



# 中小企實戰教室：

## 商務調解法律與實務

### ESSENTIAL LAW & COMMERCIAL MEDIATION FOR SMES

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# Overview

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# Types of Disputes in the Commercial Sector

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- Contract
- Employment
- Finance & Banking
- Sales of Goods
- Shareholder & Company
- Tenancy
- Tort – e.g. infringement of copyrights, passing off, product liability

# Why do we need a contract?

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- Clarity
- Define relationship
- Risk Allocation
- Protection (Enforceability)
- Helps achieve parties' objectives
  - Quality
  - Time
  - Money

# Contract Law Essentials

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SITUATION STUDY

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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- iRiver manufactures and supplies MP3 players.
- Thakral is a worldwide trading and distributor of electronic products.
- In July 2003, Mr. Lulla of Thakral approached iRiver for discussion on the possibility that Thakral distribute iRiver's MP3 players. Mr. Lulla gave them a sales pitch, highlighting Thakral's years of experience and that it was already the distributor of MP3 players for Samsung and Sanyo. No conclusion was made in the first meeting.

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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- A second meeting was arranged by iRiver. In that meeting iRiver agreed to use Thakral to distribute its MP3 players to a limited market, being audio/video shops in Tsimshatsui District, for a trial period. There were no minutes or written record of the said meetings.
- Thakral placed its first order in mid-August 2003 and thereafter there were a number of further orders.

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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➤ *Is there a contract?*



# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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- What constitute a contract?
  - Offer
  - Acceptance
  - Consideration
  - Intention to be bound
  - Legality
  - Capacity
- Can be verbal, written and by conduct

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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- Thakral on-sell iRiver's Mp3 players to retailers at a profit, partly directly but mainly through its subsidiaries, China Express Corp and China Express Associates (they will hereinafter be collectively referred to as "China Express").

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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- By October 2003, Thakral's operation had expanded and was concerned about their status as iRiver's distributor since there was no formal agreement signed. In November 2003, at P's request, D confirmed by two letters P's appointment as its authorised distributor until 31 July 2004.

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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To whom it may concern

Dear Sir/Madam

Re: Authorised Distributor

This is to certify that Thakral Corporation (HK) Ltd. are appointed by iRiver Hong Kong Limited as our authorized Distributor over the full region of HKSAR to carry iRiver brand products until July 31 2004.

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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- D also issued a formal Distribution Agreement (the Formal DA) together with one of the letters which contains exactly the same cut-off date of 31 July 2004 as well as a non-competition clause. Despite repeated discussions, the formal distribution agreement was not signed as Thakral found the non-competition clause unacceptable, given that it was already distributing competing MP3 players in the market.

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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Contrary to D's wishes, P continued to promote, market and distribute rival players, including its own "Yes" players.

In early January 2004, iRiver's newly appointed sales and marketing manager found Thakral's refusal to focus 100% on iRiver's products unacceptable. In early March 2004, iRiver terminated the agreement and recalled all unsold stock, some 2,770 units of MP3 players from Thakral and China Express, and repaid Thakral/China Express their net invoice price.

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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P then brought proceedings alleging that D's termination of its appointment before 31 July 2004 was wrongful. P claimed damages for:

- (a) lost profit on the unsold stock;
- (b) future lost profit on direct sales and sales via its subsidiaries; and
- (c) damages payable under an indemnity to its subsidiaries for its future lost profit on the unsold stock, arising out of D's wrongful termination of the agreement.

Total: HK\$4 million

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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*Can iRiver terminate the distributorship at will or by reasonable notice?*

What is the status of the letters?

Are they evidence of the previous relationship?

Are they signifying a new contract?

Are they variation of the previous distributorship?

Are they only negotiation of a new contract?



# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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iRiver's argument:-

- The letters dated 4 and 17 November 2003 were issued at Thakral's request to try it out as an authorised distributor, and for the purpose of comforting retailers, and not on any concluded contract
- After the issue of the two letters, the business simply "continued" as before when there was no concluded agreement, and therefore no intention to form any contractual relationship
- There was no evidence to show that iRiver was not entitled to terminate the agreement at will or on reasonable notice, and therefore iRiver was entitled to stop supplying Thakral at any time

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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## The Legal Principle

*(Pagnan SpA v Feed Products Ltd [1987] 2 Lloyd's Rep 601)*

*“As to the law, the principles to be derived from the authorities...can be summarised as follows:*

*(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole (see Hussey v Horne-Payne ).*

*(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary "subject to contract" case.*

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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*(3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed; ...*

*(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled (see Love and Steward v Instone per Lord Loreburn at p.476).*

*(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.”*

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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*Was it a term of the distributorship agreement that Thakral must not deal in any product in competition with iRiver?*

*Is it an express term?*

- Non-competition requirement mentioned in the meeting?  
No minutes
- No subsequent e-mails made reference to the term
- When the Yes MP3 player came on to the market, of a breach of that term.

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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*Was there an implied term not to compete?*

***What is an implied term?***

An implied term is one which can be established as representing a common intention of the parties as determined by the words of the agreement and surrounding circumstances.

An implied term may be found to be binding on the parties where it is necessary to give business efficacy to the contract (business efficacy test), or where the term represents the obvious, but unexpressed intentions of the parties (officious bystander test).

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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## Business efficacy test

- The implication drawn from what must obviously have been the intention of the parties;
- with the object of giving efficacy to the transaction;
- to add a term on the ground that without it the contract will not work.

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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Examples:

a contract to use a wharf that it was safe for the ship to lie at the wharf;

a contract for service that it should be done in a proper and workmanlike manner

a contract to pay for son's school bill as should be approved by father and that such consent should not be unreasonably withheld

a contract between a 'pop group' and their manager that the manager would not do anything which he could reasonably foresee would destroy the mutual confidence between them

a contract for driving lessons that the vehicle provided would be covered by insurance

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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## Officious Bystander Test

A term which has not been expressed but which is nevertheless so obviously a stipulation in the agreement that the parties must have intended it to form part of their contract

Something so obvious that goes without saying

A term will not be implied unless the court is satisfied both parties would have reasonably agreed to it had it been suggested to them.



# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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## Examples

- the parties shall cooperate to ensure the performance of their bargain
- the parties shall do nothing to interfere with the state of affairs necessary for the contract to operate.
- where a contract is subject to a condition precedent, there would be an obligation on each party to do nothing to prevent fulfillment of the condition.

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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## Other situations where a term may be implied

- Previous course of dealings
- Implications from words of recital
- A contract which contains no express provision for its determination may be determined by reasonable notice on the part of one or both of the parties.
- Implied by statute

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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Held: It is not possible to see how a non-compete obligation could be implied in the circumstances. Amongst the obvious barriers are that Thakral was already doing business with others, that iRiver was entitled to engage other distributors, that no trade practice was said to exist; the parties did agree to be bound until 31 July 2004; that by terminating by notices in February 2004 iRiver was in breach, and liable in damages.

# Remedies for Breach of Contract

- Damages
- Specific Performance
- Injunction

# Remedies for Breach of Contract Damages

- Aim of damages: 'so far as money can do as if the contract had been performed'
- Duty to mitigate: Duty to take all reasonable steps to minimize one's loss
- Measure of damages
  - Causation of Damage - in fact caused by breach but not regarded as too remote by the law

# Remedies for Breach of Contract Damages

- **Expectation Loss - Damages** are awarded to compensate the innocent party for its lost expectation. The principle is that the innocent party must be placed in the same position in which it would have been if the contract had been performed.
- **Reliance Loss** – to provide the injured party monetary compensation to cover the expenditure incurred in reliance of the contract which has been wasted due to the breach.

# Remedies for Breach of Contract Damages

## Assessment of damages

- Not all losses flowing from the breach of a contract are compensated.
- Law only recognizes some losses which can be compensated by way of damages.
- Losses must have been caused by the defendant's breach of contract.
- The party must have foreseen the losses at the time of making the contract

# Remedies for Breach of Contract Damages

## The Notion of 'Remoteness'

### Hadley v Baxendale (1854)

The plaintiffs, owners of a flour mill, contracted with the defendant carriers for the carriage of a crank shaft to Greenwich for use as a pattern for a new crank shaft. The carriage was delayed due to the negligence of the defendants so that the new shaft was received late. The plaintiffs claimed their loss of profits in operating the mill during the delay. The defendants argued that this loss was too remote for them to be liable for it.



# Remedies for Breach of Contract Damages

**Held,** Appeal allowed. Damages recoverable for a breach of contract should be such as might fairly and reasonably be considered as arising naturally from the breach or might reasonably be supposed to have been in the contemplation of the parties at the time the contract was made, as the probable result of the breach of it.

If there were special circumstances which had been communicated by one party to the other, the damages resulting from the breach would be the amount as might have been reasonably contemplated as flowing from such a breach in those circumstances. If those circumstances were unknown to the party alleged to have breached the contract that party, could only be supposed to have contemplated the amount of damages arising generally from such a breach. In the instant case, the jury ought to have been directed that they were not entitled to award damages for profits lost to H through the mill being inoperable.

# Remedies for Breach of Contract

## Damages

Hence,

- The plaintiff can claim damages for all foreseeable losses flowing from the breach.
- The plaintiff can also claim losses which are not reasonably foreseeable, but were 'within the contemplation' at the time the contract was made.

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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The Judge found that:

- P was entitled to loss of profit on the unsold stock;
- P was not entitled to future loss of profit, because any such claim was speculative, since D could have prioritised orders from other distributors. P was awarded \$1,016,030.91 in damages.

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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*Was iRiver liable to pay for China Express's loss?*

*Privity of Contract between iRiver and Thakral?*

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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*Held*, it is right in pointing out that Thakral and China Express are separate legal entities, and Thakral had no right to claim any loss on behalf of China Express. It is also right in suggesting that there was no privity of contract between iRiver and China Express, and China Express could have no direct claim against iRiver.

However, the Judge found, "... iRiver knew all along that it was dealing with a company in a long-established group of companies; that it would be not unrealistic for Thakral to use one of the companies within the Thakral group in its deals with the end traders", and iRiver was certainly aware of China Express's presence.

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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The profit margin arising from sales to China Express by Thakral ranging from -1.28% to 2.02% could not be a genuine profit margin as even iRiver's CEO, Ms Chen, accepted that the appropriate rate should be around 10-15%.

Applying *Hadley v Baxendale* (1854) 9 Ex 341, Thakral would be entitled to recover damages that it was liable to pay to China Express arising out of iRiver's wrongful termination of the agreement. It is certainly not unfair to iRiver.

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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## *Thakral's appeal to Court of Appeal on the issue of future loss*

iRiver had not challenged the amount of future orders and the price estimated by Thakral on the basis of past pattern, and there being no suggestion of any competing demands of other distributors nor was there any such distributor available, iRiver would have to supply MP3 players to Thakral to enable it to make a profit during the subsistence of the agreement.

**Held,** Thakral's claim for future lost profit was premised on the suggestion that under a distribution agreement, there was an implied term that the distributor would be obliged to promote and market the other side's goods, and the other side undertook to supply a certain amount of goods to the distributor. iRiver could have chosen to give priority to orders made by other distributors, actual or prospective, was not far-fetched, in a fast moving commercial city such as Hong Kong.

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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The issue is not what iRiver could or would have done. The issue is not whether there would be new distributors "courting" iRiver or whether iRiver's product could survive the highly competitive market. All these are highly speculative.

What is important is that Thakral sought damages for future lost profit and therefore bore the burden of establishing such entitlement. Unless Thakral had pleaded and had established a contractual obligation on the part of iRiver to supply certain definitive quantities and types of MP3 players to Thakral during the remaining term of the agreement, there was no valid basis for any claim for future lost profit. Whilst the agreement would last until 31 July 2004, there was no suggestion in the pleading that iRiver was contractually obliged to supply MP3 players of the quantities and types Thakral wanted.



# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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## Alternative Dispute Resolution

*“The parties' total legal costs were about \$4.7 million, while total damages were just over \$1 million. This was a typical case where the parties should have explored the much more cost-effective means of mediation to resolve their commercial dispute. The Court had given its stamp of approval to mediation and it was now the legal profession which must acknowledge its value and routinely consider with their clients whether their disputes were suitable for alternative dispute resolution.”*

# iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd (2008)

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## Alternative Dispute Resolution

*“A skilled mediator might be able to provide solutions which were beyond the power of lawyers and courts to provide. Even where mediation did not result in an immediate settlement, by narrowing down the parties' differences, it could lead to a full settlement at a later stage.”*

# Case Sharing

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# Practice Direction 31 on Mediation

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# Practice Direction 31

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- ▶ Effective from 1 January 2010
- ▶ Objectives:
  - ▶ to increase the cost-effectiveness
  - ▶ to promote a sense of reasonable proportion and procedural economy
  - ▶ to facilitate the settlement of dispute

# Practice Direction 31

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- ▶ Mediation Notice
- ▶ Mediation Response
- ▶ Mediation Minutes
- ▶ Mediation Certificate
- ▶ Minimum Participation Requirement

# Practice Direction 31

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## ► Costs sanction:

If the court considers that a party has unreasonably refused to engage in mediation, it may make an adverse costs order against that party.

# Mediation Ordinance

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# Objects of the Ordinance

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- (a) to promote, encourage and facilitate the resolution of disputes by mediation; and
- (b) to protect the confidentiality nature of mediation communications

# Scope of Application

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Mediation conducted under an agreement to mediate if either

- (a) the mediation is wholly or partly conducted in Hong Kong; or
- (b) the agreement provides that the Mediation Ordinance or the laws of Hong Kong is to apply to the mediation

Section 5(1)

# Definition of “Mediation”

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**Mediation** is

a structured process

comprising one or more sessions

in which one or more impartial individuals,

without adjudicating a dispute or any aspects of it,

# Definition of “Mediation”

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assist the parties to the dispute to do any or all of the following:

- (a) identify the issues in dispute
- (b) explore and generate options
- (c) communicate with one another
- (d) reach an agreement regarding the resolution of the whole, or part of the dispute

Section 4(1)

# Definition of “Mediation”

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a “session” include:

a meeting (include meeting conducted by telephone, video conferencing or other electronic means) between a mediator and one or more of the parties to a dispute, and includes any activity undertaken in respect of:

- (a) arranging or preparing for such a meeting, whether the meeting takes place or not; and
- (b) following up any matter or issue raised in such a meeting

Section 4(2) & (3)

# Confidentiality Obligations

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Mediation communication means

- (a) anything said or done
- (b) any document prepared or
- (c) any information provided

for the purpose of or in the course of mediation, but does not include an agreement to mediate or a mediated settlement agreement

Section 2(1)

# Confidentiality Obligations

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“A person must not disclose a mediation communication except as provided by subsection (2) or (3).”

Section 8(1)

# Exceptions to confidentiality obligations under the Ordinance

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A person may disclose a mediation communication if—

(a) the disclosure is made with the consent of—

(i) each of the parties to the mediation;

(ii) the mediator for the mediation or, if there is more than one, each of them; **and**

(iii) if the mediation communication is made by a person other than a party to the mediation or a mediator — the person who made the communication;

Section 8(2)



# Exceptions to confidentiality obligations under the Ordinance

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(b) the content of the mediation communication is information that has already been made available to the public, except for information that is only in the public domain due to an unlawful disclosure;

(c) the content of the mediation communication is information that is otherwise subject to discovery in civil proceedings or to other similar procedures in which parties are required to disclose documents in their possession, custody or power;

Section 8(2)

# Exceptions to confidentiality obligations under the Ordinance

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(d) there are reasonable grounds to believe that the disclosure is necessary to prevent or minimize the danger of injury to a person or of serious harm to the well-being of a child (child is defined as person under the age of 18 years old);

(e) the disclosure is made for research, evaluation or educational purposes without revealing, or being likely to reveal, directly or indirectly, the identity of a person to whom the mediation communication relates;

(f) the disclosure is made for the purpose of seeking legal advice;  
or

(g) the disclosure is made in accordance with a requirement imposed by law.

Section 8(2)

# Disclosure with leave

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A person may disclose a mediation communication with leave of the court or tribunal under section 10 —

(a) for the purpose of enforcing or challenging a mediated settlement agreement;

(b) for the purpose of establishing or disputing an allegation or complaint of professional misconduct made against a mediator or any other person who participated in the mediation in a professional capacity; or

(c) for any other purpose that the court or tribunal considers justifiable in the circumstances of the case.

Section 8(3)

# Thank You for your Support!

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## Q & A

### Joint Mediation Helpline Service

*A one-stop mediation platform to meet your needs*

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