

IT lawsuits a 'roll-the-dice' move

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Botched computer-system installations are increasingly bringing companies and their IT service providers to the brink of nasty, expensive courtroom fights, lawyers who work on such contracts say.

Most settle, but the disputes that have ended up in Canadian courts have pitted companies and government departments against information technology firms in convoluted, technical fights, resulting in large legal bills and years of delay. And flameouts of new computer systems, whether or not a court fight is involved, can cost companies millions.

The most notable example of this kind of litigation worldwide, said Toronto IT lawyer Michael Erdle, is the battle between Britain's BSkyB Ltd. and IT supplier EDS Corp., which was hired to install new customer-relations software for the satellite TV giant in 2000.

Last year, a British judge awarded BSkyB £709-million (\$1.13-billion) and concluded that EDS (later acquired by Hewlett-Packard) committed fraud, promising timelines and a price tag it could not deliver. A key witness for EDS, a consultant who subsequently left the company, saw his credibility shattered after the court heard that the MBA he said he'd earned turned out to be a fake one from a Caribbean website.

In what must have been a rare moment of courtroom drama in the world of IT disputes, a lawyer for BSkyB told the court that his own dog, Lulu, obtained an identical degree — and with better marks.

"I always tell people it's an example of what a high-risk, roll-the-dice proposition litigation is," said Mr. Erdle, a partner with Deeth Williams Wall LLP in Toronto, who is launching a new specialized mediation and arbitration practice for this kind of dispute. "That case is a great case study for the benefits of mediation."

The BSkyB case, which settled in June, 2010, for \$515-million after HP dropped its appeal, illustrates the acrimony and airing of dirty laundry that Mr. Erdle and IT consultant Norman Schutz say they hope to help clients avoid with their new business, Practical Resolutions Inc., launched earlier this year.

Disputes between companies are often quietly referred to arbitration or mediation to avoid the bright lights that come with a full-blown court case. But Mr. Erdle and Mr. Schutz say their background in IT means that, unlike arbitrators who handle all sorts of cases, they are familiar with the key issues in an IT dispute from the outset. A handful of disputes have already been referred to their new service.

Mr. Erdle said the tech industry has not caught up to the construction industry, which has a long tradition of incorporating streamlined dispute-resolution clauses in their contracts in order to avoid delaying big projects.

Most IT contracts do provide a procedure for handling a dispute, punting things up to the executive level if it can't be solved quickly, he said. But he thinks the trouble should be brought to a "neutral forum" as soon as possible to keep it from escalating.

"When you get into a large IT contract, it is like a marriage," said Richard Austin, a colleague at Mr. Erdle's firm and the former president of the Canadian IT Law Association. "There are ups and downs ... issues arise, and they need to be resolved."

A dispute over the scope or the performance of a seven- or eight-year project, if it were to go to court, could involve millions of pages of e-mails and documents, spiralling legal fees and years of litigation, while the already expensive IT project gets put on hold, he warns. In the end, neither side truly wins.

"Very often, if you have to go to court, it's nuclear war," said Mr. Austin, former general counsel for EDS Canada.

Montreal lawyer Sunny Handa, who co-leads Blake Cassels & Graydon LLP's 34-strong IT law group, said there's no question that IT disputes can be potentially disastrous for both sides.

"These are horrendously complex deals, they're horrendously expensive," Mr. Handa said. "These aren't window-dressing around your company; this gets into the guts of what you do. And it can grind a company to a halt."

But Mr. Handa said he did not see a "burning need" for a specialized IT dispute resolution firm, as there are already a stable of lawyers that act as arbitrators and mediators: "There is definitely a need for private professionals who can serve as arbitrators and mediators et cetera. But they already exist, in some measure."

Fraser Mann, a veteran IT lawyer with Miller Thomson LLP in Toronto, said IT disputes are bound to get even more complex, thanks to the move toward "cloud computing," in which crucial data is stored in remote locations. Cloud service providers often use subcontractors and sometimes offshore facilities, he said, adding new wrinkles.

"Software development projects, at one time, they were, well, the customer just sits back and lets the developer do the work and then customer signs off at the end of the day," Mr. Mann said. "But it doesn't really work that way. It has to be a much more iterative process, with much more back-and-forth communications."