Mediation of Computer Disputes

by Geoffrey Grinter

There currently exists a wave of enthusiasm in the community for the mediation of disputes as a means of alternate dispute resolution (ADR). But what of computer disputes? That is, disputes of every conceivable type which might arise in relation to hardware and software. Does mediation have a role to play?

Mediation is defined by the New South Wales Law Society as follows:-

"1. Mediation is a **voluntary** process in which a mediator **independant of the disputants facilitates the negotiation by the disputants of their own solution** to their dispute **by assisting them systematically to isolate the issues in dispute, to develop options** for their resolution **and to reach an agreement which accommodates the interests and needs of all the disputants.**

2. The mediator **does not impose a solution** on the disputants. It is not his function to attempt to coerce a party into agreement nor should he attempt to **make any substantive decisions for the parties. He/she may raise** and help the parties explore **options** for settlement. **It is not the mediator's function to give legal advice to the parties.**

3. The solicitor mediator should not attempt to direct the decision of the parties based upon the mediators interpretation of the law as applied to the facts of the dispute. It is a **fundamental** principle of mediation **that competent and informed parties can reach an agreement which may not correspond to legal guidelines** contained in the relevant statutes or case law that does not correspond to general community standards".

The Federal and State Governments have both adopted the mediation process. Mediation has for some time, been part of the Family Court regime and it has been introduced by the State Government into the Local Court system. The New South Wales Law Society sponsored "Settlement Week" has become an annual event achieving settlement rates of about 70%.

In the Federal sphere legislation exists in the form of the **Courts (Mediation and Arbitration)** Act, 1991 which was enacted to enable the Court to develop ADR structures and procedures and to ensure confidentiality and to exclude the liability of dispute resolvers and persons referring matters to ADR.

The Federal Court Rules make provision in Order 72 about the referral of proceedings to mediation, nomination of mediators, conduct of mediation conferences and adjournment or termination of mediation.

The New South Wales Supreme Court has produced an ADR paper giving a summary of its recommendations. It is recommended that a pilot project be conducted over a three year period to introduce mediation into the Court system.

The project is divided into three phases, each of one year duration. The third phase will require the parties in certain disputes to furnish the Court with a certificate of a recognised mediator that mediation has been attempted prior to the commencement of proceedings. This, of course, amounts to compulsory mediation and it is not favoured by a number of mediators as the success of mediation normally involves voluntary participation. However, if the project is adopted and it is codified in terms similar to the Commonwealth Legislation (which is the intention) it will radically change the method of dealing with litigation in New South Wales.

Disputes in the information/technology field have been recognised as a source of mediation work in the United Kingdom. Marion McKeone, in her article appearing in the Law Society's Gazette No. 22 12.6.91:-

> 'Computer litigation has proved to be a rapidly growing and lucrative area of work for a number of major firms. But a survey shows it is an area where work generated through litigation has peaked and is now ripe for the use of Alternate Dispute Resolution'.

The article deals with a 1991 survey of 250 law firms in the United Kingdom. The survey was conducted by technology consultants, Mathiason Turner Associates Limited. Of the firms responding to the survey 90% were instructed in end user disputes and 67% were concerned with software/copyright disputes. The survey found that the most frequently found feature of computer disputes is their cost. Technical complexity and the use of jargon were also cited by 52% of the Respondents. The Respondents overwhelmingly were in support of ADR. The main advantage cited was its cost effectiveness, followed by speed and ability to focus on the issues involved. Privacy

and the ability to continue to do business with each other afterwards were also listed. The main disadvantages were that firms may still litigate and the apparent reluctance on the part of disputing parties' lawyers to get involved. A lack of competent neutrals was also cited as a disadvantage by 29% of the responding firms.

I was recently in the United Kingdom and I was aware of two groups operating there which dealt with computer dispute mediation. Namely, Computer Mediation Limited, a division of International Dispute Resolution Limited, operating out of London and Bristol and CEDR (Centre for Dispute Resolution) operating out of London.

IDR Europe Limited is a private company offering mediation and training. As far as I could determine the operations of Computer Mediation Limited have been encompassed into IDR Limited. The service to mediate computer disputes is provided and promoted through IDR Limited.

CEDR commenced operation in November, 1990 and is an independant, non-profit organisation launched with the support of the confederation of British industry to promote ADR techniques and services. Its membership consists of a number of commercial, industry and public authorities together with professional members. At the 30th April, 1992 there were 95 members of industry and the public communities and over 125 in the professions including private members. It has set up an information technology working party to target the IT area and attract suitable neutrals.

I met with Professor Carl Mackie, Chief Executor Officer of CEDR, and his associate, Stacey Jessiman. I was told that they have 8 qualified mediators to deal with computer disputes. The mediators are CEDR trained and are either lawyers or consultants with formal training or industry experience in the IT field. Computer mediation dispute work is promoted through seminars, articles and journals, press releases and the training programme.

CEDR has mediated 175 disputes since its inception and of which 5 have been computer related. Two case studies provided by CEDR give an example as to how mediation works:-

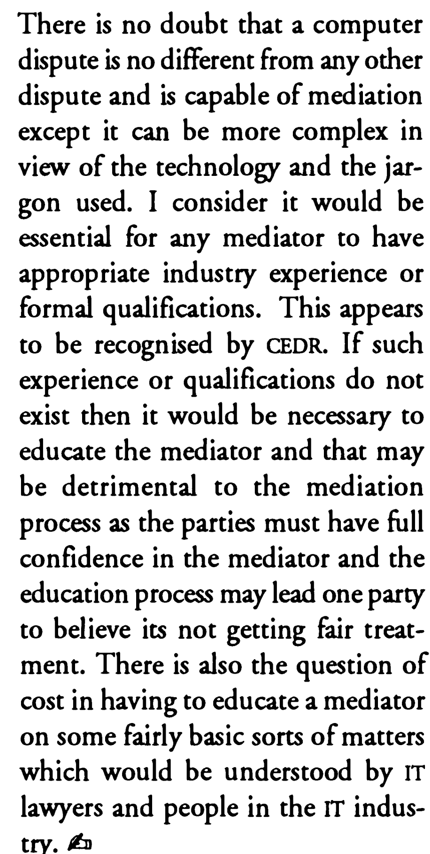
Case Study 1

A software company was contracted to supply a custom designed software system. The client firm experienced difficulties with the program and they set about inhouse alteration. Eventually the whole system malfunctioned and a dispute arose over liability. Direct negotiations failed and a mediator was called in to put ADR tactics into practice. In one day a compromise solution was negotiated. The faults in the system were worked out and the modifications made by the inhouse specialist of the client firm were taken on by the software company who paid the client firm royalties. ADR produced a constructive outcome of a confrontational situation which would have otherwise resulted in litigation.

Case Study 2

A dispute involving complex legal and technical issues arose in 1982 between IBM and Fujitsu. It concerned the copying of IBM mainframe operating system software by Fujitsu. By 1985 IBM were demanding arbitration. Two arbitrators were appointed, one skilled in dispute resolution, the other was a retired computer executive. The arbitrators felt the case was suited to ADR and that it would be more beneficial to deal with general agreements rather than specific claims. They decided to act as mediators rather than arbitrators. They successfully plotted out agreements which dealt with past software abuses, made compensation payable, set up a license scheme for operating systems on other company's hardware and finally set out in the contract governing their relationship that any disputes arising between them would also be handled by ADR.

ADR supplied solutions to the immediate problem. They also supplied a framework for future business relations and the means of solving future disputes.



Conclusion

There is no doubt that a computer dispute is no different from any other dispute and is capable of mediation except it can be more complex in view of the technology and the jargon used. I consider it would be essential for any mediator to have appropriate industry experience or formal qualifications. This appears to be recognised by CEDR. If such experience or qualifications do not exist then it would be necessary to educate the mediator and that may be detrimental to the mediation process as the parties must have full confidence in the mediator and the education process may lead one party to believe its not getting fair treatment. There is also the question of cost in having to educate a mediator on some fairly basic sorts of matters which would be understood by IT lawyers and people in the IT industry.

Geoffrey Grinter is a Barrister-at-Law, Sydney.