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To Negotiate, but How? The Example of Cross-border Intellectual Property Disputes from a French Perspective

I. Introduction

In order to resolve cross-border intellectual property (IP) disputes, French companies are increasingly trying to reach amicable settlements by negotiation, whether with or without the support of a mediator, before having recourse to state courts or arbitration. The reason for this lies both, in the specific nature of IP, that always involves some degree of 'emotionality', as well as in the possible damage to reputation associated with a judicial conviction. Starting with negotiation as today's most important method of conflict resolution in cross-border legal disputes, this text shall outline the Harvard concept of principled negotiation, discuss implications of psychological negotiation research and explain their significance for conflict resolution in the field of IP.

II. Negotiation - the most important means of resolving conflicts

Negotiation is the most important means of resolving conflicts today. By way of contrast to litigation or arbitration that are often complex, lengthy and costly, negotiation offers a more cost and time effective means of ADR. In the wake of increased innovation density, Internet use and cross-border trade, the vertical and hierarchical social structure, characterised by an imposed order, gives way to a horizontal social structure, whose order has been negotiated[1] (the so-called 'negotiation revolution'[2]). Thereby, the exclusive peace-making role of the state[3] in dispute resolution is called into question. Today, companies are particularly keen to negotiate amicable settlements in the field of IP, an area of fierce market competition where reputation is a key economic factor. Nevertheless, they rarely seek advice from lawyers to develop a specific negotiating strategy, and lawyers with proper negotiating skills are rare. Companies often seem to assume lawyers to be only interested in fees, the amount of which would be higher in the case of an unsuccessful negotiation and a subsequent lawsuit.[4]

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1 *Hauser*, Wirtschaftsmediation in Deutschland und Frankreich im Vergleich, 2016, 36. *Fisher et al.*, Getting to yes, negotiating agreement without giving in, 3rd ed. 2012, preface.

2 *Hacke*, Ein neues Modell der Wirtschaftsmediation, ZKM 2016, 168 (170).

3 *Faget*, La double vie de la médiation, Droit et Société (29) 1995, 25 (38).

Under French law, however, a lawyer is obligated to defend the interests of his client and, in case of legal proceedings, to inform the court in his application of the efforts made to find an amicable solution to the dispute[5]. Even if this information often resembles merely a formal clause, the French legislator encourages the parties to settle. As natural advisors of companies, lawyers are particularly well equipped for this task due to their professional training and ethics. Since only few economic operators have adopted dedicated negotiation practice, it would be of great benefit to lawyers, to obtain negotiation competences that would complement their traditional role as legal advisors.[6]

III. The Harvard concept of negotiation and psychological negotiation research

Traditional negotiation is not very different from litigation: the parties present their respective legal positions, on which they would also rely in litigation, and make their claims in the form of requests. In doing so, they often exert pressure on the other party, by highlighting their financial power or a competitive position on the market, or by using psychological cunning[7]. Those factors may nevertheless later prove to be 'false power'. This type of haggling can lead to hardening or even blockage of the conflict (the respective positions remain incompatible) and may thus cause a new escalation between the parties. Such traditional negotiation will in the best scenario lead to an agreement in the form of a settlement with compromises, in which the parties partially abandon their respective positions in accordance with the conditions of French law. However, negotiation research has shown that compromises reached under pressure, by cunning or with the goal of a simple 'fifty-fifty', often fail to exploit the full economic potential. Contrarily, an approach based on the concept of 'principled' negotiation aims to satisfy the respective interests as much as possible, and to create value beyond the mere settlement of the legal dispute.

Based on scientific findings of negotiation research conducted at Harvard University, Roger Fisher and William Ury developed their method of principled negotiation in their ground-breaking 1981 work 'Getting to Yes, Negotiating Agreement Without Giving In'. Since then, this method has been informed by the results of psychological research on human behaviour in conflict situations. Nevertheless, it has yet to become an integral part of the 'tools' used by CEOs and lawyers in practice, who remain largely convinced of their traditional negotiation skills obtained through experience.

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5 Art. 56 New Code of Civil Procedure (France)

6 *Besombes et al.,* Médiation et entreprise. Nouvelles obligations et perspectives, JCPE 29.09.2016, 1505, 29, see N° 26 - 30.

7 *Joule et al.*, Petit traité de manipulation à l'usage des honnêtes gens, 2014; *Hauser*, Existiert die Vertrags- und Verhandlungsfreiheit?, available at: http://www.cmap.fr/wp-content/uploads/2017/03/Vertragsfreiheit_Martin-Hauser.pdf (last downloaded: 28.04.2018)

Proposing four main principles of negotiation, Fisher and Ury advise negotiators to separate the people from the problem, focus on interest instead of positions, invent as many options for mutual gain as possible and base decisions on objective criteria. They furthermore emphasise the necessity to allow the respective interests to overlap, by relying on 'true power', i.e. by calculating the parties' best alternative to a negotiated agreement (BATNA)[8].

In cases of particularly difficult, emotionally charged negotiations or where the parties' BATNA has to be considered, a lawyer trained in principled negotiation might be tempted to assume the role of a 'neutral' and empathic third party (i.e. mediator). However, this double role ('tough' negotiator vs. empathic mediator) risks to be misunderstood by clients, whereas the use of an external neutral mediator, would allow the parties and their lawyers to fully concentrate on the content of the negotiation, without having to worry about its course. Nevertheless, companies still often hesitate to invest in a mediator they do not know and remain reluctant to disclose confidential information. Still, the principles of interest oriented negotiation outlined above form the basis of all business mediation in the western world today[9]. According to statistics of the *centre de médiation et d'arbitrage* in Paris (CMAP), recourse to mediation has grown by 15% in 2016 at CMAP alone, and 82% of conventional mediation conducted there, led to a successful amicable settlement.[10]

IV. Principled negotiation in relation to intellectual property

According to French law, only such a creation enjoys IP protection that can be regarded as *original*, because it was shaped by the personality of its author. Therefore, disputes in the area of IP are necessarily characterized by the personality of the author and his *intuitu personae*. Principled negotiation allows parties to present their allegations to the other party, express their emotions and formulate their requests, without further escalation of the conflict or blockage of the process. The findings of conflict psychology demonstrate that empathic listening, showing of understanding, mutual recognition and the experience of a 'consensus on dissent' have an immediate calming effect. These tools contribute to a change of perspective that is key to a creative search for solutions, well adapted to the parties' interests.[11] Due to the strong emphasis on the author in French IP law, it is therefore crucial to treat persons and interests

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8 *Garby,* D'accord, 2016, 70ff.

9 *Hauser,* Wirtschaftsmediation in Frankreich und Deutschland im Vergleich, 2016, 67; *Touzard*, La médiation et la résolution des conflits - étude psychosociologique, 1977;

10 2017 CMAP Baromètre de la médiation, available at: http://www.cmap.fr/wp-content/uploads/2015/11/CMAP-Barometre-de-la-mediation-2017.pdf (last downloaded: 28.04.2018).

11 *Hauser,* Wirtschaftsmediation in Frankreich und Deutschland im Vergleich, 2016. 83 - 86.

separately and to respond adequately to the emotions of the other party. In absence of a neutral third party and with the sole support of legal counsel, this approach can be time consuming and complex. Nevertheless, persuading the parties to change their perspectives and to show mutual recognition will later prove beneficial to the negotiation. This is all the more relevant in cross-border negotiations, since the difference of cultural backgrounds of the parties will make it harder for a party to listen empathically. Especially in emotionally charged conflicts, it will be more challenging to appropriately respond to the emotions of the other party or to switch perspectives. In order to achieve the best results in cross-border negotiations, parties and lawyers therefore additionally require intercultural competences.[12]

Since IP law grants companies monopolies or exclusive rights, they often attempt to simply assert their legal positions in negotiations. Hence, it can be particularly hard to shift the focus on the respective interest, instead. However, where such a shift is achieved, companies operating in the creative sector and sharing a tight market soon discover the advantage of interest oriented solutions to their conflict, even where IP violation has occurred. The area of IP is therefore particularly suited for the development of creative options that can lead to a mutual gain and render an amicable solution more likely. The parties may then choose amongst these options according to objective criteria, a feature that state courts cannot offer in practice. Solutions that have been found through this method of principled negotiation comprise the assumption of defence costs for a patent by the other party, the acceptance of the termination of a license agreement on the condition that production of the items continues in favour of the new licensee or the establishment of a joint venture for the joint use of an allegedly illegally imitated trademark. Moreover, in practice, most instances of conflict resolution, reached by principled negotiation, lead to the reconciling acknowledgement by one party of the creative achievements of the other, and companies should for these reasons carefully consider the option of negotiation or mediation with their lawyers before commencing legal proceedings.[13]

V. Conclusion

In cross-border IP disputes, the interests of the parties are often compatible and allow amicable solutions that satisfy the respective interests. Often, they also permit the creation of additional value beyond the subject matter of the conflict, by taking

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[12] *ibid*. 54 - 64 concerning intercultural aspects of the German-French relations.

[13] *Hauser,* Was kann die Parteien für die Mediation motivieren? 23.06.2014 available at: http://www.cmap.fr/wp-content/uploads/2017/03/motivation-Parteien-Mediation_Martin-Hauser.pdf (last downloaded: 28.04.2018).

into account emotional aspects of activities in this creative sector. A mere focus on the respective legal positions of the parties will however, in the best case, lead to a settlement with compromises, and this only if both parties move away from their positions and give in with regard to the subject matter of the conflict. Compared to such 'simple' comparative yielding of the parties, a conflict-solving agreement reached by principled negotiation has the advantage of a more comprehensive satisfaction of their interests and needs, a prevention of new escalations and the increased visibility of new perspectives.