Sixth IMIG Meeting At WIPO
September 3, 2007

Some Thoughts Regarding Impasse
(With a Focus on IP Mediations)

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1. Why Impasse

Parties become stuck for many reasons.

Business representatives cannot develop a rapport and cannot engender trust.

Counsel are not helpful, and worse, are destructive in their manner and words.

Counsel have a contingent fee stake in the outcome of the dispute, thus creating a floor below which counsel's client cannot settle, without substantial alteration of the client's fee arrangement with counsel.

An insurer places a non-negotiable value on the case.[1]

Counsel, the parties and the mediator have not prepared thoroughly.

Players not a the table may cause the parties to become stuck.

A licensor may be constrained by most favored licensee provisions in prior license agreements.

A vendor or vendee may constrain a party with respect to price.

A party may be constrained by its need to enhance the market value of the company.

An investor may have a constraining stake in the outcome of the mediation. Bankers and government agencies may have a constraining stake in the outcome

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[1] The interests of contingent fee lawyers and of insurers sometimes raise impenetrable barriers to resolution of IP disputes. Above average parties and above average counsel will assist the mediator in persuading contingent fee lawyers and insurers to relax their demands.
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of the mediation.

The outcome of disputes in other jurisdictions may be material to the mediation.

And so on .....

2. Avoiding Impasse

In every IP mediation, the above average IP mediator, as well as the above average client and above average counsel, must all keep an eye on situations that might lead to an unwanted impasse. The best way to break an impasse is to cut it off before it becomes an impasse –

Often, this is a matter of probing for a thorough understanding of each party's real interests and needs.

Understanding each party's real interests and needs will often spotlight a potential impasse.

Exploring options calculated to meet all sides' interests and needs may avoid fatal impasse.

Understanding and revealing the strengths and weaknesses of each side's BATNA.

Understanding whether it is a person, a procedural problem, or a substantive problem that seems to be leading to an impasse will assist in avoiding the impasse.

But not all impasses are avoidable. Indeed, impasse is a hall mark (at least temporarily) of most IP mediations.

3. Breaking Impasse

Many techniques for breaking impasse are available to the IP mediator, the parties and their counsel. Above average IP parties and above average IP counsel will be aware of the techniques, and will be prepared to work with the above average IP mediator to implement them. For example, a suggestion to consider and to employ mediation and last offer arbitration should come as no surprise to parties or their counsel.

An above average IP mediator may use reality testing in attempting to break an impasse. The mediator may –

(a) question the soundness of a party's legal or factual position,

(b) inquire as to the cost of litigation compare to the cost of settling,

(c) ask the parties to compare the real rewards of litigation versus the cost of litigation (including the real consequences of a loss in litigation),

(d) ask a party to tabulate the pros and cons of the party's BATNA and of the other parties' BATNAs,

(e) take a party through a litigation risk decision tree,

(f) explore creating other relationships,

(g) ask each party what the party would do if it owned both sides of this problem,

(h) explore with one party what that party can give up that is of little value to it but of relatively larger value to the other side,

(i) explore with the parties a short term solution followed by continued monitoring,

(j) explore with the parties the engagement of an expert to render an opinion on an issue on which the parties are stuck,

(k) explore with the parties adjudicating a specific issue which will determine the outcome of the negotiation,

(l) ask each party for the party's view as to why the parties are stuck,

(m) ask each party to step into the shoes of another party in order to reveal what is causing another party to be stuck,

(n) ask each party to re-assess its situation in order to guard against self-serving valuations in the party's favor and against reactive devaluation of another party's proposal,

(o) re-engage the parties in option exploration,

(p) inquire of each party why the discussion is not working, and if the party would like it to work, what the party believes could make it work,

(q) ask each party to re-visit the meaning of what another party has said in criticizing or rejecting a proposal – with the thought that a new understanding of the criticism may emerge,

(r) re-visit the role of emotion in causing the parties to be stuck,

(s) explore with the parties whether or not a cultural nuance bears on why the parties appear to be stuck,

(t) inquire of each side (sometimes counsel only, sometimes the party only, sometimes each party and its counsel) as to whether, if the mediator can persuade another party to accept the mediator's suggested solution, the party with whom the mediator is speaking will accept the proposal,

(u) inquire of each party as to whether it is stuck on an issue the other party(s) does not know about, and what that issue is,

(v) inquire as to whether, if a party cannot persuade another party it is wrong, will the party give up this tack and try to find a solution that does not require an admission of error,

(w) inquire as to whether an apology will help a party become unstuck, and if so, what apology,

(x) ask a party what it would like another party to say,

(z) inquire as to whether an acknowledgment by another party of injury to or dislocation of a party will assist in getting the party unstuck,

(aa) ask a party to recount the role it has played in the history of the dispute,

(bb) work with contingent fee lawyers and insurers to re-formulate their positions in order to help the parties reach agreement,

(cc) ask the parties to list jointly the points of agreement and the points of disagreement, and to brainstorm solutions as to the points of disagreement,

(dd) ask the parties to record in writing the reasons for their inability to reach full resolution, in the same formal manner as a final agreement is prepared,

(ee) let time pass and reconvene, or

(ff) inquire as to how much longer a party is willing to pay the price of continuing the conflict.[2]

In the end the above average mediator must be patient, must persevere, must remain committed, must direct all concerned to being creative, must be optimistic, and sometimes, must bark at a CEO. E.g. –

"Tom, you are a crazy fool not to settle on these terms!"

The last statement may be the last words uttered by the mediator. But a party may need it. Even want it. And the parties may resolve their differences as a result of it.

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2 Two recent books by Kenneth Cloke contain much that is useful in helping the parties to become unstuck. They are Cloke, *Mediating Dangerously*, Wiley Publishers Inc. 2001, and Cloke, *The Crossroads of Conflict*, Janis Publications 2006.