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Global trends in mediation

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Editorial

Global trends in mediation

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SPECIAL ISSUE on global trends in MEDIATION

Mediation is a process both new, in terms of its emergence in the legal arena, and old in terms of its timeless universality. From its birth in the western world, mediation has travelled a winding and often challenging path through common law and then civil law jurisdictions. Suggestions that mediation would be nothing more than a short-lived fad have been short-lived themselves. At the same time many critical questions about mediation process, mediation structures and environment, and mediation outcomes have yet to be explored from a global and comparative perspective.

The civil law/ common law dichotomy has always been a fascination for comparative lawyers. While some writers maintain that strong differences have always existed between these two great legal traditions, others challenge these traditional beliefs with the view that the perceived differences are far more illusory than real.[1]

This special issue of the Bulletin comprises contributions on the modern mediation movement from eight countries: Australia, Denmark, Italy, England and Wales, the Netherlands, South Africa and the US. The essays are drawn from the forthcoming publication, *Global Trends in Mediation*, due for publication in August 2003. *Global Trends*, the book, comprises a collection of national essays by leading ADR academics and practitioners from Australia, Canada, England, Scotland, South Africa, Germany, Austria, Poland, the Netherlands, Belgium, Italy, Switzerland, Yugoslavia, Denmark and the US.[2]

Mediation has grown rapidly in many common law jurisdictions such as the US, Australia, Canada, England and Wales since the 1970s and 1980s. The current state of mediation practice in most common law jurisdictions can be traced back to the establishment of community justice centres in the 1970s and 1980s.

In contrast, civil law jurisdictions have displayed, until recently, a greater reluctance to embrace the practice of mediation to resolve legal disputes. Compared with the common law experience, mediation in jurisdictions such as Austria, Quebec, Denmark, Belgium, Scotland, Germany, Italy, Poland, Switzerland and Yugoslavia has travelled, and is still travelling, a more difficult and winding path to recognition as a legitimate and valuable alternative to litigation. Recently, however, the European Union has signalled a strong focus on ADR and, in particular, mediation. It has declared ADR a 'political priority', published a Green Paper on ADR in Civil and Commercial Law and contributed to the development of online dispute resolution infrastructure.

It is useful to point out that not all common and civil law jurisdictions confirm these systemic patterns. The cases of the Netherlands and South Africa provide exceptions. The Netherlands, although stemming from a civil law tradition, has historically taken a proactive approach to legal reform, borrowing from both civil law and common law jurisdictions. Compared with most other civil law jurisdictions, the Netherlands has a well-established system of pre-trial conflict handling mechanisms. As a result, mediation developments in the Netherlands have been able to slide into the existing pre-trial structures and mediation has enjoyed success earlier in the Netherlands compared with other civil law countries.

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South African lawyers essentially apply a common law process to laws drawn from the civil codes of European jurisdictions. The system is a kind of uncodified civil law, which coexists with traditional community dispute management such as the *makgotla*. While the legal profession in South Africa has been hesitant to embrace the mediation of civil legal disputes going before the courts, the fall of the apartheid system has opened the entire spectrum of human rights, discrimination, constitutional, environmental and intergovernmental issues to ADR and put mediation very clearly on the South African map.

Despite differences in the developmental stages of mediation practice in both common law and civil law jurisdictions, common issues are the *structure*, *process* and *outcomes* of mediation.

Recurring *structural* issues include how aspects of the regulatory framework such as civil procedure law, government policy, regulation of fees, laws on mediation and mediators, and mediation referral systems impact upon the mobilisation and actual practice of mediation. The debate about the extent to which it is useful to regulate mediators and mediation practice reflects the quest to find a balance between flexibility and diversity, on one hand, and consistency, on the other.

The significant discrepancy between some mediation practices (for example, mandatory mediation, evaluative mediation) and mediation theory (for example, voluntary, interest-based process) is one of the major challenges facing the future of mediation in terms of *process* quality. The theory/practice gap is arguably more pronounced in court related mediation where lawyers and judges can 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 objectives of court related mediation, such as improving access to justice, reducing court waiting lists and increasing consumer satisfaction with the legal system, have been fulfilled.

This Special Issue on global trends looks beyond our Anglo-American ADR world and offers an insightful snapshot of global trends and national nuances in relation to the quality issues of mediation process, structures and outcomes.

I would like to thank Ms Anca Butcher for her valuable editorial assistance in the preparation of this Issue. ●

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Endnotes

1. See R Sacco 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 *Amer J Comp L* 1, 3, and also A Marfording `The Fallacy of the Classification of Legal Systems: Japan Examined' in V Taylor (ed) *Asian Laws Through Australian Eyes*, LBC, Sydney, 1997, p 65.
2. Alexander, N (ed) *Global Trends in Mediation*, Dr Otto Schmidt Publishing, Cologne, August 2003 (forthcoming).

contributions

Contributions to the **ADR Bulletin** for 2003 are welcome

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