

AMERICAN BAR ASSOCIATION  
MERGERS AND ACQUISITIONS COMMITTEE  
INTERNATIONAL M&A SUBCOMMITTEE  
SUNDAY, AUGUST 5, 2012

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Attorney/Client Privilege Issues in Cross-Border  
M&A Transactions

1. Introduction of Case Study.
2. Description of Legal Position of the European In-House Lawyer and Impact of Akzo Nobel Case.
3. Review of Basic U.S. Principles of Attorney-Client Privilege and Attorney Work Product Privilege.
4. Case Study Group Discussion.
5. Suggestions to Deal with Communication and Privilege Issues in Cross-Border M&A Transactions.

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German AG has engaged you as the U.S. M&A lawyer in connection with the acquisition of the shares of a corporation based and incorporated in the State of Arizona whose product line is large scale industrial equipment. Over the past year, your client has lost six key sales to this Target as a result of the Target's new and innovative, highly efficient equipment item. The Target has sold 30 of these large scale pieces of industrial equipment over the past six months and is the talk of the industry. Your client currently only has a U.S. sales subsidiary and is extremely keen on acquiring this entity to bolster one of its marginal business units.

The Target is represented by an aggressive U.S. firm with a reputation for difficult and adversarial contract negotiations and a "take no prisoners" litigation culture. Lead counsel has advised you not to even think about negotiating any non-commercial portions of the proposed Purchase Agreement such as the anti-sandbagging clause as there are many other suitors who have expressed an interest in the Target. Due diligence has disclosed that a suit has been filed against the Target in the state courts of Arizona where one of these pieces of the new equipment, in combination with the equipment of another supplier, has resulted in an explosion that has shut down the entire plant of the customer. The Target's counsel states that he has evaluated the case and any prospective purchaser should not think about any price reduction or indemnity for the case as it is an "absurd claim" that should be quickly dismissed based on contractual limitations in the sale contract and the fact that the operators clearly operated the equipment in an "idiotic manner" in violation of the explicit instructions in the Operations and Maintenance Manual for the equipment.

Your past experience indicates that this case is in fact problematic for four reasons:

- (1) The contract limitations are not readily upheld in that jurisdiction in a tort claim.
- (2) The particular problem alleged with the equipment appears to be a high risk item for that equipment in any application.
- (3) The Operations and Maintenance Manual is only written in English while nearly all of the customer's operators speak only Spanish.
- (4) Your firm has worked with the Plaintiff's counsel who is not only a savvy lawyer but also is an Arizona "good ole boy".

You must now include comment in your due diligence report to German AG about this case, but you have a concern about ensuring that any comments made will be protected by the attorney/client privilege or alternatively attorney work product not only in connection with any claim under the Purchase Agreement but also in the existing Arizona case in the event that your

client takes over the company and must defend the suit. Specifically, you have the following concerns:

- (a) The general counsel for German AG is new and is overseeing his first large acquisition.
- (b) The Chairman of the Executive Board of German AG has historically consulted with a strategist in an unrelated German management firm as his consigliere in acquisitions.
- (c) The business unit of German AG who would have the responsibility for this product line customarily uses an outside engineering consultant to evaluate any equipment problems and safety risks.
- (d) German AG has significant ongoing insurance coverage for products liability and products recall insurance which it expands to cover acquisitions requiring risks to be fully disclosed to the insurer.
- (e) As part of the acquisition team, you need to work very closely with the U.S. accounting correspondent of German AG's accounting firm, and the reports of that correspondent are consolidated in the German accountant's due diligence report to German AG.

With all of these concerns, you turn to one of your good German colleagues on the ABA M&A Committee to assist you in evaluating the land mines and how to possibly avoid them.

**Attorney and in-house counsel - A strict division under the laws of most of the most important European Countries**

	<b>German law countries (GER, CH, AU)</b>	<b>Roman Law Countries (F, I, SP, Belgium)</b>	<b>Scandinavian Countries (e.g. Finland)</b>
May in-house counsel plea and appear at court	No for GER and AU, yes for CH as no limitation to represent clients at court exist	No for F, Italy and Spain Some exceptions are granted in Italy, in Spain it depends on the admission to the bar	No
May in-house counsel claim an "attorney-client privilege" in his communication with outside counsel or within his company	No	Yes in Belgium, No in the other Roman law countries	No

Legal sources:

**Germany:** BRAO (Federal Order for the legal profession, ZPO, StPO, VwGO (federal acts on civil, criminal and administrative court procedures)

**CH:** BGFA (Federal Act on the free movement of legal services), various cantonal provisions, ZPO, StPO, VwVerfG

Spain: law 34/2006 as of 30. october

**Italy:** Act of the legal profession and its regulation, code of ethics approved by the Federal Bar.

**Austria:** Federal order of the legal profession, ZPO, StPO, VwGO

**Belgium:** Law of 1.3.2000, [www.ije.be](http://www.ije.be)

**France:** Law no. 71-1130 of 31.12.1971; decree no. 91-1197 of 27.11.1991; 2005-790 of 12.07.2005 and the reglement interieur national de la profession de l'avocat.