MCC INTERVIEW Ansgar C. Rempp / Jones Day

Views on the changing transactional world

MCC: Please describe the current environment for American law firms doing business in Germany.

Rempp: All major challenges that we – and most of the other U.S. firms – faced in Germany have by now been overcome. For instance, some time ago, it was difficult for non-German law firms to find good talent, at both senior and junior levels, in Germany. The situation on the recruiting front has improved dramatically. Nowadays, Jones Day is one of the most attractive firms for strong German candidates because we offer long-term stability, a highly integrated global network, and exciting cross-border work. In recent years, we’ve hired a large number of German partners with very strong practices and market recognition in all important areas.

The other major challenge was the difficulty in attracting German clients, whether large corporations or any of Germany’s very successful family-owned businesses. In fact, many of Germany’s largest and most successful companies are privately held – Bosch, which is the world’s largest automotive supplier, and BMW Group are examples. That also has changed.

In recent years, Jones Day has been able to significantly increase the number of German clients, including major companies like Volkswagen and SAP as well as privately owned “Mittelstand” companies like MAHLE (you may have noticed the large Delphi transaction we signed for MAHLE earlier this year) and Merz.

MCC: What legal challenges do German businesses face in today’s market?

Rempp: Whether large corporations or one of the Mittelstand companies, German businesses are facing the same global challenges as their U.S. counterparts. More and more, the complex legal problems they are confronted with are cross-border, which means that the companies and their advisors cannot simply look at problems through the German, Japanese or U.S. lens. One must analyze a given matter in many jurisdictions at the same time in order to be able to solve problems efficiently. Taking a silo approach from a jurisdictional perspective will eventually create more problems than it will resolve, and that’s why these companies need law firms with an extensive and fully integrated geographical reach. While there remain certain smaller challenges in the German market, today’s market mostly presents opportunities for a full-service global firm like Jones Day.

MCC: How will the availability of the Unitary Patent change how U.S. companies should think about protecting IP in Europe?

Rempp: The other major change is the availability of the Unitary Patent, which will allow U.S. companies to file a single patent application in Europe rather than having to file separate national patent applications in each of the member states. This will simplify the process of protecting IP in Europe and make it more cost-effective for U.S. companies.

MCC: How can U.S. patent owners prepare for the implementation of the Unitary Patent?

Rempp: One of the key steps that U.S. patent owners can take to prepare for the implementation of the Unitary Patent is to review their existing patent portfolio and assess which patents are likely to be valid and enforceable under the new system. They should also consider whether it is necessary to file additional applications or to file oppositions against other patents.

Rempp: Another important step is to review the proposed unitary patent court and assess whether it will be an effective and efficient means of resolving patent disputes in Europe.

Rempp: Finally, U.S. patent owners should be aware of the potential for increased costs associated with the Unitary Patent system, including the costs of maintaining and enforcing patents in the new unitary patent court.

MCC: What hot button issues of U.S. patent law are Fish’s clients in Europe concerned about?

Rempp: Fish’s clients in Europe are concerned about several hot button issues of U.S. patent law, including the post-grant review proceedings before the Patent Trial and Appeal Board (PTAB), which allow third parties to challenge the validity of patents after the patents have been granted. These proceedings are seen by Fish’s clients as a threat to the legal certainty of patent rights and as a means for competitors to weaken the value of patents.

Rempp: Another issue of concern is the availability of district court jurisdiction for patent infringement suits in the U.S., which is currently limited to the Eastern District of Virginia and the Northern District of California.

Rempp: Finally, Fish’s clients are concerned about the impact of recent changes to U.S. patent law, such as the America Invents Act, on the enforcement and protection of intellectual property rights in the U.S.

MCC: What is your opinion on the availability of the Unitary Patent in Europe?

Rempp: I believe that the availability of the Unitary Patent will be a significant step forward for the protection of intellectual property rights in Europe. It will simplify the process of obtaining protection in multiple countries and make it more cost-effective for European companies.

Rempp: However, there are also potential challenges associated with the Unitary Patent, such as the need for additional resources and expertise to manage a multinational patent portfolio.

Rempp: Overall, I believe that the Unitary Patent will be a positive development for both U.S. and European companies and will help to strengthen the protection of intellectual property rights in Europe.
of today’s patent judges will serve part-time in the new local courts when they start to operate. At the same time, three central divisions will be established in Paris for telecoms and software, in London for pharma and chemicals, and in Munich for machinery, hardware and automotive, having predominantly competence for invalidation actions and also for infringement matters. Because of the local divisions as part of this new organizational structure, claimants are not limited to bringing only automotive or machinery disputes. German courts, they can also bring pharma, software or hardware claims in Germany. Traditionally, German courts were preferred for patent litigation because German judges have a reputation for being very sophisticated, and you can still count on that for the future.

MCC: What is the anticipated impact of these developments on patent matters going forward?

Rempp: The existing European patents are and will continue to be as valid as the new Unitary Patents, so there is no immediate call for change there. The Unified Patent Court System adds the ability to bring an infringement or nullity claim in one court and one proceeding, with results that apply to all jurisdictions covered under the new system. There are a number of implications here, including that litigation stakes will rise because the geographic area, and therefore the revenues, behind a patent are significantly larger than under the old system. You’re now covering all participating countries with one claim and one litigation, which in turn means that litigation will more often take on “bet-the-company” proportions — losing could literally mean the end of the company. The new system inherently involves more international litigation, though property and licensing aspects of these patents will still be governed by relevant underlying national laws. Whatever the bundle of applicable laws in a patent portfolio, however, international firms with patent capabilities in all large European jurisdictions will enjoy a major competitive advantage.

MCC: How does the dramatic weakening of the euro affect transatlantic M&As?

Rempp: Germany has been investing and is continuing to invest heavily in the U.S. The year 2014 represented a historic high in terms of German acquisitions of U.S. targets, with German companies investing about $70 billion in inbound U.S. transactions. Significant transactions include Siemens-Dresser-Rand, Merck/Sigma-Aldrich, SAP/Concur and TRW/ZF Friedrichshafen—and these are just four of the large ones. These investments have mainly been driven by the fact that German companies have very strong balance sheets and credit ratings, operate in an environment of record low interest rates, have high strategic interest in global U.S. companies, and, until autumn of 2015, enjoyed a favorable EUR/USD exchange rate. The latter factor is essentially interest rates, have high strategic interest in global U.S. companies, and, until autumn very strong balance sheets and credit ratings, operate in an environment of record low. Generally speaking, the stakes involved in large U.S. acquisitions over the last five years have been huge, with all of them in the several-billion-dollar range. For example, for software companies, having a major foothold in the U.S. market is extremely important.

The second component, relevant for technology-related industries, pertains to the fact that the U.S., technology-wise, is clearly at the forefront and therefore presents attractive opportunities for German companies. Thirdly, U.S. and German companies are probably the most globally involved and positionally reliant on globalization and therefore have a strong strategic interest in expanding their global reach and adding further globally well-positioned targets to their portfolios. That interest runs in both directions across the Atlantic. A German company might acquire a U.S. company with an existing global presence, or the flip side may occur.

On the other side, German companies, particularly in the telecom, financial, energy and automotive sectors, will be attractive to U.S. acquirers. For example, the financial industry in Germany will soon experience significant changes, in part driven by the tightened regulatory environment but also by a recent trend to divide large banks into separate entities and not have each and every financial service under one roof. Postbank is a good recent example. This, of course, creates opportunities for interested buyers.

On the energy side, large players in Germany are heavily restructuring for a variety of reasons. One example is E.ON, which recently announced a division of its businesses and subsequent spinoff of a major business. These developments in the energy sector will definitely create new opportunities for U.S. investors. Why is Germany attractive to American investors? For reasons very similar to why the U.S. is attractive for Germany. Strong, cash-rich U.S. balance sheets and the need to do something with their money will lead to an increase in strategic investments. Many U.S. companies have cash sitting in Europe that they do not know how to repatriate for a variety of reasons. On top of that, low interest rates make for cheap lending, and of course there’s the now-favorable currency exchange rate. Based on all of this, we will experience a wave of U.S. investment in Europe, and mainly in Germany, this year.

MCC: The “Internet of Things” is the next step in the technological revolution. What challenges do you see on the horizon for German companies in this context?

Rempp: In the context of the “Internet of Things” or, as we say in Germany, “Industrie 4.0,” there are two key areas of concern for a number of German players: intellectual property and data protection. Companies like Siemens and Bosch, for example, have reason to take precautions because of their focus on innovative products, and so does a company like SAP because of the type of software it has traditionally been developing.

Certainly these companies will need to protect, from an IP perspective, their technologies and products, with software companies facing the biggest challenge of all. In Germany, and Europe generally, it is very difficult – with a few exceptions, nearly impossible – to protect software as a patent. Compared with the software patent protections in the U.S., this is a weakness in the German/European approach, not only in light of the logical business need to protect innovation, but especially in light of the Internet-related developments we’re talking about.

Regarding data protection, we all know that continental Europeans are considered (certainly by U.S. standards) excessively concerned about data privacy, and most of us are. Connecting information automatically with software creates a situation where loads of sensitive data – business/trade secrets and employee information, for example – are pooled in certain areas and exchanged on the basis of access privileges. Over and above the obvious challenges here, we are dealing with the fact that Europe still doesn’t have a harmonized data-protection law. That definitely needs to change.

However, beyond these challenges, if players like Siemens and Bosch stay ahead of the curve and do the right thing, they will benefit from this development.

MCC: You have been heading all three offices of Jones Day Germany – in Frankfurt, Munich and Düsseldorf – since the beginning of 2013. What are your plans for the next few years?

Rempp: We have grown by about 50 percent over the last three years by adding highly qualified laterals to all our German offices without sacrificing quality for quantity. We will be continuing on that path in the coming years in all our German offices and across our various practice groups. We are fortunate to be uniquely attractive in terms of partnership culture and integrated global reach. Not surprisingly, we are being continuously approached by large numbers of strong lateral candidates.