

Litigation in Taiwan and Germany

(在臺灣與在德國之訴訟實務)

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I. Introduction

As Germany, Taiwan has a codified system of law, legal matters are decided by references to the codes and the writing of scholars and the judges who interpret the codes. However, beside this similarity are many differences in the legal practice and understandings which can result in losses for foreign companies. The following article will introduce some practical issues for Taiwanese and German companies

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while considering doing business and taking legal actions. This article aims to sensitize for problems in international business even between countries which share the same law tradition. Those considerations are sometimes a little bit generalizing and based on personal experience as most of cross-cultural descriptions. For protecting one's own right in international business doesn't exist one absolute solution, but only some guidelines, examples may further support cross-cultural understanding. My article starts with two typical cases in Germany and Taiwan which contain problems which companies can meet abroad as introduction. After some general considerations, the third part explains the situation at courts and for attorneys. The following four parts review some single problems.

II. Introduction cases

The following cases should exemplify some differences in the legal practice between both countries and show some pitfalls for companies doing international business.

1. IFA trade show in Berlin/ SISVEL

In 2008 220 German Customs officials raided 69 companies' stands at IFA trade show (Internationale Funkausstellung, Consumer Electronics Unlimited) in Berlin, including Emtec's, MSI's, TECO's and Xoro's, after the Italy-based company Sisvel lodged a complaint. Sisvel claimed that these exhibitors are violating its patent rights for MP3 and DVD technology. Sisvel's is a disputed actor at tradeshow and sometimes considered as a notorious patent troll.¹ The result of the raids has left some makers with nothing to show at the event, effectively putting a premature end to the trade show for these companies and brought those companies under media attention. One of the raided companies, TECO, asserted that anyone can see that the

¹ Intellectual Property Expert group (IPEG), 8.9.2006, <http://www.ipeg.eu/?p=47>.

exhibited TV don't even operate MP3 or built-in DVD player.² Contrary to public statements by some companies on 3 September 2008³, no action claiming damages against Sisvel was made public. In one case, it took the prosecutors office more than three years to give the defendant the opportunity to a statement of defense. Although some companies claimed that there are obviously no facts to base the claims and even some companies has paid royalty fees to Sisvel, the prosecutors in Berlin didn't initiate preliminary investigation against Sisvel because of collusion or fraud.⁴

2. Simple misunderstandings?

A Taiwanese and a German company discussed a sales contract of some German machines. They already negotiated concrete specifications, delivery times and other terms. Due to different English accents⁵, the outcome of this negotiation hasn't been clear. After two days, the German company sent a letter in which it confirmed the order from the other company with further specifications. Not feeling bound to discussions, the Taiwanese company disregarded the letter. The following calls didn't lead to any result, the German company insists now on payment. The Taiwanese side in order to calm down the heated discussion expressed its regrets about the misunderstanding and promised to find a solution. The

² Liu Chao-kai, chairman, TECO, Taipei Times, 2008/9/5.

³ Taipei Times, 2008/9/5; Channel, 2008/9/8,
<http://www.channelpartner.de/index.cfm?pid=54&pk=265769>.

⁴ According to the German Criminal Procedure Law, when two parties of a conflict claim the opposite party has committed a crime, the prosecutor's office is obliged to initiate preliminary investigation against both parties. In this case, when Sisvel's claim is justified than the companies have committed an offense against the patent law. Contrary, when Sisvel has initiated investigations against the company contrary to its better knowledge, than Sisvel has committed fraud, collusion or misled public authorities about the fact that an unlawful act has been committed (Section 145 d No. 1 StGB/Criminal Code). At that time, the authorities aren't able to decide which of the claims are truthfully, therefore they must initiate investigation against both parties. When the circumstances are clear, they have to discontinue one the procedures.

⁵ When speaking English, second-language speakers tend to transfer their own grammatical structure into English. Germans are taught to use the British accents. Due the different articulation, Taiwanese have sometimes problems to understand English spoken by Germans.

conflict results later in litigation.

III. General Considerations

A comparison of the litigation praxis of both countries should start with general considerations about legal problems and litigation while initiating new business abroad. A company planning doing international business and drafting contracts has to take into account the different legal systems, behavior, other legal culture, different value of legal advice and legal proceedings and intercultural problems including different kinds of hidden prejudice. Businesses wishing to carry out cross-border transactions must reckon with the existence of different national contract laws when operating in the internal market. This can lead to additional transaction costs, increased legal uncertainty for businesses and lack of consumer confidence and thus cause obstacles to cross-border trade.⁶ Inexperienced parties tend to draft own contracts, often use standard forms or internet resources (sometimes from countries with other legal systems). Due to different applicable law, some contractual terms might be void or contain loopholes.⁷ Beside the concrete contract terms, the company has to choose the applicable law and the place of jurisdiction.⁸ Unfortunately, many Taiwanese Small and Medium Enterprises' (SME) oversee this elementary problem. At this stage, a party should start to consider the possibility of later litigations and the differences between litigation systems. The best contract draft is worthless when a court in another country applies different law. Other relevant questions worth to consider are resources and specialization of courts, procedural

⁶ Expert Group on European contract law: A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback, explanatory_note_results_feasibility_study_05_2011_en; Graf v. Westphalen, Fallstricke bei Verträgen und Prozessen mit Auslandsberührung, NJW 1994, 2113.

⁷ Graf v. Westphalen, Fallstricke bei Verträgen und Prozessen mit Auslandsberührung, NJW 1994, 2113.

⁸ See below V.

problems (duration of process),⁹ litigation fees, the enforcement of foreign judgments and judicial assistance between the countries.

Soft factors shouldn't be underestimated. While using English as the (supposed) same language, both parties interpret English terms with the background of their own language and cultural understanding. The meaning of legal terms often differ from the usual meaning, the assistance of non-professional dictionaries may add further misunderstandings. The literal translation of common used phrases often appears strange or offensive in other languages.¹⁰ Different culture behaviors and perceptions complicate the understandings. Some cultures avoid direct objections while other culture consider those direct objections as sign of straightforwardness,¹¹ that was maybe one of the reasons for the conflict in case 2.

IV. Situation at courts and for attorneys

Exactly knowing the situation in their home country, Taiwanese often overvalue the efficiency of the legal system in other countries, particularly in Germany. Nevertheless, the systems in both countries share the same shortcomings.

(1) The German statistic shows generally a decrease of new legal disputes, the German local courts received 1,496,122 new actions (first instance, in 1999), 1,213,093 (2010), the regional courts 382,881 (first instance, in 1999), 372,150 (2010), except family matters.¹² Decreasing as well as in Germany, the Taiwanese district courts received in 2010 approx. 2,220,000 new civil cases.¹³ The English version shows only 164,331 civil cases and 938,192 non-contentious

⁹ See below IV.

¹⁰ Petzold, Claudius: Hürden im internationalen Kontakt, *Anwaltsmagazin online*, 2010, p. 1.

¹¹ Petzold, Claudius: Hürden im internationalen Kontakt, *Anwaltsmagazin online*, 2010, p. 2.

¹² Bundesamt für Justiz, Referat III 3, *Geschäftsentwicklung bei Gerichten und Staatsanwaltschaften*, 20. September 2011.

¹³ Without distinction between different procedures and law, including family matters. <http://www.judicial.gov.tw/juds/jsi/home.htm#02k>.

matters,¹⁴ much lower than in Germany. The recorded number of Intellectual Property-related cases (IP cases) from the date of establishment of the Intellectual Property court (IP court) to date is 5,392.¹⁵

As in Germany, judge's and attorney's most concern is the failure of governments to provide courts adequate resources to do its job¹⁶, lack of resources often leads in Germany to long duration of proceedings¹⁷. For example: As personal experience, a position of a judge in the Chamber for Commercial Matters at the Regional Court in Offenburg remained unfilled for more than six month in 2010. The first measure for the judge has been to reply to several complaints about the stay of litigation proceedings. During my work as prosecutor, we have to wait several weeks for the finalization of our decisions because the court clerks have been sick or on leave. The application of statistical and evaluation systems created by some private consulting firms to the public system leads to grotesque work burden for prosecutors. Now the police and the prosecutors have to fill in data in many statistics, a difficult system keeps them more alert about their competences (or lack of competence) than investigating their cases. Smart statistical work results often in better statistical results than correct work. They are now preoccupied nearly 20 % with administrative systems and statistics about their work efficiency – in order to prevent them from wasting their working time. Judges at different courts already openly protest against staff reduction.¹⁸ Fortunately, compared with the

¹⁴ <http://www.judicial.gov.tw/juds/report/eg-6.htm>.

¹⁵ Last Updated November 30, 2011, http://ipc.judicial.gov.tw/ipr_english/index.php?option=com_content&view=article&id=16&Itemid=29.

¹⁶ John Eastwood: Protecting IPR, Euroview 12/1/2012, p. 24 for Taiwanese Intellectual Property Courts as an example for the general perception.

¹⁷ Presse release, Ministry of Justice, 2010/8/18, <http://rsw.beck.de/cms/main?toc=njw.root&docid=307263>; The European Court of Human Rights has already declared several times the recurrent failure to help ensuring that proceedings determining civil rights and obligations are completed within a reasonable time. (exp. CASE OF RUMPF v. GERMANY, (Application no. 46344/06), JUDGMENT, 2 September 2010).

¹⁸ Eilin Jung, Aus Protest gegen Personalkürzungen Bremer Gerichtspräsidenten zwingen die Politik in die Knie, Legal Tribune Online, 2011/9/9, approx. 25 % of the jobs at courts have been cut in the last 18 years in Bremen.

German situation, the time to the first hearing in Taiwan is relatively short which seems to be an advantage. However, the first hearing is the first in a series of many that will occur prior to the resolution of a case.¹⁹

(2) Another item worth to consider is the job specialization of judges. The range of work has changed, globalization and technical development alter the requirements for judges. They need to understand more international business (commercial practice), English and foreign or international law (CISG). Generally, judges in civil divisions at smaller courts aren't able to keep up with the job specialization of the attorneys. Lack of resources and a rotation system don't allow them to gain enough special knowledge. In a civil division at smaller courts, a judge has to decide the full range of civil cases from banking to construction. Cases aren't decided by abstract legal considerations but by the presentation of facts, often are difficult technical problems the center of the dispute. The understanding of expert testimony needs some basic technical knowledge. It is for many attorneys a frustrating experience to explain to impatient judge technical problems. More than their German colleagues, Taiwanese judges seem to be more reluctant to elaborate those backgrounds. The bookish attitude of judges is in Taiwan often criticized.²⁰

The Ministry of Justice and courts try to keep up with attorney's specialization. Beside divisions for family matters (family courts) at the local courts (Section 23 b GVG/Courts Constitution Act), many regional courts established commercial divisions (based on Section 93 GVG). Bigger courts establish civil divisions with special areas (Berlin as example: for personal rights, press-related cases, investment, enforcement of foreign judgments, banking-related cases, IPR-cases (with further separation), and special panels for construction and architecture cases).²¹ Taiwan tries to follow up too. The IP court was

¹⁹ Baker & Mc.Kenzie, Taiwan: A legal Brief, p. 16; See below VII.1.

²⁰ The so called dinosaur judges.

²¹ Organizational chart of the Regional Court Berlin 2012, http://www.berlin.de/imperia/md/content/senatsverwaltungen/justiz/gerichte/landgericht/gvpl/gvpl_stand_2012_01_01.pdf?start&ts=1325236536&file=gvpl_stand_2012_01_01.pdf.

established on July 1, 2008.²² Taiwan doesn't have commercial divisions but divisions for family and traffic matters. Bigger district courts as in Taipei or Kaohsiung have established some civil divisions which have to decide only about special fields of law.

Legal education should be accompanied by the achievement of soft skills and some life experience. A theoretical young genius judge may fail to understand practical life outside the book teachings, a fresh graduated judge's self-confidence may not be at the same level with his practical abilities. At best, a judge has gained some working experience before his appointment as judge. Different requirements for candidates for judges display the underlying educational and social concept. Although the state examination is still the most important factor in Germany, other skills can influence the decision for appointments as in Hamburg (professional experience, other legal practice, PhD or work experience abroad²³) or Baden-Württemberg (other legal practice, social skills)²⁴. The appointment of Taiwanese judges still focus on their grades in the examination, currently the Ministry of Justice starts to open the profession as judge for a small number of experienced attorneys.

(3) Much more than in Taiwan, approx. 147,000 German attorneys face tough competition.²⁵ The reasons for choosing the attorney's profession are different between both countries, the profession as attorney is mostly the second choice for German graduates. The education as lawyer in Germany follows the conception of the "*Einheitsjurist*", there is no difference in education for later judges and attorneys. The future profession is mostly determined by the outcome of both state exams. After passing the second state exam,

²² Intellectual Property Organization Act, promulgated on March 28, 2007, http://ipc.judicial.gov.tw/ipr_english/index.php?option=com_content&view=article&id=16&Itemid=29.

²³ Information of the Ministry of Justice Hamburg, <http://justiz.hamburg.de/einstellung-von-staats-anwaelten/2180226/richtereinstellung.html>.

²⁴ Information of the Ministry of Justice Baden-Württemberg, <http://www.jum.baden-wuerttemberg.de/servlet/PB/menu/1238320/index.html?ROOT=1153239>

²⁵ Gregor Samini, Trostpreis Anwaltsberuf, Berliner Anwaltsblatt 4/2008, p. 142.

every candidate is entitled to become an attorney, § 4 BORA (Federal Lawyer's Act). The best graduates can choose between the professions, the profession as attorney in small law firms or as self-employed attorney is remained for the underachiever. 70 to 80% of the graduated lawyers become attorneys²⁶, a situation which leads sometimes to bad qualification and performance. The increase in competition influences the work of attorneys, acquisition of new clients became a main part of his daily work²⁷, attorney's economic necessities often conflict with professional ethics. The education prepares mainly for anything but not for later profession as attorney.²⁸ No one must go the far as the Higher Regional Court (OLG) Düsseldorf which believe in a widespread, collaborative practice by attorneys to undervalue the amount of dispute²⁹ in order to cut down court fees on the back of the treasury. They court further believes – based on its own experience – that the saved amount opens space for higher attorney fees.³⁰ But many colleagues were forced by financial pressure and pressure to succeed to questionable actions in favor of their clients.

V. Choice of jurisdiction and forum shopping

(1) Even though both countries share the same legal system, their similarities shouldn't lead to the conclusion that choice of law isn't important. The Taiwanese court system enjoys a good reputation,³¹ civil courts works independent and impartial. Courts in other countries faces the same shortcomings described as above³². In conclusion, there

²⁶ Gregor Samini, Trostpreis Anwaltsberuf, Berliner Anwaltsblatt 4/2008, p. 142, growth rate 2006/2007: 3,42 %.

²⁷ Gregor Samini, Trostpreis Anwaltsberuf, Berliner Anwaltsblatt 4/2008, p. 142.

²⁸ Gregor Samini, Trostpreis Anwaltsberuf, Berliner Anwaltsblatt 4/2008, p. 143f, concept of the „Einheitsjurist“.

²⁹ As in Taiwan, the calculation of the court fee is based on the amount in dispute (or: the claim's amount). A higher amount in dispute results in higher court fees.

³⁰ OLG Düsseldorf, Beschluss vom 10.5.2011, I-2 W 15/11; in strong opposition: DAV, Berliner Anwaltsblatt 9/2011, p. 309.

³¹ Bayrischer Industrie- und Handelskammertag, Exportbericht Taiwan, July 2008, p. 15.

³² See above IV.

is no general advice in favor or against Taiwanese or German law and courts' jurisdiction. However, the small differences may result in unpredictable outcome. Regarding to Taiwan, one author describes it as a usual textbook approach to specify one's own courts and laws to handle any disputes that may later arise under a contract, the reasoning being that overseas courts may give an unfair "home court" advantage to the "home" company.³³ Insofar as they point out that Taiwan's system has generally not these sorts of problems and, in fact, offers many advantages with regards to speed, this opinion is shared by many foreign lawyers. Especially for any contractual matter in which a dispute might need injunctive-type relief (particularly where significant trade secrets or other intellectual properties are involved), it will often be important to specify Taiwan's domestic courts to ensure that swift action can be taken within Taiwan.³⁴ Beside, the differences in the legal practice should lead to other conclusions as other practice regarding default degrees³⁵, different approaches to contract freedom (German Standard law) or the existence of special courts³⁶. Compared with German law, the contracting parties in Taiwan enjoy more freedom of contract (particularly for agency agreements, the law is more in favor of the principal³⁷). As well as in Germany the seller may retain his property rights until full payment was made, but this title retention is difficult to enforce in Taiwan.³⁸ There are special circumstances for Intellectual Property Rights (IPR).³⁹ Another good example is the German law regarding Standard Contracts/General Terms and Conditions (AGB) in the relation between entrepreneurs⁴⁰. While those terms are only regulated in

³³ John Eastwood, Eve Chen, Enforcement of foreign court judgments in Taiwan, June 2007, p. 3. Many foreign companies are afraid that courts will give local companies some kinds of preference while deciding.

³⁴ John Eastwood, Eve Chen, Enforcement of foreign court judgments in Taiwan, June 2007, p. 3.

³⁵ See below VI.

³⁶ See above IV.

³⁷ Bayrischer Industrie- und Handelskammertag, Exportbericht Taiwan, July 2008, p. 15.

³⁸ Bayrischer Industrie- und Handelskammertag, Exportbericht Taiwan, July 2008, p. 16.

³⁹ Bayrischer Industrie- und Handelskammertag, Exportbericht Taiwan, July 2008, p. 15.

⁴⁰ Section 14 BGB: (1) An entrepreneur means a natural or legal person or a partnership with legal personality who or which, when entering into a legal transaction, acts in exercise of his or its

sweeping clauses in the Taiwanese Civil Code, there are complicated regulations in the German Civil Code (BGB), the tightening jurisprudence by the Federal Court of Justice (BGH)⁴¹ makes the drafting of AGB to dangerous field for specialists. I have hardly ever found any standard contracts without questionable terms. Many scholars criticize the tough jurisprudence of the BGH⁴², some authors even see a disadvantages for the German law and the market. This law – formed by case law – is difficult to understand for foreign attorneys.⁴³ Different interpretation leads to different outcome. Statistics recently presented by an IP Court judge indicate that patent litigants only have a 9.35% chance of success in the IP Court. Even Japan, which currently faces heavy condemnation for its patent infringement success rates of 20%, is far higher. The patent infringement litigation success rates in the US are about 75% for jury trials and 40% for bench trials. In Germany, the patent litigation success rate is about 35%.⁴⁴

(2) Often, the parties tend to choose their own law,⁴⁵ because of better understanding of the traps and the practice. Generally, parties should avoid that a court shall apply foreign law. A judge educated many years in his home country's law won't be able to fully comprehend small differences in interpretation, application of law and the other practice based on the foreign law. Some authors discuss the pro and contra of choosing a foreign court and home countries law as applicable law.⁴⁶ For instance, they suggest a “*forum*⁴⁷” in Germany

trade, business or profession.

⁴¹ Overview, Graf v. Westphalen: AGB-Recht im Jahr 2007, NJW 2008, 2228ff, 2234ff.

⁴² Graf v. Westphalen: Wider einen Reformbedarf beim AGB-Recht im Unternehmerverkehr, NJW 2009, 2977ff; Berger, Für eine Reform des AGB-Rechts im Unternehmerverkehr, NJW 2010, 465.

⁴³ Berger, Für eine Reform des AGB-Rechts im Unternehmerverkehr, NJW 2010, 465, 466.

⁴⁴ John Eastwood: Protecting IPR, Euroview 12/1/2012, p. 24 for Taiwanese IP courts as an example for the general perception.

⁴⁵ Graf v. Westphalen, Fallstricke bei Verträgen und Prozessen mit Auslandsberührung, NJW 1994, 2113f. The International Private Law of most countries allows that choice of law.

⁴⁶ Graf v. Westphalen, Fallstricke bei Verträgen und Prozessen mit Auslandsberührung, NJW 1994, 2116.

which shall apply foreign law. In German as well as Taiwanese International Private Law, foreign law is qualified as law, not as fact. As consequence, the judge is compelled to determine the foreign law ex officio, including the legal texts, the interpretation, the practice and customs, Section 293 ZPO.⁴⁸ At the following level, the court has to examine whether the applicable foreign is void because of *ordre public*.⁴⁹

(3) On the other hand, the outcome of legal procedures is sometimes more predictable in Germany than in Taiwan.⁵⁰ There is comparatively little judge-made law in Taiwan.⁵¹ Voluminous commentaries offer reviews over judgments and decisions by German courts. Lower courts tend to comply with the decisions of higher courts which are listed in common used commentaries and internet resources which help to assess the chance to win an action. In case of improper regulations, higher courts in Germany are much more spirited to close legal loopholes or even to correct faulty laws. Decisions by the Federal Constitutional Court (BVerfG), the BGH, or the Federal Labor Court often initiate legal reforms. Much more than the parliament, German courts refuse to run with short public media perceptions, for instance by cases of child abuse⁵² or ideology-driven,

⁴⁷ *Forum* means here the court which has to decide.

⁴⁸ Graf v. Westphalen, Fallstricke bei Verträgen und Prozessen mit Auslandsberührung, NJW 1994, 2116.

⁴⁹ Graf v. Westphalen, Fallstricke bei Verträgen und Prozessen mit Auslandsberührung, NJW 1994, 2116 with the Standard Contract Law as example. *Ordre public* means the body of fundamental principles that underpin the operation of legal systems in each state, Compare Article 6 GVG: A provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law.

⁵⁰ Further, see below VII.2.

⁵¹ Baker&Mc Kenzie, Taiwan: A legal Brief, S. 13.

⁵² Examples are the decisions of the BVerfG regarding the preventive detention (BVerfG, 2 BvR 2365/09 vom 4.5.2011, Absatz-Nr. (1 - 178)). The BVerfG especially remained independently from political or media influence, it often decided against temporary public opinion, for instance the decision against the NPD-ban (Petzold/Chen, S. 130), or even against unanimous enactments of the German parliament (Petzold/Chen, S. 132). The court didn't avoid conflicts with parties or other organizations (Petzold/Chen, S. 192ff).

simplifying concepts⁵³. Often, courts are working as the “Hüter des Volkes” (watchdog of the people).⁵⁴ Other key concerns about the practice of Taiwanese courts include bizarre “tests” used by many prosecutors and judges in criminal trademark infringement cases that are supposedly testing the skill of the IPR rights holder to tell the difference between genuine and fake goods.⁵⁵

(4) The current version of the CCP and the ZPO allows for the enforcement of “irrevocable” foreign judgments (i.e., final judgments) with some exceptions. Practically speaking, as their German counterparts, the Taiwanese courts don’t find many jurisdictional or public order/good morals problems – the lion’s share of problems arise in evaluating service of process and reciprocity⁵⁶.

(5) Legal and court fees influences the choice of jurisdiction. Compared with Germany, the calculation of court fees based on percentage is more transparent, Article 77-13 Taiwanese Code of Civil Procedure (CCP). The nonlinear calculation of court fees in Germany requires some knowledge and software programs. This complex calculation finds its regulation in an independent act (GKG, Court Fees Act). Even the attorney’s fee is decided by an independent act (RVG, Lawyers’ Compensation Act), but many attorneys now request hourly based fees for commercial matters. As regulated in Article 78f CCP, the losing party shall bear the litigation expenses in Germany. In cases of a partial victory or a partial defeat, the court may order the litigation expenses to be borne by both parties in a certain proportion; or by a particular party alone, or order both parties separately to bear the litigation expenses they incurred respectively. In fact, the winning party in Taiwan has to burden parts of his attorney fees⁵⁷ which

⁵³ The time of the new economy has created some grotesque simplifying concept as “every worker is a self-entrepreneur of his own working force” which were strongly rejected by the labor courts.

⁵⁴ Chen/Petzold, p. 170.

⁵⁵ John Eastwood: Protecting IPR, Euroview 12/1/2012, p. 24.

⁵⁶ John Eastwood, Eve Chen: Enforcement of foreign court judgments in Taiwan, June 2007, p. 2

⁵⁷ Bayrischer Industrie- und Handelskammertag, Exportbericht Taiwan, July 2008, p. 16 f.

aren't considered as default damages as in Germany.

(6) One time- and cost-spending specialty of Taiwanese CCP is worth to consider. In Germany, the Power of Attorney only needs to be signed by directors or a person in charge. Contrary to Taiwan, a simple objection of this power of attorney isn't accepted by German courts, the opposing party has to specify its objections. Taiwanese courts require further the notarization of the Power of Attorney in a time spending and costly procedure, including the involvement of different authorities and a recognized translator. The Judicial Yuan and the Ministry of Justice have both reiterated that to allow IPR infringement cases involving foreign litigants to be investigated and prosecuted more effectively, if information in the case files and physical evidence is sufficient to demonstrate that a Power of Attorney is genuine, and the opposing party does not dispute its authenticity, there is no need to require the legalization procedure. However, in current practice courts still require legalization on their own initiative, or do so if the opposing party challenges the authenticity of a Power of Attorney, even if the opposing party does not substantiate its objection.⁵⁸ On 2 March 2004, the Judicial Yuan wrote to the Executive Yuan and other organizations to state that when the opposing party deliberately challenges the authentic Power of Attorney without raising reasonable grounds for doubt, then under the provisions of the Codes of Civil and Administrative Procedure, the court may impose a fine of up to NT\$30,000.⁵⁹

A foreign party initiating an action in Germany or in Taiwan, is obliged to provide a security for the litigation expenses on motion request of the defendant which shall cover the defendant's costs if the plaintiff lose the case, Section 110 ZPO, Art. 96 CCP.

(7) Beside above mentioned issues, service of process through judicial assistance is another problem. Courts are not allowed to communicate

⁵⁸ Lee and Li, POAs of foreign rights holders in IPR litigation, March 2004 Issue.

⁵⁹ Christina M. H. Chao, Lee and Li, POAs of foreign rights holders in IPR litigation, Bulletin_November 2004 Issue.

directly with a party abroad, at least the translated actions needs to be sent through different administrative levels (including both Ministry of Foreign Affairs and embassies), Article 145 ff CCP. That might take from Germany to Taiwan six month and adds costs for difficult translations into German/Chinese. An injunction will be worthless after this period. A company which considers the risk being a defendant should agree to the place of jurisdiction at the opposite country to gain some time for the service of process. A contracting partner and possible plaintiff will consider if the higher costs and time for judicial assistance are worth to be paid for a relatively small amount of claim.

VI. Different appreciation of legal proceedings and legal advice

Generally, most people in Taiwan consider the legal system in Germany as more advanced than in their own country, maybe due to lack of knowledge about the shortcomings in Germany. There seems to be still some levels of reluctance and mistrust against courts on the Taiwanese side. In my personal experience and due to lack of statistics, Taiwanese companies tend to solve problems through negotiations and are much more willing to give up claims. Some years ago, the websites of one of the German Chambers of Commerce has provided the information that Taiwanese companies are reluctant to initiate actions even when their claims are obviously justified and simple to prove. Some German companies misunderstood that as reason to delay payments without any justified reasons. Taking actions is much more considered as an unfriendly act than in Germany.⁶⁰ Many foreign attorneys may agree that Taiwanese companies are more cost conscious. Especially Taiwanese SME aren't willing to pay for legal advice and focus on technical problems during negotiating contracts. To my personal experience, they face losses because of their failure to

⁶⁰ Bayrischer Industrie- und Handelskammertag, Exportbericht Taiwan, July 2008, p. 17.

consider legal problems while negotiating. Legal remedies as tool to protect own rights or sometimes to generated unjustified income⁶¹ aren't common in Taiwan.

More common in the past in Western countries is the usage press information, press releases or media relation work to put pressure on the opposite party which is not interested to bring the case to the attention of the media. Press information about protecting its own patent rights against infringers from abroad further highlights the own competitiveness as well as the reputation of the own company.⁶² Competent information can work as some kind of advertisement. German media regularly report about fake products from Asia. Courts, prosecutors and the police increasingly utilize media relation work for public relations.⁶³ A good example for positive (or negative) media work is the acquisition of Siemen's Mobil phone division by BenQ. The public in Germany received the impression that a well working German factory was mismanaged by "Asians".⁶⁴ When BenQ starts to react, it looks more than a justification.⁶⁵ In the above mentioned introduction case 1, the companies from Asia disregarded this tool. Some press release about the inactivity of the prosecutor's office, the incompetence of judges who believed in a patent troll and the announcement to avoid in future trade shows in Germany may have forced the authorities to do their work properly. A fire of complaints to all relevant (and even not involved) organizations as accompanying tool can be helpfully, at least it overloads the prosecutor with double

⁶¹ Bayrischer Industrie- und Handelskammertag, Exportbericht Taiwan, July 2008, p. 17.

⁶² Handelsblatt, Aktion gegen Produktpiraterie auf der Cebit, 6.3.2008; Stern, Großrazzia gegen Produktpiraten, 2008/3/6, <http://www.stern.de/digital/computer/cebit-2008-grossrazzia-gegen-produktpiraten-613371.html>.

⁶³ Senior prosecutor Hans-Jürgen Lendeckel, Polizeisprecher Oliver Stock, both with legal statements, in: Stern (German magazine), Großrazzia gegen Produktpiraten, 2008/3/6, <http://www.stern.de/digital/computer/cebit-2008-grossrazzia-gegen-produktpiraten-613371.html>.

⁶⁴ Welt online, 2006/9/24, http://www.welt.de/wirtschaft/article154847/Eine_deutsche_Marke_verschwindet.html; Berliner Zeitung, 2006/10/5, <http://www.berliner-zeitung.de/archiv/schutzrechte-der-einstigen-siemens-handly-sparte-liegen-offenbar-weitgehend-bei-benq-in-taiwan-die-meisten-patente-sind-weg,10810590,10424224.html>.

⁶⁵ Süddeutsche Zeitung, 2008/11/4, interview with K.Y. Lee.

work and keep him alert⁶⁶. As in Taiwan, the prosecutor's offices are bound to directives by higher authorities, Section 146 GVG, here the Chief Public Prosecutor's Office and above the Ministry of Justice.⁶⁷ That opens the way for political influence in important cases as here case No. 1. Negative media reports in Asia about lack of protection of exhibitors from Asia and the abuse of legal proceedings may influence the decision of Asian companies to choose other trade shows in future. Due to fierce competition between the trade shows worldwide and the increasing importance of Chinese trade show, negative publicity poses threats for the Messe Berlin GmbH which organizes the IFA. The Messe Berlin GmbH will use public and political relations to intervene at the Ministry of Justice as reaction. German media reports that the inefficiency of public authorities may result in loss of jobs, will create additional pressure to the authorities. The resulting political considerations by the executive branch may decide about prosecution but not solely on legal considerations.⁶⁸

VII. Some special problems

1. Expedition of process

Only fast judgments are good judgments. A delayed judgment often hinders the enforcement of rights because the losing party found in the meantime ways to hide assets or to request insolvency. With regard to the aforementioned situation at courts⁶⁹, delaying the litigation belongs to the tools of the attorneys. A party which is in urgent financial difficulties is more eager to negotiate a settlement than

⁶⁶ The Chief Public Prosecutor's office is the supervising authority for the prosecutors. Every complain about a prosecutor brings its attention to the case. When the complaint has any substance, the Chief Public Prosecutor's office will require reports and review the case. Due to harsh requirements, Chief Public Prosecutor's office finds often mistakes. At least, a complaint will result in much additional work.

⁶⁷ Maier, *Wie unabhängig sind Staatsanwälte in Deutschland?* ZRP 2003 Heft 11, p.387.

⁶⁸ Maier, *Wie unabhängig sind Staatsanwälte in Deutschland?* ZRP 2003 Heft 11, p.389.

⁶⁹ See above IV.

waiting for a judgment, even when its claim is justified. There exists neutral terms between attorneys which indicates that the party is willing to delay the litigation.⁷⁰ Here is in Taiwan some room for improvement. The (often early) first hearing is the first in a series of many that will occur prior to the resolution of a case.⁷¹ In the German as in Taiwan's Code of Civil Procedure (CCP) law, the court is bound to the principle of Expedition of process – or simply: To decide as soon as possible without any delay. Several regulations should bring the process forward and hinder parties to delay decisions. As example, Article 196 CCP requires the parties to present the means of attack or defense in due course according to the phase of litigation before the conclusion of the oral-argument sessions. Where a party, attempting to delay litigation or through gross negligence, presents an attack or defense in a dilatory manner at the possible cost of a timely conclusion of the litigation, the court may deny the means of attack or defense so presented. The same rule shall apply when the purpose of the means of attack or defense presented is unclear and the presenting party fails to provide a necessary explanation after being ordered to do so.

The reform of the Civil Code of Procedure in Germany has introduced new remedies to accelerate the process. In international cases, the court will order written preliminary proceedings in accordance with Section 276 Para 1 ZPO⁷². The judge has to direct the defendant in this ruling that the defendant declares about his intention to defend his rights within two weeks after service of process. When the defendant misses this deadline, he may face a default degree.⁷³ Within further two weeks, the defendant has to reply to the plaintiff's statements. According to Section 276 Para 3 ZPO the court may set another deadline for the plaintiff to reply to aforementioned facts. Before hearing, the parties already changed some statements and enable the judge to prepare the hearing or sometimes to make new orders. This

⁷⁰ Actually, there are many legal ways to delay as: long letters, new and many offer of proof, requests for new deadlines. More sophisticated is the praxis to "make up" this dispute. The opposite attorney makes many new statements which the plaintiff has to object by himself. The dispute become much more complicated and the judge become overladen by facts.

⁷¹ Baker&Mc Kenzie, Taiwan: A legal Brief, S. 16.

⁷² Foerste in Musielak ZPO, § 276 Rn. 3 und 5: in difficult cases.

⁷³ See below, Section 331 Abs. 3 ZPO.

period is much important, false or incomplete statements are difficult to clarify in hearing and will influence the later consideration of evidence. In my personal experience, parties (especially from Taiwan) tend to underestimate this period. An experienced judge may use another tool to fasten the procedure. Section 138 Para 2 ZPO obliges the parties to make statements regarding the opposite party's presented facts. Not explicitly or indirect denied facts are deemed to be conceded, Para 3. The parties are mostly not allowed to solely deny facts or plead ignorance. The judges have developed a stringent model for the representation of facts, the so called *Darlegungslast*.⁷⁴ The judges often have another behavior regarding orders which helps to fasten up the process.⁷⁵ Some judges tend to issue orders with comprehensive statement about facts and applicable law at this time. Above described tools result in an already prepared hearing, the parties have already stated their facts and legal considerations. The court often only needs one or two hearings to make a final decision.

2. Judicial orders, directions and explanations

One kind of measure to fasten processes is an indicative court order. As well as in Taiwan, the Civil Code of Procedure requires the court to direct the parties, to present appropriate and complete arguments about the facts and the laws regarding the matters involved in the action, question the parties or direct them to make factual and legal representations, state evidence, or make other necessary statements and representations, Section 139 Para 1 ZPO, Art. 199 ff CCP. Section 139 Para 1 ZPO requires the "*Materielle Prozessleitung*" of the court⁷⁶. In practice, the orders help to bring the process forward. Concrete orders show the parties the prospect of success at current stage. They can reduce factual statements and questions in dispute, the first review by a judge may increase the possibility and willingness of parties to

⁷⁴ *Darlegungslast* means that the plaintiff is required to state the necessary facts supporting his claim and the defendant to deny. The *Darlegungslast* can alter between the parties depending on the other party's prior statements. Stadler in Musielak, ZPO, § 138, Rn. 9, 10.

⁷⁵ See below 2.

⁷⁶ *Materielle Prozessleitung* means that the judge actively leads and directs the procedure.

negotiate settlements. Judges are bound between two conflicting responsibilities, to be neutral and to direct the parties.⁷⁷ How they find a balance depends on the self-understanding as judges and social skills, the person of the judge, and his self-confidence. It seems as Taiwanese judges tend to take more care about their neutrality.

3. Default degree

The procedure law in both countries knows the default degree (Art. 385 CCP, Sections 331 ff ZPO). Where one of the parties fails to appear at the oral-argument session, the court may, on the appearing party's motion, enter a default judgment based on the appearing party's arguments; where the party who fails to appear is summoned and fails to appear again, the court may also on its own initiative enter a default judgment based on the appearing party's arguments. In entering a judgment provided in the preceding paragraph, the court shall take into consideration any argument made, evidence-taking conducted, or the preparatory pleading submitted by the party who fails to appear; if necessary, the evidence stated by the party who fails to appear shall also be taken. The differences to German law are great. When the plaintiff fails to appear, the court shall dismiss the action on motion of the defendant without any discretionary authority, Sec. 330 ZPO. If the defendant fails to appear, the factual assertions are deemed to be conceded, Para 1. When it is justified, the court shall, on the appearing party's motion, enter a default judgment based on his arguments, Para 2. The same rule applies, when the defendant misses to declare his intent to defend himself against the action, Para 3.⁷⁸ Taiwanese courts tend to give the not appearing part another opportunity to protect their rights, more than two hearings are common.

4. Letter of confirmation

The letter of confirmation is a German commercial custom. After oral

⁷⁷ Stadler in Musielak, ZPO, § 139, Rn. 5.

⁷⁸ See above, Section 276 Para. 1 ZPO.

negotiations, one side sends a letter which summarizes the content and the outcome of the negotiations. The purpose of this letter is to avoid later disputes about the content of the settlement. If the receiving party doesn't agree with the content of the letter, it has to make the objections as soon as possible. Otherwise, the addressee of the confirmation is bound to its content.⁷⁹ Not used in Taiwan, as my experience, Taiwanese companies tend to ignore letters with false content because they believe those letters have no legal effect. Fortunately for the Taiwanese part of the transaction, the legal implications of the letter of confirmation aren't applied on the international trade without restrictions – even when the German law is applicable.⁸⁰ However, this exception isn't known for many German companies, they expect reactions, misunderstanding and mistrust are the result, the second reason for the dispute in the introduction case 2.

5. Protection of Intellectual Property Rights

Maybe the most difficult issues for Taiwanese companies are cases related to Intellectual Property Rights⁸¹. The preparation for IPR protection starts already in an early stage, patent holders will use “spider in the web”, buy catalogs and visit the booth at trade shows. The first days at trade shows are used to research the market with two different aims. The main aim is to find infringers and buy products as a proof of patent infringement. As second aim, they search for possible inventions without protection. When they find infringement at Web, it helps to attack its infringers quickly by selecting a court that is patent friendly and fast in making decisions, allowing them to expand that verdict quickly across the nations.

Enforcing patent rights at trade shows provides a comfortable way to protect rights. Courts and attorneys have established a special practical procedure in Germany. It is recommendable to first send a warning

⁷⁹ BGH, Urteil vom 12. 2. 1968 - VIII ZR 84/66 (Frankfurt); Urteil vom 8. 2. 2001 - III ZR 268/00.

⁸⁰ Graf v. Westphalen, Fallstricke bei Verträgen und Prozessen mit Auslandsberührung, NJW 1994, 2116; Hopt in Baumbach/Hopt, HGB § 346, Rn.29.

⁸¹ In the following: IPR cases.

letter to the infringing party requesting the infringer to cease and desist⁸² from using the IPR in the future, to pay a contractual penalty in case of contravention and to provide the IPR owner with information about the source of the products as well as the exact amount of infringing products. Most of right holders will prefer a solution through negotiation and send attorneys to the stand. If the infringing party doesn't sign the cease-and-desist declaration within a time period fixed by the owner, the owner has the possibility of initiating court actions in order to assert its claims.⁸³ The court is allowed to serve the action at the stand in German language⁸⁴ which avoids long process of judicial assistance and translation costs. A right holder can choose between a normal civil action and a preliminary injunction. If negotiations fail, a preliminary injunction is the better option. The requirements for a request for injunction are lower than for an action, the plaintiff only needs to substantiate his reasons for injunction but doesn't need to provide full evidence. Normally, the presentation of the patent, an explanation, information about genuine products and an affidavit⁸⁵ is sufficient to gain an order.⁸⁶ German courts issues the injunction without hearing in a few hours which means that they may take only the plaintiff's statements into account. This put the defendant under pressure, he needs to take actions by himself and is now hindered to exhibit his products.

There is a special remedy in Germany for companies which has faced unjustified claims and is afraid of later preliminary injunction available. They can deposit a so called "*Schutzschrift*" at the court before taking part in trade shows. This "*Schutzschrift*" contains some explanations of the exhibited products and Third Parties' related claims, it works like a defense in advance. Before issuing the preliminary injunction, the judge shall read the related "*Schutzschrift*"

⁸² A special term which means that the infringer agrees to refrain from exhibiting, advertising, offering or selling the disputed products in future again.

⁸³ Kador & Partner, Seizure at Customs Germany, p. 7.

⁸⁴ Section 178 ZPO.

⁸⁵ An affidavit is a written declaration or statement of facts, made voluntary and confirmed by the oath.

⁸⁶ Kador&Partner, p. 3.

and consider possible defenses. Although it is often suggested to deposit a “*Schutzschrift*”, this tool bears some risks because everybody is entitled to review this “*Schutzschrift*” at court. Therefore, a patent holder who is searching for possible infringers can read a possible defense against his (later, possible) claim in advance.

Another way of protection is to initiate criminal procedures in Germany, because infringing IPR might constitute a crime, Section 142 PatentG (Patent Act). This tool to protect rights bears advantages and risks. As advantage, the patent holder only needs to make a substantiate report to the custom authorities which will later investigate the case with public measures as search warrants. However, an unjustified report may result in actions against the patent holder.⁸⁷

VIII. Abuse of legal proceedings

They are different ways to use or abuse legal proceedings, beginning from the choice of patent-friendly courts. According to German law, to the court’s jurisdiction belong all areas wherein the infringer has carried out substantial acts to sale his goods.⁸⁸ Preliminary injunctions further have advantages, the court has the only limited time to decide about complex matters, the good formulation of a request by a known law firm against an unknown company from Asia might be the real factor for success than the legal and factual content. The time and the knowledge of the judge in charge are too short to make a balanced decision. When choosing the criminal law to enforce his rights, the disadvantages are more flagrant, a judge specialized in criminal law will decide about matters with mainly civil and technical background. Search warrants in criminal cases often contain solely empty phrases and are granted after cursory examination. The lack of knowledge and time might be the reason that judges issued the warrants in the introduction case 1. Another known way is the so called *Italian*

⁸⁷ See above, footnote 4.

⁸⁸ LG Mainz, BB 1971,143.

torpedo. While proceedings are pending in one state, the same action cannot be brought before a court based in another member state. Under the Brussels Convention, the court in the second state must decline jurisdiction. As a result, the alleged infringer brings an action for declaration of non-infringement of IP rights in one country to prevent enforcement of the rights in another.⁸⁹ On the other hand, potential infringers will seize jurisdictions and file in a slow court, creating maximum length of time for infringement of the product.

IX. Conclusions

International business and litigation bear many costs and traps for the foreign parties. There is no general advice whether the German or the Taiwanese courts or law have more advantages or disadvantages or not. The choice of jurisdiction and law (mostly in the contracts) has to consider the special circumstances and the real risk to become a later plaintiff or defendant. Companies need to keep in mind that despite the same legal tradition in Taiwan and Germany, there still exist many differences in interpretations, judges' self-understanding and legal practice. The freedom of contract between entrepreneurs enjoys in Taiwan a higher value than in Germany. Taiwanese companies should be more aware of legal questions and be better prepared for other legal practice in international business. In many foreign countries, using legal procedure (or even the abuse of procedure and law by the more experienced side) has already become a part of doing business.

⁸⁹ Mario Franzosi, Franzosi Dal Negro: The Italian torpedo, <http://us.practicallaw.com/6-101-1410?q=&qp=&qo=&qe=>, Published on 30-Mar-2000; Kate Davies: Where to now, the Italian Torpedo?, <http://kluwer.practicesource.com/blog/2011/where-to-now-the-italian-torpedo/>.

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