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Transnational Litigation Q3 2025 Update – Germany Introduces a New Shield for Trade Secrets in Litigation

*In an effort to strengthen its attraction as a litigation venue, Germany has introduced a new framework to keep trade secrets confidential during litigation. This framework can be found in the new section 273a of the German Code of Civil Procedure (*Zivilprozessordnung, ZPO*).*

I. Introduction

On 1 April 2025, Germany enacted the Justice Location Modernization Act (*Justizstandort-Stärkungsgesetz*) which allowed to install Commercial Courts and to conduct proceedings before these courts in English (see our previous alert "*Revolutionizing Commercial Disputes in Germany – The Launch of English-Language Commercial Courts and Chambers in Frankfurt*" for more details). In addition, the reform also addresses the protection of trade secrets through the newly created Section 273a ZPO.

Previously, there was only fragmental protection for trade secrets in general civil proceedings, whether in the taking of evidence, written submissions, or oral hearings. Parties therefore often faced a dilemma: either disclose their confidential know-how as evidence and risk it becoming public or withhold key information and weaken their case. This situation often led parties to choose arbitration.

The new framework is intended to close this gap in the civil court system by empowering courts to shield sensitive business information in virtually any civil lawsuit and thus enhances Germany's position as an attractive forum for dispute resolution.

II. Requirements to Apply for Confidentiality Protection According to the New Framework

The new framework **applies to all civil proceedings** throughout the civil court hierarchy, i.e. before Local Courts (*Amtsgerichte*), Regional Courts (*Landgerichte*), Higher Regional Courts (*Oberlandesgerichte*), and the Federal Court of Justice (*Bundesgerichtshof*).[1]

According to early commentators in German legal literature, **any information submitted in legal proceedings** – whether for the purpose of asserting or defending legal claims – may potentially be classified as requiring confidentiality protection.[2] However, it remains to be determined whether future court decisions may impose limitations on this principle.

The information must plausibly qualify as a **trade secret** under Section 2 No. 1 of the German Trade Secrets Act (*Geschäftsgeheimnisgesetz, GeschGehG*). Specifically, it must:

- Not be generally known or easily accessible within the relevant business circles,
- Have commercial value due to its secrecy,
- Be subject to reasonable confidentiality measures (e.g., access restrictions, NDAs), and
- Be protected by a legitimate interest in secrecy.

Applicants must plausibly demonstrate the trade secret nature of the information (*glaubhaft machen*). The court need not be fully convinced; it is sufficient if the existence of such a trade secret is considered more likely than not.[3]

The documents for which protection is sought must be specifically identified in the application. Applicants may also request that the full version of the submitted documents be introduced into the proceedings and made accessible to other parties only if the court grants the confidentiality application.[4]

III. Court Ruling on Confidentiality Classification

The decision on whether to classify information as confidential lies with the court.

If the court **rejects** an application, the applicant may **immediately appeal** this decision to prevent any risk of exposure of the trade secret. This ensures that confidentiality can be preserved without awaiting the outcome of the main proceedings.

The classification of information as confidential may only be challenged **in conjunction with an appeal in the main proceedings**.

IV. Consequences of Classification as Confidential Information

Once the court has classified information as confidential, the procedure and legal consequences follow the provisions of the German Trade Secrets Act.

- **Obligation of Confidentiality:** All participants in the proceedings – parties, counsel, witnesses, experts, and other representatives – are legally bound to maintain secrecy. They cannot use or disclose the protected material outside of the court proceedings. This obligation continues after the proceedings conclude.
- **Sanctions**: Any **breach can result in sanctions**, including fines up to €100,000 per violation or up to six months' imprisonment.
- **Additional Protective Measures**: Courts may impose measures such as restricting access to hearings or documents to a limited group for each party, and excluding the general public from hearings after considering each party's right to a fair trial, its right to be heard, and the interest in keeping the information confidential. Case files available for inspection by third parties may have confidential sections redacted.
- **Minimum Access Rights**: Each party must be allowed access through at least one natural person, as well as their counsel or representatives. Beyond that, the court decides what further orders are necessary.

V. Conclusion on Confidentiality Protection According to the New German Framework

By aligning German court practice more closely with the confidentiality standards long seen as an advantage of arbitration – and combined with the option to conduct proceedings in English – the new section represents a decisive step towards enhancing the attractiveness of German state courts for commercial disputes.

Parties are well advised to request confidentiality protection at the earliest possible stage – ideally with their initial submission – to ensure sensitive information is safeguarded throughout the proceedings.

The new provision applies not only to future cases but also to lawsuits already pending as of 1 April 2025, enabling litigants in ongoing disputes to make immediate use of these protective measures. This retroactive effect may give companies the confidence to introduce evidence they had previously withheld for fear of disclosure.

VI. Comparison with U.S. Law

By comparison, litigants in both federal and state civil proceedings in the United States (U.S.) have long benefited from trade secret protections afforded under rules of civil procedure and, in certain state law cases, privileges against the disclosure of trade secrets during litigation.

In the U.S., trade secret protections vary depending on the stage of the litigation and whether a case applies Federal Rules of Civil Procedure (**FRCP**) or state rules of civil procedure. In the U.S., parties gather evidence to build their cases during a process called "discovery." A litigant is most vulnerable to the exposure of trade secrets during discovery. Balancing the desire to protect trade secrets with a long-standing policy of allowing liberal discovery, the U.S. Supreme Court

developed rules permitting litigants to request narrow or non-disclosure of trade secrets. In particular, litigants in cases applying the FRCP may request permission to withhold trade secrets during discovery under Rule 26(c) or Rule 45(d)(3)(B) of the FRCP.[5]

1. Rule 26(c) General Protection Against Disclosure of Trade Secrets

Under Rule 26(c) a litigant may obtain a protective order "requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way." Although Rule 26(c) allows courts to completely restrict the discoverability of trade secrets, more often, courts allow such discovery but limits it to specific parties, specific information, or for disclosure in specific venues.[6]

To obtain a protective order to limit the disclosure of trade secrets under Rule 26(c), a litigant must "move" or make a request for a protective order in the court where the case is pending.[7] Generally, a litigant seeking to resist discovery of trade secrets must show that (1) the information sought is a trade secret, and (2) disclosure of the information sought would be harmful to the other party's interest in the trade secret.[8] If these requirements are met, the burden shifts to the party seeking discovery to establish that the disclosure of trade secrets is relevant and necessary to prepare the case for trial.[9]

Determining whether information is a "trade secret" depends on whether the court must apply state or federal substantive law. One commonly invoked definition derives from the Uniform Trade Secrets Act (**UTSA**) – a model trade secret misappropriation law enacted in some form in 48 states. The UTSA defines "trade secret" as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[10]

Lastly, in ruling on a motion for a protective order, a federal district court must "balance the need for the trade secrets against the claim of injury resulting from disclosure."[11]

2. Rule 45(d)(3)(B) Protection Against Compelled Disclosure of Trade Secrets by Subpoena

Unlike a protective order under Rule 26(c) which provides a broad protection against the discoverability of trade secrets, Rule 45(d)(3)(B) applies to information compelled by subpoena. Rule 45(d)(3)(B) provides that a litigant may move the court to quash or modify a subpoena if it requires disclosing a trade secret.[12]

Most state courts have enacted rules identical to Rule 26(c) and Rule 45(d)(3)(B), affording litigants in courts applying state law procedure the same protections as litigants in courts applying the FRCP.

3. State Law Evidentiary Privilege Against Disclosure of Trade Secrets

In addition to protections against the pre-trial discovery of trade secrets, some states, such as California, have adopted a privilege against the admission of trade secrets as evidence in court proceedings. For example, California's trade secret privilege allows the owner of a trade secret to refuse to disclose the trade secret "if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice."[13]

[1] Explanatory memorandum of the German Federal Parliament (Bundestag), BT-Drucks 20/864, p. 32.

[2] Münchener Kommentar zur Zivilprozessordnung (MüKoZPO), *Prütting*, § 273a para. 8 (7th ed. 2025) (commentary on § 273a of the German Code of Civil Procedure).

[3] BeckOK GeschGehG, *Gregor*, § 20 para. 17 (24th ed. Sept. 15, 2024) (commentary on the German Trade Secrets Act).

[4] BeckOK ZPO, *Bacher*, § 273a paras. 63–66 (57th ed. July 1, 2025) (commentary on § 273a of the German Code of Civil Procedure).

[5] Referred to hereinafter as "Rule 26(c)" or "Rule 45(d)(3)(B)," respectively.

[6] *See e.g., Multi–Core, Inc. v. Southern Water Treatment Co.*, 139 F.R.D. 262 (D. Mass. 1991).

[7] The motion must include "a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." *Fed. R. Civ. P. 26(c)(1)*. If a party seeks a protective order for "matters relating to a deposition," the party seeking the protective order must file the motion in the court for the district where the deposition will be taken. *Fed. R. Civ. P. 26(c)(1)*.

[8] *In re Remington Arms Co., Inc.*, 952 F.2d 1029, 1031 (8th Cir. 1991); *Centurion Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323 (10th Cir. 1981) (citing 8 Wright & Miller's Federal Practice and Procedure § 2043 (1970).

[9] *Remington* at 1032; *Am. Standard Inc. v. Pfizer Inc.*, 828 F.2d 734 (Fed. Cir. 1987); *Centurion* at 325.

[10] Unif. Trade Secrets Act (With 1985 Amendments) § 1(4) (Nat'l. Conf. Of Comm'rs on Unif. State L.'s 1986).

[11] *Centurion* at 325; *Remington* at 1032.

[12] Additionally, under Rule 45(d)(3)(C), a court may, instead of quashing or modifying a subpoena requiring the reveal of trade secrets, "order appearance or production under specified conditions if the serving party: (i) shows a substantial need for the testimony or material that

cannot be otherwise met without undue hardship; and (ii) ensures that the subpoenaed person will be reasonably compensated."

[13] Cal. Evid. Code § 1060.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any leader or member of Gibson Dunn's Transnational Litigation practice group:

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