MEDIATION A SOLUTION THAT DOESN'T CRASH

Getting the Best from your Mediation and Possibilities for Dispute Resolution

Phillip Howell-Richardson

Mediator & Consultant with SJ Berwin

Introduction

Thank you Michael and David. As Michael said my name is Phillip Howell-Richardson and I am a full time mediator. I have mediated many disputes in the IT and Telecommunications Industry. It need hardly be said that the disputes are wide ranging and some challenging! Software licensing issues, software and hardware performance issues, finance issues, framework disputes, failures to provide promised systems, breakdowns in relationships and claims and counter-claims over cost, performance, specifications and failed time limits have all featured.

Just by way of further background I think it would also be useful to pause to look at some of the characteristics of the Industry and the reasons for failure that exist. It is staggering to note that in a Standford Review in the US alone well over 250 billion dollars a year are spent on IT projects and the application of IT and 31.1% of those projects were cancelled before they reached their final completion. Only 16.2% of the software projects were completed on time and in the case of larger projects involving multi national companies or Government Agencies the news was that only 9% of the projects came in on time and on budget. The good news is that the rate of failure is decreasing!

The research went on to establish the prime reasons for failure and there appears to be common ground that the leading reasons for failure can be found in these areas:

1 Lack of user input at critical points in the life of the project

2 Incomplete requirements for specifications and over ambitious specifications being undertaken.

3 Failure to incorporate changes in the specification.

4 Lack of senior management support so that the IT project is treated as an integral part of the whole business and not just as a mechanical process that is peripheral to part of the business.

Drilling down further into some of the characteristics of IT disputes, I have seen that the following appear time and time again:

1 The nature of the projects often involves commitment and trust. Quite often strain is placed upon the relationship such trust and commitment disappears or becomes non existent. Indeed quite

often the relationship can turn “sour” with all that that may bring for parties working closely together in an environment which requires open co-operation and partnership.

2 Quite often it is the case that there are a limited number of users and a limited number of suppliers of products and services. Initially maintenance of the business relationship is paramount but quite often very different interests emerge as the project continues. The user may not have much alternative but to continue albeit in a relationship which is non-productive and which will result in unwelcome cost and publicity. The supplier in turn may feel wedded to an unpredictable and distrustful partner who can provide a significant threat to the long term viability and business development of the supplier.

The parties are often caught in catch 22 situations. To continue may lead to operational expense, management failure and public recrimination but the alternatives of cancelling the project or continuing to throw money at the project are equally as bad.

It is just this back drop that has provided the ideal conditions for the use of mediation so as to obtain resolution not only to disputes that have entered litigation but also emergent situations of disagreement and performance failure.

I think it would be useful at this point to highlight particular strengths of mediation in the context of the IT industry.

Mediation brings:

1 Confidentiality. This is of course important.

2 Relationship building. The process provides an opportunity to work together constructively.

3. Dispute resolution processes that can be designed for the particular circumstances that the parties face.

4 A process that can dig out of the morass of information, misinformation and failed communication the core interests that may have been forgotten and which can be restored in order to drive the relationship in the future.

5 A process that is solution driven that has as its object the examination of underlying interests for the purposes of settlement or solution. In this context solutions may arise not only out of the result of the examination but also out of the actual process undertaken. For example, a new contract may be negotiated, new licensing arrangements reached, new arrangements for product support provided, new technical solutions explored in an environment of collaboration and indeed the process may be specifically designed so that its only outcome is the recreation of a working effective relationship.

In essence the mediation process can help to address imaginatively not only the consequences of failure which are irreparable but also the needs of the parties who remain in contract and who are in a malfunctioning business relationship and who need to address and eliminate the emergent drivers for failure.

This Talk

The purpose of my talk today is to help you deal with some frequently met issues and point up some of the possibilities that are emerging for you in the application of mediation and mediation techniques.

I shall deal with the following:

1 How to get the most out of the mediation process.

2 Some mediation techniques that may be deployed from the start or early on in an emerging dispute.

Getting the Most Out of the Mediation

1. One of the first questions that arises is what sort of mediator do I want? Do I need an expert mediator, do I need an expert as a mediator, or do I need a mediator working with an expert.

This is often a fundamental question for many people who have highly complex disputes, teams of interested parties whether within the company or as advisors all with their own interest in the "right" outcome of a dispute.

There are a variety of issues that underlie this question.

1 What is the underlying attitude of your own team to the process of mediation and the dispute. Quite often teams of advisers have built in, subconsciously or otherwise, a whole historical analysis of failure with underlying reasons and the mechanics of the dispute has its own dynamics. The advising team and sponsoring management need to be proved right. Also the advising team may not in fact fully buy in to the proposition that the mediator is not a judge and that the mediator is in fact an expert at helping the parties to reach their settlement, to analyse the issues and to deploy the issues prior to negotiation and decision making. Who asks this question may be an indicator of how your negotiating team at the mediation itself should be composed and what needs to be done in preparation. Fundamentally as David has already said, whilst the mediator may well employ very challenging techniques that will lead to re-evaluation of positions and statements of right and wrong, the mediator at the end of the day is not the decision maker and will not impose any decision upon the parties.

2 Is this in fact a question that needs to be analysed in terms of what kind of "style" is required by a mediator to work with the parties most effectively. The underlying characteristics of leading characters and of the fundamentals of the dispute itself may require a more evaluative mediator rather than a facilative mediator. Or is it a mediator who is analytical, scientific, startling, safe or perplexing? The best mediators are all of those as and when required by the mechanics and dynamics of the mediation itself. Within that however the physical presence of the mediator, the delivery of the issues by the mediator, the speech used by the mediator and the extent of mediation experience of the mediator are all those that can be relevant in the choice of a mediator. Even though the most experienced mediators deploy the techniques and presentation that are necessary for the characteristics of the dispute that presents, the parties should take time to select the mediator that suits their assessment of the critical characters and negotiation problems that need to be dealt with in the mediation.

3 Or is this a question that may in fact be a question about trust. The presumption may be that the knowledge and experience of a person steeped in the industry will enable the parties to trust the mediator more. If trust means having a decision maker then that issue has already been dealt with. If trust in fact means that the parties will be able to work easily with the mediator, discuss matters of technicality and get over their core concerns then there are two principle points to be made. The first is that any serious mediator will have spent his time reading the briefing papers

and undertaking contact with the parties prior to any mediation meeting. The purpose of working with the parties is to establish an easy efficient working relationship and to start the process of gathering together information, selecting the relevant information and then communicating it as is needed in negotiations during the course of the mediation itself. Secondly, the parties themselves will always have their own expert knowledge about what is important to them in the dispute. The mediators task as an expert mediator is to get the parties to apply that knowledge to their underlying interests in order to obtain an outcome. It is a core of skill of the expert mediator that he is able to work with the parties on whatever they may choose and the fact is that mediators do work in highly complex disputes quite outside their original areas of experience.

4 Or is this question a question about process. What do you need from the process that will enable the mediator to solve your problem. Will it help both sides to have an expert mediator working with an expert, or in fact, do you want two mediators to work together because of the particular requirements of the dispute.

If a mediation does require a phase where there is a careful assessment of particular technical issues or complicated development of specifications then the mediator and the parties may choose to use to work with the mediator and an expert where the expert can advise independently all the parties and the mediator as needed. In these circumstances the expert is there to assist the process. The expert is not there to advise the parties or to recommend a solution but he is there to help everyone the mediator included to identify the particular areas of concern that, with the guidance of the mediator, should be addressed.

A little while ago I mediated a dispute involving 20 parties, 83 people and a vast complex of factual issues and highly complex insurance and off-shore company law. The parties in conjunction with me chose a co-mediator to deal with some of the parties in order to help them mediate their disputes, and a process of 3 concurrent mediations was agreed upon. The characteristics of the underlying disputes were such that either of us could, and in fact we did, undertake parts of the sub mediations together but the parties wanted to use the two of us in particular ways. In essence the parties looked at the characteristics of the dispute itself and with the mediators decided what they thought they might need to deploy.

5 Underlying the question may also be the question “how are experts to be involved in the mediation”. Experts do have a role to play in the assessment of risk and in the acquisition of information and material that the decision makers in the process need for negotiation. It is the mediators task to ensure that the expert’s adherence to his “viewpoint” being correct does not hijack the process of acquisition of information, assessment of information and negotiation to achieve solutions based upon core interests. I have mediated disputes where whole armies of experts have been present. One of the techniques that I use is that the agenda for the experts’ meetings is fixed jointly by the leaders of the decision making teams. Another technique is that the experts give presentations on specific areas to all the teams and decision makers who may be involved so that information may be delivered in a clear concise way and risk and opposing views may be analysed. At their best experts do identify the common ground and will obtain information which will enable them and their teams to reconsider their view of possible outcomes of disputes in the expert’s area. It is a recognised technique for mediators to remind the chief negotiators of any teams that experts bring their views and their views are based upon a variety of factual, legal and technical matrices and they are but a further contributor to the risk analysis that is being undertaken. At their worst experts may derail a mediation into a period that only serves to prove that one expert is more right than another. In these circumstances the expert mediator acts to help

the parties move away from such dead end negotiation and to maintain the parties' energies on their fundamental interests in negotiations.

In passing if I were now an expert and not a mediator I would be in an expert in:

1 Software systems in the engine rooms of ships whose engines malfunction or explode.

2 The insurance arrangements for captive insurance companies off shore in tax-free havens.

3 The particular software system requirements, operational requirements, and practical and legal restrictions on the application of software systems to the provision of clinical support systems in the NHS.

In fact I am not although I have mediated disputes that involve the above and for a time I was priviledged to be in the company of people who were experts and who worked with me in obtaining a solution.

2 Are creative outcomes really possible or is this just another form of litigation?

Mediation enables you to decide upon the solution that you want. There is no judge. The confines of an historical analysis of fact undertaken through the battle ground of litigation with armies of opposing forces reconstructing evidence of the past for the purpose of squeezing relevant factors into a analytical rights driven decision making machine, yes I mean the Judge, who can only give certain remedies, largely based in money alone, is not the agenda that you have to adhere to.

The outcome of the mediation is entirely up to the parties and I can best illustrate that by giving you two cases in which I was the mediator one of which was undertaken very late in the day just before trial where the parties had spent a fortune on costs in litigation and the other at an entirely different point in the dispute process well before litigation and even as the relationship between the parties was breaking down.

The trial mediation

In this case, a joint venture had been created to exploit "a golden product". The software was to be the answer to the finance industries need to extract certain information quickly, re-formulate it and then present it in an easily digestible form for analysts. It had several world beating capabilities. The original "inventor" joined with some sponsoring financiers and went into a joint venture with a software development company. The joint venture company was held 50/50 and after the original rush of enthusiasm to create the project the inevitable happened. The software company began to pour resources into developing and supporting the product far beyond the original expectations, the money ran out during the initial pilot phase with no sales having been effected, the stress of developing the product lead to threats, the product was eventually locked up in the dispute and was not developed at all whilst the parties argued about intellectual property, unpaid invoices for work, failure of software performance, failure of marketing initiatives, failure of product support in the field, inadequate funds being provided despite promises, and attempted acts of piracy!

It can be imagined that the lawyers for both sides had a field day and the costs incurred by both were soon far in excess of the first development budget for the project. When the mediation arrived before me the parties were facing a 10 week trial and the prospect of not only arguing their issues in public, certainly to the detriment of the software provider who had a considerable interest in maintaining their reputation with their existing customers, but also potential ruination for both companies. The inventor and his financiers wanted to re-finance yet could not do so while the dispute existed where the ownership of the IP was in question, and the need for co-operation on access to essential software information for the original versions

was a necessity. The software company in turn did not want to be proved "wrong" in its software designs and were wild! What happened!

This outcome was:-

i) A perpetual irrevocable licence on agreed terms was granted to the original inventor for the original versions of the software together with complete freedom to develop the original software as required.

ii) The software house gave up its 50% shareholding in the joint venture.

iii) The software company was to be paid for its co-operation on agreed rates as it co-operated in providing information to the new software house.

iv) An agreed sum was to be paid to the software house once the refinancing had taken place and further payments were to be paid at various staging posts on subsequent sales of the product if achieved.

v) Both parties agreed to a form of wording that was to be used in the market place and outside that the terms of the settlement were confidential save for the purpose of re-financing.

vi) The original contribution of the software company would be acknowledged for a period of time in any publicity and the software house agreed to use its contacts to market the finalised product on commission terms in the future.

The Relationship Mediation

The following case is a case where two parties reached an outcome which they could not have reached but for mediation and did so at a time when litigation was not in being nor in contemplation, except as an emerging threat but at a time when the project itself was in difficulty.

In this case a government department had entered into a framework agreement with a well known systems provider. Within the government department there was an IT project director and an IT team which had, together with the supplier, created the original specification of what was an ambitious IT pilot project for the UK. The project's aim was to connect a large number of users distribute information and become truly interactive in a highly critical area in the delivery of services. In line with good practice the staging posts were clearly set out, a great deal of time had been spent on researching the underlying technical issues with the supplier and in matching the project with the users requirements, stakeholders had been created both within the supplier and within the government department who "owned the project" and time had been taken at the commencement of the project for the personnel on both sides to establish working relationships and a methodology for development of the software and the systems. So far so good. I suspect that for the government department the PAC enquiries into how to deliver IT projects successfully featured very highly on their agenda. The project started and as so often happens there was a blaze of glory and success on the early milestones. However, as the project moved forward external factors on cost, changes of personnel, changes to specification, lack of technical support and clarity in the specification at critical stages, all emerged.

Quite understandably, relationships began to deteriorate, communications began to break down and the contract dispute resolution clause was brought into play.

In the first case there was good faith negotiation between the immediate project managers. It is fair to say that both parties did try to resolve the issue at first level but by this time there were divergent views, emerging different interests on cost and performance, and "position taking" in order to support teams that were struggling with the problems that were being thrown up daily. The input of the users was sporadic but quite often vehement and demanding. The first level dispute resolution process did not work and the dispute then escalated.

The project continued but so did the dispute. The dispute continued to escalate and went through various levels of management until eventually it arrived at ministerial level and CEO level. Both organisations had a strong continuing interest in resolving the differences which were now beginning to threaten the overall viability of the project and the delivery of successful outcomes. A dispute project manager was nominated for the government department and a duly authorised director was nominated to explore the problems and seek solutions.

Initially the two nominated decision makers got on well and sorted some of the initial problems. However, some of the problems were more deep seated and lay in the original contractual relationship. Issues of cost and where risk and responsibility lay needed to be re-addressed and worked out. With the intervention of legal departments and with the best will in the world, that was not being achieved. Some bright spark thought of mediation.

The mediation took place over three weeks and encompassed a series of processes. One process was designed to bring up to date and crystallise the most recent specification that would reflect more realistic ambitions. That specification was to be fully costed in accordance with current rates and would serve as the blueprint for contractual purposes for future work and development. At the same time new reporting arrangements were put in place which enabled both parties to monitor, record and agree the development of the software as it was undertaken. The precise scope of the contract in the future was decided upon and new financial arrangements were put in place. As regards the past the very substantial claims by the supplier were in fact partially paid by a payment on account and partially reflected in the new rates that were agreed. The original contract was re-negotiated based upon the experience of the parties in the first period and both parties agreed on the reasons for failure and what had to be removed as drivers for dispute in the future.

The mediation process had as its outcome the re-establishment of the relationship between the parties, the settlement of the claims for money by the supplier that had arisen out of past misunderstandings and an identification of what had gone wrong in the past so that future disputes may be avoided.

Right back at the beginning

In the time that is left I would like to highlight two particular techniques that you may wish to bear in mind when thinking about ways to avoid disputes and deploy mediation and mediation techniques..

1. Deal mediation

   Clearly a great deal of time and effort can go into defining the contract and the project right at the commencement. There are many opportunities here to seek out and deliver a structure that not only defines with care the responsibilities of the parties and the risks and benefits that accrue but also what the parties are to do if disputes should arise. At the very least a dispute resolution clause that is not just looking at arbitration should be used. There is a copy of a simple SJ Berwin dispute resolution clause in your packs and you should consider designing your own system.

   More importantly however there is the opportunity to spell out issues and problems that can cause difficulty later. That in itself may lead to a deal which has been constructed breaking down during the course of negotiation. It is here that a deal mediator who is a neutral intermediatory may be able to help in bringing the parties together at that early time to confront the present and future problems that need to be addressed.

   The deal mediator does not displace the parties lawyers he is simply the lawyer for the situation that presents. A deal mediator may be used when talks are stuck in staked out positions, deadlock is reached and there is poor communication or no communication at all on an area in the contract that has not received particular attention up to that point or which is causing friction. The task of the deal mediator is to work with the parties to address the blockage in the negotiations at that

stage and the deal finalised. There is much discussion at present whether early application of deal mediators to this country will become far more frequent where at present it is more well known in the United States but the jury is out as to whether deal mediation is a dead-end in itself or whether it is in fact an opportunity to deal with hard issues at the commencement of a contract. Some even think it is impossible to be neutral at all as a deal mediator. In normal "mediation" the mediator lets the parties take the lead in settling the issues but in deal mediation it is the neutral or deal mediator's obligation to work with the parties and to lead them to solutions.

2. Embedded mediators.

Once the deal has been created then the next possibility is that parties decide to appoint a mediator or dispute resolution provider from the start for monitoring and communication purposes and dispute avoidance as the project develops. In this scenario an individual or company is named as a neutral or dispute resolver and their responsibility either on behalf of expressed stakeholders or on behalf of all the parties to the contract is to obtain regular reports on progress, discuss regular blockages that may occur and seek to extend communication so that any emerging point of friction or disagreement is confronted quickly and addressed by the parties before they become deep seated. No doubt many consultant project managers would say that that is just the job that they do but in this context the mediator uses mediation techniques from the commencement of the dispute and his job is to pro actively work with the parties to seek solutions right from the start and to avoid dispute at all. Here again, organisations have been created which do carry out this function but we have yet to see how far or in what way this principal will be applied to significant contracts.

Summary

Mediation undoubtedly brings resolution to destructive litigation in a way that can rebuild relationships restore business and achieve project fulfilment. The prize remains to use mediation early in the life of a dispute in a project so that the lessons of early failure can be learnt and applied to avoid future problems with the unnecessary loss of money, time and relationship stress caused by emergent dispute eliminated. The prize is there to be achieved.