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OMPUTER CONTRACTS FOR THE WARY

Even the rather restricted experience of the Courts to date suggests that negotiations between the prospective customer and the supplier of hardware and/or software, which precede a contract may most accurately, be likened to a dialogue of the deaf. At a number of relevant points, the supplier may think that, it understands the needs of the customer and the customer may believe that it will be acquiring hardware and software to satisfy its needs. On a great number of occasions these beliefs are substantially misplaced. It is to this problem that the paper is firstly intended to be directed. The balance of the paper will be devoted to a discussion of the most expeditious and cheapest way of resolving difficulties which may arise from the supply of hardware and/or software where some form of dispute resolution may be required. This question may require attention at two stages. Firstly when drafting the contract, secondly if and when a dispute actually arises. Other than in the respects I have mentioned I do not intend to address myself to the drafting of protective provisions in a contract. Most organisations already have their basic contracts prepared by their lawyers.

To illustrate the proposition that most disputes result from a failure of communication let me instance a dispute in which Mr. Foote was to be an expert witness. Amongst many other difficulties two stood out. The purchaser complained that the computer was not user friendly. Too often it was said, the message was to contact the supplier for assistance. The supplier in turn

explained that it considered the customer a novice who required assistance rather than advice enabling it to rectify errors. Whatever may have been the rights and wrongs it was a great pity that the supplier did not make clear in the original negotiations what its philosophical approach was to the problem of error messages.

Again the customer was not told that the source code was knowledge peculiar to the supplier and that in point of fact on the expiration of the warranty period the purchaser was effectively obliged to enter into a maintenance contract with the supplier.

Because the action was settled it left unresolved a number of questions of law basic to the computer industry. Is the sale of a system, a sale of goods within the meaning of the Sale of Goods Act? The importance of that question lies in the fact that the Act imports a number of implied terms into the contract. It is no easy matter to exclude such warranties. Importantly for present purposes both parties may fail to address their minds to the question of adherence to the warranties. Being implied by law they of course do not appear in the contract. Assuming the existence of the implied condition that the system should be of "merchantable quality" was the system, in the instance I have mentioned, one which satisfied the requirement, i.e. is a System which requires and relies on support from only one supplier who may not stay in business "merchantable"? Was the system merchantable in the absence of the source book? Was the system, with the very restricted error messages, fit for the particular purpose specified by the purchaser?

I might add, in parenthesis, that as far as I could detect no particular precautions were taken to ensure that the source code did not die with the young gentlemen who were the supplier company.

I suggest that on both sides the motto will have to be better too much information than too little.

In pre contract negotiations demonsterably the first step is for the prospective purchaser to have a clear concept of the nature and extent of the transactions in its business. Sheer repetition and familiarity with the procedure may dull the customer's sense of awareness of a procedural step or its importance. A great number of disputes relate to capacity to accommodate and the speed with which transactions are handled. A customer may, acting quite honestly, fail to have an accurate awareness of peak loads of transactions, when they occur, the frequency with which they occur, or their extent. A regular periodic closing of accounts may be so much part of the routine of the customer's business that its scope may no longer be fully appreciated. The second step for the customer is to explain the business pattern with clarity to the intending supplier. I suggest that there should be insistence by the supplier on a flow chart and a written exposition of the step by step procedure. Clarity is often obtained when visual perception is called in aid. The third step for the customer is to enquire in what particular the installation of computer equipment can assist in the handling of the business transactions.

For the supplier's part it is necessary, having got the explanation as to the intending customer's business pattern, to satisfy himself that in truth the description

is accurate and that the supplier has an accurate understanding of what is involved. It is often at this stage that fatal misunderstandings occur. This may be due to a number of factors. At the threshold, the purchaser may be in error in believing that the business follows a particular pattern. At other times the error is in description. Yet again, there may be an error of perception on the part of the intending supplier. If this stage of the transaction is successfully passed, the next area where there is great room for error, is in the picture painted by the intending supplier of the ability of the equipment to satisfy the perceived needs of the customer. This I hasten to say, is not due to any intention on the part of the supplier to mislead. Often it is due to a belief on the part of the supplier that the pattern of business conducted by the customer can be adapted to the needs of the computer rather than vica versa.

It is crucial to ensure that the parties are at one on; 1) the procedure to be converted, 2) the manner in which the conversion is to be implemented and 3) the results required from the System. In relation to 1) and 3) a ready field for disputes is a failure to consider the future and enlarging needs of the customer's business.

It may be thought that the writing of specifications and written tenders would satisfy the demands of the situation and do away with the possibility of error. Once again, I think that the problem of semantics poses itself. The possible area for misunderstanding may be enlarged by the written word. In the result then, at the risk of repetition, it has to be emphasised that the documents have to be in nontechnical language. The purchaser has to explain to the other what its operations are, what

its needs are on the one hand and the vendor on the other hand has to explain what scope there is for satisfying those needs. In other words the contract has to spell out in detail the performance of the system. What are the transactions to be handled and with what speed will transactions be handled. These are the obvious precautions. The real art is in attempting to cover matters which seem to the supplier to be quite obvious but do not allow for the buyer's unfamiliarity with the area.

Consistently with the use of non technical language the Contract will need to cover the vendor's obligations regarding site preparation, delivery, installation interfacing with foreign devices, maintenance, conversion of data, provision of documentation and so on.

One way of reducing the scope for difficulty is to prescribe acceptance test procedures at each phase, as well as on total installation. Test data should include the customer's own data. Anticipating to some extent what follows, I suggest that the contract provide for third party testing in the event of dispute.

Against the possibility that in spite of all these efforts a dispute may arise the draftsman may choose to designate one of a number of avenues available for the resolution of disputes. Broadly speaking the initial decision has to be made, whether to select; the path of (1) mediation and conciliation, (2) arbitration or (3) litigation. As will be seen when discussing the third of these alternatives, it is not necessarily a wholly exclusive alternative.

Mediation and Conciliation

This is an approach which is hardly ever utilized Yet great and long standing trading people, like the Chinese and the Japanese, no doubt for cultural reasons, are strongly in favour of it. Particularly in a situation where it is hoped that trading relations might continue in the future it has a great deal to recommend it.

Mediation is a process in which the mediator acts as a "go between" in an attempt to bring the parties together in arriving at a solution to their problems. The mediator does not decide the dispute. On the contrary, the final resolution is a decision solely of the parties and the mediator's only function is to act as an intermediary to bring the parties together to resolve the dispute themselves.

In conciliation proceedings, the conciliator takes a more active role in helping to resolve the dispute. Conciliation is a process whereby the dispute is referred to a conciliator who investigates the subject-matter of the dispute and attempts to reconcile opposing contentions. The conciliator then formulates proposals for settlement, which the parties are free to accept or reject. Again, as with mediation, the conciliator does not finally decide the dispute. The final decision is that of the parties, except that with conciliation the parties now have the advantage of an independent third party to recommend a decision after investigation of the facts.

conciliation may be provided for between the parties, or may be the subject-matter of an ad hoc agreement to mediate or conciliate after the dispute has arisen. Provision should be made for the manner of choosing the mediator or the conciliator and for the way the proceedings are to be initiated and conducted. As I have said in both mediation and conciliation the final resolution is up to the parties and the effectiveness of both methods depends to a large degree on the good will of the parties. Once a final resolution of the dispute has been arrived at, however, it should then be reduced to contract form so that if one party later changes its mind, the other may sue on the agreed resolution and not have to reopen the whole dispute.

The primary need in both conciliation and mediation is for a strong impartial and knowledgeable conciliator. He has to be stong in order to restrain the parties from slipping into mutual recrimination. The demand for impartiality is obvious. In addition to the hand of restraint, he has to offer the hand of guidance in steering the discussion into promising channels of compromise. This can only be done after exploring the reasons for the parties being in dispute. I want to emphasise that this is a function distinct from allocating blame worthiness and is designed more to try and work out what the problem is and how it arose. Once that problem has been bedded down there is then the final stage of trying to arrive at a workable solution. In order to assist in this last mentioned exercise and indeed in evaluating reasons for the problem, it is necessary to have a man with sufficient expertise in the computer industry, but also with a lively

mind ready to understand any of the intricacies of the customer's business.

Arbitration

Arbitration is a more formalized method of dispute settlement than mediation or conciliation. In essence, arbitration is the process of submitting a disagreement to one or more impartial arbitrators, outside the court system and sometimes without the participation of lawyers, with the obligation that both parties will abide by whatever decision is reached. Arbitration differs from conciliation in that the decision given by the arbitrator - the award - is binding on the parties and may be enforced against a recalcitrant party.

The reasons for preferring arbitration to litigation are many. One of the main reasons is that arbitration is held in private and avoids publicity. Publicity of commercial disputes is adverse to the interests of both parties in that a resolution may require the disclosure of trade secrets, business procedures, and other matters which could damage the interests of both parties and which they would rather keep confidential. Furthermore, the private atmosphere and informality of the proceedings create a climate more conducive to the friendly resolution of the dispute than does the adversarial court procedure. Business men who wish to maintain friendly commercial relations, notwithstanding a dispute over a particular transaction, do not wish to publicize such differences or have the "win or lose", "all or nothing" situation of a court decision. The latter can often be avoided in

arbitration, particularly where the parties to the arbitration authorize the arbitrator to decide as a matter of equity and free the arbitrator from the strict application of rules of law.

There is presently before the NSW Parliament the Commercial Arbitration Bill.

Two important new provisions of the Bill are clauses 20 and 18 (3). Clause 20 provides as follows:

> "Subject to Section 18(3) and unless otherwise agreed by the parties to the arbitration agreement, any question that arises for determination in the course of proceedings under that agreement shall be determined according to law". (my emphasis).

The well established principle at the present time is, that an arbitrator is required to determine a dispute in accordance with applicable principles of law in the same way as a Judge. Yet clause 20 seems to contemplate an entitlement on the part of the subscribers to the agreement to discard this requirement and permit the dispute to be determined according to some other prescribed standard. If this approach is to be enshrined in legislation, it has a crucial bearing on the desirable composition of the tribunal. A knowledge of relevant legal principles will in those circumstances no longer be either necessary or an advantage. I will revert to this question shortly.

Clause 18(3) is in somewhat similar vein although its thrust is not quite as revolutionary as the proposal in clause 20. Clause 18(3) provides that, unless otherwise agreed by the parties to an arbitration agreement, an arbitrator or umpire, in conducting the proceedings under an arbitration agreement, is not bound by rules of evidence, but may inform himself in relation to any matter in such manner as he thinks fit. The position may be said to represent merely a legislative recognition of existing principle. That arbitrators are ordinarily bound by the laws of evidence was laid down more than a century ago in Attorney-General v Davison (1825) McCl & Yo.160; 148 E.R. 366, and emphatically re-affirmed in Re Enoch and Zaretzky Bock & Co 1910 1KB 327. However in Macpherson Train & Co. Ltd v J. Milhem & Sons 1955 2 Ll.L.R. 59 the English Court of Appeal held that the umpire was entitled to give effect to a rule of the General Produce Brokers' Association of London which authorised the reception of evidence and information "whether the same be strictly admissible as evidence or not". Both these clauses of the Bill highlight a point which is continuously required to be kept in mind when considering appropriate courses of action in relation to arbitrations. That is the consensual nature of arbitration, a fact to which great emphasis was given by the speeches of Law Lords in Bremer Vulkan Schiffbau v South India Shipping Corporation 1981 A.L. 909.

If the Bill is passed into law, it is reasonable to expect, that from time to time, parties to an arbitration will exclude, not only the requirement that the strict rules of evidence be adhered to, but also that the arbitration be determined in accordance with applicable rules of law. Yet for a long time the view was held, best

expressed in the graphic phrase of Lord Justice Scrutton in Csarnikow v Roth Schmidt & Co 1922 2KB 478 at 488 "There must be no Alsatia in England where the King's writ does not run". In other words arbitrators applied as best as they could principles of law in the same way as any Court.

The relevance of the adoption of the Bill in its present form cannot be overstated. If the Bill should become law and, if the parties to the given agreement should avail themselves of the provisions of both clause 18(3) and clause 20, then, subject to one further consideration, there will be no apparent reason why a lawyer should be either the, or one of the, arbitrators. A knowledge or relevant principles of law and of the rules of evidence, by the arbitrator or in the tribunal, will no longer be a requirement or an advantage but may be a positive handicap, in that, a traditional legal approach as may prevail in circumstances where the parties have expressed their desire otherwise.

The reservation, even in circumstances such as I have outlined, is that a lawyer has his skill as a fact finder to offer as the, or as one of the, members of the tribunal. This ability is of particular relevance where there are disputed questions of fact arising for determination. Some lawyers are better than other at determining, in circumstances of a conflict of evidence where the truth lies. Whether a given lawyer does possess great insight or not, it is inevitable that, through years of practical application, he should develop a facility for assessment of competing claims for veracity.

Let me then suggest, that the questions which the appointor of the tribunal should ask in the first instance, are the following:-

1. Is the tribunal to apply principles of the general law?
2. Are the applicable principles of law well settled or susceptible to considerable argument?
3. Is the arbitrator required to apply the rules of evidence?
4. Is there likely to be any contest of fact in relation to which questions of evidence could be important?
5. Is there likely to be any evidentary contest in relation to which assessments of credibility will be required to be made?

If the answer to all the foregoing questions is in the affirmative, then one needs to inquire into the extent to which the arbitrator will be called upon to determine question calling for expertise. However, generally speaking, in these circumstances an arbitrator with legal experience is called for. His lack of expertise will have to be compensated for by one of the means I will discuss later.

In truth, as we all know, most arbitrations call both for application of legal principle, rules of evidence, findings of fact, on the one hand, and the application of expertise of a particular kind on the other. What then should be done in those circumstances?

No doubt if one were to conduct what might be called a "Rolls Royce" type of arbitration, one would appoint

two arbitrators one of whom would possess the necessary legal qualification, the other the necessary expertise. Quite apart from the large additional expense which would thus be incurred, there may be difficulties arising from the call of the arbitration agreement for the appointment of a single arbitrator. Again what if the two were to disagree? What qualifications in those circumstances would the umpire be called upon to have? It is necessary therefore to return to the major question, should one have an expert in the particular field, with legal assistance when he calls for it, or a lawyer with the assistance either of expert evidence called by the parties, or possibly obtained by him.

If the tribunal be a lawyer, he may, by agreement of the parties, adopt procedures which are not available to a Judge as well as the usual methods of procedure. The tribunal may be content to be informed on questions of expertise merely in the same way as the Judge would be by the calling of expert evidence. I would not regard this as a satisfactory procedure for an arbitration even if one were to bring into play exchange of expert reports and other procedures appropriate for the definition and shortening of issues.

An alternative that offers itself, is an examination by a third party expert of the disputed item and a report from him to be received in evidence. In a sense this would take the place of a court appointed expert which is a procedure authorised by most rules of court.

An arbitrator need not be so restricted in the use of an expert, provided that, both parties agree. Thus,

by agreement between the parties, the expert could be asked any questions at all the Tribunal may consider appropriate calling for the exercise of his expertise. Furthermore the parties may agree that the expert's report should be final and conclusive on the particular technical issue thereby precluding the calling of evidence to contradict him. It may be necessary that one or both parties be given leave to cross examine him (cf Sheppard J. "Court witnesses - A Desirable or Undesirable Encroachment on the Adversary System" 56ALJ 234). It is this ability to mould procedure with the agreement of the parties that in my view makes the consensual nature of arbitration so important. By agreement an Arbitrator may acquire information in ways not available to a Judge. Such a procedure would then remove one of the basic difficulties in determining on the composition of the tribunal.

Another possible course is for the arbitrator to have his own expert to advise him. In Admiralty matters it is common for Judges to sit with an assessor or assessors, who advise him on matters of navigation.

In many of the British Colonies in Africa there used to be a system where an assessor sat with the Judge advising him on matters of native custom.

The advantage of having an expert assessor, as distinct from another arbitrator, is that the assessor has no voice in the determination but is there merely to assist and advise, in private, the tribunal on matters of expertise.

In my view there would be no difficulty in lawyer/tribunal being in effect schooled by the expert, out of the hearing room, and in a much more expeditious fashion than is the case where his information is gleaned from persons who are usually partisan experts.

In a very real sense the employment of such an assessor or expert reproduces the assistance which a lay arbitrator customarily obtains from the employment of his own solicitors and or counsel. The advantage, it seems to me is that the trained lawyer/tribunal will be able to bring his expertise to bear on the dispute on a minute by minute basis and give rulings on evidence without the need for consultation and still receive the necessary expert advice as the occasion arises. If the tribunal were the expert then he would be in difficulties in that he could not readily obtain legal advice on minute by minute basis as problems arise. Nor yet would he be as ready to make assessments of witnesses' credibility. On the whole therefore, I would suggest that where there is a mixture of disputed facts and expertise the balance may well come down on the side of an appointment of a lawyer/tribunal assisted in one or other of the ways I have suggested.

Another advantage of arbitration is that the parties may choose as arbitrators specialists in the field in question, who are experienced in the trade and knowledgeable as to the customs and usages of the branch of trade involved.

Arbitration can also help reduce "litigation "neurosis". Many individuals have a fear of legal proceedings and particularly of involvement in a court proceeding. Consequently, instead of pursuing their remedies in a court, many would rather simply leave the matter lie even though they feel unjustly treated. A provision for arbitration, with its less formal proceedings, may dispel some of those feelings and allow these individuals more equal access to justice.

The disadvantages of arbitration in summary are these. Firstly, there may be substantial cost incurred which would not obtain in the case of Court conducted litigation. The arbitrator has to be paid where as the State provides a Judge free of charge. Some place or room for the arbitration has to be provided and paid for, stenographers have to be paid for to record the proceedings. The arbitrator has to be paid for writing his award. More likely than not the parties will, even in an arbitration, employ legal representives. The costs are likely to be much the same as in litigation, although an arbitration may be marginally less expensive in that the time required to educate a Judge in the intricacies of the art would not be necessary in the case of an expert arbitrator. A great advantage however, is that the parties get the services of a guaranteed expert who should have a ready grasp of the technical problem.

Litigation

The manifest disadvantage here is that whilst getting a man trained to sift disputed facts and presumably in the relevant legal principles, the parties will have to start

from the beginning in educating him in matters relevant to computer technology. Not only that but the expert will first have to tutor the barrister so that he in turn will lead the appropriate evidence before the Judge in order to tutor the later threw medium of an expert. Whilst always ready to learn, this seems to me to be an unconscionable waste of time. Efforts should be made to segregate technical issues which arise in these soughts of disputes and send them to an expert for determination. Thus for example a Judge may have to determine what the relevant contractual obligations of the parties were and then send the findings to an arbitrator to determine whether the article supplied conformed to those contractual requirements. Of course there is the ready made objection that the Judge will have to have a smattering understanding of the technicalities just in order to determine what were the contractual obligations.

It is in order to avoid pitfalls and difficulties of the kind I have mentioned that it is so necessary that at the time of formultion of the engagement between the parties, there be a clear and precise understanding in ordinary every day language of what are the requirements for party on the one hand and what can be reasonably be provided by the other party.