

Trade secrets in Brazil

✓ Background

A Portuguese entrepreneur engaged in negotiations with a Brazilian company in pursuit of a joint effort in an innovation-related project. The parties signed a Memorandum of Understanding where they included the tasks each party was committed to develop, the background each part would contribute to the project and a preliminary distribution of the budget if the funding were finally granted.

The Portuguese entrepreneur decided to ask his lawyers to draft a contract including non-disclosure agreement clauses and penalty clauses, so as to ensure his clients' portfolios were not unduly revealed or stolen by the Brazilian company.

Negotiations went well. However, a few months later, the entrepreneur became aware that his future 'partner' had decided to go on with some of the ideas and used the information disclosed during negotiations.

⚙️ Actions taken

In Brazil, unauthorized use, exploitation or disclosure of trade secrets is governed by both criminal and civil provisions –concerning unfair competition-. The entrepreneur's lawyers decided to file a criminal claim on the basis of the unauthorized use of confidential knowledge before the Brazilian courts.

They also filed a complaint for a preliminary injunction to prevent the unauthorized use of confidential information.

As for the damages, claimants are entitled to choose among these three criteria, according to Brazilian law and practices:

- The profits that would have been earned if the infringement had not occurred.
- The profits earned due to the infringement.
- The royalty that the infringer would have paid for a license.

Since Brazilian courts are reluctant to compensate for damages and only actual and proven damages are awarded, the EU entrepreneur decided to use the amounts allocated within the contract to each party to calculate the profits that would have been earned if the infringement had not occurred.

📊 Outcome

Brazilian courts ruled in favour of the EU entrepreneur and the infringer was criminally convicted. He was also granted damages, as well as the penalty agreed in the contract.

📖 Lessons learned

Including confidentiality clauses in your contracts should be taken into account.

In some cases, criminal actions are more deterrent than civil ones.

Including financial provisions within pre-contractual documents may be helpful to prove the damages caused by the infringement, especially in Brazil, since proving damages is usually burdensome and difficult there.

In addition, penalty clauses are a good practice to obtain an economic compensation, regardless of the proven damages.