10-2010

Four mediation stories from across the globe

Nadja ALEXANDER
Singapore Management University, nadjaa@smu.edu.sg

Published in Rabel Journal of Comparative and International Private Law, 2010 October, Vol. 74 (4), pp. 732-758.
http://www.jstor.org/stable/27878893

Four Mediation Stories from Across the Globe

By Nadja Alexander, Hong Kong

Contents

I. Introduction

In the past 30 years mediation has emerged as a significant dispute resolution narrative around the world. It contains many stories told by different story-tellers – stories about diverse practices, communities and courts, increasing institutionalisation, regulation, accreditation, standards, research and theoretical developments. Together these stories weave a tapestry of our social and cultural experience of mediation and define mediation as a narrative, a practice and a profession. Four of these stories are introduced here.

Some storytellers say that mediation is the story of how legal systems are being rescued from their demise into non-affordability, inaccessibility, anonymity and over-legalisation. This is the story of mediation as an alternative dispute resolution (ADR) process – the *ADR Story.*

Others point to the fact that mediation in many countries is no longer alternative. Rather it is increasingly becoming a mainstream and integrated

part of many legal systems, thereby extending concepts of justice, law and dispute resolution. This is the *Regulation Story.*

Yet other storytellers tell the tale of the development of mediation from a life skill to a profession. The growth in accreditation standards on national, regional and international levels has been a boon for the training industry, yet many remain unsatisfied. This is the *Professionalisation Story.*

Finally there are those who see mediation as the epic tale itself. Mediation is viewed as a significant tradition in its own right – moving across, influencing, and being influenced by, other major traditions of law, society and culture. In the 21st century the mediation story is emerging as an important international narrative. This is the *International Story.*

In this paper I will explore the significant developments in the practice of mediation through these four stories and with reference to the common law jurisdictions of Australia, Hong Kong[1] and England.[2]

II. The ADR Story

The ADR – alternative dispute resolution – Story is one of the early mediation stories and it continues today. In this story mediation offers an attractive alternative to formalistic legal processes and becomes the pin-up process of the ADR movement. Here *alternative* makes different promises, depending on your reference point.

For many the *alternative* in ADR promises improvements to access to justice and more efficient delivery of dispute resolution services. This aspect of the ADR Story became prominent with the introduction of civil procedure reforms in Australia, England and Hong Kong.

Lord Woolf's review of the civil justice system in England and Wales[3] prompted major reforms, most notably the introduction of active judicial case management coupled with pre-litigation ADR. In Australia numerous court-related mediation schemes already existed at the time of publication of the Woolf Report in England, however the English Report provided the impetus for a national review of civil litigation. The Australian Law Reform Commission conducted an inquiry into the state of the Australian civil litigation system and concluded that there was a need for courts to assume a greater case management role and develop a greater use of ADR processes to reduce delay.[4] The Woolf Report has also been influential in Hong Kong

---

[1] Hong Kong refers to the Hong Kong Special Administrative Region (SAR).

[2] England refers to the jurisdiction of England and Wales.

[3] *Lord Woolf*, Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales (London 1996).

[4] *Australian Law Reform Commission*, Managing Justice: Review of the Adversarial System of Litigation, Final Report 89 (1999).

where the judiciary has now recognized mediation as an important supplement to court proceedings. The Civil Justice Reform (CJR) of 2009 was implemented in January 2010 with the multiple objectives of increasing the cost effectiveness of civil procedure, promoting a sense of reasonable proportion and procedural economy, and facilitating the settlement of disputes.

Critics have suggested that mediation in the ADR Story is a "quick and cheap" method to deal with small-value claims in order to free up courts to deal with higher-value matters. We need look no further than the New South Wales *Civil Procedure Act* (NSW) 2005 as an example of this approach. According to the Act, courts must exercise their powers giving effect to the overriding purpose of the Act, that is, to facilitate the "just, quick and cheap" resolution of the real issues in the proceedings.[5] While there is evidence to suggest that court waiting lists have diminished and in some Australian jurisdictions quite dramatically,[6] there is no evidence to suggest that higher value cases or cases "requiring adjudication" end up in the courts.

In this context Dame Hazel Genn has said that mediation "is not about just settlement, it's just about settlement."[7] She holds concerns for what she sees as "the downgrading of civil justice, the degradation of civil court facilities and the diversion of cases to private dispute resolution" in England.[8]

Thus the ADR Story promises quantitative benefits but also raises concerns about how it will impact on the quality of civil justice overall. In addition there are concerns about the integrity of the mediation process itself when cases are inappropriately diverted from the courts into ADR. Here the dilemma is how to balance competing public interests of quick, cheap and efficient resolution of matters to ensure effective use of court resources on one hand, and the maintainence the conceptual integrity of mediation through the elements of voluntariness and party autonomy, on the other.

In addition to the economic-rationalist benefits of the ADR Story, the *alternative* in ADR also promises conflict ownership, party autonomy and transformational opportunities. In February 2010 the Hong Kong Working Group on Mediation released its Mediation Report with recommendations for the future development of mediation in Hong Kong. In it the Working Group recognizes the potential for quantitative merits of mediation such as saving time and money. The Report goes on, however, to identify risk man-

---

[5] Civil Procedure Act 2005 (NSW) s. 56. For a similar provision in the ACT see Court Procedures Rules 2006 (ACT) rule 1303(5)(g).

[6] See *T. Sourdin*, Mediation in Australia, The Decline of Litigation?, in: Global Trends in Mediation, ed. by *N. Alexander* (Alphen a.d.R. 2006) Chap. 2.

[7] *H. Genn*, Judging Civil Justice (Cambridge 2010) (The Hamlyn Lectures 2008).

[8] *J. Rozenberg*, Dame Hazel Genn warns of "downgrading" of civil justice: Law Society Gazette, available at <http://www.lawgazette.co.uk>.

agement, and the preservation of dignity, stress and relationships as significant advantages of mediation compared with litigation.[9]

In relation to party autonomy, mediation offers a shift in responsibility for, and ownership of, disputes from institutions of the legal system to the parties themselves. Party autonomy means that parties can make choices in relation to how they allocate risk in managing their dispute. Further parties have a say about the nature of the mediation process conducted and are themselves masters of the outcome of their dispute. Party autonomy has been an important aspect of the ADR Story in Australia where private sector and community mediation, independently of the courts, continues to thrive. Some Australian writers have also advocated party autonomy as the guiding and overriding feature of mediation, which shapes choices about process and outcomes.[10] In England and Hong Kong party autonomy is a strong part of the ADR rhetoric, although in practice mediation appears more focused on service-delivery and justice themes. In relation to England, Genn in her Hamlyn Lectures of 2008, highlights the continuing reluctance of litigants to participate voluntarily in mediation.[11]

Opportunities for transformation are also an *alternative* offered by the ADR Story. Relational transformation deals with the way parties relate to each other through mutual acknowledgement and responsiveness and in the Hong Kong context are associated with concepts such as face-saving and dignity. In the western cultures of England and Australia relational transformation focuses on deepening the dialogue between parties, empowering and educating them to be able to relate to each other more constructively. Transformation in mediation can also mean that disputes are perceived as an opportunity to work towards social change by identifying not only the individual but also the social causes of the conflict. In Hong Kong, for example, numerous mediation services are associated with cultural values of collectiveness and harmony which, in turn, draw on traditional Chinese values, along the lines of "Mediation brings harmony. Harmony brings prosperity".[12] In his policy address for 2007–2008 the Chief Executive of Hong Kong, Mr. Donald Tsang stated, "to alleviate conflicts and foster harmony, we will promote the development of mediation services."[13]

---

[9] Report of the Working Group on Mediation, Hong Kong, Department of Justice (2010) at 3.16; (cited the Hong Kong Mediation Report 2010).

[10] See, for example, *H. Astor/C. Chinkin*, Dispute Resolution in Australia[2] (Sydney 2002).

[11] *Genn*, Judging Civil Justice (supra n. 7).

[12] See the overriding principle on a mediation services homepage at <www.mediate.com.hk>. See also the mission statement of the Hong Kong Mediation Centre at <www.mediationcentre.org.hk>.

[13] Hong Kong Government, Chief Executive's Policy Address 2007–8, at <www.info.gov.hk>.

In summing up the ADR Story, we can see that mediation offers an *alternative* not only to long court waiting lists and decisions by a third party; it also offers opportunities for autonomy, empowerment and transformation as an *alternative* to the voicelessness and disenfranchisement experienced by many in the legal system.

However it is difficult to ascertain the extent to which the ADR Story has fulfilled its promises. At present, research into ADR use in Australia, England and Hong Kong is limited, although there is some evidence in Australia and England as to settlement rates, cost efficiency and participants' views on satisfaction and process characteristics.[14]

In Australia *The Resolve to Resolve Report* highlights the lack of data and empirical research on qualitative and quantitative aspects of mediation and other ADR processes.[15] In particular a need for comparable and longitudinal data is identified. Where research is available it is said to be sporadic, often the result of a one-off grant. As a result it is difficult to paint an informed picture of Australian mediation. This problem is not unique to Australia. Genn has pointed out that the Woolf reforms in England and Wales were implemented without the benefit of research and this has made it difficult to evaluate the impact of the reforms in relation to their objectives. She points out that, "[a]lthough courts in England and Wales collect a considerable quantity of information for administration purposes, this database information generally misses vital descriptive elements such as case type, value, and outcome".[16]

Finally, one may speculate as to whether the ADR Story has come to its natural end. With increasing use and mainstreaming of ADR, the appropriateness of the term *alternative* has been questioned and there have been a number of attempts to replace the word *alternative* with more accurate descriptors such as *appropriate* and *amicable*.[17] These attempts have been short lived. For example, in the 1990s in Australia there was a legislative and policy initiative in family mediation to replace the term ADR with PDR, *primary dispute resolution*, in order to emphasize the focus of the court on non-determinative processes. The new acronym did not strike a chord with me-

---

[14] See *Victorian Law Reform Commission (VLRC)*, Civil Justice Review Report 14 (Melbourne 2008) 10.

[15] NADRAC (National Alternative Dispute Resolution Advisory Council), The Resolve to Resolve: Embracing ADR to improve access to justice in the federal jurisdiction, A Report to the Attorney-General, Canberra: Department of Attorney-General (2009) Chap. 6 (cited The Resolve to Resolve Report).

[16] *H. Genn*, Solving Civil Justice Problems: What might be best?, Paper (Scottish Consumer Council Seminar on Civil Justice, January 19 2005), <www.ucl.ac.uk/laws/genn>.

[17] See, for example, *Sir Laurence Street*, The Courts and Mediation, A Warning: Australian Dispute Resolution Journal 2 (1991) 203; National Alternative Dispute Resolution Advisory Council, "What Is ADR?", <www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/What_is_ADR>.

diation practitioners and users, and while it still exists in policy and regulatory documents, it has done little to reduce the dominance of the terms ADR and *alternative* dispute resolution in conflict resolution parlance.[18] Nevertheless the *Victorian Law Reform Commission Civil Justice Review* highlites the need for ADR processes to challenge the perception that they are a secondary and inferior *alternative* to the resolution of disputes through the assertion of legal rights in a litigious process. Such approaches are often "not just an *alternative* to litigation, but may be the most *appropriate* way to resolve a dispute".[19]

In the final analysis it seems that ADR is more than an acronym; it has become a term of art in its own right. In years to come people may no longer know, or care, what the letters ADR represent but they will know what ADR means.

III. The Regulation Story

The Regulation Story explains the relationship between mediation and the legal system. It is a story which has much to tell as regulatory activity in relation to mediation has exploded in recent years. In this story regulation of mediation is considered in relation to both form and content. In terms of form, regulation is understood in a broad sense. Regulatory approaches to mediation include top down, legalistic regulatory forms such as legislation, court rules, and judicial decisions. They also include "softer" and participatory forms of regulation such as industry self-regulation, regulation by private contract and the market laws of supply and demand.

In terms of content, different aspects of mediation can be regulated. The four main categories of mediation regulation are:

(1) Triggering mechanisms – how is mediation initiated?

(2) Process and procedure – how is the mediation process conducted and what procedures are used for appointment of mediators, payment and administrative matters?

(3) Standards – how are mediation practitioner standards and quality assurance measures regulated?

(4) Rights and obligations – how are legal rights and obligations of participants in mediation regulated?

These different regulatory forms and aspects of regulatory content are assumed throughout this exploration of the regulation story. The third category of mediation regulation, mediator standards, is dealt with later in this paper in the Professionalisation Story. Next, regulatory snapshots from Aus-

---

[18] Family Law Reform Act 1995 (Cth.).

[19] *VLRC*, Civil Justice Review Report (supra n. 14) 212.

tralia, England and Hong Kong are presented, followed by a critical examination of a number of regulatory issues in mediation.

1. Australia

In the past three decades mediation processes have become firmly integrated into the landscape of the Australian legal system. Mediation practice has evolved through a mixed regulatory approach combining self-regulatory, market and legislative elements, often found in common law jurisdictions.[20]

There is a healthy private sector for mediation regulated primarily by market principles, private contracts and industry standards. Community mediation is sometimes established by legislation but process and accreditation aspects are usually dealt with by internal policy. Court-related mediation schemes, in both administrative tribunals and courts with civil jurisdiction, are legislatively based, although numerous cases are referred to the private sector for mediation.

This proliferation of ADR schemes in industry, business and judicial arenas has created a growing acceptance amongst both litigants and the legal profession that at some stage in proceedings the option of pursuing a non-litigious dispute resolution process must be considered. Courts and tribunals around Australia now offer a wide variety of referral practices and procedures that cover the spectrum of these ADR processes, including case appraisal, conciliation, arbitration, settlement conferences and mediation. Of these processes, mediation is the most commonly recognised and utilised, with a growing trend towards courts exercising their discretion to order mandatory participation, even overriding both parties' objections to the referral.[21]In some jurisdictions there is routine referral of a particular type of dispute to mediation such as motor vehicle accidents. Even in courts lacking a structured or explicit court referral process, mediation practices have been incorporated into case management flow, due to the close interdependence of the two policy approaches, ADR and case management. There are now hundreds of pieces of court- and sector-specific legislation that regulate mediation alone, prompting calls for a national approach in the form of a national ADR protocol and legislation.[22]

---

[20] *N. Alexander*, Mediation and the Art of Regulation: The Queensland University of Technology Law and Justice Journal 8 (2008) No. 1, p. 1.

[21] See, for example, Supreme Court of Queensland Act 1991 (QLD) ss. 102–103 and the case of *Remuneration Planning Corporation Pty Ltd* v. *Fitton*; *Fitton* v. *Costello*, [2001] N.S.W.S.C. 1208 (14 December 2001).

[22] See The Resolve to Resolve Report (supra n. 15) Chap. 3. See also the introduction of

In short, judges and registrars in Australian jurisdictions are now authorized to become involved in both the management of individual cases and the overall caseload of the court, and can issue directions, ensure compliance with court orders, confine a case to the issues genuinely in dispute and generally make rules governing the conduct of proceedings with reference to an underlying philosophy of efficiently and economically disposing of cases[23] consistently with the interests of justice.[24]

There is further impetus at both the state and federal level to continue this incorporation of mediation into the fabric of the legal system and legal culture, with the implementation of legislation that would shift the adversarial paradigm to one that fits with principles of mediation, access to justice and proportionality.[25] There have been numerous recommendations and studies that have called for mediation and other ADR processes to be considered standard practice in civil litigation, with a variety of suitable procedures[26] available early in litigation proceedings. Moreover proposals that would shift the focus from the role of courts in mandating ADR towards greater party responsibility in the ADR process are currently being considered as part of civil procedure reforms at state and federal levels in Australia. By way of example, the Victorian Law Reform Commission has proposed a Standard of Conduct for Parties to Disputes (including Pre-action Protocols). These pre-action protocols could be introduced for the purpose of setting out codes of "sensible conduct" which disputants are expected to follow when there is the prospect of litigation.[27] Similarly the ADR Blueprint in

---

the national Civil Dispute Resolution Bill (Attorney-General, Media Release, 17 May 2010, Canberra.

[23] Court Procedures Rules 2006 (ACT) rule 21; Civil Procedure Act 2005 (NSW) ss. 56–58 and rules 2.1,2.3; Supreme Court Rules (NT) rule 1.10; Uniform Civil Procedure Rules 1999 (QLD) rule 5; Supreme Court Civil Rules 2006 (SA) rule 3; Supreme Court (General Civil Procedure) rules 2005 (VIC) s. 1.14; Rules of the Supreme Court 1971 (WA) O1, rules 4A and 4B.

[24] Interests of justice are however paramount. In this case in proceedings before the Federal Court the defendants were refused leave to amend their defence for case management reasons. On appeal the High Court held that although case management principles were a relevant consideration, the interests of justice required that a party be permitted to raise an arguable defence; *Queensland* v. *JL Holdings Pty Ltd* (1997), 189 CLR 146.

[25] On proportionality, see *A. Zuckerman*, Justice in Crisis: Comparative Dimensions of Civil Procedure, in: Civil Justice in Crisis: Comparative Perspectives of Civil Procedure, ed. by *id.* (Oxford 1999) at 47–48.

[26] The Victorian Law Reform Commission believes that the availability of a variety of different ADR options would enable courts to "fit the forum to the fuss," and enhance the courts ability to manage certain litigious disputes more efficiently and effectively. See *VLRC*, Civil Justice Review Report (supra n. 14).

[27] See *Victorian Law Reform Commission (VLRC)*, Proposed Standards of Conduct for Parties to Disputes (including Pre-action Protocols) clause 1.

New South Wales contains a number of proposals, which specify greater responsibilities for parties, including:[28]

(1) the enactment of a set of guiding principles for conduct of civil disputes;

(2) greater compliance by government agencies with the Model Litigant Policy; and

(3) the ability of courts to take into account parties' attempts to engage in ADR when making costs orders.

At a federal level, NADRAC's *The Resolve to Resolve Report* referred to previously, has recommended legislation to require litigants to take "genuine steps" to resolve their disputes before going to court. This recommendation has now been adopted in the Civil Dispute Resolution Bill (2010). In line with English and Hong Kong practice, the Report also suggests that courts be granted discretion to impose adverse costs orders on those who fail to comply with the pre-litigation "genuine steps" duties.

Significantly, The Resolve to Resolve Report recognizes that legislative duties and sanctions are necessary regulatory initiatives but that they are insufficient to bring about further changes in Australian dispute resolution culture. The Report views education and public awareness as significant contributors to cultural change and recommends a stronger focus on mediation and ADR:

- at the tertiary education level;
- in continuing professional education; and
- in public communication by referral bodies such as courts

to address the pervading consciousness of litigation that still informs the attitudes of most legal practitioners and litigants. [29]

2. England

As indicated previously, the Woolf Report (1996) heralded the greatest changes to civil procedure in England and Wales since 1883. The Woolf Reforms (cited Reforms) in the form of the Civil Procedure Rules (CPR) 1999 that were subsequently introduced made the case for courts to play an active role in case management and in providing information about, and

---

[28] See NSW ADR Blueprint Discussion Paper: Framework for the delivery of alternative dispute resolution ADR Services in NSW (Sydney, NSW Attorney General's Department 2009).

[29] See The Resolve to Resolve Report (supra n. 15) Chap. 4 and the *Australian Law Reform Commission*, Review of the adversarial system in litigation: rethinking the federal civil litigation system, Issues Paper No. 20 (1997).

encouraging, mediation and other forms of ADR.[30] Until that time civil mediation had enjoyed only limited success.

The overriding objective of the Rules is to increase affordability and predictability of litigation and to inject a sense of proportionality into the administration of justice relative to the value and complexity of each case (CPR rule 1.1). To this end courts may stay proceedings to allow parties to pursue mediation and may order the parties to consider ADR. The Practice Direction on Pre-Action Conduct provides that parties are required inter alia to follow a reasonable procedure to avoid litigation. Unreasonably refusing to consider ADR as an option may amount to a breach of these requirements.[31] CPR rule 3.1(5) provides that a court may order a party to pay a sum of money into court if that party has, without good reason, failed to comply with a rule, practice direction or a relevant pre-action protocol.

In this way the Reforms hoped to increase pre-litigation settlement of cases, encourage greater cooperation among parties, lawyers and the courts, and reduce court caseloads, resulting in savings for the government. These objectives have been met to varying extents. At the same time there are concerns about some of the repercussions of the Reforms.[32]

In relation to the positive outcomes of the reforms, research indicates that fewer claims and appeals are being filed[33] and that cases are settling earlier than in the past – presumably due to the pre-action protocols requiring parties to focus on settlement at an early stage.[34] Thus there is a less adversarial culture, which is more focused on settlement than was the case prior to the Reforms. Allen comments that,

"[b]efore the CPR reforms, there was a degree of worry that an expression of being willing to engage in mediation was in itself evidence of weakness, signalling a wish to compromise which would give comfort to opponents and stiffen their resolve to fight on. The combination of the CPR and significant court decisions since then has effectively abolished that fear, as there is a generalised duty to consider ADR without any duty to settle."[35]

Despite these encouraging comments, the use of mediation and ADR generally appears not to have increased in England. Despite much effort to promote ADR through the Civil Mediation Council, courts and private

---

[30] *Lord Woolf* (supra n. 3).

[31] See para. 4.4(3) Practice Direction on Pre-Action Conduct, which lists unreasonably refusing to consider ADR as an example of non-compliance with the Practice Direction or relevant pre-action protocol.

[32] See The Resolve to Resolve Report (supra n. 15) Schedule 4.

[33] *Genn* (supra n. 16).

[34] *J. Peysner/M. Seneviratne*, The management of civil cases, The courts and the post-Woolf landscape: DCA Research Report 9/2005.

[35] *T. Allen*, Implementing the EU Directive on Mediation, A Consultation Paper (London 2009) at 28. For updates consult the Centre for Effective Dispute Resolution (CEDR) website <www.cedr.co.uk>.

mediations service providers, a lack of familiarity and comfort with ADR processes persists and client (and lawyer) reluctance to engage genuinely in mediation is not uncommon.[36] The cost of civil litigation in England and Wales remains high due to a range of factors including a reduction in legal aid, legal costs insurance, conditional fee arrangements and satellite litigation.[37] Moreover a consequence of the Woolf Reforms has been to frontload legal costs as solicitors are doing more work pre-filing in order to comply with the pre-action protocols.[38]

While the increase in early settlements is to be applauded, it has been noted that many of these settlements take the form of negotiations between lawyers and do not resemble interest-based mediation or offer the participatory benefits promised by the ADR Story outlined in the previous section. If this is the case then, as The Resolve to Resolve Report points out, "prospective litigants may not be better off, and [...] those who would previously have settled without proceeding to hearing may now be spending considerably more for a similar outcome."[39]

3. Hong Kong

In Hong Kong in 2010 stakeholders and policy makers are engaged in a dialogue about how to regulate the diversity of mediation from local villages with traditional mediation practices to corporate boardrooms. The Civil Justice Reform of 2009 introduced inter alia Practice Direction (PD) 31 which requires parties to reasonably consider the use of ADR and in particular mediation. PD 31 is modelled on the English provisions referred to previously and heralds the beginning of a concerted regulatory push by the legislature and the courts[40] to develop quality mediation practice in Hong Kong and encourage people to use the process.

The Hong Kong Mediation Report 2010, referred to previously, sets out recommendations for future regulation. The most interesting recommendations relate to the enactment of mediation legislation in a stand-alone mediation ordinance. The legislation is to deal with aspects of mediation, which are necessary to provide a legal framework for the development of mediation

---

[36] *Genn* (supra n. 16).

[37] *P. Cashman*, The Cost of Access to Courts, Confidence in the Courts Conference, National Judicial College and Australian National University, 9–11 February 2007 (Canberra 2007).

[38] See *Lord Justice Jackson*, Civil Litigation Costs Review, Preliminary Report (London, Judiciary of England and Wales 2009).

[39] The Resolve to Resolve Report (supra n. 15) Schedule 4.

[40] See, for example, *Hui Ling Ling* v. *Sky Field Development Ltd*, [2007] HCA 35 para. 5–6, where the court commented on its policy in relation to mediation and stays of proceedings.

practice. In this context the Report highlights the need to enact provisions in relation to confidentiality and admissibility of mediation evidence (privilege) issues.[41] Importantly recommendation 32 spells out that the proposed legislation should not hamper the flexibility of mediation. A number of other recommendations provide more detail in this regard and set out those aspects of mediation which are not to be regulated by legislation. According to recommendation 37 the legislation should not deal with procedural aspects of mediation apart from issues relating to appointment of mediators and permitting non-lawyers and foreign lawyers to participate in mediation. Recommendation 36 suggests that the issue of enforceability of agreements to mediate should not be dealt with by proposed legislation; however it makes suggestions in this regard in the event of legislative activity. Finally recommendation 40 states that it is not necessary to introduce provisions to suspend the running of limitation periods during the mediation process.

Thus the Hong Kong Mediation Report recommends a legislative framework containing provisions relating to rights and obligations of participants in mediation, primarily in relation to confidentiality and admissibility of mediation evidence. Process and accreditation issues are – at least at this stage – to be left to more flexible and responsive forms of regulation. To this end the Working Group has developed a sample agreement to mediate and a national code of conduct for mediators entitled the Hong Kong Mediation Code.[42] The Code is voluntary is nature however the Report has recommended that referral bodies such as courts require mediators to adhere to the Code.[43]

With the benefit of insights from other jurisdictions, the Report recommends that key mediation terminology such as mediation, mediator, mediation agreement and mediation settlement agreement be defined in legislation. This approach is consistent with key legal instruments on mediation such as the Uniform Mediation Act in the United States and the EU Directive on Mediation. Moreover it aims to pre-empt the difficulties that may arise in the absence of consistent definitions. In Australia for example, where at the time of writing no national mediation legislation has been enacted, the lack of consistent terminology has led to practical and legal difficulties. For example, a current policy debate is grappling with the extent to which mediators who go beyond the facilitative model are covered by (otherwise applicable) provisions relating to confidentiality, admissibility of evidence, and immunity. In other words if mediators are not practising facilitative mediation as set out by accreditation standards – and many are not – are they mediating?[44] And if they are not mediating are they covered by court rules

[41] See the Hong Kong Mediation Report 2010 (supra n. 9) Recommendation 38.

[42] See the Hong Kong Mediation Report 2010 (supra n. 9) Annex 3.

[43] See the Hong Kong Mediation Report 2010 (supra n. 9) Recommendation 30.

[44] On mediator accreditation, see the Professionalisation Story later in this article.

and statutes that deal with mediation and mediators? This debate has also begun in Hong Kong as plans for legislation develop.

Finally in the Regulation Story, a number of specific regulatory issues in mediation will be examined, namely the constitutional ability of courts to mandate mediation, and the duties of parties and lawyers to act reasonably in relation to the mediation process, and to participate in mediation in good faith.[45]

4. Mandating mediation

Constitutional and philosophical objections to mediation compulsion have been widely debated.[46] In England the court in the case of *Halsey* v. *Milton Keynes* took the view that the Civil Procedure Rules could not be interpreted so as to effectively mandate mediation, for to do so would be "an unacceptable restraint on the right of access to the court and, therefore, a violation of art 6" of the European Convention on Human Rights (ECHR) which guarantees access to a fair hearing in a court of law.[47] This decision has been criticised by a number of commentators on the basis that parties who do not reach a settlement agreement at mediation are free to seek access to the courts to deal with their dispute.[48] In light of the uncertainty on this point clause 14 of the Mediation Agreement of the English ADR organisation, the Centre for Effective Dispute Resolution (CEDR), provides that parties' rights under the ECHR are not affected by the agreement to mediate and that if there is no settlement the parties' right to a fair trial remains. Beyond Europe the International Covenant on Civil and Political Rights (ICCPR) is prima facie applicable to access to justice issues. As Bell J. of the Victorian Supreme Court in Australia has noted,

"[a] judge has a fundamental duty to ensure a fair trial by giving due assistance to a self-represented litigant, whilst at the same time maintaining the reality and appearance of judicial neutrality. The duty is inherent in the rule of law and the judicial process. The human rights of equality before the

---

[45] This section is drawn from *N. Alexander*, International and Comparative Mediation (Alphen a.d.R. 2009) Chaps. 3 and 5.

[46] See, for example, *T. Naughton*, Mediation and the land and environment court of New South Wales: Environment and Planning L.J. 9 (1992) 219 (at 223).

[47] *Halsey* v. *Milton Keynes NHS Trust and Steel* v *Joy and Halliday*, [2004] EWCA Civ. 576 (cited *Halsey* v. *Milton Keyne*). See also the comments of Laws J. in *Ex parte Witham*, who concluded that it was not lawful to set fees at a non-affordable level in order to encourage mediation, as this would effectively diminish the right to sue in a practical sense: *R* v. *Lord Chancellor, Ex parte Witham*, [1998] QB 575 Div. Ct.

[48] See, for example, *S. Fielding*, Mediation post-Halsey: New L.J. 154 (2004) 1394, *T. Allen*, A closer look at Halsey and Steel (2004) available at <www.cedr.com> and What happens now?, The impact of Halsey (2004) available at <www.cedr.com>.

law and access to justice specified in the International Covenant on Civil and Political Rights are relevant to its proper performance."[49]

At first glance these judicial comments appear to conflict with an emerging trend in many countries to compel parties – by direct or indirect means – to participate in mediation. A closer examination, however, suggests that it is a question of balance and proportionality. The principle of a right to a fair trial may be subject to restrictions, which are themselves proportionate and part of an overall legitimate aim of improving access to justice.[50]

Judicial comment in Australia supports the notion that courts have an inherent power to mandate mediation as part of their case management functions.[51] Most court referral mediation schemes that mandate mediation, however, do so within a statutory framework and the court relies on legislative authority and not inherent jurisdiction.[52]

To date the trend in Australia has been towards providing courts with power to mandate mediation. In England and Hong Kong, courts have been hesitant to give courts power to directly mandate mediation. However, courts have power to impose costs sanctions where parties have acted unreasonably in relation to their engagement (or not) with the mediation process.

5. Pre-litigation duty to act reasonably in relation to the mediation process

As canvassed earlier the Woolf reforms in England introduced the Civil Procedure Rules, which require parties to take all reasonable steps to avoid litigation. This may involve consideration of whether it is appropriate to engage in mediation. Similar provisions have been in force in Hong Kong since January 2010 and Australia is contemplating the introduction of similar legislation.

In Australia there has been historically more focus on the role of courts in mandating ADR and less on the pre-litigation duties of parties. However a shift towards greater party responsibility in mediation is likely. At the time of writing proposals similar to the English and Hong Kong civil procedure reforms are being considered at federal and state levels in Australia. A new

---

[49] See *Tomasevic* v. *Travaglini and Anor*, [2007] VSC 337 at para 155. See also *Ragg* v. *Magistrates' Court of Victoria*, [2008] VSC 1.

[50] See ECHR 28 May 1985 *(Ashingdane* v. *The United Kingdom)*, Series A No. 93 24–5, 57. On proportional justice, see *Zuckerman* (supra n. 25).

[51] In Australia see *AWA Ltd* v. *Daniels t/as Deloitte Haskins and Sells and Ors* (1992), 10 ACLC 933 at para. 13.

[52] See "Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes" (1989–1990): Harv. L. Rev. 103 (1989/90) 1086–1089. An example of statutory authority to mandate mediation can be found in s. 53A Federal Court of Australia Act 1976 (Cth.).

Civil Dispute Resolution Bill (2010) imposes pre-litigation, dispute resolution duties on parties and lawyers with costs sanctions for non-compliance. This is part of a general push towards pre-filing mediation and ADR, which aims to build upon the existing court-related mediation culture at state and federal levels.[53]

In England there has been a line of cases interpreting the Civil Procedure Rules (CPR).[54] These cases are likely to be influential in Hong Kong and to some extent in Australia.

The approach of the English courts was summarised in *Brown* v. *Rice and Patel*. "There is also a clear public policy now reflected in the CPR to encourage mediation as a preferred means of dispute resolution to litigation. CPR rule 1.4(1) obliges the court to further the overriding objective of enabling the court to deal with cases justly by actively managing cases. Rule 1.4(2)(e) defines 'active case management' as including 'encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure'. Rule 26.4(1) entitles a party, when filing the completed allocation questionnaire, to request that the proceedings be stayed while the parties try to settle the case by ADR. The encouragement of mediation by this court is also emphasised by Chapter 17 of the Chancery Guide 2005." [55]

The often-cited case of *Halsey* v. *Milton Keynes General NHS Trust* sets the parameters for the application of costs sanctions for unreasonable behaviour in relation to the mediation process. The court held that where a party – including a subsequently successful party – unreasonably delayed consenting to mediation until a very late stage so that the chances of a successful mediation were poor, they might – in exceptional cases – be subject to an adverse costs order. At the same time the court emphasised that there was no presumption in favour of using mediation but there was an obligation on parties not to unreasonably refuse an invitation to mediate.

A number of years later *Nigel Witham Ltd* v. *Smith and Anor*[56] endorsed the principles enunciated in *Halsey*.[57] However on the facts of the *Witham* case

---

[53] See the discussion on this point in the "regulatory snapshot" of Australia earlier in this article. On a federal level see The Resolve to Resolve Report (supra n. 15). On a state level see VLRC, Proposed Standards of Conduct for Parties to Disputes (supra n. 27) clause 1, and see also the NSW ADR Blueprint Discussion Paper (supra n. 28).

[54] See, for example, *Regina (Cowl and others)* v. *Plymouth City Council*, [2001] EWCA Civ. 1935, *Dunnett* v. *Railtrack Plc*, [2002] EWCA Civ. 303, *Hurst* v. *Leeming*, [2002] EWHC 1051 (Ch.), *Royal Bank of Canada* v. *Secretary of State for Defence*, [2003] EWHC 1479 (Ch.), *Halsey* v. *Milton Keynes* (supra n. 47), and *Nigel Witham Ltd* v. *Smith and Anor (No 2)*, [2008] EWHC 12 (TCC).

[55] See *Brown* v. *Rice and Patel*, [2007] EWHC 625 (Ch.) at para. 12 referring to *Halsey* v. *Milton Keynes* (supra n. 47).

[56] *Nigel Witham Ltd* v. *Smith and Anor (No 2)* (supra n. 54).

[57] *Halsey* v. *Milton Keynes* (supra n. 47).

no unreasonable delay was found. In fact it was rather the timing of the mediation that was in issue. Here the court found that the critical moment to mediate was missed by both parties and that even if mediation had been undertaken earlier, it may not have produced a different result in the circumstances. Other cases from common law jurisdictions have noted that an initial refusal to participate or failure by lawyers to achieve settlement may be redeemed by subsequent mediation.[58]

6. Duty to participate in mediation in good faith

Although mediation is frequently conceptualised as a consensual process in which parties are at liberty to choose their level of participation, jurisdictions are increasingly invoking a duty on the parties to take part in mediation in a proactive way. Duties to participate in mediation oblige parties to engage in the process in varying degrees but they do not require parties to compromise or reach settlement.

In Australia these duties have been variously phrased as a duty to participate in "good faith,"[59] "genuinely and constructively,"[60] or "reasonably and genuinely."[61] Alternatively, the obligation may be phrased as a duty to attend or a duty to participate with costs sanctions applicable for non-compliance.[62]

Furthermore, Australian civil procedure rules and case law suggest that courts are prepared to review the parties' behaviour in mediation, particularly in relation to ordering a stay of proceedings and making an assessment of costs.[63]In Queensland, Australia, for example, courts may impose costs sanctions on parties who:

- fail to attend ADR,
- fail to act reasonably and genuinely in ADR, or
- impede the ADR convener whilst s/he conducts the ADR process.[64]

---

[58] See the Australian case, *Automasters Australia Pty Ltd* v. *Bruness Pty Ltd*, [1999] WASC 39 (21 May 1999). See also the Hong Kong case of *iRiver Hong Kong Ltd* v. *Thakral Corporation (HK) Ltd*, [2008] HKCU 1236 quoting the English decision of *Dunnett* v. *Railtrack*, [2002] 2 All ER 850.

[59] See the Civil Procedure Act 2005 (NSW) s. 27. Positive duties to participate in negotiation and mediation in good faith can be found in s. 11 of the Farm Debt Mediation Act 1994 (NSW) and s. 31(1)(b) of the Native Title Act 1993 (Cth.).

[60] See the Court Procedure Rules (ACT) rule 1180.

[61] See the Uniform Civil Procedure Rules (Qld) s. 325.

[62] See the Supreme Court Rules (NT) rule 48.13(13); Supreme Court Act 1991 (QLD) s. 103; Rules of the Supreme Court (WA) O29 rule 3(2).

[63] Supreme Court Act 1991 (Qld) s.103(2).

[64] Supreme Court Act 1991 (Qld) s.103; "Impede" is further defined as failing to attend, failing to participate or failing to pay an amount the party is required to pay under a referring order: Uniform Civil Procedure Rules 1999 (Qld) s. 322.

Significantly, unsuccessful mediations will not automatically allow negative inferences to be drawn against either party.[65] Therefore an obligation to participate in good faith does not equate to an obligation to resolve the dispute.

In England, despite the absence of an express statutory requirement to participate in mediation in good faith, case law has held that such a duty exists. The case of *Earl of Malmesbury* v. *Strutt and Parker*[66] considered the application of cost sanctions in relation to a party's unreasonable behaviour in mediation. The case dealt with a dispute in which the Earl ultimately prevailed in court, but the financial quantum awarded was significantly less than both his claim and his final offer at mediation.

Jack J. made the following comments: "[T]he claimant's position at the mediation was plainly unrealistic and unreasonable. Had they made an offer which better reflected their true position, the mediation might have succeeded."[67] The judge equated the behaviour of a party who had agreed to mediate and then acted unreasonably with that of a party who unreasonably refused to mediate. As the latter behaviour could, under the CPR, be taken into account in costs determinations, his Honour considered it appropriate to take the former category of behaviour into account.

7. Insights from the Regulation Story: Australia, England Hong Kong

Since the early days of the ADR Story mediation has been subject to considerable regulation in Australia – a combination of market rules, industry codes, case law, court rules, and legislation. Legislation mainly focuses on triggering mediation and on regulating rights and obligations of participants. Process and standards are mostly left to self- and industry- regulation through codes of conduct and other standards. In addition it is important to note that regulation in Australia has developed over a period of 30 years. In other words the piecemeal regulatory approach accompanied developing practice, attempting to meet its changing needs. The sector-specific approach in Australia has thus served a useful developmental purpose; however the plethora of inconsistent laws has now prompted calls for a national framework. Unlike Australia, mediation practice in England was minimal prior to the introduction of the Woolf Reforms. While the Reforms have increased the number of settlements and improved the settlement culture to some extent, they appear to have done little to develop a mediation culture

---

[65] Uniform Civil Procedure Rules 1999 (Qld) s. 322.

[66] *Earl of Malmesbury* v. *Strutt and Parker,* [2008] EWHC 424 (QB). In this case both parties waived privilege so that evidence from the mediation could be considered in relation to the award of costs.

[67] See *The Earl of Malmesbury* v. *Strutt and Parker* (previous note) at para. 72.

in the private dispute resolution sector and private mediation remains limited. In Hong Kong it is early days for the Regulation Story. While the policy makers have been influenced by the Woolf reforms they are alert to the criticisms of it and potential risks associated with a top down approach to mediation.[68] In addition to an active and supportive judiciary and Department of Justice, there is a growing private sector for mediation in family, commercial, and other areas.

IV. The Professionalisation Story

Mediation as a consensual form of dispute resolution has traditions in many cultures, particularly in Asia, the Pacific, the Middle East, and Africa. One of the features of contemporary mediation that distinguishes it from customary mediation practices is the trend to professionalise the practice through accreditation schemes and to identify those people who are permitted to conduct mediation and those who may not. Professionalisation is a form of regulation and as such could have been considered in the Regulation Story. However it has developed as a major political issue within mediation communities throughout the world and for this reason alone deserves its own story.

The Professionalisation Story is about accreditation. It tells us who is in the mediation club and who gets to mediate. Logically therefore it is also about who is not in the Club and who does not get to mediate. It embraces hotly debated issues such as:

- Should mediation remain a life skill rather than being professionalised?
- Should mediation practice be reserved for lawyers and does mediation by non-lawyers amount to the unauthorised practice of law?
- What regulatory form should professionalisation take?
- How will professionalisation enhance quality?
- Should accreditation be compulsory or a voluntary acknowledgement of quality assurance?
- How to determine the content and duration of accreditation requirements?
- How to determine the costs of professionalisation?
- How to establish the qualifications of trainers and standards bodies?

This section will highlight the major developments in the Professionalisation Story and touch on some, but not all, of the aforementioned themes. Contrary to some civil law jurisdictions such as Austria and Slovenia, Australia, England and Hong Kong have not legislated in relation to accredita-

[68] See, for example, references to *Genn*, Judging Civil Justice (supra n. 7).

tion of mediators. In addition there are no general restrictions on non-lawyers becoming mediators. The three common law countries have adopted the view that quality assurance through accreditation must be balanced with the flexibility, diversity and innovation that mediation promises. To this end responsive regulation such as codes of conduct and industry standards with buy-in from the mediation community was considered more useful than legislative intervention. Thus the path to professionalisation has been dotted with sector- and organisational-specific accreditation schemes in all three countries. Until recently none of the three had a national scheme for mediator accreditation. However this changed in 2008 with the publication of the Australian National Mediator Approval Standards.

These self-regulatory and voluntary national accreditation standards were first introduced in 2008 on a transitional basis, together with National Mediator Practice Standards, and form the core of the National Mediator Accreditation System. During a transitional period of approximately three years, the National Mediator Accreditation Committee (NMAC) comprising representatives of identified interest groups will negotiate the details of implementing the Standards and establishing a permanent Mediator Standards Body (MSB). The System operates on a devolved system of self-regulation by the mediation profession, and is the result of years of informal and formal consultation and collaboration. There has been strong support from courts, government departments,[69] and the private sector. Numerous private and public referral bodies including courts require their mediators to have national accreditation as a quality assurance benchmark. Mediators wishing to be accredited to the national standard must comply with training and assessment standards and join a recognised mediator accreditation body (RMAB). At the time of writing RMABs are self-recognising bodies. Practice and compliance issues within the System are dealt with by dialogue and consultation among members of NMAC.[70] However once the MSB is established it will function as a final body in relation to accreditation issues.

In terms of content, the standards require a facilitative or interest-based approach to mediation. The main features of accreditation include approximately 40 hours of training, a practical assessment of skills and competency, 25 hours of mediation practice and 20 hours of continuing professional development every two years. There is also a requirement for professional indemnity insurance. Mediators must renew their national accreditation every two years. Mediators wanting to move beyond a facilitative approach are

---

[69] See *T. Sourdin*, Mediation in the Supreme and County Court of Victoria, A Report, Department of Justice, Victoria (2008) Recommendation 3: Courts should define and describe the mediation processes that are to be used by external mediators and ensure that all mediators are properly trained and accredited.

[70] The Australian National Accreditation and Practice Standards can be found at <www.mediationworld.net> under the country heading, Australia.

required to comply with the requirements for offering a blended ADR process. By contrast family mediation in Australia is treated as a speciality area and federal legislation has been enacted establishing considerably higher standards and more onerous training and assessment requirements for those wanting to be recognised as family dispute resolution practitioners.

In England the Civil Mediation Council (CMC) – an independent body established to represent and to promote civil and commercial mediation in the country and to consult with the government, the courts and industry – has proposed a national mediator registration scheme. This will replace its existing accreditation pilot scheme in favour of a system of registration for organisations and individual mediators. Registration will be open to both mediators in England and abroad, and will require adherence to minimum standards of training, administration, experience and on-going professional development. Those registered may use the CMC logo as a mark of assurance to the public. The minimum standards for registration include 24 hours of mediator training and six hours of continuing professional education annually. There does not seem to be a practice requirement. These requirements are lower than the Australian standards and have been criticised by some as too low to offer the public any type of quality assurance.[71]

In Hong Kong the Working Group on Mediation, established by the Department of Justice, deliberated long and hard about the need for national standards and there were strong views expressed for and against a national accreditation approach. The result was a compromise embodied in Recommendation 28 of the Mediation Report: "A single mediation accrediting body in Hong Kong could be in the form of a company limited by guarantee. The possibility for establishing this body should be reviewed in 5 years." In other words, while a national approach to accreditation is desirable, it is too early to address this issue in 2010. However the Report does not consider that accreditation is unimportant and Recommendation 30 suggests that courts refer matters to mediators who at least subscribe to the national Code of Conduct. Section 9 of this voluntary Code deals with competence and accreditation. At the time of writing the Report and its recommendations have been circulated for comment. Finally, while there are no national accreditation standards in Hong Kong, most mediation service providers offer their own accreditation. This was also the case in Australia and England prior to national initiatives emerging. These standards generally promote a facilitative mediation model and comprise training, assessment and continuing professional development and are similar to the Australian standards in terms of content. However there are no ongoing practice obligations nor is professional indemnity insurance required. Renewal requirements vary.

---

[71] Civil Mediation Council to Register Respectable Mediators: The Mediator Magazine, January 2010.

Thus the trend in these three countries is towards voluntary national accreditation of facilitative, interest-based mediators using an industry-initiated, self-regulatory approach. Such an approach suggests that mediation practice is primarily facilitative. However the most recent survey of Australian mediation practice indicates a significant gap between accreditation standards and mediation practice in court-related matters. The survey was conducted in the Supreme and County Courts in Victoria and involved 500 court-related mediations by mediators, many of whom stated that they were nationally accredited.[72] The following table highlights the findings of the research compared to the Australian National Mediator Accreditation System referred to previously.

National Mediator Standards (Australia 2008) and Survey of Court-connected Mediations in Victoria (2009)[73]

Quality or Principle	*Approval or Practice Standard*	*Empirical Survey Evidence*
Role of the parties	Maximise participant decision-making	Limited role for participants
Role of representatives	Party-controlled system, representatives in support	Lawyer dominated system
Focus of negotiations	Interest-based focus	Rights-based focus
Measures of effectiveness	Enhanced party satisfaction in dispute processes	Efficiency in case management
Function of mediators	Non-advisory role for mediators	Mediators tend towards evaluative interventions
Model of mediation	Facilitative model of mediation	Settlement and evaluative models

These findings are consistent with previous research which suggests that many mediators in court-related mediation contexts employ conciliatory and directive techniques, such as suggesting solutions to invite compromise,

---

[72] *T. Sourdin*, Mediation in the Supreme and County Courts of Victoria, Report prepared for the Department of Justice, Victoria, Australia, April 2009.

[73] The table is reproduced from *L. Boulle*, Editorial: Weighing the Evidence: ADR Bulletin 11 (2009) No. 3, p. 43.

to help the parties achieve settlement.[74] The Australian Law Reform Commission has noted research indicating that court-based mediators may adopt an interventionist approach, in part motivated by their knowledge of likely court orders in the dispute at hand.[75] Interestingly, as previously discussed, similar criticisms have been levelled at court mediation practice in England.

The marked difference in the above table between the practice in the surveyed courts and the National Mediator Accreditation System has raised serious questions about the future of mediation practice and the ability of the national accreditation system to provide quality assurances about the nature of mediator practice in court-related settings. These findings must be understood within the broader context of Australian mediation practice of which court-related mediation is only one part. Mediation practice that occurs in the private sector and in community organisations appears to be more in line with the national standards.[76]

On an international level business leaders such as Erik Pfeiffer, Chairman of the Board of Paranova Gruppen in Copenhagen and Wolf von Kumberg (Legal Director, Assistant General Counsel, Northrop Grumman Corporation) have publicly endorsed the development of a pool of internationally recognised mediators who carry with them a trust mark of skill and experience and the backing of reputable organisations.[77] The International Mediation Institute (IMI) is one such initiative. Founded in 2007 with financial support from three mediation organisations in the Netherlands, the United States and Singapore respectively, IMI has consulted, and continues to consult, widely with mediators, mediation users, mediation service providers, government representatives and others who have a stake in the global development of mediation. At the time of writing, IMI has developed a competency certification scheme (IMI Certification Scheme) and is finalising its standards for training and assessment. The organisation operates with the support of selected national mediation organisations around the world to certify international mediators.[78] This is part of the International Story, explored next.

V. The International Story

The International Story is about the apparent ability of mediation to move beyond borders and its global, cross-cultural appeal. It deals with the explo-

---

[74] *L. Boulle*, In and Out the Bramble Bush: ADR in Queensland Courts and Legislation, in: Alternative Dispute Resolution and the Courts, ed. by *Sourdin* (Sydney 2004).

[75] Australian Law Reform Commission, Review of the Federal Civil Justice System, Discussion Paper 62 (Canberra 1999).

[76] See *Astor/Chinkin* (supra n. 10).

[77] See comments by international business leaders on <www.imimediation.org>.

[78] For more information on IMI, see <www.imimediation.org>.

sion in international mediation services and cross-border regulatory instruments on mediation. It also addresses the issue of ethics in relation to the export of mediation from the so-called first world to the third world.[79]

The mid to late 1990s signalled the beginning of the internationalisation of contemporary mediation and ADR. Domestic trends began to extend to cross-border dispute management. International commercial arbitration institutions – such as ACICA in Australia, the HKIAC in Hong Kong and the LCIA in London – and national ADR organisations – such as ACDC in Sydney, ADR Center in Rome, CEDR in London, CPR in New York and JAMS in California[80] – began to develop their cross-border mediation services and facilities. The first transatlantic alliance of ADR organisations, the Mediation Services Alliance (MEDAL), was founded in 2005.[81] In 2009 JAMS in the United States and ADR Center in Italy announced an agreement to form the JAMS International ADR Center to provide mediation and arbitration of cross-border disputes and training services worldwide.

In addition, organisations that offer international mediation services in specialised fields include the World Intellectual Property Organisation (WIPO) for intellectual property disputes[82] and the International Ice Hockey Federation in relation to its own sporting disputes.[83] E-commerce and e-conflict have contributed to a proliferation of online dispute resolution services (ODR) across borders. ODR service-providers for the Internet Corporation for Assigned Names and Numbers (ICANN's)[84] Uniform Domain Name Dispute Resolution policy include WIPO, Asian Domain Name Dispute Resolution Centre (ADNDRC),[85] and the National Arbitration Forum (NAF)[86] based in the United States. Other prominent international online mediation service-providers include the Claim Room (England and Australia) and Square Trade (US). The largest on-line auction house in the world, E-Bay, offers dissatisfied customers ODR services, including mediation.

---

[79] Parts of the International Story are drawn from *Alexander*, (supra n. 44) Chap. 1.

[80] ACICA is the Australian Centre for International Commercial Arbitration, HKIAC is the Hong Kong International Arbitration Centre, LCIA is the London Court of International Arbitration, ACDC is the Australian Commercial Disputes Centre, CEDR is the Centre for Effective Dispute Resolution, CEDR Solve is CEDR's Dispute Resolution Service, CPR is the International Institute for Conflict Prevention and Resolution, and JAMS is a private alternative dispute resolution provider.

[81] International News, JAMS and CEDR Announce Strategic Alliance: World Arbitration and Mediation Report 16 (2005) 178.

[82] World Intellectual Property Organisation (WIPO) has an Arbitration and Mediation Centre, see <www.wipo.int>.

[83] *I. Blackshaw*, Mediating Sports Disputes: National and International Perspectives (The Hague 2002) at 170.

[84] Internet Corporation for Assigned Names and Numbers at <www.icann.org>.

[85] Asian Domain Name Dispute Resolution Centre (ADNDRC) at <www.adndrc.org>.

[86] National Arbitration Forum (NAF) at <www.domains.adrforum.com>.

In terms of international regulatory instruments, the United Nations Commission on International Trade Law (UNCITRAL) published a Model Law on International Commercial Conciliation in 2002, which has been influential in policy discussions worldwide including in Australia, England and Hong Kong. The European Directive on Mediation in Civil and Commercial Disputes (2004), which requires member states of the European Union to regulate aspects of mediation, is also having an influence well beyond its regional focus.

European Union policy has specifically addressed international mediation in consumer disputes. In 2005 the European Union established the European Consumers Network (ECC-Net) to inform customers of their rights and assist in the resolution of cross-border complaints and disputes.[87] The European Commission issued Recommendations in 1998 and 2001 reinforcing its support for the use of mediation in international consumer disputes.[88] Again these developments are watched closely at governmental levels not only in England but also in non-European countries.

In relation to family disputes, there are numerous cross-border regulatory instruments. The Hague Conference on Private International Law has produced three relevant Conventions. The first is the Hague Child Protection Convention of 1996 which promotes the use of mediation with respect to matters that fall under the Convention[89] (Art. 31). The Hague Adult Protection Convention[90] is a sister Convention reflecting much of the 1996 Hague Convention in the context of vulnerable adults. Finally the Hague Child Abduction Convention[91] also makes provision for mediation. In the European Union, Council Regulations, Directives and Recommendations have been adopted that specifically relate to cross-border family mediation, reinforcing support for mediation in family disputes.[92]

---

[87] Available at <www.ec.europa.eu>.

[88] Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/EC), O.J. L 115/31; Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (C(2001) 1016), O.J. L 109/56.

[89] The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, available at <www.hcch.net/>.

[90] The Hague Convention of 13 January 2000 on the International Protection of Adults, available at <www.hcch.net/>.

[91] The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, available at <www.hcch.net/>.

[92] See the Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (O.J. L 338/1), the Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, O.J. L 26/41. Recommendation 1639

In 2007 the Permanent Bureau of the Hague Conference on Private International Law released a feasibility study on cross-border mediation in family matters. The study examines the development of international family mediation practice and concludes with some suggestions for future work in the field including greater international cooperation and communication about available mediators, mediation services and national laws on family mediation. Finally the study suggests that the Hague Conference continue to work towards uniform standards in relation to mediator approval and practice and laws relating to incentives and requirements to mediate, confidentiality and the international recognition and enforceability of mediated agreements.[93]

It seems therefore that regulatory activity in mediation is set to continue as national policy-makers debate the opportunities and risks associated with international harmonisation. Paradoxically, one of the risks associated with international mediation standards is the impact they may have on the ability of mediation to translate across borders and cultures.

According to Antaki[94] there are two primary world traditions in mediation, namely intuitive or informal mediation, on one hand and cognitive, scientific or western on the other. While the former continues to be practised in the Middle East, much of Asia, the Pacific and Africa, the latter approach, western mediation, emerged in the United States and – according to Antaki – is spreading worldwide. He goes on to consider the development of mediation and similar processes throughout history from customary, traditional societies to nation-states and modern justice systems and concludes that mediation models vary according to whether they are serving a communitarian social structure or a mainly individualistic one. In other words mediation's global appeal is its flexibility which international regulation threatens to stifle.

The facilitative mediation models favoured in the west do not always sit comfortably in non-western countries. Hong Kong – where east meets west – is a prime example of this phenomenon. Here western-style facilitative mediation that encourages the parties to problem solve creatively may sit rather uncomfortably with Chinese parties who expect to be directed towards a just and fair resolution by the mediator. As one Chinese participant

---

(2003) on Family Mediation and equality of sexes, Adopted 21 June 2004, Recommendation No. R (98) 1 of the Committee of Ministers to Member States on Family Mediation, Adopted 21 January 1998.

[93] See *Hague Convention of Private International Law*, Feasibility study on cross-border mediation in family matters, (General Affairs and Policy), Prel. Doc. No. 20 of March 2007, at 21–28, avaible at <www.hcch.net/>.

[94] *N. Antaki*, Cultural Diversity and ADR Practices in the World, in: ADR in Business: Practice and Issues across Countries and Cultures, ed. by *J. C. Goldsmith/A. Ingen-Housz/G. H. Pointon* (Alphen a.d.R. 2006) Chap. 11.

in a facilitative mediation course remarked, "[t]hey'll never get Chinese parties to really do this.You can't talk to Chinese parties and ask them to make the decision.They *want* to be told how the case should come out. That's what the neutral is for!" [95]

This brings us to the final part of the International Story – the ethics of exporting mediation. In 2010 mediation and ADR programs for the third world are being funded through first world institutions as part of economic and legal reform. In this context, western mediation is frequently introduced to reforming countries by well – intentioned consultants as a culturally inclusive and value – free process,[96] which it is not.

Australia and England are active exporters of their brands of mediation. Their aid consultants travel all over the world to train, accredit and provide regulatory support for establishing mediation in developing nations. This is done in the name of improving access to justice, economic reform and reduction of poverty. At the time of writing Australia is particularly active in the Pacific region. While much western mediation is being introduced in this region, there are some stories of cultural exchange in the ADR context. In Papua New Guinea and the Solomon Islands, for example, current proposals to introduce mediation into civil procedure accommodate customary and advisory mediators in national mediator accreditation schemes.[97] As Hong Kong gains confidence in its own brand of east-west mediation, it will be interesting to see its export strategy in relation to China and other parts of the world.

If globalism is to aspire to a truly open marketplace, then the process of globalising mediation must be inclusive and fair. It must accommodate culturally appropriate, familiar and accessible dispute resolution processes.

VI. Close

It's not only artists who are allowed to dream. Academics have a professional license to imagine the future. So what does the future hold for mediation especially in the three jurisdictions examined in this essay? In a provocative article Peter Adler heralds the end of mediation.[98] He refers to

---

[95] *L. Barrington*, Mediating Across Cultures: Cultural Challenges for the International Mediator: Mediation Newsletter (September 2002).

[96] On the value crisis and confusion in mediation, see *Dorothy Della Noce*, Mediation Theory and Policy, The Legacy of the Pound Conference: Ohio State Journal on Dispute Resolution 17 (2002) 545.

[97] Personal correspondence with the courts in these countries.

[98] *P. Adler*, The End of Mediation, An Unhurried Ramble On Why The Field Will Fail And Mediators Will Thrive Over The Next Two Decades!: <http://www.mediate.com/articles/AdlerTheEnd.cfm?nl=209#1>.

the fact that mediation today is far removed from the original ideals and rhetoric that so enthused and motivated its early champions. He likens mediation to legalised processes to which legal practitioners pay lip service and which they exploit to satisfy their still adversarial goals. His criticism highlights the risks posed by the regulation, professionalisation and international stories of mediation.

Reflecting on the three countries examined in this essay, it is important to remain vigilant and persevere with the challenge of diverting or even reversing the end of mediation. The following questions are critical and provide an impulse for future debates.

How can Australian mediation manage the potential confusion associated with a plethora of sector-specific regulation without losing the benefits of diversity that makes mediation so appealing? How can the federal government introduce a national framework that is robust yet responsive to the mediation sector? What can be done to align court mediation practice with the industry-regulated national accreditation scheme?

What can inspire a turnaround in English dispute resolution culture so that mediation becomes widely accepted and is more than a formalised prelitigation hurdle in which parties reluctantly engage? How can policy-makers build on the successes of mediation and learn from the criticism of the Woolf reforms, particularly those relating to the frontloading of costs and the absence of qualitative benefits of mediation in settlement practice?

Finally, how can Hong Kong mediators and policy-makers constructively recognise the distinctions between their own historical-cultural form of mediation practice and contemporary mediation? How can they build a bridge between these two traditions to offer the world their own brand of mediation? How can they give effect to the best qualities of traditional and contemporary practice through education, promotion and development of mediation?