Basics of Trade Secret law and Enforcement in China

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In the United States, Europe, and East Asia, trade secret lawsuits have steadily increased in recent years. Trade secret lawsuits now often resemble patent cases in complexity, cost, and risk. Enforcement, however, differs substantially in different jurisdictions. China’s trade secret laws are less centrally organized, and enforcement is weaker.
A Refresher

• A trade secret is *any* item of non-public business information shared in confidence.
• That means business, financial, and technical information.
• Compared to patent, copyright, and trademark law, trade secret law covers the most information by volume, and it covers the most information by category or type.
Overview – International Trade Secret Law

• U.S. trade secret law now includes a federal version, the Defend Trade Secrets Act of 2016.
• The European Union likewise now has a Directive to harmonize trade secret law in member states.
• Taiwan and South Korea have U.S-style trade secret laws.
• China has various laws on the books, with recent changes, but practical enforcement has long been a major concern.
Trade Secret Law - China

• Trade secret problems in China are well-known.
• U.S. criminal prosecutions for trade secret theft often feature defendants acting on behalf of Chinese state entities.
• Companies operating in China often take unusual defensive measures to avoid theft from business partners.
• Law firms and IP organizations have protested lax enforcement for many years.
Trade Secret Law in China is a Patchwork

- 1993 Anti-Unfair Competition Law
- January 2007 Interpretation guidelines
- Further updates effective October 2017
- State Administration of Industry and Commerce (AIC) Provisions Regarding the Prohibition of Trade Secret Infringement
- Criminal provisions – amended 2015
Trade Secret Law - China

- There is no civil discovery.
- While a plaintiff theoretically can ask a local AIC to conduct a raid on the defendant, it must present compelling evidence without the benefit of discovery.
- These local AICs reportedly have little power and defendants sometimes refuse to cooperate. Fines are very low.
- Criminal prosecution is also reportedly spotty.
- MOFCOM may get involved.
• Civil litigation has also been an option.
• As of 2013, however, trade secret plaintiffs reportedly lost as many as 80 percent of such civil cases.
• Prevailing plaintiffs could obtain royalty damages, lost profits, or unjust enrichment.
• But the absence of discovery makes litigation difficult.
Perhaps reacting to pressure, China made two important changes in its trade secret laws in 2013 and 2014.

First, the Civil Procedure Law was amended in 2013 to allow for preliminary injunctions in trade secret cases.

Second, in 2014, China created three IP courts (in Beijing, Shanghai, and Guangzhou) and their jurisdiction includes technology-based trade secret lawsuits.

Recent examples in 2017
Trade Secret Law - China

- It is still too early to assess whether these changes are truly meaningful.
- However, in August 2013, Eli Lilly became the first trade secret plaintiff to obtain a preliminary injunction under the new Chinese law.
- The case was significant because an American company was one of the plaintiffs (along with the subsidiary).
Options – Contract Terms

• Forum selection clauses
• Choice of law
• ADR
• Contract rules can allow U.S-based lawsuits even for conduct that is almost wholly foreign.
Options - Litigation

- U.S.-based subsidiaries and residents.
- The new DTSA provision for foreign activity.
- The International Trade Commission.
- Civil litigation within China.