

EURIM Working Group Minutes

Working Party: Theme 04/Fair Dealing
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THE EUROPEAN
INFORMATION
SOCIETY GROUP

EURIM



Minutes of the EURIM Theme 4 (Fair Dealing) Meeting Potential for ADR Guidelines for Software Contract disputes 28th May 2002, kindly hosted by the Chartered Institute of Arbitrators, 12 Bloomsbury Square, London WC1

Summary

Purpose of Meeting

1. To assess the practicality of producing procedures or developing schemes for Alternative Dispute Resolution with regard to software and services contracts.

Main areas of agreement

1. ADR schemes could not solve all the fair dealing issues but could help with the majority of cases.
2. There were different levels of solution for different problems and for different stages in disputes.
3. There were direct advantages both of privacy, cost, lower insurance premiums and limited timescales, and indirect advantages of increased market confidence that could be used as leverage to involve suppliers
4. ADR procedures or guidelines must address the fact that most software was sourced under US jurisdiction
5. A simple set of definitions was needed to clarify all the various terms, their advantages and disadvantages

Next Steps

1. The group would focus on developing ADR schemes through relevant trade associations. CIArb would start by initiating discussions with ISPA and e-Centre UK and then with Intellect.
2. The group would explore the other options:- a joint workshop with e-Centre and ISPA, or a one day briefing conference to educate the IT industry, in the light of the follow-up discussions to the meeting.

Actions Agreed

1. EF to circulate the EURIM Fair Dealing Group's draft Guidelines to the Group
2. GH to pass his presentation to EF for circulation to the group
3. GP and MB to liaise regarding DTI support for fair dealing guidelines
4. RW, KW and GH to liaise regarding ADR schemes for their trade bodies and the possibility of a joint workshop.
5. GH to liaise with Intellect (Via EF if necessary) on scope of and ADR scheme
6. KW to pass ISPA's code of conduct to EF for circulation to the group
7. JR to look into appropriate press coverage

Tabled Papers

1. Agenda
2. Chartered Institute of Arbitrators membership prospectus

References

1. EURIM Fair Dealing guidelines to reasonableness in software contracting
2. CSSA Contract Guidelines
3. EURIM Fair Dealing Case studies
4. ISPA code of practice
5. E-Centre White Paper on ADR

Next Meeting Date: TBC

Meeting Notes

Action

- 1 **Introduction**

GP thanked the Chartered Institute of Arbitrators for kindly hosting the meeting and outlined the agenda.
He asked everyone to introduce themselves and summarise their interest in ADR.
- 2 **Progress to date**
 - 2.1 GP recapped the progress of the EURIM fair dealing group to date. They had produced a set of case studies and, with the help of Computalaw, a draft *Code of Fair Use and Best Practice for Software contracts*. The latter was rather user biased and they needed more supplier input to achieve a document that would be acceptable to the whole industry. Computer Weekly had been helpful in publicising the key issues and their activities. They supported guidelines to reasonable contracting.
 - 2.2 EF noted that as a result of feedback from a number of bodies, including several suppliers, the Code (which required a formal body to administer it) had been converted into general guidelines that could simply be endorsed. These guidelines were designed to complement the existing CSSA software contract guidelines. These were at an early draft stage but she agreed to circulate them to the group.
 - 2.3 GP noted that the CSSA guidelines were very general and were aimed at drafting new contracts. They did not cover the main issue today – holes in existing contracts. 90% of “stiffing” related to legacy contracts where situations arose that could not be envisaged when the contract was first formed.
 - 2.4 PM noted that the fundamental problem was that parties were entering into what was effectively a rental agreement that after a few years would become binding for organisations because the software would be embedded in their company processes. By the time of renewal the user was in a very poor position to renegotiate the “rental” for the next term and therefore customer and supplier were not on an equal footing. The presumption of a 3 year renewable rental was probably unfair. This problem was essentially the result of short-termism and could not be addressed overnight.
 - 2.5 It was agreed that there were major pressures on IT managers to get new systems in before deadlines or cut the purchase price that might force them to go along with terms that were punitive in the long run. Chief executives were not interested in small print on contracts but wanted to know when systems would deliver better efficiency and profits.
 - 2.6 PV asked JR to update them on the Microsoft dispute. JR and PM agreed that large companies had tended to negotiate individually with MS for the best solution for their own requirements and in many – if not most- cases, these negotiations had yet to be resolved. This reluctance to co-operate publicly disguised how widespread this issue was.
 - 2.7 CW noted that the fact that companies were not publicising their negotiations did not necessarily mean that they were not in dialogue with one another. Much of the pressure for silence was probably coming from Microsoft.
 - 2.8 Whilst the most highly publicised cases of contract abuse concerned large corporations smaller users were also being exploited but had a less powerful voice to complain.
 - 2.9 PV asked whether ISPA had guidelines on internet contracts. KW replied that they had a code of practice aimed at the consumer rather than business contracts. They were also looking at an ombudsman scheme.
- 3 **What should guidelines seek to achieve?**
 - 3.1 GP asked whether it was practical to produce guidelines for ADR. GH replied that the Chartered Institute did not write codes of practice but did formulate rules that would apply to such codes (for instance the arbitration procedures referred to in the ABTA code of practice for Travel Agents). These involved sets of procedures and rules so that each party knew where they stood regarding maximum cost, awards, timescales etc.
 - 3.2 PM noted that ADR was only one component of a pyramid structure that the group had been discussing previously. Once an ADR procedure was established they had to persuade people to use it, either through contractual obligation within new contracts or through regulation that made disputes over existing contracts subject to ADR or through membership obligations of trade associations.
 - 3.3 MB noted that as a general principle Government were extremely reluctant to interfere in contractual freedom, and would only ever do so on a consumer level. The success of ADR relied on its attractiveness to both parties – it could not be forced on either but the advantages of cost and privacy could be advertised more.
 - 3.4 CW cited recent case law – that failure to go to mediation had been judged unreasonable and the party that won the case had to pay the costs for this reason. Establishing industry practice guidelines was a good incentive to use ADR.
 - 3.5 PV noted that the particular point of leverage with suppliers was the lack of new sales.

Customers were losing confidence in the suppliers business practices and were delaying, even avoiding, IT investment. Suppliers that adopted disputes resolution procedures or guidelines would go some way to restoring this confidence.

3.6 CW noted that they must differentiate between packaged software with standard licenses and systems contracts for more bespoke packages where there was more room for negotiation. The latter was where education should be targeted.

3.7 It was agreed that any guidelines must address the fact that most software originated in the US and terms and conditions were fundamentally dictated by US law. RM noted that there were user groups who might take this on. PV noted that they would have to work with the main US trade associations – the IT Association of America, EIA and CompTIA.

3.8 GH noted that the CI Arb had the advantage of 17 overseas branches, including a very active US branch with whom he would be pleased to cooperate.

3.9 GP asked how they could make it happen JR noted that there was a formidable framework at their fingertips if they chose to coordinate the debate. CW would be happy to help consolidate it if necessary.

4 Introduction to Chartered Institute of Arbitrators (CI Arb) - Gregory Hunt

ASK

4.1 GH outlined their objectives - to promote private dispute resolution, including mediation, arbitration, adjudication, etc. They had 10,000 members in 89 countries, including 380 chartered arbitrators as well as mediators and expert witnesses. Their main advantage was cost effectiveness.

4.2 The Institute was keen to help EURIM members with ICT disputes. Although they had only recently become involved in this sector, they had already established a web trader arbitration scheme among other online schemes, and their members had long experience in the sector.

4.3 PM asked whether these arbitrations were binding on both parties. GH replied that the rules governing the arbitration were separately defined for each scheme, and this gave them the flexibility to provide exactly what was needed by the sector concerned.

4.4 PM noted that arbitration meant different things to different people and it would be necessary to have some clear definitions to avoid confusion. Under the 1996 Act the award of an arbitrator was binding in general circumstances. GH noted that, provided variations to this rule were agreed by both parties, this need not be the case.

4.5 It was agreed that a set of definitions for these terms was needed.

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4.6 CW noted that different solutions were appropriate on different occasions. To resolve a technical point (eg to determine whether a system was delivering what it promised), it was best to appoint an expert. Arbitration was appropriate for a different stage. GH noted that in the UK the arbitrators were also the experts and were schooled in law and arbitration as well as being experts in their field.

4.7 GH noted that the European branch of the CI Arb was holding a meeting in Brussels on 14th June on e-Commerce and IT disputes. He would like to announce a partnership with EURIM, and be able to outline the form it would take, it at that meeting.

5 Setting up guidelines, who should be involved, how to draw in major suppliers.

GP, MB

5.1 GP reported that when the EURIM Fair Dealing group had discussed guidelines with DTI there had been unwillingness to move things forward. He agreed to follow this up with MB.

5.2 MB noted that DTI wanted to support ADR and had some useful experience of using guidelines with EEJNET, which had established an online dispute resolution scheme.

5.3 GH reported that "Howtocomplain.com" under the respected leadership of John Bridgeman had developed a good reputation for explaining how complaints should be made to different industries. ADR was important when organisations wanted to maintain a business relationship with the other party, and the privacy allowed business reputations to remain intact.

5.4 CW noted that ADR schemes or guidelines would not solve the problem of those suppliers whose practice was to buy up small suppliers and review their terms and conditions to extract more profit from existing contracts. Such "revised" terms often took immediate effect and when they impinged on central processes such as payroll the user had little room for manoeuvre. Such situations were also difficult to legislate against. ADR would not have any impact or stop them doing what was both profitable and legal. Unfair contract terms from DTI to define what could not be in a contract, such as the practice of excluding all warranties, were one answer, particularly when there was an imbalance in the negotiating positions for the parties.

5.5 GP agreed:- ADR would only work if it was advantageous to both parties and in this case was not in the suppliers' interest. CW noted that existing case law on unfair contracts was of limited use and relied on demonstrating that the terms were imposed on the user and the parties did not have equal negotiating power. More substantial changes needed

further legislation.

- 5.6 It was agreed that whilst ADR might not address these extreme cases it would address the majority of disputes.
- 5.7 GP noted that in the financial sector, insurers would reduce rates to suppliers who included an ADR clause in their contracts and this might have some leverage. The other area of leverage was the lack of confidence in the market.

6 **General recommendations**

- 6.1 WR was uncomfortable that the issues of users were not covered. Simple solutions were needed to illustrate the main concerns with contractual relationships. There was a whole range of different things that needed to be simplified so that they were comprehensible to a user within an accessible structure. It was agreed that there were different levels of solutions – one was publicising standard clauses and explanations of what they meant, another was sets of guidelines.
- 6.2 KW noted that a clause in the Communications Bill required suppliers of electronic services to sign up to codes of practice and ADR schemes or risk fines. SMEs, who needed most protection, should be the target for this advice and help.
- 6.3 PM noted that organisations usually tried to resolve contract problems within the local IT or business area so that the working relationship could continue rather than resorting to litigation. Timescales and project objectives added pressure to achieve a working solution and it was essential to involve corporate lawyers at an early stage to prevent businesses accepting disadvantageous terms in order to guarantee project or service continuity. They needed to ensure that lawyers were fully aware of the ADR route
- 6.4 MB noted that they should stress the advantages of a fixed dispute resolution scheme, and the risks of not having it.
- 6.5 GP noted, and all agreed, that ADR could only address some fair dealing issues and others had to be addressed through alternative means.

7 **Moving Things Forward**

- 7.1 GH noted that recent discussions with a motor manufacturer regarding an arbitration scheme for dealer franchises had led to the inclusion of arbitration clauses in all contracts. Similar schemes could be available for EURIM members.
- 7.2 Another option was a one day conference organised jointly by the Institute and EURIM to brief the IT industry on ADR and mediation as part of the EURIM programme.
- 7.3 MG noted that there was a wide spectrum of disputes and no one solution would meet them all. On the whole, successful codes of practice and ADR schemes were linked to trade associations or bodies that could exert sanctions on their members. A number of such schemes already operated successfully. PV noted that there were commercial advantages in having ADR routines set up through trade associations as they improved confidence and helped promote new business. ISPA and e-Centre were ideal models with good points of leverage among their members. It was agreed this should be the way forward.
- 7.4 GH noted that around 30 of their 70 existing schemes were run through trade associations. He recommended establishing ADR schemes rather than just insert clauses to adopt ADR within contracts, because the former enabled costs and timescales to be managed with certainty.
- 7.5 GP asked how this would be achieved. KW noted that ISPA already had complaints procedures with sanctions and a best practice code, which they could use as a starting point. Their main difficulty was promoting the code to ensure the right people were aware of it. GH agreed they should use their existing code, and the only difference would be that it would refer to independent dispute resolution procedures. RW and KW agreed to liaise with GH. **RW, KW, GH**
- 7.6 PV suggested a joint workshop between e-Centre, ISPA and RightsWatch who shared a number of members with interests in this area. KW confirmed that on the subject of RightsWatch, ISPA wanted to open dialogue with DTI on the subject of liability provision in the e-commerce directive.
- 7.7 MG noted that CIArb were in a good position to develop schemes with ISPA and e-Centre and now needed to open a dialogue with Intellect. [NB there was confusion as to whether CSSA had claimed to have an ADR scheme with CIArb, which was not the case. In fact they confirmed that they had an ADR scheme with CEDR].

8 **Immediate actions**

- 8.1 GH agreed to email his presentation to EF for circulation to the group with the minutes. **GH, EF**
- 8.2 EF agreed to circulate the existing ISPA code of practice to the group, and e-Centre's white paper on dispute resolution. **EF**
- 8.3 JR agreed to give press coverage where appropriate, possibly in a positive light **JR**

presenting the opportunity for companies to provide better customer services by offering ADR as part of their contracting.

- 9 Date of Next Meeting**
- 8.1 It was agreed that a follow-up meeting should be held after CI Arb, E-Centre and ISPA had met. A date would be circulated shortly.

Attendance – 28th May 2002

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