The Role of Law in Moulding and Shaping ADR

Some Australian Experiences

Laurence Boulle

> 'Mediation does not exist in a vacuum. The environment surrounding mediation practice, in particular legal, political and cultural factors , impact upon the development of mediation in any given jurisdiction.'
> Alexander, Gottwald & Trenczek in *Global Trends in Mediation* (2003).

1. Introduction – ADR in and out of the Shadow of the Law

In Australia mediation operates both as a system separate and independent from the courts and formal legal system, and as a system operating inter-dependently with and within the legal system. It has a dualistic identity which will be illustrated by reference to two practical case studies: the professionals who needed a settlement and the company directors who needed legal certainty.

2. The Structural Factors Linking ADR and the Law

Many structural factors have led to the growing role of the law in shaping and moulding ADR. Reference is made to five such factors, namely:

- The increasing use of legislation, regulations and rules of court to create frameworks for ADR or to regulate directly aspects of ADR processes such as mediator accreditation and confidentiality;
- The provision for voluntary or mandatory referral of cases to ADR by courts and tribunals in many jurisdictions;
- The growing tendency for courts to review decisions emanating from ADR or alleged irregularities which occurred in the conduct of an ADR process;
- The control of the legal profession over aspects of ADR practice and professional requirements to advise clients in respect of ADR options.
- The relatively a-theoretical and flexible nature of common law education which has allowed ADR and skills training to be incorporated into law school curricula.

3. Court Assumptions about ADR Processes

The close interaction between the courts and mediation entails that judges, directly or indirectly, articulate their assumptions about the system. The following have been referred to in Australian cases: that mediation can be successful even where the parties are opposed to it, that senior advocates (barristers) make the best mediators, that the normal conduct of mediation involves the mediator separating the parties after the opening statements and shuttling between them for the rest of the mediation, that mediators should be civilly liable for their negligence, that mediation is more

time and cost efficient than litigation, and that the main benefits of ADR over adjudication relate to its speed and cost effectiveness. Many of these assumptions are based on judicial intuition as opposed to scientific empirical evidence.

4. Reviewing ADR Outcomes and Procedures

There are many Australian cases where disputants have sought review of mediated outcomes on the grounds that the conditions of the mediation were oppressive, coercive or unconscionable. In some cases the courts have relied on the evidence of mediators in determining them. While the review outcomes are mixed, some cases upholding the mediated outcomes and others not, the fact of judicial review is likely to cast a legal shadow over the conduct of ADR connected to the courts as occurred with arbitration decades earlier.

5. Defining the Mediator's Standard of Care

There has been one Australian case in which a mediator was sued and the court had to decide whether the mediator had a case to answer or whether the matter should be dismissed on grounds that there was no legal cause of action. The allegations arose out of a mediation in which the parties indicated beforehand that taxation advice was necessary to achieve a settlement but the mediator overlooked this in pushing the parties to a settlement late at night. He was alleged to have acted negligently and to have breached his contract with the parties. The court found that as a matter of law a mediator in these circumstances had no immunity and had a case to answer and sent the matter to trial. In so doing it pronounced on the nature of mediator functions and the appropriate standards of case with which they should be performed.

6. Some Consequences of the Law's Influence on ADR in Australia

- The legal profession in Australia has assumed a significant, but not exclusive, position in mediation practice.
- The courts and legal system in Australia are beginning to define key elements of ADR such as the nature of mediation, the limits of mediation confidentiality and the standards of mediator conduct.
- The roles of legal representatives in Australian ADR processes have been significant in developing a culture of expectations among clients and mediators.
- Under the influence of lawyer-mediators there has been a shift from facilitative to evaluative mediation, although the trend has not been consistent.
- Australia has not yet raised the question, as in some countries, as to whether mediation involves the 'practice of law' which, if answered affirmatively would have significant consequences for mediation's development.

7. Judges as Mediators and Dispute Resolvers?

As with other common law systems, Australian courts have never had the same settlement functions as those prevailing in civil law jurisdictions, in some European

countries dating back several centuries. In the common law countries the 'market-place' model has prevailed with courts being able to refer matters out to private mediators and having no direct supervisory role over the conduct of the process and its outcome. However there is current interest in Australia in the topic of judicial 'dispute resolution' as opposed to judicial 'dispute determination'. While there is strong resistance to the notion of judges acting as mediators, especially in cases which they will consider later, the idea is currently being discussed by courts and policy-makers.

8. The ADR Empire Strikes Back

There is evidence in Australia of reciprocal influences between ADR and the legal system through their close interaction. The influence of ADR has been felt in judicial attitudes, court procedures, changes in legal terminology and arguably even in the content of legal rules provided in legislation. There are also significant areas of ADR practice, particularly in community and commercial disputes, where the law has little direct impact.

9. Lessons Learned from Australian Experiences

There are many unresolved issues in relation to the interaction and inter-relationship between ADR and the formal legal system. On one hand ADR has become legalised and judicialised where it is part of the formal system, referrals are made by judges, senior lawyers act as mediators and mediated procedures and outcomes are reviewed by courts. On the other ADR has retained an independent sphere of existence outside the legal system. A healthy balance between the two would seem to a salutary goal for policy-makers, practitioners and academics.

10. Developing ADR Policy Collaboratively – The Universality of the ADR Experience

There are competing and complementary motivations for the development of ADR in various jurisdictions. The European parliament's 2004 directive makes clear policy statements on the need for mediation to co-exist with litigation and on other key issues. However as the quotation above implies ADR developments occur in a contested political arena and it may be that the way in which these debates take place is more significant than any substantive outcomes.

Laurence Boulle – laurence_boulle@bond.edu.au
Professor of Law, Bond University, Australia
Mediator and Conciliator
Visiting Professor, Faculteit Rechtsgeleerdheid, Universiteit van Gent
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