Comparative ADR

From common law to civil law jurisdictions: court ADR on the move in Germany

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

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

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

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

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

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

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

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

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

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

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

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

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

§15a EGZPO does not mention the term ‘mediation’. Rather it chooses to use broader terms for consensus based ADR, namely ‘Schlichtung’ and ‘Streitbeilegung’. Nevertheless, all relevant background papers, commentaries, conference discussions and literature suggest that exceptions to mandatory ADR, to avoid going to ADR,\(^9\) (2) the temptation to ‘push’ quick settlements in light of flat rate mediator payment schedules with a bonus for settling a dispute;\(^10\) and (3) the ability for States to avoid implementing the mandatory nature of the system by choosing not to enforce penalty provisions for non-attendance at an ADR session.\(^11\)

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

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

Model 1 is likely to promote a settlement or evaluative mediation model. Model 2 is likely to perpetuate the work of the Schiedsleute tradition, which has enjoyed a strong tradition in a number of German States such as Nordrhein-Westfalen. While Schiedsleute is best translated as ‘conciliators’, empirical research on their practices reveals a strongly directive ADR model, sometimes reflecting a conciliation model and other times reflecting wise advice giving or early neutral evaluation.\(^12\)

Model 3 is essentially a combination model. Organisations or institutions may apply for approval as an ‘ADR organisation’ and thereby become eligible to mediate under the mandatory scheme. To date approved organisations include lawyer and Schiedsleute organisations, and community mediation centres. Accordingly, a wide spectrum of mediation styles is likely to be observed.
employed under this model.

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

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

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

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


10. See, for example, Art 13 BaySchG. For a critique of the Bavarian Model see Alexander above note 7.


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Dealing with 'mediation block' distress calls

Online ADR comes to Australia

Margot McKay and Bernadette Murray

All experienced mediators have been in the situation where an agreement is in sight, but neither of the parties wanted to be the first to make their offer or demand. If you have ever conducted a mediation and couldn’t get the parties to agree on a settlement amount and wondered if there was a better alternative, then the answer has arrived.

A new and innovative online financial claims settlement service, which is available on or off the internet, has been introduced into the Australian mediation market.

Settlement Online System (SOS) was developed by two lawyers and mediators, Margot McKay and Bernadette Murray. Our interest in devising the process stemmed from our involvement in mediation and alternative dispute resolution and a desire to find a more efficient and cost effective way of resolving financial disputes.

A tool for mediators

We regard SOS as a mediation tool which can form an important part of a mediator’s toolkit aimed at achieving successful outcomes. SOS can also broaden a mediator’s skill base and enhance a mediator’s reputation for resourcefulness and innovation.

The SOS service offers a confidential, automated negotiating process that encourages both parties to a financial dispute to reach a fast, cost effective final settlement.

If settlement is reached, it is legally binding. If settlement is not reached, the status quo reverts to the prenegotiating position, and both parties can have confidence that their prior rights are intact as neither party ever sees what the other party has offered or demanded.

What are the benefits?

SOS has been developed to avoid the protracted and frustrating processes of financial settlement that can occur within the context of both mediation and litigation. Its developers believe, based on the use of similar systems overseas, that this online alternative financial resolution process will save time, money and sanity for mediators and the parties to a mediation.

In the spirit of ADR, SOS offers a process of resolving financial disputes by consensus rather than confrontation. SOS speeds up the crucial negotiating process that is frequently the main sticking point to a mediated settlement. It takes the subjective, confrontational and entrenched positioning elements out of the equation.

In mediated insurance claims, SOS has been used by mediators who have hailed it as an inexpensive and easy to access process that has saved time, administration and associated cost overheads for both the insurer and the claimant.

How it works

Disputing parties register through the SOS website at <www.settlementonlinesystems.com.au> and, after verification of their details, can submit their confidential ‘blind’ demands and offers. Each offer >
major policy issues relating to mediation, it does add to the burgeoning ‘jurisprudence of ADR’. This was hardly contemplated in the pioneer days of the late 1980s.

The case also illustrates two other points. First, it shows the ease with which mediation is being opened to public judicial scrutiny, particularly through the eye witness evidence of mediators, lawyers and clients. This raises important issues of theory and practice which need attention from the ADR community. Second, the complaint by Freeman that the mediation process ‘was more adversarial than he believed it would be’ is revealing. This, if true, is an interesting reflection on the discrepancy between the popular vision of mediation in some quarters and its practice in certain legal circles. Merely changing process and structure does not necessarily lead to a change in attitude and behaviour, and mediation in practice can be tough, brutish and bloody.

National Judicial College opens

Finally, mention should be made of the long awaited National Judicial College of Australia whose establishment carries the support of all Attorneys-General in the country. Last year, the national press carried advertisements calling for expressions of interest from institutions to host the College. Its main role will be to provide professional development courses for judges, magistrates and other court officials. Some of the training will be provided on appointment to judicial office, other parts will be provided on a continuing basis, and it will focus on both the practical skills required in the judicial role, as well as broader social and legal issues. It is expected that judicial education on ADR in all its manifestations will be part of the College’s functions.

Laurence Boule, General Editor.