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## Mediation across Borders

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## **Mediation across Borders**

by Eunice Chua and Jolene Goh\*

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### ***A Fictional Example of a Cross-Border Dispute***

Mr L is the director of InVisions, a large Indonesian manufacturer providing top-of-the-range camera components to MK Pte Ltd, a Korean-headquartered mobile phone manufacturer. Mr K, who is a native Korean, is the General Manager of the company's regional office based in Thailand and manages the deals involving InVisions. The business relationship is a lucrative one and both companies have had generally good relations since 2003. Annual profits for InVision arising from sales to MK amounted to US\$2.3 million last year while the sales of MK's mobile phones that are installed with InVision's cameras reaped them a profit of US\$3.5 million in the same period.

During discussions for a renewal of the supply contract in May 2012, cultural and other differences in opinion resulted in the beginnings of a dispute emerging. Mr L expected to continue to receive immediate payment of the goods upon receipt as per previous practice. Mr K proposed that payment be partially made within 30 days of the invoice date, and the remaining payment disbursed upon reaching an agreed annual sales target in December each year. The rationale for this change was because the financial situation of MK had deteriorated with increasing competition requiring more complicated products. MK now required a longer payment runway with all their suppliers. Mr K does not tell Mr L this as he felt it would weaken his negotiating position. The new proposal seemed risky for Mr L, and he preferred the original arrangement. but as MK has been a reliable and important client of InVisions, he agreed to it without raising too much concern.

Unfortunately, MK's mobile phone sales did not meet the sales target in 2013 due to the launch of a competitor's product. Mr K exercised his right to withhold the remaining payment for the goods to minimise losses to his company. He further insisted that Mr L take back the unutilised stock of cameras and threatened to impose a stock storage fee of US\$10,000 per day. A dispute ensued, and both companies turned to their legal advisers.

To the reader, it might be easy to think that all of this could have been prevented if Mr K had asked for an instalment payment term at the start of the renewal negotiations and been upfront about MK's financial situation given that Mr L seems to be a loyal partner and would likely have agreed to a longer payment term. Conversely, one may also have thought that Mr L bears some responsibility for not having raised his concerns to Mr K during the negotiations.

We are able to discern all this because the article provides us critical information on the situations and considerations of both companies. In contrast, Mr L and Mr K are only aware of their own sides of the story and their respective companies are only aware of what is reported by Mr L and Mr K. When emotions run high at the start of the dispute, further communication or sharing of information becomes limited and guarded, since both parties now act through their legal advisers.

Cross-border disputes are multi-layered and complications can arise not only because of cultural and language barriers between individuals, but also because the companies themselves function in different legal systems, with different standard operating protocols, and complex internal dispute management structures.

### **Why Mediation for Cross-Border Disputes?**

Disputes like InVision and MK's are increasingly common as the world becomes more connected. In a survey published by the Singapore Academy of Law in January 2016 of 500 commercial law practitioners and in-house counsels who deal with cross-border transactions in Singapore and the region, 74% of the respondents indicated that cross-border business in Asia has increased for them in recent years.<sup>[1]</sup> The complexity of disputes can also be expected to grow as more and more dimensions are introduced into the dispute.

Mediation offers parties an effective and quick opportunity to work out a mutually-beneficial solution to their dispute. Compared with arbitration and court hearings, a typical mediation takes a much shorter time of 1 or 2 days and this can translate to significant cost savings. Additionally, because mediation settlements are negotiated and signed on a voluntary basis, parties are able to factor in wider operational considerations and tailor specific remedies beyond financial compensation. This often achieves for parties a more lasting and sustainable outcome and spares the individuals from the anxieties and cost of further appeals against outcomes decided by third parties.

The Singapore International Mediation Centre ("SIMC") was created specifically to develop the space for international mediation and meet the needs of the market.

Launched in November 2014, SIMC offers services and products specifically designed for parties in cross-border disputes. A panel of over 65 international mediators from 14 countries gives the SIMC a unique competency to manage cultural differences and cross-jurisdictional disputes. Reinforcing the panel of mediators is a panel of over 70 technical experts covering diverse fields who can be engaged to advise on disputes involving complex technical issues. A professional secretariat helps to facilitate each mediation. Working together with the Singapore International Arbitration Centre ("SIAC"), the SIMC is also the first to offer the Arb-Med-Arb service which allows parties to attempt mediation after commencing arbitration. Mediated settlement agreements obtained through the Arb-Med-Arb service can be enforced as awards under the New York Convention in over 150 countries. SIMC also has a close relationship with the Singapore International Commercial Court ("SICC"), such that cases before the SICC that are more appropriately dealt with through mediation will be referred to the SIMC.

These services address the need for an enforceable outcome that parties involved in cross-border disputes regard as the top-most factor influencing their choice of dispute resolution method as evident from the Singapore Academy of Law survey. Singapore enjoys a growing global reputation as a preferred centre for international dispute resolution by offering "proximity", "efficiency" as well as "neutrality/fairness".<sup>[2]</sup> Mediation services at the SIMC complement arbitration at the SIAC and litigation at the SICC to provide users with a full suite of dispute resolution options.

In the fictional case above, SIMC's services could be used at an early stage to assist the parties to enter into an agreement to mediate. All it takes is for either of Mr L or Mr K to be interested in attempting mediation and to file a mediation request at SIMC before SIMC can serve as a neutral and objective third party to propose mediation for the dispute and ensure that all the parties have an understanding of the mediation process. The SIMC Rules are based on international best practices and provide a framework for the conduct of the mediation.

Assuming Mr L and Mr K agree to attempt mediation, we can expect that both Mr L and Mr K may feel uncomfortable if the mediation is conducted in the “home” territory of either party. Singapore lies at the centre of major international travel routes and could serve as a neutral and convenient venue for the conduct of the mediation. SIMC would be able to arrange for mediations in Singapore to be conducted in Maxwell Chambers, a state-of-the-art dedicated dispute resolution facility where SIMC is based. In addition to having the logistics of the mediation arranged for them, by choosing SIMC, Mr L and Mr K would have access to SIMC’s panel of mediators and panel of technical experts. Should Mr L and Mr K be unable to agree on who to serve as mediator, under the SIMC Rules, SIMC will serve as appointing authority to help the parties find the most suitable mediator for their dispute.

Mr L and Mr K would also have the full support from the SIMC Secretariat throughout the mediation process, which in addition to the above, includes proposing timelines and managing the progress of the mediation, arranging for any translation or interpretation services, as well as assisting the parties to break any impasse relating to the setting up of the mediation. Where requested, the SIMC can also assist in convening pre-mediation conferences which can help the parties define the agenda and attendance for the mediation and therein increase the chances of successful settlement.

Finally, if Mr L and Mr K are concerned that there may be a need to enforce the terms of the mediated settlement agreement, they could make use of the SIAC-SIMC Arb-Med-Arb service to give their mediated settlement agreement enforceability as an arbitral award in Indonesia, Korea or Thailand.

## **Future Trends**

International mediation is set to rise, driven by the increase in complex cross-border trade and user demand. Free Trade Agreements such as the Trans-Pacific Partnership (TPP) would further facilitate such an increase, and in turn, lead to the increased need for dispute resolution facilities that are able to cope with international disputes.

Differences would continue to play a big part in these disputes and would need to be managed as part and parcel of doing business – language differences, cultural differences, and business practice differences. A tool like mediation, by introducing a trusted and neutral third party to facilitate negotiations, is able to help parties overcome seemingly intractable challenges and broker creative solutions, that save cost and time that could be better deployed to grow their businesses and profits.

In an earlier study, 98% of Fortune 1000 Corporations reported using mediation as a dispute resolution tool.<sup>[3]</sup> Mediation also ranked first amongst other Alternative Dispute Resolution (“ADR”) mechanisms such as arbitration and hybrid services such as mediation-arbitration or med-arb. Today, awareness of mediation and its benefits have grown.

In the Singapore instalment of the 2016-2017 Global Pound Conference (“GPC”) series, a survey of the audience showed that 33% of the respondents indicated that the future of dispute resolution would likely see a greater emphasis on collaborative instead of adversarial processes.<sup>[4]</sup> Preferences for hybrid processes are also on the rise. 31% of respondents at the same GPC Singapore Conference indicated that the combination of adjudicative and non-adjudicative processes was the most effective dispute resolution process today in addressing their needs.

SIMC has seen its caseloads reflect these trends. Since its official launch in November 2014, SIMC has seen 9 cases filed with it as of 20 May 2016, 3 of which are Arb-Med-Arb cases filed in 2015, less than a year into SIMC’s operations. The progressive take-up rate of the service speaks to the ability of Arb-Med-

Arb to meet the needs of the parties by providing an efficient and effective way of settling disputes without compromising enforceability.

Of the 9 cases received by the SIMC, the sums in dispute ranged from SGD 1.5 million to more than SGD 600 million. These cases have included disputes in the sectors of construction, oil and gas, shipping, aviation and the sale/supply of goods and services. The parties involved in the disputes have included companies from Singapore, Cayman Islands, Germany, India, Korea, Laos, Macau, Malaysia, Myanmar, Taiwan, Thailand, the United States and Vietnam. These statistics demonstrate the wide appeal and relevance of mediation.

## **Conclusion**

This is the beginning of the growth in the international mediation and ADR scene in Asia. Initiatives to further educate potential users of the benefits of mediation are also underway, including the GPC series which will make stops at 6 Asian cities in addition to Singapore, as well as the upcoming Asia Mediation Association Conference in Beijing in October 2016. As the needs of consumers change, so will the provision of mediation and ADR services in order to bring the best value and outcome to consumers. SIMC is committed to meet these needs and make a contribution to the development of mediation in Asia.

[1] Singapore Academy of Law (2016), “Study on Governing Law and Jurisdictional Choices in Cross-Border Transactions”, <[http://www.sal.org.sg/Documents/SAL\\_Singapore\\_Law\\_Survey.pdf](http://www.sal.org.sg/Documents/SAL_Singapore_Law_Survey.pdf)> (accessed 20 May 2016).

[2] See Singapore Academy of Law (2016) , “Study on Governing Law and Jurisdictional Choices in Cross-Border Transactions”, <[http://www.sal.org.sg/Documents/SAL\\_Singapore\\_Law\\_Survey.pdf](http://www.sal.org.sg/Documents/SAL_Singapore_Law_Survey.pdf)> (accessed 20 May 2016) where proximity, efficiency and neutrality/fairness were ranked as the top three reasons for choosing Singapore as a venue for dispute resolution.

[3] 2013: Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations (Harvard Negotiation Law Review).

[4] Global Pound Conference Survey Results (Singapore 2016): <<http://globalpoundconference.org/Documents/GPC%20Series%20Singapore%202016%20Voting%20Results.pdf>> (accessed 20 May 2016).