ADR Bulletin
ADR Bulletin

Volume 4 | Number 5 Article 4

11-1-2001

Mediation for the information technology industry

Yvonne Packbier

Eric Pratt

Recommended Citation

Packbier, Yvonne and Pratt, Eric (2001) "Mediation for the information technology industry," *ADR Bulletin*: Vol. 4: No. 5, Article 4.
Available at: http://epublications.bond.edu.au/adr/vol4/iss5/4

This Article is brought to you by ePublications@bond. It has been accepted for inclusion in ADR Bulletin by an authorized administrator of ePublications@bond. For more information, please contact Bond University's Repository Coordinator.

The ADR Bulletin

Industry applications for ADR

Mediation for the information technology industry

Yvonne Packbier and Eric Pratt

This article considers the characteristics of the information technology (IT) industry and its clients and gives a description of the most likely sources of disputes occurring within this industry. Examples are given of companies in the industry that have incorporated alternative dispute resolution and mediation into company policy. Although mediation seems to be very well suited for the IT industry, several factors inhibit its uptake. The article concludes with some suggestions about action required in order for the IT industry to take advantage of the benefits of mediation and the role that the ADR community should play.

'The IT industry is one of the fastest growing and innovative industries in the Australian economy, with a sustained growth approaching 12 per cent over the last five years. It accounts for some $50 billion in sales with annual exports close to $4 billion.'

Characteristics of the IT industry and its clients

The information technology industry

The IT industry is relatively young. The first electronic digital computers were built in the late 1940s with Australia being the fourth country to build a computer (in 1948). In the beginning, the computers were the size of tennis courts but in the 1980s the advent of the 'personal computer' (PC) started the big breakthrough of technology. Suddenly it was possible to have a desktop at work or a computer at home. The computer became an enabler for enormous scientific and social change. Yet the power of the computer remains the same; it lies in the program fed and used by its human operator.[1]

The IT industry is one of the fastest growing and innovative industries in the Australian economy, with a sustained growth approaching 12 per cent over the last five years. It accounts for some $50 billion in sales with annual exports close to $4 billion.[2] The IT industry is now made up of almost 19,000 companies in Australia, which is an increase of 36 per cent since the last ABS survey in 1995-96. A large percentage of these organisations (79 per cent) can be classified as computer consultancy services, 8 per cent of the companies are wholesaling computers and 5 per cent specialise in telecommunication services.[3]

Most of the organisations in the IT industry belong to the small and medium enterprise (SME) sector, with 96 per cent employing fewer than 20 people in 1989-99. These businesses, however, accounted for only 24 per cent of employment and 12 per cent of total industry income. Most of the IT business is generated by about 1 per cent of the industry which are large organisations that account for 65 per cent of the total IT industry employment and generate 76 per cent of total industry income. The average income of these large businesses during 1998-99 was $307.6 million.[4]

Users of technology

Information technology entered business with the introduction of computers as payroll calculators. It is for this reason that many companies still have the management of IT under the financial unit's responsibility, although IT is now supporting all the different components of business processes.

Besides being utilised in the accountancy department, IT is used as an enabling tool by all industries to enhance their core business. For example in the manufacturing industry, IT enables the 'just in time' delivery of raw materials; in the construction industry IT makes CAD (computer aided design) systems possible; worldwide reservation systems have changed the tourism industry; and in the healthcare industry it is now possible to exchange client information between the different healthcare providers.

Organisations with a great dependency on their IT applications, such as the banking and airline industries, used to keep the development, implementation and maintenance of IT inhouse. But in the ➢

Published by ePublications@bond, 2001

➢ last 10 years there has been a tendency to focus more on the core business of an organisation with the IT activities being outsourced to companies that specialise in information technology.

Disputes in the IT industry

Issues and disputes in the IT industry are mainly caused by a lack of understanding with respect to expectations between the IT focused and business focused people involved in IT projects. As a consequence, effective communication between these parties is hampered, and in some cases miscommunication can occur without parties being fully aware of it.

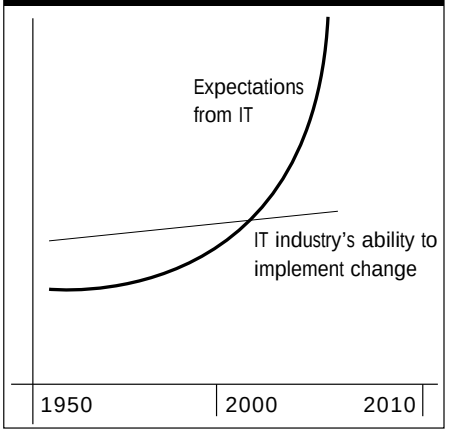
This was confirmed by a recent Australian survey which found that 30 per cent of software problems are never resolved.[5]

Expectations between IT and business oriented people are out of line as a result of past investment that did not produce the desired results, computerisation that might have added instead of eliminated work, and past change that created confusion and complexity, making improvements harder. The IT industry tends to oversimplify the ease of achieving future results by technology implementations. In many cases there might not be sufficient time spent on communication about required business process improvements and change processes that organisations have to go through to achieve the expected outcomes. The challenge for the IT industry is that it will only be clear what was really required by the client once the client starts using the system that was implemented.

The IT industry has experienced phenomenal changes in the past two decades. Hardware and software evolution have resulted in contracts and technology becoming increasingly complex. Figure 1 depicts the assumption that the IT industry's ability to implement change is fairly constant but in contrast the expectations from IT have been growing exponentially as time progresses.[6] In the light of this, it would seem reasonable to assume that the potential for dispute will increase as the gap increases.

Besides ongoing technology changes, many other day to day business situations can lead to conflicts or disputes — such as failure to meet expectations in performance,

Figure 1: gap in expectations



product standards, delivery of contract terms, or partnerships where changed circumstances lead to arguments over loss and profit allocation.

The IT industry is very immature when it comes to contract negotiation and contract management. There is little experience and limited availability of legal and contractual frameworks that can be used. One of the consequences of this is that each of the parties involved might have a constant feeling of being 'ripped off'.

Information technology performance disputes

A recent court case in Australia between the Royal Automobile Club of Victoria (RACV) and Unisys involved eight weeks of court hearings and took almost five years. Unisys installed a system for RACV in 1995 to automate document retrieval for its claims processing centres. RACV found the retrieval time was 10 times what it had asked for.

'It's a huge expense for a client to go through an eight week trial. It's difficult and grinding because barristers don't know a great deal about computers, judges don't know a lot about it and there is a huge amount of jargon,' says Mr Schute, from Phillips Fox in Melbourne, representing the RACV.[7]

Your web host isn't up to expectations. Your site is available 99.7 per cent of the time as stipulated by contract, but performance is slow, bandwidth is tight, and the firewall isn't keeping hackers out. You call your account representative, but the complaint is dismissed. After all, uptime is adequate. If you want other shortcomings fixed, it'll cost. These kinds of disagreements with vendors are all too common, especially with large or customised IT installations during extended rollouts. One party thinks it has delivered per contract; the other says results aren't what it thought they would be, according to Sandra Sellers, president of Technology Mediation Services, McLean, US. Perhaps the parties didn't understand each other clearly to begin with, or their needs and expectations changed over the course of the process.

Intellectual property disputes

Being creative is important in the IT industry, as the average life of software and hardware is very limited. New ideas are developed with enthusiasm and put into production. The IT industry is therefore a fertile ground for disputes around the issue of who owns the intellectual property. Clients are duplicating programs; programmers change employment and take with them knowledge and ideas from their former employers; client lists are stolen; and the results of research and development are passed on to others. The reality of the industry is that even carefully worded contracts are somewhat hollow and limited in what they can do when it comes to resolving disputes.

Mediation instead of litigation

The term alternative dispute resolution is truly an oxymoron. It purports to be an alternative to the trial of a lawsuit. In fact, the lawsuit is the alternative resorted to only after the adversaries in a conflict walk away from each other and refuse to address each other's demands. It is, therefore, more accurate to describe the lawsuit as an unsatisfactory alternative to negotiation and mediation.[8]

Mediation is a decision-making process in which the parties are assisted by a third party, the mediator, who attempts to improve the negotiation process and to assist the parties reach an outcome to which each of them can assent.[9] Mediation is an assisted negotiation with the process sometimes being voluntary, flexible, easy to commence, low cost, fast (most mediations take only one to two days) and confidential. Mediation provides an opportunity to look at the ➢

➢ future and to move towards outcomes by providing a framework which brings the parties together.

The IT industry moves too fast for traditional means of dispute resolution. It can take up to two years to secure a date in court and, if the case goes to appeal, a further two to three years is not unusual. By the time the disputing parties appear in court, the dispute itself is often no longer relevant (because, for example, the technology at the centre of the dispute is not being used anymore). The IT industry has neither the time, patience nor resources to waste on long, drawn out cases; it needs to deal with business disputes quickly and efficiently. This is particularly the case for the SMEs that comprise the bulk of IT companies in Australia.

'Mediation provides an opportunity to look at the future and to move towards outcomes by providing a framework which brings the parties together.'

The IT industry can learn from the many decades of experience within the construction industry and by doing so can develop more maturity in the use of contracts. The importance of system specification is similar in the IT and construction industries. Large outsourcing of IT projects shows similarity with multi-tier contracts in the construction industry. Moreover, both industries are technical, make heavy use of contractors, and are riddled with jargon. The construction industry has included mediation in its contracts for several years with great success.

A major concern of many organisations is to preserve business relationships, which is especially important in the relatively small Australian IT industry. The mediation process places an emphasis on restoring consensus and relationships rather than fuelling the fire of combat through opposing advocates and experts seeking to win. Mediation brings all the parties to the bargaining table where they can 'realistically' evaluate their positions and safely explore settlement options. Mediation even works in those cases where the parties have been unable or unwilling to negotiate, or have taken unrealistic or intransigent positions.[10]

According to Allen Tidwell from the Macquarie University Graduate School of Management:

> The beauty of mediation is that it forces people to engage with each other, rather than wind each other up from a distance. Disputants don't become alienated from the source of the problem. Once lawyers get involved, it becomes an institutional problem that takes on a life of its own.[11]

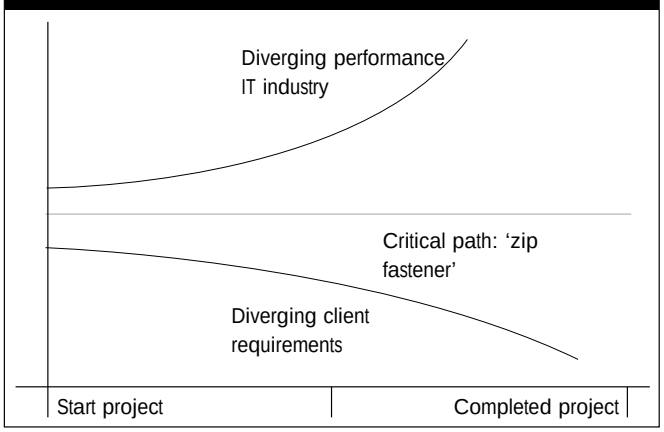
The experience of the Centre for Dispute Resolution (CEDR) in London shows that mediation has a 90 per cent success rate, with the highest chance of success in IT industry disputes when intervention has been possible at an early stage.[12] One of the main reasons mediation can fail is that it is brought in too late in the dispute proceedings.

Mention has been made of the gap which frequently exists between IT and business expectations. If one adds to this the remarkable advances in IT technology which can and often do appear during the course of a long project, the widening gap in expectations is hardly a cause for wonder. It is apparent that the outcome of a contract may be quite different from what the parties envisaged at the outset. Double divergence can occur from what the building industry would term the 'critical path of construction'.

Figure 2 shows the 'critical path' as a straight line between contractual conception and completion. A diverging performance curve away from the critical path can develop as a result of the IT industry's confusion as to the original contractual terms and requirements. A diverging curve in the opposite direction represents the client's ongoing requirements prompted by its changing perception of the original contractual terms, current experience and tempting technological advancement.

Managing relationships from the start by having a third party involved to ➢

Figure 2: adjusting expectations



➢facilitate the shared visioning during contract negotiations could *prevent* disputes. A mediator, as third party, could be involved during the whole course of the project to facilitate discussions regarding past, present and future issues in order that expectations can be adjusted before large positional gaps are formed.[13] The mediation service will act as a sort of 'zip fastener' for the two divergent curves to keep the parties on the 'critical path'. In this way, the problems of a gap in expectations and even miscommunication can be identified at an early stage and alleviated.

Companies already utilising mediation

Several international technology vendors regard a structured dispute resolution method as making good business sense and have implemented methods in their company's policy to make sure that internal and external disputes will be dealt with in a timely and cost effective manner.

Some years ago Motorola Inc developed a sophisticated ADR policy. As a result of that policy it estimates that it has saved approximately 25 per cent of its budgeted litigation costs, which run into the tens of millions of dollars.

Before General Electric (GE) set up its formal early dispute resolution (EDR) system it spent tens of millions of dollars more annually resolving problems than it does now, says Elpidio Villarreal, a legal counsel with the company. Elpidio emphasises not waiting too long before calling in lawyers or professional mediators as partners in crafting solutions. He instituted GE's EDR procedures to keep conflicts from escalating out of control. 'The intention is to have a "cradle to grave" dispute-resolution process,' he says.[14]

Case study: mediation in the IT industry

The dispute

The dispute involved a computer services business and its customer.[15] In 1993 the customer commissioned the supplier to design and build a computer system for use by the customer's salesforce. After a number of delays and interruptions to the project, the supplier delivered the system to the customer in 1994. Following acceptance tests, the customer conducted a field trial of the system. The system was never put into operational use.

The supplier became aware of a dispute when its project director chased some unpaid invoices. Some months later the customer wrote to the supplier, purporting to terminate the contract on the grounds that the system had failed the acceptance tests and seeking repayment of monies paid under the contract. The supplier replied by refuting the customer's claim on the grounds that the customer had accepted the system by conduct, namely the supplier fixing faults during the customer's acceptance tests and the customer's act of putting the system into a field trial. After further correspondence between the parties and their lawyers, the parties agreed to try mediation before embarking on litigation. A settlement was agreed, with both parties bearing their own professional costs in connection with the dispute.

Why mediation?

The IT company saw mediation as a means of establishing a dialogue with the customer, without all the emotional heat generated by litigation. The parties also recognised the considerable cost and time savings which could be achieved if the dispute could be settled through mediation rather than litigation.

Key benefits

The mediation proved to be an enormous saving in legal fees; the supplier's costs were less than one third of the costs it would have incurred just to prepare the defence document if the dispute had litigated. As regards time saving, there is little doubt that this dispute would have been settled if it had litigated. The difference is that it would have taken another 18 months to reach the same point, with a huge mountain of costs to argue over. With the supplier's day rates for consulting and senior project staff being more than $1000 per day, litigation would have represented a considerable waste of effort and loss of potential revenue. Before the dispute, the parties were barely on speaking terms. The mediation helped to re-establish the failed relationship. Maybe the biggest benefit was that the mediation helped to clarify issues a lot faster than litigation, enabling both parties to make a sensible assessment of their legal and commercial risks. Even if the mediation had not produced a settlement, it still would have been able to be regarded as a success for this reason alone.

Inhibitors to the uptake of mediation in the IT industry

The IT industry is missing out on the opportunity to utilise appropriate (or alternative) dispute resolution (ADR) methods, and specifically the mediation process, as a way to deal with their business disputes as the industry has little awareness about these alternatives to litigation.

A recent survey by the CEDR in the UK indicated that for the majority of the small and medium sized companies, the external legal advisors did not discuss mediation, although 77 per cent of the companies researched were experiencing serious disputes.[16] There are no similar survey results available for Australia, but such a lack of awareness in the IT industry might be higher as a result of the high proportion of SMEs in the IT industry.

Lawyers who are providing legal advice and assistance in contract negotiations to the IT industry are (in general) not forthcoming in informing senior executives about the benefits of involving an independent third person as a mediator. Open negotiations between parties who are assisted by their lawyers may never take place without the assistance of a third party mediator because lawyers are often more interested in posturing than in resolving disputes. As a result, hard bargaining tactics are often employed which emphasise the differences in the parties' positions, rather than seeking a common ground for settlement. Lawyers often fear that the making of any 'reasonable' settlement offer will be taken as a sign of weakness or will be used by the other side as the starting point for the next round of negotiations.

The IT industry should be made aware that this posturing and hard bargaining can be reduced or eliminated by a mediator ➢

➢ whose job it is to keep the parties focused on exploring productive avenues to settlement. Mediation provides a safe environment for negotiation because the mediator can control and direct communications. In this fashion, unproductive discussions can be avoided and concessions or proposals will be communicated only if they are likely to lead to a settlement.

The ADR industry itself is inhibiting the uptake of mediation as well. In a small market such as Australia, many different organisations, associations and centres seem to be providing mediation services, without a nationally accepted accreditation standard and without a sufficiently enforced quality control mechanism. It will be crucial for potential users of mediation in the IT industry to know which organisation to approach as a source for quality mediators.

Conclusions

In order to create more awareness within the IT industry about mediation and other methods of ADR, it will be beneficial to create similar national education and awareness raising processes to those that have been used successfully within the construction industry.

Once awareness has been created, it is critical that quality ADR professionals can be accessed who are sufficiently trained in IT issues and culture. Certification of mediators should be backed up with continuing professional education to assist in keeping track of rapid developments within the IT industry and to maintain high standards of professional competence and ethical behaviour. Moreover, ongoing monitoring of the quality of ADR services being delivered would boost the IT industry's confidence in the use of such services.

Mediation seems to be so well suited for resolving disputes in the IT industry that litigation should be treated as the alternative. ●

Yvonne Packbier LLM MBA is director of ZenFormation, an organisation providing industry development and mediation services. She has more than 15 years experience within the IT industry and is a certified mediator specialising in IT disputes. Eric Pratt QC is Chairman of IAMA's Queensland Chapter. Comments on this article or requests for information are welcome via zenformation@optusnet.com.au.

Endnotes

1. Ayensu Dr E *The Timetable of Technology* Hearst Books 1982.
2. AIIA, information from <www.aiia.com.au>.
3. Australian Bureau of Statistics, Canberra 29 May 2000.
4. Australian Bureau of Statistics, Canberra 28 November 2000.
5. 'IT a necessary evil: survey' *The Australian* 21 August 2001.
6. Based on research by Sheldon Dorenfest & Associates (Chicago, US) a research and consulting company specialising in the health IT sector.
7. 'Unisys loses court battle' *The Australian* 28 August 2001.
8. Observation of William Cousins, February 2000, Grynbaum's Mediator Update, from article by Morgerman G, 'Construction mediation: after 20 years, poised at the new millennium' available at <www.mediate.com/articles>.
9. Boulle L *Mediation Principles, Process, Practice* Butterworths Sydney 1996.
10. From article by Roberts M 'Why mediation works' available at <www.mediate.com/articles>.
11. From article by Rimac M 'Peace work' *Magazine of The Qantas Club* Spring 1999.
12. Mackie K 'The end of the beginning for leading industry troubleshooter' *Computers and Law* February/March 1997.
13. Other forms of ADR could be relevant as well, but that is outside the scope of this article.
14. Marks S *Network World* 12 February 2001 <www.ITworld.com>.
15. Example of a recent mediation of an IT industry dispute through the Centre for Dispute Resolution, described by John Yates in his article 'Did you spill my pint?' *Computers and Law* February/March 1997.
16. News release 25 June 2001 Centre for Effective Dispute Resolution (CEDR) at <www.cedr.co.uk/index.php?location=/news/archive/20010625b.htm>.

The ADR Bulletin
The monthly newsletter on dispute resolution

is a Prospect publication

PUBLISHING EDITOR:
Fiona Britton

MANAGING EDITOR:
Elizabeth McCrone

PRODUCTION:
Kylie Pettitt

SYDNEY OFFICE:
Prospect Media
Locked Bag 2222
Chatswood Delivery Centre
Chatswood NSW 2067 AUSTRALIA
DX 29590 Chatswood
Telephone: (02) 9414 8250
Facsimile: (02) 9414 8251
www.prospectmedia.com.au
prospect@prospectmedia.com.au

SUBSCRIPTIONS:
$445 a year including postage, handling and GST within Australia, posted 10 times a year.

Letters to the editor should be sent to the above address.

This journal is intended to keep readers abreast of current developments in alternate dispute resolution. It is not, however, to be used or relied upon as a substitute for professional advice. Before acting on any matter in the area, readers should discuss matters with their own professional advisers.

This publication is copyright. Other than for purposes and subject to the conditions prescribed under the *Copyright Act*, no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior written permission. Inquiries should be addressed to the publishers.

ISSN 1440-4540

Print Post Approved PP 255003-03417

©2001 Prospect Media
ABN: 70 001 002 357

Published by ePublications@bond, 2001