

# Mediating Computer and Other Technology Disputes

by Connie Carnabuci

With the growth of mediation as a method of commercial dispute resolution, an issue which has arisen for consideration (which is not specific to technology disputes but which is very well highlighted by those disputes) is whether the mediator needs to be an 'expert' in the subject-matter of the dispute or the law relating to the subject-matter of the dispute.

One view is that the essence of mediation is the process. This process is based on the concept of 'principled negotiation' whereby an independent third party (ie the mediator) assists the parties to identify: the matters in dispute; their respective needs; and options for resolving the matters in dispute and satisfying their respective needs. The solution is one which the parties agree to. It is not one which is imposed upon the parties by an adjudicator. The mediator need only be skilled in the process of mediation.

Another view is that the mediator is better able to facilitate a principled negotiation of a dispute where the mediator has expert knowledge of the subject-matter of the dispute or the law relating to the subject-matter of the dispute.

Sue Duncombe, the Executive Office of LEADR, feels that it is desirable, but not necessary, for a mediator to have some expertise in relation to the subject-matter of the dispute as it assists in breaking down communication barriers if the mediator can 'speak the language' of the parties.

Micheline Dewdney, co-editor of the Australian Dispute Resolution Journal and a member of the Law Society of New South Wales' Dispute

Resolution Committee, is of the view that a mediator who is skilled either in the subject-matter of the dispute or the law relating to the subject-matter is in a better position to 'assist in generating options to resolve the dispute, even though it is not the mediator's function to either provide legal advice or solve the dispute for the parties.' In addition, Ms Dewdney is of the view that the 'expert mediator' has a level of familiarity with the subject-matter that will often give the mediator strong credibility and assist in creating a problem-solving atmosphere.

Carol Dance, Chief Executive Officer of Australian Commercial Disputes Centre ('ACDC'), makes the point that technology disputes encompass a range of different types of disputes. At one end of the spectrum there may be disputes about fees owing to a consultant, whilst at the other end of the spectrum there may be a dispute about the fitness for purpose of the work which has been delivered. The issues between the parties may encompass matters other than merely technical issues. In Ms Dance's view, 'it is essential that the mediator has the respect of the parties, has credibility. A mediator with technical expertise in the subject-matter of the dispute is better able to reality test proposed solutions and assist in generating other options.'

Ms Dance stated that often in technical disputes, 'the parties can't agree on a mediator.' One party may be relying on a rights based argument and therefore want a mediator with legal expertise. The other party may be relying on a technical argument and therefore want a mediator with technical expertise. One way of over-

coming this situation is to appoint a skilled mediator (in the sense of an individual who is skilled in the process of mediation) and an independent expert to assist the mediator on technical issues which may arise. It is essential that the parties respect the mediator and that the mediator is not perceived by either party to have a greater understanding of a particular party's business or interests. The mediator must be perceived as neutral. By participating in the process of choosing the mediator, the parties' commitment to the overall process will generally be heightened.

Ms Dance raised as an example the case of *IBM v Rothmans*, which was a dispute about the computerisation of distribution systems. The dispute had been in arbitration for a considerable period. Unbeknownst to the arbitrator the parties mediated the dispute (concurrently with the arbitration) before Sir Laurence Street and successfully resolved the matters.

Sir Laurence Street's view is that 'the pre-eminent skill required of a mediator is people skill: familiarity with the litigation process and a good commercial sense are all necessary.'

In Sir Laurence's view familiarity with the general litigation process is necessary because it is that process which will be the fallback position if the matter is not negotiated, and it is that process which forms the context in which the mediation takes place. On the issue of whether the mediator needs to have expertise in the particular subject-matter of the dispute, Sir Laurence is of the view that 'it certainly helps if the media-

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## Abstracts

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may examine the errors of reasoning in expert systems used to assist professionals working in certain areas of financial services.

### *Copyright Protection of Software in Australia - K.Puri*

The author examines the Australian law of software copyright, and focuses on *Apple v Computer Edge* and the Federal Court and Full Federal Court case of *Autodesk v Dyason*. The paper also briefly considers the other similar cases in common law

countries, and notes where the reasoning of the courts have diverged.

### *Problems in Selecting Effective Computer Technology for Use at the Bail Stage of the Criminal Justice System - Patricia Hassett*

This paper looks at three proposals for using computer technology to reduce unjustified criminal detentions. The author concludes that the application of computers to the area of detention decisions will pro-

mote rationality, consistency and predictability.

### *Ethics for Computer Technology and the Criminal Justice System - W.A.Tupman*

This paper stems from a concern of the author that while a great amount of computer technology is available to the criminal justice system, there is little regulation of the ethical use of the technology. The paper looks at why the technologies are being introduced, what the applications are, and proposes a code of conduct in their use.

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tor has knowledge of the field in which the dispute has arisen.' Sir Laurence does not, however, see this as an essential pre-requisite.

Sir Laurence is of the view that the issue of whether the mediator needs to have expertise in the subject-matter of the dispute has arisen in part because of the subject belief of some mediators that they are not comfortable mediating outside their own area of expertise.

In Sir Laurence's view, two levels of mediation can be maintained in a commercial dispute. On the first level there can be negotiation between executives of each of the entities. These negotiations will, because of the players, be conducted very much in a business environment. If areas of specialist conflict are identified a second level of specialist discussion can be introduced, chaired by an independent specialist. Sir Laurence is of the view that the importance of the confidence of the parties in the mediator cannot be under-estimated. In Sir Laurence's words 'The readiness of the mediator to plough the soil is critical. The


mediator cannot sit back in a lofty way and call for people to attend negotiations'.

Bridget Sordo, Executive Director of Settlement Week and Responsible Legal Officer for Dispute Resolution Committee with the New South Wales Law Society, advised that the criteria for a Law Society panel of mediators is being considered but is yet to be resolved. The Law Society does, however, maintain a panel of mediators for Settlement Week mediations. The Law Society maintains details of areas of expertise of the mediators on that panel. Several mediators on this panel have experience in Technology Law.

LEADR and ACDC both maintain registers of mediators and arbitrators detailing the areas of expertise of those mediators and arbitrators.

It is a reflection of the evolution of specialised legal practice (with technology law being one of the fastest growing legal specialties of recent times) that the 'expert mediator' argument does have a certain appeal. However, whether 'expert mediator' or not, it is the process of the parties' commitment to that process (in-

cluding their commitment to the mediator) which will be the critical factors in resolution of any dispute. The issue of the 'expert mediator' is more one of degree than conceptual divergence.

If you are interested in obtaining information about mediators or arbitrators contact LEADR on 210-4200 or ACDC on 267-1000. 

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