Kluwer Mediation Blog

# Increasing Transparency in Intellectual Property Mediation

Yuying Zhang (Research Associate Singapore International Dispute Resolution Academy) · Sunday, February 9th, 2025

**Introduction**

Mediation is commonly used as a form of appropriate dispute resolution (**ADR**) for various types of disputes, and this is increasingly so for intellectual property (**IP**) disputes. As recorded in the inaugural IP section of the Singapore International Dispute Resolution Academy (**SIDRA**) Survey: 2024 Final Report (SIDRA IP Survey), 86% of the respondents indicated that mediation is one of the most commonly used dispute resolution mechanisms for IP disputes.

The flexibility and freedom that come with mediation are unique to it and are generally not found in other forms of dispute resolution such as arbitration and litigation. Parties are at liberty to choose when to mediate, whether prior to the commencement of official proceedings (e.g., arbitration or litigation) or even during the proceedings as and when they deem suitable. Furthermore, mediation is mostly confidential, thus empowering parties with the confidence to share information with each other and negotiate in good faith.

However, only 14% of the respondents to the SIDRA IP Survey said that they actually preferred mediation. The cloak of secrecy surrounding the process and outcomes of mediations may have hindered a clear understanding of the benefits that come with mediating IP disputes, especially since there is generally no information available on the success rate or the types of IP disputes that are suitable for mediation. There have, thus, been calls in the SIDRA IP Survey for increased transparency in IP dispute resolution processes.

There are multiple facets to transparency, such as the appointment of mediators, the process and the outcome. The present article is only concerned with transparency in the process and seeks to first discuss the "dialectic tension" between confidentiality and transparency in mediation, specifically for IP disputes. This is then followed by delving into the Association of Southeast Asian Nations (**ASEAN**) Mediation Programme (**AMP**) developed by the World Intellectual Property Organisation (**WIPO**) in partnership with the Intellectual Property Office of Singapore (**IPOS**), which reflects the demand for more transparency in IP mediation but still balances it with confidentiality.

## Dialectic tension between confidentiality and transparency in IP mediation

### *Confidentiality in mediation*

One of the key draws of mediation lies in its confidentiality. There are three types of confidentiality: (1) insider-outsider; (2) insider-insider; and (3) insider-court. Insider-outsider confidentiality is what people commonly associate with mediation – the idea of keeping discussions in the session private to only those involved. Insider-insider confidentiality refers to the regulation of information shared during the caucuses, more commonly known as private sessions between the mediator and one of the parties. The other party is not privy to this information unless the disclosing party consents to the information being shared. Insider-court confidentiality is known as "without prejudice", where mediation communications are typically prohibited from being used in any subsequent court or arbitral proceedings as evidence should the mediation fail.

The importance of having information shared during mediation kept confidential cannot be over-emphasised – it enables parties to prioritise the merits of the dispute rather than diverting their attention to potential ramifications, such as on their commercial interests, reputation, and commercial and personal relationships. 79% of the respondents to the SIDRA IP Survey indicated that confidentiality is an important or absolutely crucial factor to consider when choosing the type of dispute resolution mechanism to resolve IP disputes. 64% of the respondents were satisfied with the confidential nature of the dispute resolution mechanism they had chosen, regardless of whether it is mediation or otherwise.

However, confidentiality in mediation is not absolute. It is generally circumscribed by certain exceptions. The mediator may disclose confidential information in necessary situations to stakeholders beyond the mediation such as the court or law enforcement agencies without needing to obtain consent from the parties. One such example that is frequently highlighted by mediators in practice is when a parent divulges to the mediator (in a family dispute) that he or she intends to take their child overseas and keep them there permanently. This is especially worrying when the parent is not granted the appropriate rights and obligations to keep the child overseas with them. The mediator would then be obliged to report this to the relevant authorities.

The confidential nature of mediation becomes a double-edged sword, especially in IP mediation, with interested parties unable to access information about previous cases. They are thus, unaware of the suitability of mediation for their disputes and the possible solutions that they may be able to obtain through mediation. This then restricts the development of creative ideas and solutions in the IP industry.

### *Transparency in mediation*

There have been calls in the SIDRA IP Survey for more clarity and transparency in the rules and procedures for IP dispute resolution. 86% of the respondents to the SIDRA IP Survey ranked

clarity and transparency in rules and procedures as an important factor affecting their choice of dispute resolution mechanism but only 57% indicated that they are satisfied with this factor.

This is interesting since mediation and litigation have been chosen by respondents to the Survey as the most commonly used dispute resolution mechanisms for IP disputes. However, mediation is confidential unlike litigation, suggesting that while mediation is a popular dispute resolution mechanism for IP disputes, respondents are unhappy with the lack of transparency in the mediation process. This would then likely explain the low preference for mediation in IP disputes despite it being one of the most commonly used dispute resolution mechanisms. The SIDRA IP Survey thus, echoes the demand for transparency in the IP mediation process.

Transparency in mediation is not a new concept. Transparency in IP mediation allows for access to information that was previously unavailable, such as the details of the mediation process and the outcomes. Interested parties would be able to get ideas on how to approach their own disputes as well. It would also allow the owner of the IP to receive "*public affirmation of the validity and ownership of the* [IP] *right, which might act as a deterrent to future infringers*", while still enjoying the benefits that come with mediation.

While transparency in the IP mediation process has its benefits, it should not be absolute. Complete transparency would defeat the purpose of opting for mediation, which is to take advantage of its confidentiality. There should be a suitable middle ground.

## AMP

### *Unique features of AMP*

There have been programmes and initiatives that reflect this trend. An example is the AMP launched in 2023, which allows parties to enjoy the best of both worlds – the confidentiality that comes with mediation, and to some degree the transparency that comes with litigation. This programme is a result of the collaboration efforts between the Singapore government and WIPO, where businesses with an IP dispute in ASEAN countries are eligible for up to SGD 8,000 in funding for "*mediations administered by the WIPO Arbitration and Mediation Center's Office*" in Singapore. The administration fee for the WIPO Center is also waived.

This programme is unique, wherein parties must consent to named publicity (excluding details of settlement terms) and to providing feedback on the mediation experience. The programme publishes concrete real-life cases on its website of how IP disputes are resolved through mediation. Further, publication of the names of mediating parties on the IPOS Hearings and Mediation Department website encourages potential disputants to choose mediation. This is especially so if well-known brands are involved since this reduces the resistance that small and medium enterprises may have towards mediating disputes as compared to litigating, since there may be fear of power imbalances in mediation or other similar concerns. However, this transparency is not unqualified, and parties are not required to reveal their settlement details. This instils trust in potential parties thinking of utilising such programmes. There is also no requirement under the

AMP that parties must settle their dispute.

### *The AMP experience*

At the time of writing, there have been five cases – all successful settlements – under this programme. The very first case in 2023 involved two groups of family members contesting the trademarks used in association with Chew's Optics by Chew's Optics (Bishan) and Chew's Optics (Kovan) – the latter two supposedly with no proper licensing. Another notable dispute involved claims of trademark infringement, passing off and malicious falsehood. The parties in this case had already reached a settlement previously where the party in breach agreed to, *inter alia*, publish an apology on their website. However, the parties found themselves in litigation once again due to differences in interpretation of the settlement terms. They then sought assistance of this programme and managed to successfully resolve the matter. More details of these mediations can be found on the IPOS website.

The IPOS Hearings and Mediation Department has published not just details of the process, but also feedback from lawyers and parties. The case summaries describe the challenges that arose during the mediations, such as parties finding it difficult to depart from their positions and how mediators managed to skilfully address these issues by tapping into their expertise or calling for caucuses (private sessions). Parties were also very satisfied with the mediation process, highlighting its confidential nature and cost-effectiveness, which further strengthened their "*commitment to maintaining harmonious business relationships with their partners while upholding their commercial interests ethically and responsibly*". The successful mediations also allowed parties to "*put the dispute to rest and focus on [their] business*".

## Conclusion

The confidentiality of mediation is one of its main advantages but could also be a drawback. Parties interested in using mediation for IP disputes may be deterred when they lack access to information about the process and outcomes. This is evidenced by the SIDRA IP Survey where respondents indicated that they wanted more clarity and transparency in the rules and procedures, such as mediation, when it comes to IP disputes. A controlled degree of transparency, such as that provided by the AMP, allows parties to acquire a better understanding of the kind of solutions that they may be able to achieve beyond formal litigation or arbitration proceedings. Publication of parties' experiences of mediating their IP disputes could help future disputants better appreciate the benefits of mediation and consequently, encourage further uptake of mediation for IP disputes.

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