution for Family Disputes and the Situation in German Law* (1994). For the first USA-German comparative work in mediation,

Finally, several edited collections of academic essays on ADR developments around the world have also been published.<sup>17</sup> Generally, the format of these publications comprises a series of contributions, each focusing on ADR developments in a given national jurisdiction – in other words, a series of national reports. With the exception of an initial comparative essay bringing together the themes of the national reports, there is not a great deal of comparative analysis to be found in these publications.<sup>18</sup>

This article seeks to extend the available scientific literature by focusing on the development of mediation in a civil law jurisdiction, namely Germany, from an Australian common lawyer's perspective.

## Mediation in Germany and Australia

Mediation services, in particular court-related mediation initiatives, have grown rapidly in many common law jurisdictions such as the United States, Australia, Canada, New Zealand and England since the 1970s.<sup>19</sup> The current state of mediation practice in Australia can be traced back to the establishment of community justice centres in New South Wales in the early 1980s.<sup>20</sup> Recent policy papers relating to the resolution of family law disputes refer to mediation as a form of Primary Dispute Resolution (PDR), rather than ADR, because the vast majority of disputes are dealt with and resolved using mediation.<sup>21</sup> In the twenty-first century court-related ADR

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see W Gottwald, *Streitbeilegung ohne Urteil* (1981). For a recent analysis of a specific form of court-ADR in the USA and its suitability in the German context, see C Duve, *Mediation und Vergleich im Prozess: dargestellt am Beispiel des Special Master in den USA* (1999).

- 16 S Breidenbach, *Mediation: Struktur, Chancen und Risiken von Vermittlung in Konflikt* (1995). Breidenbach's critical analysis was based on the US experience of mediation.
- 17 See, for example, W Gottwald et al, *Handbuch zur aussergerichtlichen Konfliktregelung (AKR)* (1997); D Campbell and S Cotter (eds), *Dispute Resolution Methods: The Comparative Law Yearbook of International Business Special Issue 1994* (1995) 335; W Gottwald and D Stempel (eds), *Streitschlichtung: Rechtsvergleichende Beiträge zur au ergerichtlichen Streitbeilegung*, (1995).
- 18 For a similar view see E Clarke, 'Comparative Research in Corporate Law' (1996) 3 *Canberra Law Review* 65.
- 19 For example, all jurisdictions in the United States and Australia have legislation regulating court-related ADR. On Australia, see T Altobelli, 'Mediation in the Nineties: The Promise of the Past' (5th National Mediation Conference, Brisbane, May 2000); for discussion on the position in the United States, see S Press, 'The Institutionalisation of Mediation' (2000) 3 *ADR Bulletin* 22, and see the *Model Uniform Mediation Act* drafted by the National Conference of Commissioners on Uniform State Laws, Prefatory Note, Point 2 <<http://www.pon.harvard.edu/guests/uma/main.htm>> (Accessed 7 February 2002)].
- 20 *Community Justice Centres Act* 1983 (NSW); see also W Faulkes and R Claremont, 'Community Mediation: Myth and Reality' (1997) 8 *Australian Dispute Resolution Journal* 177.
- 21 Response of the Family Court of Australia to the Attorney-General's Department Paper on 'Primary Dispute Resolution Services in Family Law' (1997) *Family Court of Australia* 8.

exists in every court and tribunal in Australia, which means that no category of legal dispute is excluded from the potential application of ADR, and in particular, mediation. The growth of mediation in Australia has been supported by a number of factors. First, long court waiting lists, costs of litigation and dissatisfaction with the nature of court processes has prompted the development of court-related mediation procedures allowing courts to refer matters to mediation. Secondly, the concept of mediation as a qualitatively different process from adjudication and arbitration has been pro-actively promoted in the wider community.<sup>22</sup>

In contrast, civil law jurisdictions such as Germany, Austria, France and Switzerland 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 is travelling a more difficult and winding path to recognition as a legitimate and valuable alternative to litigation.<sup>23</sup> It took many years for the German pioneers of mediation to attract any significant attention from legal practitioners and the wider community. Despite early discussions on the topic, it was not until the latter half of the 1990s that the civil mediation movement began to enjoy more than academic attention.<sup>24</sup> 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.<sup>25</sup> Current litigation reforms are heavily focussed on reducing court waiting lists through court-related mediation schemes.<sup>26</sup>

Such developments indicate that the German, and indeed the European, mediation movements are repositioning themselves from the academic to the practitioner-focused political arena. As a well-recognised and practised form of dispute management, however, mediation in civil law jurisdictions is still waiting in the wings.

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22 ALRC, *Alternative or Assisted Dispute Resolution*, Background Paper 2 (1996).

23 W Hoffman-Riem, 'Konfliktbewältigung in einer angebotsorientierten Rechtsschutzordnung' (1997) *ZRP* 190; H Prütting, 'Richterliche Gestaltungsspielräume für alternative Streitbehandlung' (2000) 1 *Bremer Beiträge zur Rechtspolitik* 32.

24 In contrast, the victim-offender mediation movement in the criminal law area developed as a quite separate movement from mediation for civil disputes. By the mid 1980s it had established not only an academic but also a practical relevance in Germany: see T Trenczek, 'Victim-Offender Reconciliation Programming in West-Germany - A Review and Assessment' in B Galaway and J Hudson (eds), *Criminal Justice, Restitution and Reconciliation* (1990) 109-124; and also D Dölling *et al* (eds), *Täter-Opfer-Ausgleich. Eine Chance für Opfer und Täter durch einen neuen Weg im Umgang mit Kriminalität* (1998).

25 The website for the Centrale für Mediation contains an up-to-date listing of current mediation events and German mediation literature. It is available at <<http://www.centrale-fuer-mediation.de/mediation.htm>> (accessed 7 March 2002)].

26 For example, §15a EGZPO (Introductory Law of the Code of Civil Procedure) and §278 V ZPO (Code of Civil Procedure).

In painting a more detailed comparative picture of mediation practice in Australia and Germany, the following categories of mediation practice will be considered:

- community mediation,
- court-related mediation,
- industry specific programs, and
- mediation services in the private sector not regulated by legislation.

I will also discuss mediation standards and training and education in Australia and Germany.

### **Community Mediation**

Community mediation refers to mediation that takes place at a community level: at community justice and legal centres, in schools and in other organisations that offer mediation services to the wider community.

#### *Australia*

Australian Community Justice Centres have well-established government – sponsored mediation centres located throughout Australia.<sup>27</sup> The centres offer mediation services either free of charge or for a very low cost to the public. Generally, mediation in all industry areas is available, although most mediations that take place deal with family, neighbourhood, small business or consumer disputes. The mediation process applied in Community Justice Centres is regulated by state legislation as are other mediator relevant issues such as standards of care and mediator liability.

In addition, both government and non-government organisations in Australia offer community mediation services. These include UNIFAM and Relationships Australia with respect to family disputes, organisations with religious connections such as Anglicare, legal aid offices and community legal centres that provide inexpensive legal services including mediation to members of the public, the ombudsman and government departments dealing with families and juveniles. School mediation projects focussing on peer mediation and anti-bullying can be found in all Australian States.

#### *Germany*

In Germany, on the other hand, community mediation programs are still in their infancy. One of the better known of these programs is Mediationsstelle Brückenschlag.

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27 Community Justice Centres are referred to by different names in the various Australian jurisdictions, for example, in Queensland they are referred to as Dispute Resolution Centres.



This particular program was founded in 1996 as the first community mediation centre in Germany. Financed partially by public funds and partially by a mixture of private donations, profits from training courses and the voluntary work of mediators and other staff, Brückenschlag has provided a model for emerging community programs in Germany.

Other community mediation projects include Waage in Hanover (victim offender mediation), Förderverein Umweltmediation eV in Bonn, which focuses on environmental mediation, and a small number of school mediation projects.

In Germany some government-sponsored legal centres providing legal advice also offer conciliation services (Schlichtung).<sup>28</sup> Despite the fact that the bulk of their work consists of legal advice, these centres are officially recognised conciliation centres (anerkannte Gütestellen), which means that a number of legal consequences follow when parties enter into a conciliation process. First, the German equivalent of the statute of limitations (Verjährung) ceases to run for the duration of the conciliation process, and second, any agreement between the parties can be enforced in a court of law.<sup>29</sup> Generally, these services are inexpensive or free for those with limited financial resources. Nevertheless they are not widely utilised by the disputing public.

The institution of the Schiedsmann has a very long tradition (up to 180 years) in various German states (Länder). There is not an Australian equivalent. Generally, the local government is responsible for appointing persons to the office of Schiedsmann. Appointees are highly respected members of the community, who fulfil the role on a voluntary basis. Bierbrauer has examined the role of the Schiedsmann.<sup>30</sup> He concludes that the nature of the dispute resolution process offered by the Schiedsmann varies considerably according to both the individual Schiedsmann and the jurisdiction. While a number of Schiedsmänner offer processes similar to mediation, others demonstrate a much more inquisitorial approach, sometimes offering the disputants legal advice. Again, there is not a great public demand for the services of the Schiedsmann.

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28 A prominent example of one of these conciliation centres is the ÖRA in Hamburg.

29 § 209 I Nr 1 and II Nr 1a of the German Civil Code (BGB).

30 G Bierbrauer, 'Factors Affecting Success in the Mediation of Legal Disputes: Third Party Conciliation through the German "Schiedsmann"' in Lloyd-Bostock (ed), *Law and Psychology* (1981) 103.

## Court-Related Mediation

Court-related mediation refers to mediation that occurs in the 'shadow' of the court. The connection between mediation and the court may vary according to the nature of the referral system in place.

### *Australia*

Variations of voluntary and mandatory court-connected mediation schemes exist at federal, state and local levels.<sup>31</sup> Court-related mediation in Australia dates back to the 1980s. Today mediation is offered as a court-related dispute resolution process in almost every Australian court. Examples of voluntary schemes can be found in the Federal Court of Australia and the District Court of New South Wales, while examples of mandatory schemes are to be found in the Queensland, Victorian and Western Australian Supreme Courts, the Family Court of Australia and the Administrative Appeals Tribunal (AAT).<sup>32</sup> The developing trend is towards mandatory referral to mediation at the discretion of the court.

The models also differ in terms of how the mediators are sourced. In general, mediators are sourced in one of five ways: mediators are employed by the court, the mediation service is outsourced to an external mediation organisation, the court maintains a panel of external mediators, the parties select their own mediator, or there is a combination of the above.<sup>33</sup> The costs associated with mediation are either borne by the court (for example, when the mediator is an employee of the court) or by the parties (for example, where the parties select a private mediator).

In addition to the above-mentioned forms of court-connected mediation, reference should be made to National Native Title Tribunal (NNTT). Although the NNTT does not have a court/tribunal-connected mediation process, the principles of interest-based negotiation provide the basis of dispute resolution processes in the NNTT, reflecting an attempt by the tribunal to include traditional indigenous dispute management processes as part of the court's overall dispute management procedures.<sup>34</sup>

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31 For an overview of court-annexed mediation in Australia, see B Sordo, 'Australian Mediation Initiatives to Resolve Matters Awaiting Trial' (1994) 5 *Australian Dispute Resolution Journal* 62. On the institutionalisation of mediation in Australia, see G Hughes, 'The Institutionalisation of Mediation: Fashion, Fad or Future?' (1997) 8 *Australian Dispute Resolution Journal* 288.

32 Section 34A, *Administrative Appeals Tribunal Amendment Act 1975* (Cth).

33 H Astor, *Quality in Court Connected Mediation Programs* (AIJA, Victoria, 2001) 8-13.

34 R French, 'Role of the Native Title Tribunal' (1994) 1 *NTN* 9.

## *Germany*

Court-related mediation has not yet played a major role in German dispute resolution. In this regard, however, German practice is poised for a potentially significant change. The German parliament has recently passed a number of laws creating legal frameworks for the establishment of both voluntary and mandatory court-related mediation 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 routine mandatory court-related ADR (aussergerichtliche Streitschlichtung) with respect to certain kinds of civil disputes that would normally be heard in the Magistrates Court. Under the legislation, certain kind of disputes cannot be filed in court until a certificate indicating an attempt at mediation or ADR is presented. A number of German states have already introduced legislative schemes providing for mandatory ADR within the framework of §15a EGZPO.

In addition, effective as of 1 January 2002, § 278 V ZPO (the Federal Code of Civil Procedure) was amended to provide for court referral to ADR (aussergerichtliche Streitschlichtung) with the consent of the parties.<sup>35</sup> Within the framework of this amendment, the Ministry of Justice in Niedersachsen initiated a state-wide voluntary court-related mediation pilot project beginning in March 2002.

Accordingly, current developments in Germany indicate two distinct policy 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 effort in Niedersachsen to challenge and change the existing dispute management culture through the introduction of voluntary court-related mediation schemes.

### **Industry Specific Programs**

One indicator of the prevalence of mediation in the dispute management practice of a country is the amount of legislation relating to mediation. Court-related mediation schemes established by legislation were discussed in 3.4. Here, legislation about mediation (not related to the court) in relation to specific types of disputes or specific industries will be considered.

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35 § 278 V ZPO reads, 'Das Gericht kann die Parteien für eine Güteverhandlung vor einen beauftragten oder ersuchten Richter verweisen. In geeigneten Fällen kann das Gericht den Parteien eine außergerichtliche Streitschlichtung vorschlagen. Entscheiden sich die Parteien hierzu, gilt § 251 entsprechend'. § 251 I ZPO reads: 'Das Gericht hat das Ruhen des Verfahrens anzuordnen, wenn beide Parteien dies beantragen und anzunehmen ist, dass wegen Schwebens von Vergleichsverhandlungen oder aus sonstigen wichtigen Gründen diese Anordnung zweckmäßig ist.'

## *Australia*

In a paper delivered at the Fifth National Mediation Conference in Australia in May 2000, Altobelli identified 104 statutory instruments throughout Australia that refer to mediation or mediation-like processes.<sup>36</sup> Most of these statutes have emerged in the past ten years and the number continues to grow. While a number of these pieces of legislation deal with court-related mediation programs, the majority concern the introduction of mediation (not related to the court) to specific industries or types of disputes before the parties engage in the litigation process. Areas covered by such legislation include migration, workplace relations, health, telecommunications, postal services, environmental protection, sugar industry, commercial tenancies, housing and many other areas. For example, the *Cooperative and Community Housing Act 1991 (SA)* states that disputes arising under the legislation can only be determined by the relevant appeal authority if a genuine attempt has been made to settle it first by mediation.<sup>37</sup> Similarly, the *Farm Debt Mediation Act 1994 (NSW)* grants the farmer under a farm mortgage the option of going to mediation before the creditor may take enforcement action against the farmer.<sup>38</sup>

## *Germany*

Specific legislation on mediation is very limited in Germany. It does, however, play a role in insolvency and family matters.

In terms of insolvency, § 305 I Nr 1 of the German Insolvency Law (InsO) was introduced in 1999. The law provides creditors and debtors with the option of mediation to settle their dispute.<sup>39</sup>

With respect to family law disputes, a mediation process for the examination and confirmation of visitation rights can be found in § 52a of the German Family Procedural Law (FGG).

## **Mediation Services in the Private Sector Not Regulated by Legislation**

### *Australia*

The Australian private sector has played an active role in the development of mediation practice in Australia. There are a great many private ADR organisations. Well known ones include Leaders in ADR (LEADR), the Australian Commercial

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36 T Altobelli, 'Mediation in the Nineties: The Promise of the Past' (Fifth National Mediation Conference, Brisbane, May 2000).

37 Section 84 *Cooperative Community Housing Act 1991 (SA)*. See also *ibid*, 13.

38 Sections 8 (1) and 9(1) *Farm Debt Mediation Act 1994 (NSW)*.

39 See also T Zipf, 'Schuldnerberatung, - Vermittelnde Tätigkeit zwischen Schuldner und Gläubigern im Hinblick auf die Insolvenzordnung' (1998) 1 *Konsens* 79.

Disputes Centre (ACDC), Mediate Today, the Conflict Resolution Network, the law societies and bar associations of the various states, and the Australasian Dispute Centre (ADC) whose members represent other mediation groups as well as stakeholders.

These organisations offer a rich variety of mediation services including mediations, panels of mediators who are available to mediate disputes, mediation venues, standard mediation documentation (for example, agreements to mediate, mediation clauses), publications about mediation, and conferences. Mediations conducted by these organisations may take place within the framework of court referrals to an external mediation provider. They are also the result of a growing awareness of the need to manage intra- and inter-organisational conflict as part of an overall risk management strategy. Sourdin points to the formulation of standards for use in the prevention, handling and resolution of disputes in a business context as evidence of the growing importance of mediation in the private sector.<sup>40</sup>

As Altobelli points out, many industries have integrated mediation and other forms of ADR into their dispute management processes/grievance procedures without legislative compulsion.<sup>41</sup> Examples of these dispute management schemes include the Telecommunications Industry Ombudsman, the Life Insurance Complaints Scheme, the Australian Banking Industry Ombudsman and the National Electricity Code. Such schemes are generally focussed on resolving consumer complaints through mediation or other ADR processes.

In Australia law societies have played a very important role in the development of ADR and, in particular, mediation as a mainstream dispute resolution process. One need only recall the Settlement Weeks of the early to mid 1990s, the development of training programs, approved mediator schemes, literature on mediation and the promotion of mediation in the wider community including schools. As law societies are professional bodies that represent the interests of their members, that is, solicitors, it follows that all mediators who wish to offer their services via the law society must also be admitted to practice as a solicitor. Australian bar associations offer similar services to their barrister members.

### *Germany*

In Germany, the number of private sector mediation services on offer has risen dramatically since the mid-1990s. To date family mediation has proven to be the most practised form of private mediation.<sup>42</sup> The primary family mediation organisation in

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40 T Sourdin, 'Mediation in Australia' in N Alexander (ed), *Global Trends in Mediation* (2002) (forthcoming 2002).

41 Altobelli, above n 36, 23.

42 See H Gerwens-Henke, 'Zehn Jahre Familienmediation – Ein persönlicher Rückblick in die Anfänge' (1998) 1 *Konsens* 15.

Germany is the interdisciplinary body Bundesarbeitsgemeinschaft für Familienmediation (BAFM). In 1993 the BAFM established guidelines for mediation in family disputes. This initiative was followed by the development of a mediation accreditation program. The practice of environmental mediation has also been growing in Germany since the early 1990s both in the private and public spheres. In 1998 a national association for environmental mediation, the Förderverein Umweltmediation eV, was formed as an alliance between private and public groups.<sup>43</sup> Despite the fact that mediations of medium to large-scale commercial disputes in Germany are few in number, a small number of senior German legal practitioners and academics are determined to promote the use of commercial mediation. To date members of this group have successfully held conferences, seminars and training events and formed a number of associations and conducted a number of mediations. In 1996 the National Association for Mediation in Business and the Workplace (Bundesverband Mediation in Wirtschaft und Arbeitswelt - BMWA) was formed.<sup>44</sup> The year 1998 saw the establishment of the Society for Commercial Mediation and Conflict Management (Gesellschaft für Wirtschaftsmediation und Konfliktmanagement - GWMK), an organisation whose members largely consist of lawyers from major German commercial law firms. Finally, the Centrale für Mediation based in Cologne has fast become a national focal point for publications, training and mediation events. An overview of the rapidly growing number of mediation organisations in the German private sector reveals a tendency to form organisations according to the dispute area, for example, family mediation, commercial mediation or environmental mediation.

The German Law Society (Deutscher Anwaltverein - DAV) is also playing a growing role in the German mediation industry. Unlike its Australian law society counterpart, the DAV does not have an officer or a department devoted to the development of mediation and ADR in Germany. The DAV relies primarily on the voluntary efforts of its members. Accordingly, the potential influence of the DAV on the German mediation movement is limited.

In addition to the creation of the above-named organisations in the 1990s, there is a number of long-existing conciliation centres in various branches of German industry. Generally, these conciliation centres operate through chambers of commerce (such as the German Chamber of Industry and Trade), and industry associations (for example, in the textile, radio and television, technical and car industries). Like the government legal centres offering conciliation services (see 3.1), most of the dispute resolution processes associated with these conciliation centres do not follow an interest-based mediation model. Rather, the processes offered tend to be directive, interventionist and rights-based in nature.

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43 The Association is an alliance between the Arbeitsgemeinschaft für Umweltfragen and the Deutschen Bundesstiftung Umwelt.

44 BMWA (1998) 1 *Konsens* 75.

## Mediation Standards and Accreditation

### *Australia*

Standards of conduct and accreditation in mediation continue to be controversial issues worldwide. To date the Australian mediation industry has not been subject to national regulation. As far as regulation does exist, it is imposed by service-provider organisations and industry groups, and therefore varies from provider to provider and industry to industry. So, for example, the law societies of the various Australian States prescribe standards for education and conduct in a mediation, as do other organisations such as Relationships Australia, community justice centres and LEADR. In other words, the forces of a free market regulate the practice of mediation in Australia.

In June 2001 NADRAC (National Alternative Dispute Resolution Advisory Council) launched a report entitled, 'A Framework for Standards'. According to NADRAC, 'its approach has been guided by the need to balance the objectives and interests of parties, ADR service providers, governments and the broader society.'<sup>45</sup> In essence, NADRAC has taken the path of encouraging diversity of standards in recognition of the broad range of professional backgrounds and practices of Australian mediators. In other words, the Council has refrained from recommending a national uniform code of conduct that would regulate issues such as neutrality, impartiality, confidentiality and other ethical issues. The rationale for this policy lies in the view that 'the development, attainment, maintenance and enforcement of standards should be a shared responsibility of different parties in the ADR community, particularly in the early development of ADR'.<sup>46</sup>

In terms of the nature of programs offered to train and accredit participants as mediators, these vary from organisation to organisation. In general, the vast majority of accreditation programs comprise a four day intensive course, in which participants are required to complete a number of mediation role plays. Numerous universities and private institutions offer mediation accreditation programs.

### *Germany*

As in Australia, mediators in Germany are not subject to national regulation and, as a consequence, standards and mediation styles vary greatly. Current trends in Germany indicate the likely development of mediation accreditation and practice standards according to industry. For example, the BAFM has set out mediation standards and a training curriculum for family law mediators. Over ten German training institutes

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45 Taken from NADRAC's website <<http://law.gov.au/aghome/advisory/nadrac/ForumSynopsis.html>>.

46 Ibid.

now offer mediator training and accreditation according to the BAFM's guidelines. As such the BAFM guidelines have become the de facto national family mediation standards in Germany.<sup>47</sup> Similarly, the GWMK has established a code of conduct for commercial mediators as well as standard mediation clauses and procedural guidelines for conducting commercial mediations.

In terms of education and training, the 'mediation experience' in Germany has taken a considerably different route to that of Australia. Interestingly, many accreditation programs are being designed and offered on an inter-disciplinary basis (i.e. interdisciplinary instructors and participants) at postgraduate level. Typically the programs specialise, or give students the opportunity to specialise, in one practice area of mediation such as family or commercial mediation. For example, the European Masters in Mediation is a European education initiative that offers both lawyers and non-lawyers a postgraduate degree in mediation. The University of Hagen is the German partner in this European initiative. The Masters program consists of a one-year foundation course in which mediation is taught in an interdisciplinary context drawing from legal, communication and psychological theories. The second year allows students to specialise in particular areas of mediation such as family mediation or commercial mediation and is very practice-oriented including an exchange program with another European country.<sup>48</sup> In addition, a number of other universities and private institutions offer mediation training. Although the format of the programs varies considerably, there appears to be a trend towards one- to two-year-long programs consisting of intensive training modules of about 200 contact hours in total and opportunities for clinical practice.<sup>49</sup>

The major difference in mediator accreditation training between Australia and Germany is the depth of study and supervised practice required in order to receive a mediator accreditation certificate from a given organisation. German programs are vastly superior to the majority of Australian accreditation programs in terms of depth of theoretical study, number of supervised mediations required, assessment and number of contact hours.

## **Mediation in Legal Education**

### *Australia*

In the 1980s Australian law schools began to respond to the mediation movement by offering studies in mediation and ADR as part of the law curriculum at both undergraduate and postgraduate levels. In the year 2000, virtually all Australian Law Schools have integrated ADR into their law studies program in the form of either elective or compulsory subjects. Mediation clinics are also offered at a number of law

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47 Gerwens-Henke, above n 42.

48 N Spiegel, 'Mediation – European Style' (1998) 4 *ADR Bulletin* 8.

49 H Dilßner and B Munske, *Mediation in der Bundesrepublik Deutschland* (1996).



schools. Furthermore, a growing number of law schools now offer postgraduate certificate degree programs such as masters courses specialising in ADR. Coursework skills subjects in mediation take a similar form to the training programs discussed above.

### *Germany*

Despite a number of interdisciplinary mediation certification programs being offered at postgraduate level by non-law faculties at German universities, German law schools have been reluctant to include mediation theory or skills in law curricula. Specialised courses in mediation within the legal education curriculum are not offered on a regular basis.<sup>50</sup> In 2001 the first university mediation clinic linked to a law school was established at the Europa University Viadrina. The clinic operates within the local community as a grass-roots mediation centre using a transformative mediation approach.

The Europeanisation and globalisation of law, however, has given new impetus to legal education reform discussions in Germany. In 2001 the German Justizministerkonferenz recommended the introduction of ADR skills integration in university law curricula. Accordingly, the issue of skills integration and mediation accreditation is one that must be addressed urgently by German law schools.

### **Summary: Same Questions - Different Answers**

Despite differences in the developmental stages of mediation practice in common law jurisdictions and civil law jurisdictions, the discussion in section three of this article indicates that common themes centring on quality issues relating to structures, process and outcomes have emerged in both Australia and Germany.

Recurring *structural issues* include the continuing universal debate on standards for mediation practice and mediator accreditation; how to determine the suitability of a dispute for mediation ('fitting the forum to the fuss'); flexibility versus regulation; and the systemic challenge of how to mobilise mediation practice in the shadow of the court (for example, through court-related programs) with particular focus on the key legal stakeholders – lawyers and judges.

Related to the mobilisation of mediation in the shadow of the court, is the question of *the roles played by legal stakeholders* (lawyers and judges) in the 'new' mediation systems. Laws and ordinances in Australia, Germany and other countries now

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50 Ad hoc seminars on negotiation and mediation are offered at a very small number of law schools in Germany. See F Haft, 'Folgerungen für Ausbildung und Praxis' in W Gottwald and F Haft (eds), *Verhandeln und Vergleichen als juristische Fertigkeiten* (1993) 116, who report on the seminars at the University of Tübingen.

recognise mediation as part of the role of a lawyer and, in some jurisdictions, as part of the judge's role<sup>51</sup>. In Germany, the mediative element in the judicial role has led to one view that mediation, at least in a court-related context, is a judicial function – an example of laws having a direct impact on the conduct and context of the mediation process. What specific knowledge and skills are therefore required of a lawyer or judicial mediator in addition to those offered by 'traditional' legal education? Further, how can *accreditation* curricula be designed most usefully? How can legal education be improved to include mediation skills as an integrated part of the curriculum?

Carrie Menkel-Meadow once wrote of the many ways of mediation.<sup>52</sup> The many ways are represented by the many paradigms, models and processes of mediation. On one end of the spectrum transformative mediation emphasises the importance of recognition and empowerment of parties and communities, while on the other end evaluative or legal mediation focuses on rational problem-solving with a mediator (often a lawyer-mediator) as content and process expert. The significant discrepancy between the practice of mediation (for example, mandatory mediation, evaluative/positional mediation) and the theory of the mediation process (for example, voluntary process, interest-based) is one of the major challenges facing the future of mediation in terms of *process quality* in both Australia and Germany. The theory-practice gap is arguably more pronounced in court-related mediation where lawyers or judges often play a role in the mediation process.

In terms of *outcomes* one of the key issues is whether, and if so, to what extent, the policy aims of mediation, such as improving access to justice, reducing court waiting lists and increasing consumer satisfaction with the legal system, have been fulfilled and can be fulfilled. While Australian research is piecemeal but generally positive, there is virtually no data available in Germany at this stage.

The fact that these themes recur time and time again, not only in Germany and Australia but in every legal jurisdiction that has participated in the modern mediation movement, reflects the universal application of mediation.<sup>53</sup> At the same time legal, political and cultural differences have affected and continue to affect overriding structural issues such as mobilisation of mediation and its effect on access to justice leading to different answers for the same questions, and different solutions for the same global challenges.

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51 In Germany see § 18 BORA on the role of the lawyer and see § 278 V ZPO on the role of the judge. In Australia, see the rules and guidelines of the Law Council and the various State Law Societies regulating standards of conduct for lawyer mediators, for example, Queensland Law Society, Code of Conduct for Solicitor Mediators 1994.

52 C Menkel-Meadow, 'The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices' (1995) *Negotiation Journal* 217.

53 W Gottwald, 'Alternative Streitbeilegungsformen: Erprobungsspielräume für gerichtsverbundene Modellversuche' (2000) 1 *Bremer Beiträge zur Rechtspolitik* 46.

The primary differences in the German answers to the universal questions relating to the development of mediation practice are primarily structural in nature and centre on the following themes:

- The level of legislative regulation in the infancy of the mediation movement;
- Demarcation of mediation industry according to the subject-matter of the dispute;
- The role of legal stakeholders, especially judges; and
- The nature of accreditation programs.

In the next section I will explore the reasons for these differences by discussing the six hypotheses outlined in section one.

## **Six Theses Explored**

The following six theses focus on structural issues in the German legal system compared with the Australian. These structural issues impact directly on the development and the conduct of the mediation process in practice.

### **The Civil Law Cultural Tradition**

*Thesis:* The German legal culture, steeped in the civil law tradition, restrains the development and acceptance of mediation.

Whereas the tradition of the common law has been a piecemeal development of court decisions (case law), the civil law drew upon Roman law and as such is founded on doctrinal law, that is, law laid down by scholars in an abstract and complete (no gaps) codified form. The German legal scientific revival of the late nineteenth century influenced the revisions of civil codes through Europe, resulting in an even greater focus on the theoretical and scientific approach to law. The systematic and conceptual approach to making law has been adopted throughout the legal system by scholars, legislators, lawyers and judges. Merryman argues that the conceptual structure of civil law jurisdictions and its inherent unstated assumptions about law and the legal process deeply affect how legal stakeholders think and work. As a point of comparison, he points out that attempts in England and the United States to emulate German legal science towards the end of the nineteenth century failed. The reason, he suggests, lay in the fear that the introduction of systematically rigid concepts of law and order would sacrifice the ability of the common law system to adapt flexibly to the ever-changing needs of an increasingly complex society.<sup>54</sup>

Furthermore, the legal system must be considered within the broader context of state authority. Whereas common law is based on a populist and democratic view of state authority, Damaska argues that civil law procedure is based on a hierarchical

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54 J Merryman, *The Civil Law Tradition* (1969) 85.

bureaucratised view of state authority.<sup>55</sup> In the same vein and discussing general cultural tendencies, Dagtoglou suggests that Anglo-Americans see state authority as a restriction on their personal freedoms, compared with Europeans, who consider state authorities have an obligation to citizens to maintain social values and to provide social order and services.<sup>56</sup> In the case of Germany, the authors of the post WWII German Basic Law (Grundgesetz) were determined not to allow a re-occurrence of the national-socialist regime. Accordingly, the German Basic Law incorporated social justice and democratic values that, according to Hoffmann-Riem, oblige the State to go further than providing a legal framework within which citizens can settle disputes 'on the free market'. In other words, the German Basic Law obliges the German State to set societal values of what is right, what is wrong and what is just. The continued proliferation of complex German laws in all areas of human interaction has led to the expansion of the German social justice state and the expectation amongst disputants that the paternalistically interventionist State will set and enforce norms. Therefore, where the American or the Australian would expect services from the private sector, the European would expect the same services to be provided by the State.<sup>57</sup> Topical examples include higher education and dispute resolution. Additionally, Rueschemeyer suggests that the tendency to prefer an expert judicial solution to a conflict is linked to the negative view held by the middle and upper classes for openly dealing with conflict in the community.<sup>58</sup>

Resistance to mediation in Germany and other civil law nations has been as persistent and unyielding as civil law legal systems themselves. The discussion about the constitutionality and legal validity of mediation in the German legal system, with its constitutionally-anchored social justice and democratic values,<sup>59</sup> dominated much of the academic debate in the 1990s. Meanwhile, mediation had already become part of mainstream dispute resolution in many common law jurisdictions. This preoccupation with resisting the entry of mediation as a legitimate dispute resolution process in the legal system has had a direct impact on how the mediation movement in Germany and other civil law nations has developed today. Initially, mediation services and training were offered primarily by non-lawyers (for example, psychologists, business consultants, counsellors). This has influenced the predominant mediation model taught through civil law countries and the nature of mediation training. A transformative/facilitative model that does not allow for separate meetings is commonly taught in mediation accreditation programs, and as described earlier in this article such training is considerably more theory-based, detailed and lengthy than the

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55 M Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986) 17.

56 P Dagtoglou, 'Diskussionsbeitrag' in Hoffmann-Riem and Schmidt-Assmann (eds), *Konfliktbewaeltigung durch Verhandlungen* (1990) 324.

57 Ibid.

58 D Rueschemeyer, 'Lawyers and their Society' in V Gessner et al (eds), *European Legal Cultures* (1996) 274.

59 See Art 28 I of the German Basic Law (Grundgesetz).

majority of training available in common law jurisdictions. In addition, the training generally has a solid inter-disciplinary foundation with most courses being offered by trainers from diverse disciplinary backgrounds. The strong theoretical approach reflects not only a civil lawyer's thinking but also a culturally defined approach to education and training across all disciplines throughout Germany.

Despite early resistance to mediation, mediation broke through the civil legal ceiling in the latter half of the 1990s. At this point the legal profession sought to define, regulate, institutionalise and monopolise the same mediation process they had for so long resisted.

### **The Regulation and Perception of the Legal Profession**

*Thesis:* The highly regulated German legal profession has discouraged lawyers from embracing mediation as an alternative to litigation (the regulation of the legal profession).

I don't want a lawyer to tell me what I cannot do; I hire him to tell me how to do what I want to do.

J Pierpont Morgan (1837-1913), US financier

Perhaps it was fortunate for Mr Morgan that he lived in a common law jurisdiction rather than a civil law one. Lawyers, irrespective of jurisdictional background, are not generally considered to be innovation leaders or entrepreneurs. Nevertheless, there are significant distinctions between the perceptions of common law and civil law lawyers. In comparison to their civil law counterparts, common law lawyers are perceived to be pragmatic problem-solvers; civil law lawyers, on the other hand, are systems-based theoreticians whose formalistic focus inhibits innovation, flexibility, lateral progression of the legal system and, on a day-to-day level, their ability to serve the real interests of their clients.<sup>60</sup> The rapid growth of Alternative Dispute Resolution, and mediation in particular, has been a reflection of the need to offer clients dispute management processes that better serve their real interests. It seems that common law lawyers operate in a system that enables and even encourages them to think and act in a client-focussed manner against a backdrop of constant socio-political change.

Unlike Australian lawyers, German lawyers have not always been part of a private profession. In the eighteenth century private lawyers were banned and the role of lawyers was exercised by court officials called Justizräte (judicial advisors). As such lawyers were part of a public profession. Today the rules of the legal profession are to be found in the BRAO and BORA. These rules outline the functions, obligations and duties of German lawyers. §1 BRAO states that lawyers are organs of the judicial system (Organe der Rechtspflege) thereby highlighting a lawyer's contribution to the

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60 J Fleming, *Barbarism to Verdict* (1994) 210.

overriding function of the extensive and highly efficient court system (see 5.3), rather than lawyers' roles as service-providers to their clients.

The fragmented framework within which the legal profession is educated and operates further highlights the rigid structure of the German legal profession. To illustrate this point consider the roles of the judge and the lawyer. Whereas in the common law tradition judges are appointed from the ranks of lawyers, the civil law tradition promotes the concept of a career judge. In other words, graduates choose a career as a lawyer or as a judge and there is no movement between the two professions. Similarly, it is highly unusual for practising lawyers to move laterally into academia in the civil law tradition. This occurs with much greater frequency in common law jurisdictions. A strict sense of order and categorisation can also be seen in the impenetrable division of the study and practice of law into private, public and criminal law. One is either a public lawyer, a private lawyer, or a criminal lawyer – dabbling in more than one of these categories is neither encouraged nor in some cases permitted.

Mediation is a process which, at grass roots level, aims to de-legalise conflict and thereby abandon legal typologies for conflict. Such a strict and historically embedded adherence to abstract legal classification lays the slats for the Procrustean bed into which the mediation process is laid. It hinders the experimentation and innovation associated with the infancy of the common law mediation movements. Further, it explains the strong trend for German mediation service and training organisations to form and set standards of conduct and training criteria according to legal dispute typology. While a number of mediation organisations in Australia focus on dispute practice areas such as family law, the early years of Australian mediation were distinguished by the general nature of mediation services and training with specialisations being a gradual and later development in limited areas such as family law.

An interesting study by Wasilewski has shown that larger German law firms show a higher rate of settlement than smaller ones.<sup>61</sup> Larger firms have a greater ability to adopt a strategic and business approach to managing a law firm and servicing clients' needs than a sole practitioner trained in specific legal expertise suitable for court resolutions. Until 1994 constraining regulations regarding size and composition of German law firms resulted in a disproportionately high percentage of sole practitioners and very few larger law firms (that is, between five and 10 partners). National law firms were not permitted. With the relaxation of these regulations in 1994, the legal landscape has gradually begun to change along with the attitude of the German legal profession to mediation.

One of the pragmatic obstacles still standing in the way of the growth of mediation practice is the legal fee structure in Germany. Essentially, lawyers are paid a

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61 R Wasilewski, *Streitverhütung durch Rechtsanwälte* (1990) 92.

percentage of the value of the dispute irrespective of the time spent solving it.<sup>62</sup> Where a mediator is employed, the costs of solving a legal dispute may well be more for the client, although the fees will generally be the same for the lawyer. Add to this the widespread use of legal costs insurance and one is left with a situation where:

1. The costs of court resolution but not of a mediation are met by the insurer;
2. There is an additional financial burden on clients relying on legal costs insurance payments if they choose mediation;
3. Lawyers will earn the same amount whether or not they go to mediation. With a very efficient judicial system, the risk of not settling at mediation may result in a greater investment of time for the same financial reward.

Finally, the controversial and often heated lawyer versus non-lawyer debate has assumed particular importance in Germany due to the existence of the Rechtsberatungsgesetz (The Law on Legal Advising) that provides lawyers with a monopoly in all matters involving legal advice-giving.<sup>63</sup> Recently, a number of German court decisions have endorsed the view that as mediation is part of a lawyer's role (§18 BORA) and may involve the provision of legal advice, it falls within the terms of the Rechtsberatungsgesetz. Therefore according to Article 1 §1 Rechtsberatungsgesetz, unless otherwise expressly authorised by law, lawyers are the only professional group permitted to conduct mediations.<sup>64</sup> If this judicial trend continues then much of the current debate concerning establishing standards for an independent profession of mediators will become superfluous as codes of conduct for lawyers will be widely applied.

### **The Efficiency of the German Legal System**

*Thesis:* The time and cost efficiency of the German legal system means that the promise of time and cost savings will not motivate stakeholders.

Gottwald points to the *key role of the legal profession* in the mobilisation of court-related mediation and its influential position at the crossroads between 'out-of-court' and 'in-court' dispute resolution.<sup>65</sup> In comparison to their German counterparts, Australian

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62 The percentage is calculated according to the German Regulations for Lawyers' Fees (BRAGO).

63 On the German debate concerning the Rechtsberatungsgesetz, see R Strack, 'Mediation und Rechtsberatung' (2001) 4 ZKM 184, and B Eckhardt, 'Nichtanwaltliche Mediation als verbotene Rechtsberatung?' (2001) 5 ZKM 230. The accreditation debate includes issues such as whether or not mediators require a tertiary qualification, and if so which qualification – law, sociology and psychology are always prominent contenders: Astor, above n 12, 19.

64 See, for example, OLG Rostock (2001) ZKM 192; LG Hamburg (2000) NJW 1514; OLG Hamm MDR (1999) 836.

65 On changing the dispute management culture to increase demand for mediation services, see E Blankenburg and J Stock, *Endbericht: Sekundäranalyse der Literatur zur*

lawyers and judges have come to embrace ADR as mainstream dispute resolution. The German legal profession and judiciary, on the other hand, still have a very narrow understanding of the qualities and potential of mediation.<sup>66</sup> The entire question of mobilising mediation as a potential light in the shadow of the court is extremely challenging and fascinating within the context of an Australian-German comparison. The mobilisation of mediation in Australia (and indeed in the United States) 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.<sup>67</sup> It is 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. Therefore the political 'push' for mediation to increase access to justice has not occurred in civil law countries to the same extent as it has in common law jurisdictions.<sup>68</sup> Nevertheless, current reform discussions in Germany are focusing on ways to make mediation more attractive than going to court, for example, by introducing costs incentives for lawyers to go to mediation. In this context, there is a risk that 'transplanting' successful Australian mediation referral models to Germany may limit disputants' ability to access German courts and therefore inhibit overall access to justice.<sup>69</sup>

### The Language of Mediation

*Thesis:* The absence of uniform terminology has led to confusion about the meaning of mediation in Germany.

Within the German language, there is inconsistent use of ADR terminology. Indeed, no precise word for the term mediation, exists in the German language. German words that are used to describe mediation include the terms Schlichtung and

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*aussergerichtlichen Streitbeilegung* (1999) 55. On mobilising stakeholders, see W Gottwald, 'Alternative Streitbehandlungsformen: Erprobungsspielräume für gerichtsverbundene Modellversuche' (2000) *Bremer Beiträge zur Rechtspolitik* 44, 47, 64.

66 N Spegel, 'Australian Lawyer Attitudes to Mediation' (1998) *NLR* 1; A Zariski, 'Survey Finds Strong Support for ADR' (1997) 17 June *Proctor* 29-31; T Trenczek, 'Königsweg oder Irrweg? TOA als Handlungsinstrument von Justiz und Jugendhilfe' in TOA-Servicebüro (ed), *Grenzen verschieben – Mit dem TOA auf dem Weg zu einer bürgernahen Rechtspolitik* (2000) 104.

67 For Australian law reform discussions suggesting the adoption of certain features of the German legal system see: A Marfording, 'Early Resolution of Disputes in Germany', *Civil Litigation Reform Conference Paper*, Brisbane 1996.

68 Alexander, above n 15, 220-234.

69 On the possibility of limiting access to justice through mandatory mediation models, see S Breidenbach, *Mediation: Struktur, Chancen und Risiken von Vermittlung in Konflikt* (1995) 233; R Ingleby, 'Court Sponsored Mediation: The case against mandatory participation' (1995) 56 *Melbourne Law Review* 441.



Vermittlung. Schlichtung is translated in English/German dictionaries as arbitration. Yet, there exist fundamental conceptual and practical differences between the two processes. Common usage of the word Schlichtung can refer to mediation, conciliation and arbitration collectively, or alternatively any one of the three processes. Vermittlung, on the other hand, is typically used to describe people involved in brokering deals, for example real estate agents. Therefore, to advertise oneself as a Vermittler may be confusing and even misleading for potential clients. Accordingly, many practitioners and academics have adopted the word mediation. While it is now commonly used in German literature and at conferences and training, one still finds frequent use of the word Schlichtung, particularly amongst lawyers and in recent legislation. Apart from contexts in which arbitration is specifically meant, Schlichtung generally suggests a more evaluative and legalistic form of mediation. In the mid 1990s Hill<sup>70</sup> commented that '[m]any European lawyers are not aware of the fact that there are specific mediation techniques, and regard mediation just as an extra expense, which will lead nowhere.' In a nation, which has a strong tendency towards regulation and precision, the continued use of the ambiguous term Schlichtung, in an uninformed market place may set a dangerous precedent for the practice of mediation.

A popular German ADR slogan reads: Schlichten ist besser als Richten (ADRing/Mediating is better than adjudicating). Clearly the rhyme, which is missing in the English translation, creates a catchy phrase that rolls easily off the German tongue. The message, however, is confusing because Schlichten has so many different meanings.

### **The Settlement Function of the Judicial Role**

*Thesis:* The settlement function of the judicial role in the German civil tradition has been confused with mediation.

German judges are required by law to attempt to settle a matter before hearing the case. This requirement has a long tradition in Germany and other civil law countries. In Germany the relevant section of the German Law on Civil Procedure (ZPO) is § 279. By comparison, no such legal requirement exists in Australia or other common law jurisdictions, although judicial attempts to get parties to settle may occur in some common law jurisdictions as a matter of practice rather than law.

Strictly speaking the civil law judicial 'settlement' function is not a form of court-related mediation, as it takes place within the courtroom and is conducted by the judge, who will directly hear the matter. In practice, judges' attempts to encourage parties to settle are very legalistic and interventionist. In fact, the majority of judges do not engage in a process that could be compared with facilitative mediation.<sup>71</sup>

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70 R Hill, 'Non-Adversarial Mediation' (1995) 12 *Journal of International Arbitration* 137.

71 See D Treuer, 'Impressionen über den gerichtlichen Vergleich' in W Gottwald and F Haft (eds), *Verhandeln und Vergleichen als juristische Fertigkeiten* (1993) 116; H Rottleuthner,

Nevertheless this 'mediative' function of the judicial role has led to one of two views amongst the members of the German judiciary: (1) Mediation already occurs in the courtroom and therefore court-related programs are unnecessary; or (2) As mediation is, as a matter of law, part of the judicial role, judges are the natural and rightful mediators of disputes that would or could otherwise be determined by a court of law.

In addition, the fact that if the parties do not settle, the same judge will hear the case forthwith places the judicial settlement function a world apart from court-related mediation in common law jurisdictions. In fact, if a German judge were to conduct an interest-based mediation resulting in non-agreement, adjudicating the same matter would pose a significant ethical dilemma.<sup>72</sup> After parties' disclosure of legal and non-legal interests and discussion of options for resolution, the judge would be required to banish all that she has heard from her mind to focus only on the legally-relevant points in order to make a decision correct in law. Even if this were humanly possible, the parties, knowing the immediate procedural effect of non-agreement, would be reluctant to engage in the full and frank discussion so integral to the success of the mediation process.

Finally, the settlement function of the German judge must be consistent with the overall objective of the judicial role, namely to find a legal solution for the disputants. According to Art 20 II of the German Basic Law the judicial role is bound by law and justice. Therefore, even while exercising their settlement function, German judges are required to lead parties towards a solution consistent with the relevant legal norms. This is not mediation. The above discussion has shown how confusion about the judicial role and mediation has impacted upon the modern mediation movement in Germany.

### **The Theoretical Nature of German Legal Education**

*Thesis:* The highly theoretical and rigid nature of civil law education in Germany has hindered the integration of mediation skills into law curricula.

In contrast to the situation in Germany, Australian university education plays a major role in the development of knowledge, understanding and skills of future lawyers in the area of mediation. Mediation courses at universities have undergone a period of major growth and attracted significant interest from both students and employers of lawyers. Furthermore, indications are that this interest is likely to continue and even

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'Alternativen im gerichtlichen Verfahren' in E Blankenburg, W Gottwald and D Stempel (eds), *Alternativen in der Ziviljustiz: Berichte, Analysen, Perspektiven* (1982) 145; R Rogowski, 'Die aktive Rolle des Richters im Prozeß•vergleich: Überblick über die rechtssoziologische Forschung zur vermittelnden Rolle des Zivilrichters in der Bundesrepublik Deutschland' in E Blankenburg, W Gottwald and D Stempel (eds), *Alternativen in der Ziviljustiz: Berichte, Analysen, Perspektiven* (1982) 171.

72 W Gottwald, *Streitbeilegung ohne Urteil* (1981) 68.

increase. The selection of subjects at universities at both undergraduate and postgraduate level continues to expand as even more specialisations are offered.

On the other hand, law faculties in Germany have resisted offering courses in mediation on a regular basis. In part, this state of affairs reflects the slow development of mediation practice in the German legal market-place. Another part of the answer lies in the structure of German legal education.

The structure of German legal education is embedded in its civil law traditions. 'The universities in civil law countries have been central to legal education for many centuries. Law (together with medicine and theology) was one of the first faculties established at the ancient European universities – for example at the University of Bologna in 1088.'<sup>73</sup> In Germany the nature of legal education, called the study of 'legal science' (Rechtswissenschaft), reflects the highly theoretical and scientific approach to law, which is integral to the civil tradition.

German legal education is organised around two sets of final exams, the first of which occurs at the end of between four and six years of study (Erstes Staatsexamen); the second occurs two years later (Zweites Staatsexamen) and qualifies the graduate for admission to the legal profession. The German government, without input from the universities, conducts both sets of exams. In other words, from a student's perspective it is important to study the topics that the government exams are likely to include. Mediation, and other skills subjects, are not examined by the state. Accordingly, despite real interest, many students make a calculated decision to focus on courses that are directly relevant for their exam. Moreover, professors offering mediation courses at law schools must do so in addition to their normal teaching load.

Whereas the LLM is a popular postgraduate degree program for many Australian lawyers, and is the primary degree undertaken for lawyers wanting to specialise in ADR, there is no German equivalent of an LLM for German lawyers.<sup>74</sup> German lawyers wanting to undertake postgraduate study will enrol for the equivalent of a Ph.D – a degree that lends itself to complex scientific legal study rather than skills development.

In contrast, lawyers in the common law tradition acquired their knowledge and skills through a form of apprenticeship and practical training. In fact the first professorial appointment in law in the common law world was given to Blackstone in 1758. The possibility of studying law at university existed from this date, but the apprenticeship system existed in parallel and continues in various forms today in a number of common law jurisdictions including Australia.<sup>75</sup> As a result, legal education in

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73 D Weisbrot, *Australian Lawyers* (1990) 119.

74 Note, however, that many German law schools offer LLM programs for law graduates from common law countries.

75 ALRC, *Review of the Adversarial System of Litigation: Issues Paper 21* (1997) 14.

common law countries such as Australia adopts a pragmatic, problem-solving approach with a strong skills focus. Although ADR skills have only been a recent addition to law curricula in Australia and other common law nations, advocacy as a lawyering skill has a strong tradition in common law legal education.

Accordingly, the transition of law schools to embrace ADR theory and skills as an integral part of a law curriculum has been easier in Australia than Germany. Until the structure of German legal education changes, German lawyers of tomorrow will remain ill-equipped to deal with the changing dispute resolution environment.

### **So, What's Law got to do with it?**

Law is much more than a uni-dimensional set of rules and regulations. In the words of Merryman, 'The law is rooted in culture, and it responds, within cultural limits to the specific demands of a given society in a given time and place....Substitution of one legal tradition for another is neither possible nor desirable<sup>76</sup>, ... just as, I would add, substitution of one dispute management culture for another is not.

The six theses presented in this article probe the legal, political and cultural forces at work in the development of the modern mediation movement in Germany from a comparative perspective. The differences between the common law (for example, Australian) and civil law (for example, German) legal systems mean that, in particular with respect to structural issues, common law success stories may not necessarily directly translate to civil law success stories. Nevertheless, the civil law world looks to the common law jurisdictions such as Australia and the United States for trend indications, policy ideas, evaluations of pilot and continuing projects in the field of mediation. Why? First, because the universal nature of the mediation process itself means that while differences in legal systems must be considered, such difference does not inhibit valuable comparative research, and second, because at this stage there is nowhere else to look. There is, however, a real risk associated with an ad hoc pattern of international comparison and policy transfer in a field as new as mediation. Which success stories are likely to translate and which are not? A comprehensive understanding of both mediation and the legal, political and cultural constructs in which mediation is embedded are required to approach this question. At the same time the benefit of insight works both ways. As this article has demonstrated, mediation developments in Germany have differed from Australian developments in a number of areas such as the development of mediation institutions, the debate on the role of lawyers in mediation, and the rate of regulation of mediation.<sup>77</sup> The common law world can also learn from the European early experiments and experiences with mediation systems.

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76 J Merryman, *The Civil Law Tradition* (1969) 157.

77 N Alexander, 'Die Institutionalisierung von Mediation – Entwicklungen in den USA, Australien und Deutschland' (2001) 4 ZKM 162 – 167.

With the global trend towards the institutionalisation of mediation, law will continue to have more to do with mediation. Simultaneously, converse trends towards globalisation and seamless transacting require flexible dispute resolution processes that transcend national systems. In this regard, the comparative lessons from the binary analysis of Australian and German mediation developments provide valuable and timely conceptual challenges for the world stage.