

# **IP MEDIATION**

## **FROM AN ADVOCATE'S PERSPECTIVE**

**A. TYPES OF CASES THAT MAY LEND THEMSELVES TO SUCCESSFUL MEDIATION**

**B. TYPICAL FACTORS THAT MILITATE AGAINST SUCCESSFUL RESOLUTION BY MEDIATION**

**C. CERTAIN POINTS ABOUT PROCEDURAL STEPS RELEVANT TO IP MEDIATION**

**D. MEDIATION-ARBITRATION**

## **TYPES OF CASES**

Mediation is by definition required to be consensual. Generally, cases with one or more of the following features might lend themselves to successful attempts at mediation –

- Where parties can identify and agree on the issues in dispute
- Where the bargaining powers of the parties are not too disparate
- Where the adjudication of rights and liabilities through litigation or arbitration is not possible, practicable or desirable
- Where parties can see the disadvantages of litigation outweigh advantages even where the outcome should turn out to be favourable
- Where there is room for cooperation or incentive to remove adverse competition
- Where parties desire to arrive at an outcome beyond the powers of a court or tribunal

## **TYPICAL FACTORS THAT MILITATE AGAINST SUCCESSFUL IP MEDIATION**

- Where the parties mistake mediation as a sign of weakness or involve showing one's hand to one's disadvantage
- Where the parties are advised by lawyers who have disparate levels of knowledge on the area of law involved, or have diametrically opposite views of the merits of the parties' case
- Where the parties attending a mediation are ill-prepared or ill-equipped to make decisions on possible compromises in order to arrive at a formal agreement

- In cases involving alleged infringements, where a claimant focuses on the motive or the perceived illegitimacy of the defending party's conduct
- Where the establishment of liability for infraction of rights involves a value judgment in applying legal tests the outcome of which is by no means certain
- Where the dispute in one jurisdiction is a part of a wider dispute in respect of rights elsewhere, and the parties are not ready to come to terms on the wider dispute
- Where winning or losing has such impact on the parties' business that the reality of the possible outcome in litigation is too much to face

## **DISCUSSION ON SOME PROCEDURAL STEPS RELEVANT TO IP ARBITRATION**

- The civil justice reform in Hong Kong and mediation
- When is it best to start mediation? What if the first attempt fails?
- Identifying issues for special procedure, e.g. expert determination
- Judicial appraisal on issues such as validity, liability and quantum
- What judicial appraisal achieves for a mediation

## **MEDIATION-ARBITRATION**

- Application of Med-Arb to tackle any remaining issues after mediation
- Agreement to arbitrate if mediation fails