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Y2K claims bugging you? Let's talk about it

Mediation, not litigation, is the way to tackle problems arising from insurance compliance issues, says **Samuel Passow**

In the past month the Lloyd's insurance market has been flooded with claims related to Year 2000 (Y2K) compliance issues. European reinsurance firms such as Zurich Insurance Group, Royal & Sun Alliance and Allianz have been served with writs in America by Xerox, the phone company GTE and the computer manufacturer Unisys. Combined, these claims seek remedial damages of £362 million to cover costs to date to ensure their systems were millennium bug-proof.

There have been 75 Y2K-related cases filed in the United States and some experts say insurers face potential loss exposures of up to £48 billion, nearly 40 per cent of corporate America's total spending on millennium bug defences. Even more disturbing is executives' seeming willingness to spend an estimated three times the amount of money litigating a Y2K problem than the total they spend trying to correct or prevent one. Aggrieved companies are claiming "breach of contract", while insurers say that as long ago as 1977 clients were told that Y2K-based issues would not be subject to general liability coverage because they are "foreseeable".

What is often lost is the perspective that a confrontational approach to problem-solving can add substantial costs to firms through breakdowns in commercial relationships.

The Centre for Dispute Resolution (CEDR), a London-based non-profit organisation, has spent the past year teaching a creative approach to Y2K problem-solving: the Millennium Accord, a non-binding protocol for sharing information in a commercially competitive environment with a neutral individual or panel facilitating negotiations (www.accord2000.com). It advocates a flexible, fast-track approach based on four principles that recognise how interdependent we are on technology and the potential it has to dominate most facets of commerce.

The first principle is that the problem may have such a devastating effect that it should not be seen as a competitive opportunity. The second is that such a mutual problem may be solved faster and most cost-effectively by co-operation. The third is that timely dispute prevention is preferable to retrospective redress. Lastly, communication and co-operation enhance dispute prevention.

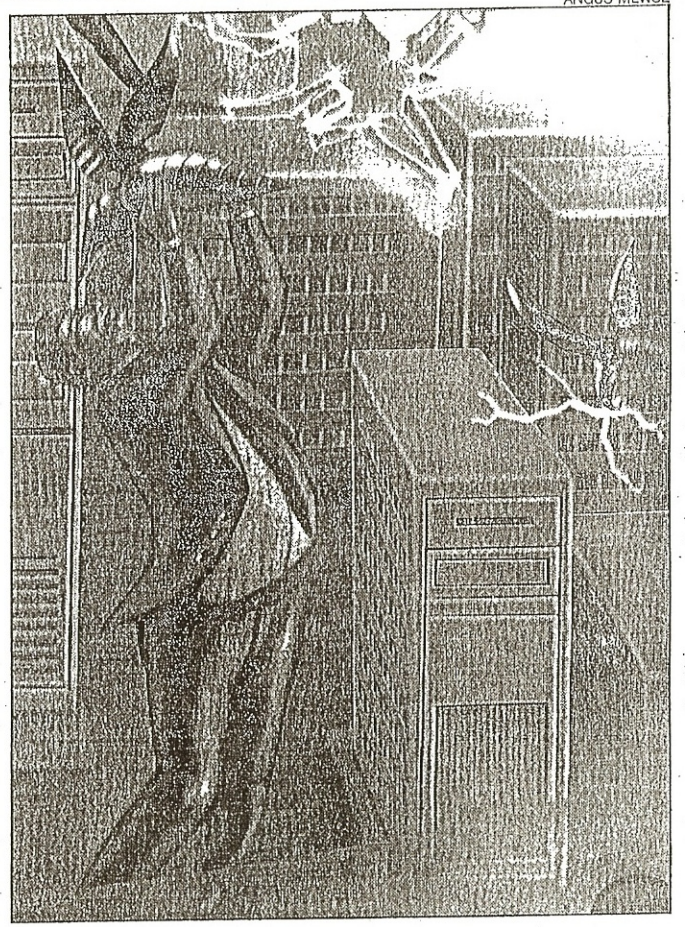
Since it was launched in December, the accord has been signed up to as a "best business practice" by 416 private sector and 84 public sector firms around the world. It has been adapted as an official protocol by leading alternative dispute resolution organisations in the US, Canada, Australia, New Zealand, Singapore and Hong Kong, establishing a global alliance of mediation facilities and resources for resolving cross-border commercial disputes.

Data collected by CEDR over the past two years shows that mediation produces a resolution nearly 85 per cent of the time. Compared with litigation, which could take months or years before reaching a trial — of which only about 5 per cent ever do — most mediation can begin within a matter of weeks and statistically last only an average of 1.3 days.

Despite the increased prospect of court-ordered mediation as a result of the Woolf Reforms to the Civil Procedure Rules, the process cannot be effective without the willingness of disputing parties to "come to the table". Often, one or both parties may not want to signal that willingness for fear of looking weak. The accord provides an automatic mechanism for expressing that willingness without signalling weakness.

Courts and arbitration tribunals can offer only financial compensation or limited orders requiring parties to act in a certain way; they do not lend themselves to more creative solutions that might better meet the business needs of disputing parties. For most firms the cost of the dispute resolution process alone can determine their profitability, not to mention viability. When larger firms drag smaller ones through the legal system by the sheer weight of their financial resources, their victory is often pyrrhic.

CEDR recently ran a mock mediation for underwriters and brokers at Lloyd's. When the audience first heard the account of a fictionalised dispute and both sides' opening bargaining positions, 35 per cent voted that the case should be settled in court, with 65 per cent voting for one of five settlement ranges. But before it ended, after two hours of intense debate between the mediator and the parties, the audience voted again. This time everyone voted for a settlement, with 55 per cent predicting an outcome of between 50 to 69 per cent of the claim, which was in fact the final outcome. All those who had voted for litigation at the beginning of the exercise changed their votes.



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