Comments

Wei-Yu Chen

Associate Professor, College of Law, National Taiwan University

I. Preliminary remarks

It's my great honor to have the opportunity to participate in this International Workshop on Comparative Civil Procedure Law. I am delighted to have the chance to read Professor Stadler's latest research. As many of you may know, Taiwanese civil procedural law has been largely influenced by German and Japanese laws; the original (1930) version of Taiwanese Code of Civil Procedure (CCP) was a result of legal transplant. Against this backdrop, Professor Stadler's insights, especially those with regard to German law, really interest and inspire me. This requires me to express my gratitude to Professor Stadler and, of course, also to the organizer, Professor Deguchi, for this opportunity.

Since this workshop obviously goes for the comparative approach, I would like to select only a few issues that particularly stood out to me from each paper and share relevant information from perspective of Taiwanese law and, where necessary, some preliminary thoughts on those issues. This way, we could talk a little more about some of the issues, while somehow staying in line with the functional method of comparative legal research. I hope this form of opinion exchange is consistent with the purpose of this workshop.

II. As for "*The Implementation of the Representative Action Directive in Germany*"

1. The need for special procedure of (consumer) collective redress

Standard civil procedure is generally considered to be not suitable for resolving disputes arising from mass harm events. When such events cause relatively large individual damages, there may be either a large number of parallel proceedings or a few proceeding with large number of claimants; traditional procedural institutions dealing with parallel or related proceedings (e.g., *lis pendens*) and multiple parties (e.g., joinder of parties) are normally not particularly helpful. On the other hand, when mass harm events only result in small individual damages, there may be no proceeding at all due to the "rational apathy" of the victims. This denotes that, for one thing, the victim's right to access to court is not fully protected, and, for another thing, the wrongdoers will eventually evade their responsibility. Neither of the situations is satisfying. As such, special mechanisms for collective redress appear to be necessary.

Such special mechanisms could basically follow two different approaches: one is to make contentious litigation unnecessary as far as possible, in particular via ADR. In a legal culture like Taiwan, where citizens tend to rely on the administrative power for protecting their rights, and the elected governments – for purpose of winning the next election – do not hesitate to put pressure on the wrongdoing enterprises, the ADR approach can be very useful. However, as far as consensus cannot be reached, the contentious litigation would still be the only way to enforce the relevant private law. The other approach that makes the proceedings simpler, faster and cheaper, in short, more effective, must thus come into play. One common feature of this kind of special procedures is that certain entities (or public bodies) who are not victim of mass harm events are entitled to bring actions against the wrongdoers on behalf of the victims; this is what we understand under the (generic) term "representative action". The effectiveness of the procedural institution of representative action depends on various

factors, such as the restrictions on qualification of claimant, the division of procedure in multiple stages or the possibility for the court to estimate total amount of compensation, and so forth. Among these factors, two of them stand out to me: (1) the funding of representative actions and (2) the choice between opt-in or opt-out mechanism. They stand out to me, because, as Professor Stadler pointed out here and elsewhere, the former one is essential to the success of this legal institution, and the latter one has been the most controversial issue in continental European legal tradition; in addition, it deserves special attention that, despite the liberal stance of the EU Representative Action Directive (RAD), the German lawmaker tends to take a more conservative approach by strictly limiting third-party funding and not allowing an opt-out mechanism.

In the following, I would like to briefly share some observations about Taiwanese law regarding the two points just mentioned. Due to the space and time limits, the focus will be on representative action by consumer associations for redress measure under Taiwanese Consumer Protection Act (CPA). This roughly corresponds to the *Abhilfeklage* under the (drafted) German Consumer Rights Enforcement Act (VDuG), knowing that this new act will also apply for certain non-consumer disputes, while the Taiwanese CPA applies only for consumer disputes.

2. Funding of qualified consumer associations

As representative actions are typically very cost-intensive, it is difficult for qualified consumer associations to take actions without sufficient financial resources. Unlike German consumer associations that are financed primarily by the Government, Taiwanese consumer associations basically need to finance themselves. Although the Government does provide subsidies and grants, the amounts available are extremely limited (for example, in 2022, the total grants amounted to 877,870 TWD, which is approx. equal to 4,000,000 JPY or 25,000 EUR); over the past 25 years, only 5 representative actions by consumer associations have been directly subsidized by the Government. This may explain why in the past decade there were only 20 court judgments regarding representative actions of consumer disputes. Moreover, when we take a closer look at these few cases, we will find right away that 12 of them (60%) concern food product liability. This is by no means coincidental. The reason lies rather in the fact that a "food safety protection fund" has been established by the Government with the purposes, among other things, to finance qualified consumer associations for initiating representative actions. Against the backdrop, demands have been made to expand this funding model, known as public special funds, to cover all types of consumer disputes (*Shen*, NTU L.J. 44spec (2015), at 1265-1267). However, this has not been realized so far (and perhaps not anytime soon).

Except for the unsatisfying government funding mentioned earlier, there are practically no other ways for consumer associations to obtain funding. Funding from third parties or lawyers would not work, because Art. 50(5) of the Taiwanese CPA requires the successful consumer association to deliver the whole compensation received to the consumers; only court costs and necessary lawyer fees can be deducted. Meanwhile, Art. 50(6) of the same act prohibits consumer associations from charging consumers. Under these provisions, third-party funding agreements very likely contradict mandatory regulations or even public policy and would thus become invalid (Art. 71 et seq. Taiwanese CC); the same seems to be true for contingency fees agreements with lawyers as well, although such agreements are generally allowed for property disputes. However, the restrictions are not totally unreasonable. Given the fact

that, in the majority (approx. 60%) of successful representative actions brought in the past decade, the court has awarded punitive damages (up to 5 times the amount), and unsuccessful claimants are in principle not obliged to reimburse the opponent's lawyer fees, there could indeed be some danger of misuse leading to a "litigation industry".

That being said, as long as the Government is not ready to give more money to qualified consumer associations, it would be beneficial to carefully permitting funding from third parties or lawyers. In this regard, the RAD, particularly its Art. 10, and the recommendation of the European Parliament on the regulation of third-party litigation funding (TPLF) are instructive for Taiwanese lawmaker.

3. Opt-in vs. opt-out mechanism

In Taiwan, as in Germany, representative actions can only be carried out on an opt-in basis. The reason why an opt-out approach has never been seriously considered is to maintain the principle of party autonomy and party disposition, too (*Shen*, in: Procedural Guarantees and Parties in Civil Procedure, 2012, pp. 28-29). However, as stated at the outset, in mass harm events, in which victims suffer only low damages and cannot be expected to act actively, the opt-in mechanism demonstrates notable shortcomings. The endorsement of the opt-out mechanism by RAD and the Model European Rules of Civil Procedure (ERCP) suggests that a rigid adherence to the aforementioned principles is not obligatory. Consumers' right of disposition can rather be restricted in a proportionate way for legitimate purpose: the legitimate purpose here is to enforce the consumer protection law, which aims at "*protecting the interests, facilitating the safety, and improving the quality of life of the consumers*" (Art. 1 Taiwanese CPA), while the individual consumer's right to opt-out could be ensured to a good extent thanks to modern communication technologies that facilitate the dissemination of information concerning the proceedings.

As a result, it may be the right moment to initiate discussions in Taiwan regarding the establishment of opt-out representative action into the CPA (or even the CCP). The alternative solution, for example the action for skimming-off illegally gained profits from enterprise under German law, should also be taken into consideration (*Shen*, NTU L.J. 44spec (2015), at 1274-1275). Insofar German law still has many aspects that we can learn from.

III. As for "*Digitisation and civil procedure in Germany*"

1. Relevant perspectives regarding digitalization of civil procedure (e-Justice)

The digital transformation is at full speed in almost every field of our life, and civil justice is no exception. When it comes to digitalization of civil procedure, there are two main aspects to be dealt with: first, how to make the most of modern communication technologies for facilitating the proceedings, and secondly, to what extent could artificial intelligence (AI) assist judges in managing or deciding cases. No matter what aspect is concerned, we would all agree that the digitalization itself is not the purpose, but a means to the proper administration of justice.

Today's topic is about the first aspect of digitalization, namely the enhanced use of modern communication techniques such as e-mail, electronic platform or video-conferencing. As we can learn from Professor Stadler's observation, both theoretical and practical issues would arise. It is generally assumed that e-justice in the sense of replacing physical communication with digital methods benefits both private and public interests (e.g., the litigants would not have to take days off in order to physically attend

a court hearing, or the court would not have to print paper pleadings), and can thus contribute to promoting access to justice and saving judicial resources. That being said, e-justice requires, as a practical matter, massive investment in the necessary infrastructure. This does not only mean that the court should be well equipped, but also the so-called "digital gap" must be filled; failure to fill the digital gap would raise serious concerns about violating the fundamental procedural rights like the right to access to court, to be heard or to equal treatment. But even if the infrastructure is perfectly ready, as a theoretical matter, the law- or policymaker may not have complete freedom in determining whether civil litigation should exclusively proceed in a digital manner. Especially potential regulations that require court hearings to be hold virtually as a rule could be contrary to the principle of party autonomy, as a "day in court" (still) matters; whether such fully digitalized proceedings would be consistent with the traditional principles of immediacy, orality and publicity, appears to be disputable as well.

It is therefore important not to overlook the downsides that the digitalization of civil procedure could entail, particularly with regard to contemporary general principles of civil justice. Keeping this in mind, I would like to highlight a few recent developments in Taiwan for your reference.

2. E-Filing in Taiwan

Based on the authorization from Art. 116(3) of the Taiwanese CCP, the Judicial Yuan, one of the highest five government branches vested with judicial administrative power, has established since 2015 an online system named "judicial service platform" for, among other things, submission (and exchange) of statement of claim, pleadings and other electronic documents. Since 2016, it has been possible to file a civil action online; the statement of claim can also be drafted online with the help of the system. However, except for certain commercial cases, for which special procedural rules (the Commercial Case Adjudication Act) apply, the use of the judicial service platform (or any other electronic means of submission) is not mandatory. Due to the lack of complementary measures (e.g., admitting qualified electronic signatures or exempting from production of paper copies), the usage rate of the platform has been low. Given the fact that the electronic filing of procedural documents can greatly simplify the electronic service or delivery of those documents and facilitate the electronic file management, as many Taiwanese courts are struggling with scanning paper documents (and using OCR to convert them into digital format), the Judicial Yuan contemplates to impose an obligation of e-filing (via the judicial service platform) on lawyers and public authorities. Although this would restrict lawyer's freedom of profession, the restriction should be proportionate and thus constitutionally unobjectionable, as the profession of lawyer is also of public interest nature (Art. 1 of the Attorney Regulation Act); insofar the situation should be similar to the case of "special electronic lawyer's mailbox" in Germany.

3. E-Court in Taiwan

According to Art. 211-1 of the Taiwanese CCP, which has been added in 2021, court hearings for oral argument (between the parties, intervenors or their lawyers) can be held virtually upon request or *ex officio*, provided that the court consider it to be "appropriate". Already in 2000, Art. 305(5), 324, and 367-3 of the same code permit court hearings for taking witness, expert or party testimony to be held virtually, insofar as the court sees it "appropriate". Irrespective of which kind of court hearings, only parties or (expert) witnesses could attend virtually, while the court has to be physically

present in the courtroom. This saves the possible debate about whether conducting virtual court hearings violates the principle of publicity, which is, however, not generally perceived to be guaranteed by the Taiwanese Constitution.

As mentioned earlier, both the provisions that govern court hearings for oral argument and for taking testimony put emphasis on judge's discretion. Despite the regulatory similarity, as we may anticipate, in practice, the court exercises its discretion quite differently: as regards taking witness and party testimony, Taiwanese judges are reluctant to hold hearings via video-conferencing. The main reasons for this reluctance include general concerns about undue influence on testimony and practical difficulties in confirming the witness's identity, just as Professor Stadler pointed out. As long as these (and other) concerns and difficulties still exist, it should perhaps be admitted that appearance in person and via video-conferencing are not equivalent in terms of evidence-taking. That is to say, the court should order witnesses or parties to physically appear in courtroom for examination, unless there are good reasons not to do so. In Taiwan, some judges believe this is the case where the witness or party to be examined resides in a foreign country and is unwilling to travel (e.g., Taiwan High Court, civil judgment of No. 109-Chung-Lao-Shang-Keng-I-Tzu-5 (2020)). However, without recourse to international legal assistance, this approach may cause problems at diplomatic level, even though there are only a few countries that have official diplomatic relations with Taiwan.

By contrast, as regards oral argument between the parties, judges are generally willing to hold hearings via video-conferencing. One important reason for this attitude is that Art. 211-1(2) of the Taiwanese CCP explicitly requires the court to take parties' intention into account while determining whether a virtual court hearing is appropriate. This clearly reflects the principle of party autonomy. Following this principle, if the parties request jointly for a virtual hearing, the court's discretion should be limited to the extent to which the court can only dismiss the request on the ground of "manifest inappropriateness" (*Shen*, Taiwan L.R. 317 (2021) at 92). However, it is not uncommon that only one party requests for (or agrees with) a virtual hearing, while the other party refuses to participate via video-conferencing. In this case, a court hearing will normally be held in a hybrid form. Although a hybrid hearing may cause some disadvantages to the party who attend virtually, it may be too soon to conclude that this constitutes a violation of the right to equal treatment, as this right can be (implicitly) waived. But what if a hybrid hearing is exceptionally not possible, for example, because the refusing party is not able to attend in person (e.g., in jail or in quarantine)? There may not be a straightforward answer to this question. In Taiwan, a court of appeal has ordered a virtual hearing against the refusing party's willing on the ground that his lawyer agreed to participate via video-conferencing and the party himself was obviously familiar with the technology of video-conferencing (Taiwan High Court, civil judgment of No. 110-Shang-Kuo-Tzu-3 (2021)). This court decision deserves approval insofar as the right to be heard and the principle of cooperation were taken into consideration. And this reminds us again of the importance of general principles of civil justice for recognizing and resolving e-justice issues.

IV. As for "*Model European Rules of Civil Procedure 2020*"

1. The significance of Model European Rules of Civil Procedure (ERCP) in light of comparative legal research with an evaluative or regulatory aim

Given the fact that the ERCP features "best practices in handling civil proceedings" on the basis of profound comparative studies, it seems legitimate to say that this set of

rules is representative, at least for European and European-oriented procedural cultures. It is this representative role that may require comparative legal researches on civil procedural law to include the ERCP. This means that, particularly for comparative legal researches aiming at reforming or developing own national civil procedural law, researchers would have to select the ERCP for comparison unless there are good reasons for not doing so, such as the lack of regulation in the ERCP; this is, for example, the case regarding rules on territorial jurisdiction and small claims proceedings.

If this methodological proposal holds true, then it would be necessary for Taiwanese civil procedural law specialists to at least take a look at the ERCP, because Taiwanese civil procedural law is clearly Germany- and thus European-oriented. Therefore, I would like to do a quick comparison between the ERCP and the Taiwanese CCP in two regards: (1) the adoption of the principles of cooperation and proportionality and, more specifically, (2) the possibility of pre-action access to information.

2. The principles of cooperation and proportionality in Taiwanese CCP

As Professor Stadler noted, in addition to the protection of fundamental procedural rights, the ERCP is based on two overarching principles: principle of cooperation and principle of proportionality. As a matter of fact, these two principles are also embedded in Taiwanese CCP, although they are not explicitly codified.

First, concerning the principle of cooperation, the Taiwanese CCP requires the court to actively manage the case, while the principle of party disposition regarding the claim and the relevant facts as well as evidence applies. Hence, the court must suggest parties to amend their claims and defenses if there are some incompleteness or incorrectness; failure to make such suggestions will result in a serious defect of the proceeding, which consist a ground for appeal. Meanwhile, the parties do not only enjoy the right of disposition, but also bear the duty to present facts and evidence timeously and have the obligation to disclose and produce information. Abusive procedural activities are of course not allowed under the principle of good faith as a general principle of law. We might say that, both under Taiwanese CCP and the ERCP, "*parties, their lawyers and the court must co-operate to promote the fair, efficient and speedy resolution of the dispute*" (Rule 2 ERCP).

Secondly, concerning the principle of proportionality, it is worth mentioning that, in Taiwan, the small claims procedure applies for claims with monetary value up to 100,000 TWD (approx. 470,000 JPY or 3,000 EUR) regardless of the intention of the parties; the so-called mandatory model has been adopted. With several major deviations from standard procedure, the small claims procedure is clearly an effective way for saving judicial resources; it also benefits the parties in the sense that disproportionate costs could be avoided. The pro ADR approach, which is taken by Rule 6 of the ERCP as an aspect of the principle of proportionality ("*Parties and their lawyers must co-operate with the court to promote a proportionate dispute resolution process*"), has been one of the distinctive features of the Taiwanese CCP. For numerous types of disputes, among other things, disputes arising from road traffic accidents and any monetary dispute up to 500,000 TWD (approx. 2,400,000 JPY or 15,000 EUR), must go through the court-based mediation before litigation can be initiated. Another aspect of the principle of proportionality, namely the proportionality of sanctions and any other measures restricting freedom, which underlies Rule 7 of the ERCP, is also inherent to Taiwanese CCP, as it qualifies as a general principle of law. Examples of court decisions referring to the principle of proportionality can easily be found.

Following this brief observation, it may not be unreasonable to say, on the one hand, the principle of cooperation and proportionality has the potential to be applicable across European-oriented legal systems. And, on the other hand, Taiwanese CCP stands in line with the ERCP in terms of the overarching principles. This would make the reference to the ERCP more valuable for evaluating Taiwanese procedural law.

3. The possible improvement of pre-action disclosure mechanism in the Taiwanese CCP with reference to the legal institution of access to evidence orders in the ERCP

As Professor Stadler pointed out, under the principle of cooperation, the ERCP clearly refuses the traditional belief that the "*a party to litigation is not required to put weapons into the hands of their opponent (nemo contra se edere tenetur)*" (Rule 25(2) ERCP). As a consequence, the ECRP establishes the legal institution of access to evidence orders, which, among other things, helps a potential claimant get access to evidence situated in the sphere of the potential defendant; in other words, it enables a kind of pre-action disclosure. This is particularly helpful in patents or trade secrets disputes, where the evidence to possible infringements are typically not accessible to the right-holders. But especially in these kinds of disputes, it is crucial to avoid the so-called "fishing expeditions" and to protect the legitimate interest in maintaining confidentiality of information to be disclosed. For this sake, according the ERCP, the access to evidence orders can only be made when "*substance of the application is sufficiently specific, proportionate, and reasonable*" (Rule 102 ERCP); and in case of a successful application, the court may require the applicant to initiate proceedings within certain period of time (Rule 106(2) ERCP). Where confidential information is concerned, the ERCP provides the court with multiple measures to protect it, including conducting hearings *in camera* (Rule 103 ERCP). We may hardly deny that the ERCP does a great job, thanks to the contribution of Professor Stadler, in balancing all relevant interests.

The legal institution of access to evidence orders could thus serve as an ideal model for reviewing corresponding legal institution in Taiwanese CCP (and that in Commercial Case Adjudication Act as well as Intellectual Property Case Adjudication Act, both of which are not included in the observation below). In fact, in Taiwan, the legal institution of preservation of evidence, which resembles the German independent evidentiary proceedings, has the function of pre-action disclosure, too. According to the Taiwanese Supreme Court's case law (Supreme Court, civil order of No. 105-Tai-Kang-Tzu-714 (2016)), the criteria for granting such an application for preservation of evidence, that is, for getting access to evidence before litigation begins, are not essentially different from what Rule 102 of the ERCP prescribes; "fishing expeditions" are thus not possible under Taiwanese CCP, either. However, the accessible types of evidence are limited to expert evidence, judicial inspection and document, which means an interrogatory to the opposing party would not be permitted. The pre-action disclosure of Taiwanese CCP is also less attractive, because an evidence preservation order cannot be enforced against the willing of the information-holder, unlike the case of the ERCP (Rule 110 ERCP). In addition, lacking explicit provisions similar to Rule 103 of the ERCP, the Taiwanese civil court tends to dismiss application for preservation of evidence on the ground of protecting confidential information. All these factors lead to the impression that, in Taiwan, potential claimants (and their lawyers) usually do not consider seeking pre-action disclosure. In order to activate the legal institution of preservation of evidence, a partial adaptation of the ERCP should come into consideration.