IN CONVERSATION WITH DR. STANLEY LAI

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This is the third part of a series of interviews that the Intellectual Property Students Association ("IPSA") has conducted with key players of the intellectual property ("IP") field in Singapore. These key players represent a diversity of views in the field of IP dispute resolution. The Singapore IP Strategy 2030 Report has highlighted that Singapore is currently seeking to strengthen its position as a dispute resolution hub for IP disputes.[1] *The main purpose of these interviews is therefore to explore and discuss the various strategies that Singapore intends to employ towards advancing its goal as an IP dispute resolution hub.*

On 30 July 2021, Dr. Stanley Lai SC, partner and the head of the Intellectual Property Practice and Co-Head of the Cybersecurity and Data Protection Practice at Allen & Gledhill, gave us a glimpse into the world of dispute resolution for intellectual property disputes. As the chairman of the Intellectual Property Office of Singapore ("IPOS"), and as one of the senior mediators of the Singapore Mediation Centre ("SMC"), Dr. Lai is uniquely positioned to provide insights on all facets of IP disputes, and in particular, mediation.

Q1: You have a wealth of experience in IP disputes, mainly in IP litigation but also as a member of the Singapore International Arbitration Centre ("SIAC") IP Panel and as a World Intellectual Property Organization ("WIPO") and SMC mediator. In your experience, which

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[1] Intellectual Property Office of Singapore, *Singapore IP Strategy 2030 Report* (Singapore: Intellectual Property Office of Singapore, 2021), online: <https://www.ipos.gov.sg/docs/default-source/default-document-library/singapore-ip-strategy-report-2030-18May2021.pdf>.

mode of dispute resolution is the most popular among clients for IP matters and why? In what circumstances would mediation be a good option for disputing parties to consider?

While litigation continues to be the primary preference for dispute resolution when the validity of IP rights is an issue, Dr. Stanley Lai believes that there is a growing interest in IP arbitration and mediation. He attributes this to the "changes to the arbitration regime in Singapore which allow for an arbitrator to rule on the substantive validity of (even foreign) IP rights, whose finding then becomes contractually binding on the disputants." In particular, this paves the way for expeditious resolution of disputes concerning the validity of foreign IP rights, which courts of law generally consider non-justiciable for reasons of territoriality. Further, a "specialist pool of IP mediators [have] paved the way for disputes on validity to be more efficiently resolved either through non-assertion/no-challenge arrangements … or as an issue to be taken out of the settlement discussions altogether."

Dr. Lai also believes that these alternative dispute resolution ("ADR") mechanisms are complementary in nature:

> "I like to think of arbitration and mediation as operating in tandem, especially since we also have an Arb-Med-Arb procedure under the SIAC rules.[2] That being said, there are also certain types of IP disputes where parties opt directly for mediation in the first instance.

[2] "Arb-Med-Arb" is a process whereby a dispute is first referred to arbitration before mediation is attempted. If parties are able to settle their dispute through mediation, their mediated settlement may be recorded by the arbitral tribunal in the form of a consent award. The consent award is generally accepted as an arbitral award, and, subject to any local legislation and/or requirements, is generally enforceable in more than 150 countries under the New York Convention. If parties are unable to settle their dispute through mediation, they may continue with the arbitration proceedings.

> Given the way our rules have evolved, parties should apply their minds to ADR options very early on. In fact, in the upcoming changes to our civil justice reform system, judges will be able to proactively order parties to attempt negotiations or mediation. As long as parties show an intention to participate in mediation and secure an outcome, there is little that cannot be mediated."

Q2: In your view, is mediation an option which only arises when the case is "less clear cut," i.e. a party is not reasonably assured of victory in court?

Dr. Lai responded that:

> "If the case was clear-cut, then counsel would have advised parties to resolve the dispute without the need for litigation. Most of the cases that end up in court carry factual, emotional or scientific discrepancies that require ventilation and resolution in court.
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> An experienced mediator would be able to evaluate parties' interests and positions, and be cognizant of the risks of pursuing litigation to finality, whether as a matter of law or evidence. The skill is then to facilitate the understanding of disputants to these issues, so that a good party-driven settlement can result without the need of incurring more time and costs."

Q3: With the new Singapore Convention on Mediation and various initiatives by IPOS to encourage IP mediation,[3] do you see a shift towards mediation as the preferred mode of dispute resolution in the future? Why or why not?

Dr. Lai described the Singapore Convention on Mediation as "a very important international instrument which has taken mediation into the global spotlight." He pointed towards the concerns of time and cost that favour mediation, before highlighting the appeal of mediation for IP disputes: "Mediation raises a real possibility of consolidating all the global disputes into a single negotiation, so that parties stand to gain a lot more, in terms of finality and cost-savings."

Dr. Lai also reiterated changes in the arbitration landscape, noting that:

> "The IP Dispute Resolution Act, which was enacted last year, amended the arbitration legislation such that any findings from an arbitration in Singapore will bind the parties to the arbitration, and will not necessarily have an impact on what happens in the register in the home country of concern. This extends to matters of validity, and even matters that may usually not be regarded as immediately arbitrable from a jurisdictional standpoint. This may also reduce the scope and frequency of jurisdictional challenges before arbitration panels."

Q4: In your experience, do you see less well-resourced actors such as individual inventors and small and medium enterprises ("SMEs") choosing ADR options such as mediation over litigation? What more can be done to increase accessibility of justice for such actors? On the other hand, what are some ways to attract more well-resourced entities to choose mediation?

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[3] Notable initiatives include IPOS' Enhanced Mediation Protection Scheme (EMPS) and the Young IP Mediator initiative.

Dr. Lai answered that mediation "should not be chosen solely on the basis of cost considerations" as it is a process which works only if "both parties are equally seized of the merits and weaknesses of a dispute before entering into a mediation process."

Dr. Lai elaborated that:

> "I think that it is not so much a consideration of whether a party chooses mediation because of costs considerations. In any litigation, regardless of how resourced they are, the parties should only pursue mediation if they genuinely intend to explore and exhaust the possibility of pre-trial or pre-action settlement. It cannot be a situation where a less-resourced actor elects mediation because it better suits their concerns over legal costs and disbursements – the well-resourced actor must willingly participate in the process as well, with the prospect of achieving a compromise."

Dr. Lai also believes that the Courts (Civil and Criminal Justice) Reform Bill, which was passed in Parliament on 14 September 2021, provides for cases that lack such reciprocity as it empowers the courts to order parties to attempt to resolve their dispute by amicable resolution.[4] Ultimately, however, Dr. Lai cautions against attributing the preference for ADR options over litigation due to cost:

> "I don't think mediation on its own can be thought of as a process that favours a less resourced actor – because for the settlement to really work, both parties have to participate, regardless of where they stand in terms of bargaining position."

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[4] Bill 18, *Courts (Civil and Criminal Justice) Reform Bill*, 1st Sess, 14th Parl, 2021, cl 71 (second reading 13 September 2021).

Q5: How do you think the 2018 proposal for a specialised IP division within the Singapore courts, which would result in a more streamlined process for IP claims, will affect the choices in the mode of IP dispute resolution in Singapore?[5] For example, do you think it would encourage more litigation over mediation, due to the simplicity and accessibility provided under the "fast track"?[6]

Dr. Lai identified the various benefits of the more streamlined process for IP claims. He pointed toward the imposition of judge-led pre-trial conferences which focus the attention of parties and counsel on the issues of fact, law and science that should be distilled for the court's determination, and the evidence that will be proffered for the purposes of trial. The effect of this is that "SMEs and individual creators and inventors can obtain a swift resolution, which can contribute to savings in time and costs."

While multinational corporations ("MNCs") also benefit from this streamlined process as it will be easier for them to secure an injunction, Dr. Lai hopes that this new process will level the playing field.

> "What we're also hoping to see are individual creators – who may not otherwise have an easy way to vent an assertion of copyright or claim a corporate infringement – taking advantage of this process and resolving a matter, sometimes against a big company. More disputes would result from these developments, and through that, more mediations will take place."

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[5] Public Consultation on Intellectual Property ("IP") Dispute Resolution Reforms, Ministry of Law (October 2018) at para 8.

[6] The proposed "fast track" places restrictions on the length of trial, the quantum of damages recoverable, and the amount of costs awarded. It also involves early and active management by the trial judge, complemented by procedural rules to allow greater judicial control over the conduct of cases.

However, Dr. Lai reminded us that litigation and mediation should not be viewed mutually exclusive dispute resolution options. He also noted that few parties instinctively opt for mediation as a dispute resolution mechanism.

> "Parties need to realize that the downside to not completing the mediation is that you carry on with a court-based process or an arbitration-based process, to a final all or nothing outcome. A timeously deliberated settlement in itself is a very important coercive factor to think about to resolve a dispute. The Affidavit of Evidence-In-Chief ("AEIC") exchange or summons for directions or the actual trial itself … gives parties pause because they will be thinking of additional costs that need to be incurred, coupled with the uncertainty of outcome, both at trial as well as an appeal to the Appellate Division, or the Court of Appeal."

Finally, Dr. Lai considered other ways through which parties may eventually end up opting for mediation as a dispute resolution mechanism.

> "Sometimes, a dispute resolution contract contains staggered pre-escalation clauses that basically impose a mediation process prior to launching court proceedings. That's the other way parties can come to a mediation with the prospect of a negotiated settlement. One of the roles of a mediator is to bring home to the parties the reality of the risk of uncertainty over a formal dispute resolution process like litigation and arbitration. That in itself is also an incentive to bring parties together to reach certain closure and make concessions. As formal proceedings have not begun, there may be less emotion that is invested in the dispute, especially before provocative statements and other unpleasantries are inserted into pleadings and affidavits. The best settlements are the result of give and take – it is very rarely a zero-sum game."

Q6: A key aim of the Singapore IP Strategy 2030 is to grow international IP dispute resolution in Singapore. What are some things that can help realise this aim?

To grow international IP dispute resolution in Singapore, Singapore has to become a hub for international IP mediations, and Singapore needs to train its local legal pool to ensure that it is up to standard.

Dr. Lai directed our attention toward recognised expert panels that can provide "a pool of scientific and statistical expertise for litigants who come to Singapore to resolve their disputes, or to perform neutral evaluations." The Singapore International Commercial Court also tries international disputes that have little or no connection with Singapore or Singapore law:

> "A strong international bench in the Singapore International Commercial Court would also allow parties to try foreign IP disputes in Singapore. The Singapore International Mediation Centre, with its pool of experienced and trained international mediators, are best placed to support this effort and bring their expertise to bear on the settlement of cross-jurisdictional and global disputes."

He also believes that mediation as a dispute resolution option can supplement and complement the existing landscape.

> "Dispute resolution processes like mediation can give parties the option to reach a settled outcome without the need to pursue a litigation that results in a zero-sum game, especially for areas where there is a scarcity of settled law. I think having this option itself is part of the Singapore IP Strategy 2030, where you have a vibrant dispute resolution system for IP, specialist judges, a growing body of local counsel that are able to deal with this – working alongside their international counterparts. You also have the two formidable mediation institutions – the Singapore Mediation Centre and the Singapore International Mediation Centre – to support the vision. I think that's the game plan going forward, and I fully support it."

With regard to how Singapore can ensure that the local legal pool is up to standard, Dr. Lai emphasizes the importance of upskilling and training.

"The senior lawyers need to train. My firm is certainly placing a great focus on training and mentoring. You will find that most of the lawyers doing IP litigation in Allen & Gledhill are also commercial litigators. They are not just doing IP, although we have one or two lawyers that specialise in IP disputes only. My personal vision has always been to make IP litigation a necessary skill set for all commercial litigators. The extent that IP features in the diet of our litigators would also turn on a more informed personal choice and preference, depending on the proclivities of the individual litigator.

IP is a very specialised field of practice. What we seek to do is to demystify it with general litigators, and with that, you're much more likely to see more disputes, rather than only confining it within one specialist pool of lawyers. As legal practice develops, there are very few areas of law where you can afford to maintain a pool of specialist lawyers who specialize in only one genre of legal practice. Clients are increasingly looking out for not just depth but also breadth in the kind of litigation and work that you do. As an IP and general disputes lawyer, I have also had to develop, over the past 10 years, complementary skill sets in data protection and cybersecurity, whilst keeping abreast with developments in artificial intelligence, blockchain, tokenization and cloud computing technology and other areas such generics, bio-similars and gene-editing within the field of the life sciences. It has been an exciting journey, which I have taken together with a steadfast team of colleagues whom I cherish and respect."