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Broadening the comparative vision in ADR

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Editorial

Broadening the comparative vision in ADR

Laurence Boulle

Much of the comparative ADR discussions in Australia refer to the two Uniteds – the UK and the US. The latter was a source of inspiration in the early days of ADR development in this country and the former has, after a late start, come to constitute a valuable source of comparative wisdom. There is some inevitability in these comparative perspectives, given historical, cultural and political realities.

Nevertheless there is a much wider source of comparative insight and analysis for mediators and ADR practitioners interested in developments abroad. In the past few years this Bulletin has published articles on ADR developments in New Zealand, Indonesia, Denmark, Canada, South Africa, Germany, France, China, the Netherlands, Sri Lanka, Austria, Italy, Ireland and China, among others.

In the current issue there are articles on ADR in Slovenia, a relatively new country in Eastern Europe where the development of judicial dispute resolution is topical, and in New Zealand where the authors describe significant universal issues relating to the development of a mediation Act.

There can only be great benefit to the development of ADR in Australia from these comparative insights. Dispute resolution is one of the oldest forms of sociological behaviour. Both traditional and developed societies have had to evolve appropriate processes of immense variety to maintain their social systems and to redress the needs of individual disputants.

The traditional dispute resolution systems in Africa and Asia provide important lessons in the treatment of communal and collective disputes where the individualistic assumptions of Western dispute resolution are not applicable. These principles are increasingly required in areas such as native title, employment, industrial

relations and residential communities where continuing collective relationships are evident. In relation to the more individualistic disputes, in family, commercial and property matters, there are sources of wisdom beyond the Anglo-American models, particularly in Europe and South America.

An example of the advantages of comparative developments abroad is found in a recent decision of a court close to home. This is the judgment of the New Zealand High Court in *Acorn Farms Limited v P and D Schnuriger* (M 136/02, 22 May 2003) in a case where there was confusion over whether conciliation or arbitration had been conducted. In the course of alleviating the confusion Fisher J made some interesting comments on these endless definitional issues and their implications.

In *Acorn Farms*, a farmer, not altogether conversant with New Zealand English, had signed an agreement containing a dispute resolution clause requiring 'conciliation' first followed by 'arbitration'. At a later stage the parties agreed to engage the services of an external intervener who would act initially as a mediator and, if that was unsuccessful, as an arbitrator. The dispute resolution process took place over a number of sessions and involved the 'presentation' of evidence by all parties. The intervener issued an award and the farmer applied to court to have it set aside on the grounds that he was confused about the nature of the process and did not adequately present his case. In essence he thought that he was participating in a conciliation or mediation and for this reason did not call a witness who was critical to his case.

In dealing with these issues Fisher J made some interesting comments on



the relationship between mediation and arbitration. He first dealt with the age-old definitional question, and adopted roughly the NADRAC categories of facilitative, advisory and determinative processes. He then noted that the function of an arbitrator, as one who makes final determinations, has natural justice implications for the process which is followed. The Court then critically discussed arrangements in which the same person, as in the present case, acts first as mediator/conciliator and then as arbitrator. While acknowledging the demand for such processes, and their availability in different contexts, he drew out the natural justice implications of the mediator/conciliator making comments on the merits of the dispute or the arbitrator using information given in the separate meetings. These eventualities require a range of precautions, such as

informing the parties, avoiding separate meetings, avoiding expressions of final views until all the evidence has been presented and providing additional opportunity for the parties to present their cases if the process moves into arbitration.

On the facts of the case the Court found against the farmer on the basis that procedural justice had not been denied to him. Of more significance is the fact it shows how the hybrid med-arb process requires that some of the procedural fairness principles associated with arbitration be guaranteed during the mediation process. This has interesting implications for the future development of med-arb processes in many contexts. ●

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