THE ADRoIT PRINCIPLES

LESSONS FOR PLAINTIFFS' LAWYERS?

By Philip N Argy

Commercial disputes are inevitable, especially in emerging areas of science and technology.

Often the specialist expertise of those involved in putting deals together leads to misunderstandings and disagreements later, which can be disruptive, distracting and cash-sapping. For a small business, defective processes can be catastrophic, with damages generally far exceeding the cost of the technology in question.

The ADRoIT (Alternative Dispute Resolution over IT) Principles were developed by a group of science and technology mediators, arbitrators and lawyers with the aim of minimising the likelihood of disputes developing in the first place, and any hiccups during the implementation of projects. Although developed primarily in a science and technology context, they can be adapted to achieve best practice in dispute resolution and prevention across all commercial organisations.

The concept of ADRoIT first arose after a survey conducted jointly by the Australian Computer Society (ACS), the Institute of Arbitrators and Mediators of Australia (IAMA) and the Project Management Institute (PMI).[1] More than 50 per cent of IT contracts ended in a dispute. And, of those, more than 30 per cent were attributable to disagreements over aspects as fundamental as what the specifications meant! When we drilled down further, we found that, apart from those that had resorted to mediation or expert determination,[2] there was universal dissatisfaction with the dispute resolution processes involved and that the costs of those processes were disproportionately high compared with the value of the dispute. There had to be a better way!

We looked at what elements of the mediation process seemed to work. They were threefold:

1. the ability of the mediator to probe the parties in separate sessions to identify mutually acceptable solutions;
2. the ability of the mediator to generate options for the parties to consider; and
3. the presence of executive management more senior than those at the coalface of the dispute and therefore in a position to see the dispute in the broader context of their organisation's commercial goals and objectives.

These three factors together result in a swifter and more commercially pragmatic approach to dispute resolution and invariably give rise to much earlier settlement.

Could these elements of success in mediation be adapted to avoid disputes in the first place, or to nip them in the bud if they did develop? We thought so. What follows is a description of the different stages of a classic technology procurement and implementation, how the ADRoIT Principles can be adapted to them and whether any aspects of the approach could be deployed by a lawyer acting for an individual or small business experiencing problems.

First and foremost, the ADRoIT Principles require an appreciation of the commercial imperatives that lead to the relationship in which the dispute has or is likely to occur. Commonly encapsulated in a business case, it is important to understand that both parties to a deal will have had some commercial rationale for entering into the relationship. Articulating that business case can be beneficial when exploring options for resolving or avoiding any dispute.

Once the business rationale for the acquisition has been articulated, the ADRoIT Principles require a conscious consideration of the alternative ways to deliver the same commercial outcome in addition to the assumed means (being the proposed project). These alternatives are then compared to the proposed project to make sure it is the optimal solution, and to explore whether there are costs or benefits in the other alternatives that could hone the decision into better shape. Engaging a neutral party as a devil's advocate will ensure that the alternative selected is the optimal one for the organisation's commercial needs.

Is there any parallel here for plaintiffs' lawyers? Do plaintiff lawyers treat each new matter as a potential project, evaluating these and brainstorming or workshopping the alternative ways that the client's objectives could be realised? My bet is that few plaintiff lawyers rarely explore beyond the well-tried options of litigation or perhaps mediation. Some may consider whether a class action, or at least the threat of one, would be a good tactic to adopt. Some may consider referring the client to a small claims tribunal, or an industry ombudsman (if one exists in the field of the dispute), or generating some publicity to support the client's cause. But the best time to consider all the potentially useful options is *before* you start to preclude any by the course you adopt. The difference between tactics and strategy is that the latter always involves precluding significant alternative approaches.

At the pre-engagement stage, ADRoIT requires a thorough understanding of both the business case and the technology, to ensure that the solution sought meets the business case. In other words, a results-orientated request for proposals (RFP) is almost always better than an RFP that simply specifies hardware and software and seeks the best price. While this approach can work in some circumstances, it's usually better to let the expert vendors deploy their resources to give you the best solution that will deliver your objective.

At the contracting stage, you also want to make sure that the business case is mapped to the stated hardware, software, functionality and service level requirements. In other words, the specification that the supplier has to meet must be the means by which the business case will be delivered. It needs to be the subject of a rigorous sensitivity analysis, both in terms of the assumptions that underlie the business case

as well as taking into account external factors that could affect the chances of the business case being delivered. Oddly enough, the vast majority of lawyers concede that the deliverable is specified in the technical schedules of a contract, which is generally left to the parties to complete. So they have wonderful 'cover terms' for the delivery of an unknown! A professional neutral with technology expertise can certify that the technical schedules specify, as the contract deliverable, something that at least seems likely to deliver the desired outcome, instead of that result being purely fortuitous as appears to be the case at present.

What can plaintiffs' lawyers learn from this aspect of ADRoIT? Ensure that the theory of the case, whether it is full-blown litigation or some alternative, is fashioned around the client's objectives, so that the strategies deployed will have the best chance of realising those objectives.

At the project implementation stage, ADRoIT involves a rigorous change control regime so that the goal posts don't move and 'scope creep' doesn't infect a project. More importantly, it provides for an independent neutral to ensure that cosiness between a supplier and a customer doesn't compromise the discipline and integrity of the contractual milestones. It also establishes early warning signs of project failure at the incipient stage, thus creating an opportunity to abort the project before scarce funds are consumed unproductively. All too often we see a supplier's representative and customer's representative making a sweetheart deal to defer some key functionality 'to release 2.0'. If what is deferred is a key part of the business case that the board thought it was getting, it might just decline to fund version two due to the failure of phase one to deliver the promised benefits. An experienced neutral will caution the participants against inadvertently deferring the business benefits that will be needed to fund the next phase of the project's development work.

Imploring a plaintiff's lawyer not to settle would seem to be an odd stance for a dispute resolver to take, but it is sometimes necessary to avoid arriving at the WRONG settlement. What is the wrong settlement? One that does not achieve your client's underlying objectives. All too often, we see settlements that people feel forced to accept because the alternatives appear to be worse. If the best available alternative does not satisfy your client's objectives, you need to consider how you came to be in that predicament – it suggests that some earlier time might have been more propitious to be talking settlement. That's not to say that litigation can't sometimes take an unexpected turn and leave you foundering for the 'least worst' escape path, but in those situations your client's best interests may be served by a settlement. Practitioners often talk about keeping in mind your BATNA – the best alternative to a negotiated agreement. But the converse is also true; you need to keep in mind your best alternative to successful litigation.

ADRoIT Principles require a dispute resolution methodology that exhaustively explores all options to salvage the business case and participant relationships before burning them with litigation. They ensure that escalation procedures are efficient and effective in meetings between participants' management, in sensible and commercially orientated attempts to negotiate a resolution, using a mediator with specialist expertise who can maximise the chances of finding a durable solution to deliver the business case and preserve relationships. At this stage, options worth exploring after meetings between senior management of all parties include mediation, neutral evaluation, mini trial, expert determination and conciliation.[3] All have their pros and cons but, importantly, they all share the benefits of ADR lost in litigation: fairness, process efficiency, cost, speed, confidentiality and relationship preservation.

A mediated solution can be better than a complete win in court. Putting to one side the issue of costs, the courts are not directed to finding the most commercially rationale outcome. They are interested in ruling on the questions of fact and law presented for adjudication. Taking the classic metaphor of a dispute over ownership of an orange, the winner will be found to have good title in the orange and the other protagonist will not. That outcome takes no account of why each of the parties WANTS the orange. If one wanted to make orange juice and the other wanted to make chocolate-coated peel, neither of them would benefit from a successful court case as much as from a successful mediation, even if the costs were the same. The court will award the winner the whole orange and the loser nothing. A mediator will encourage the parties to reach an agreement to share the orange, with the juice-maker keeping 100 per cent of the juice and the peel-coater keeping 100 per cent of the peel, with neither having any waste to dispose of. Do you think the parties after that settlement will still have a burning desire to find out who legally is entitled to the orange? Facile though the example may be, it neatly encapsulates why the often-touted 'win/win' benefits of mediation go well beyond mediators' marketing hype.

Organisations need to develop both a dispute avoidance policy and a dispute resolution policy. While some have the former, almost none have the latter. This is remarkable, given that intercepting disputes before they can develop offers massive savings in time, effort and costs. Often the engagement of a neutral expert in the early stages of a project will ensure that the contract deliverable is the business case, that the board has early warning if a project is departing from its specification, and that every opportunity to salvage the business case is taken before resorting to arbitration or litigation. Furthermore, when strategic objectives and competitive advantage are involved, the confidentiality achievable from ADR techniques offers the ability to deal with disputes without sacrificing the secrecy of the strategic planning. ■

Notes: **1** See http://www.telemetrics.com.au/adrsurvey/. At the time of the survey the author was President of the Australian Computer Society and is currently the Immediate Past President. **2** For an explanation of these terms see, for example, http://www.argystar.com. **3** *Ibid.*

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