

# **Basics of Trade Secret law and Enforcement in China**

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# Background

- 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.

# Trade Secret Law - China

- 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.

# Trade Secret Law - China

- 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.



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