

Trade Secrets Protection in Germany

It is of outmost importance to keep business or trade secrets secret. As soon as you start business with other companies or third parties, a certain flow of secret information and know how to the other party is a must to come to contracts and business. This applies regardless whether the scope is just a license to Intellectual Property or the acquisition of a company in whole or of a part only. The German law, generally applicable on all business taking place in Germany gives a little help in §§ 311 and 241 section 2 BGB (German Civil Code) as it states that as soon you start negotiations with another company you are under obligation to comply with the rights, legal and general interests of the other party. This includes that you may not make any use of trade secrets without the consent of the other party and if you do so, you might be liable for damages. There will be, however, a wide range of dispute regarding (a) whether or not an information given is a business secret or not and (b) whether or not you were entitled to use such information and (c) whether or not you got the information from the other party or from somewhere else. Such dispute might have the result to lose a business partner and business chances. This is the reason we recommend (and any qualified lawyer in Germany would do so) that before any talks, especially any exchange of information takes place, the parties conclude a so called "Non Disclosure Agreement" (NDA) for which there is no general template possible fitting to all needs. Such NDA should have stipulations with content as follows:

- What information will be given and by which means (print, electronic or other)?
- The scope for which the information may be given and used only (e.g. acquisition of a certain company).
- To which persons those information can be given – also under acceptance of the NDA – in excess to the management, i.e. accountants, lawyers or other staff and consultants, which may be put namely in a list attached to the NDA, possibly to be extended if necessary by consent of both parties.
- Duration / Term of the NDA; mostly some years after the planned deal has been concluded or failed eventually.
- An exquisite liability clause for proper and complete information.
- An exquisite clause to the scope of damages, eventually lump sums, consequential damages and burden of proof.
- Applicable law and place of jurisdiction.

Safeguarding the above issues you can reach a NDA covering the needs to protect your know how and trade secrets from being taken and used without

giving you the appropriate share. Please note that in general a contract can be really good only if you deal with the right and good partners for to find the good ones the author wishes you all the best.

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