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Trade Secrets in China

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As British companies pursue commercial opportunities in China it is important to identify and mitigate risks. Trade secrets are often crucial elements of the competitive advantage of innovative companies. Protecting trade secrets – and taking action should leaks occur – can present particular challenges in China.

What are trade secrets?

Trade secrets are defined in China as technical or operational information that:

- Is not known to the public;
- Has commercial value; and
- Is subject to measures taken by the owner to maintain confidentiality.

Examples of trade secrets include technical drawings, production processes, marketing strategies, and compiled lists of customers and suppliers.

Protecting trade secrets

Corporate trade secrets strategies in China typically have two main objectives: preventing trade secrets being disclosed, and maximising the likelihood of positive outcomes from legal or administrative proceedings should misappropriation occur. Vulnerability to trade secrets violations can come from a variety of sources: current/previous employees; potential/current business partners; industrial espionage; and breaches of online systems or physical site security.

Trade secrets protection measures should be implemented with advice from experienced, qualified legal professionals in accordance with Chinese law and enforcement mechanisms. Contracts with Chinese parties that may need to be enforced in China should be primarily drafted in Chinese language – not translated from standard English versions.

Commercial arrangements can be used to limit the likelihood and impact of trade secret misappropriation. For example, manufacturing processes can be disaggregated. Due diligence should be undertaken ahead of any joint venture.

Effective trade secret protection strategies can include using **confidentiality agreements** (or non-disclosure agreements, NDAs) with employees, potential business partners and others given access to trade secrets. These indicate to signees that trade secrets are being accessed and also provide an enforcement mechanism through the Chinese Contract Law (in addition to the various stipulations on trade secrets in other legislation and regulations).

Further employee policy measures include holding **entry and exit interviews** to underline obligations to protect trade secrets. **Non-compete agreements** for employees with access to confidential information generally require additional compensation in China and are subject to time limits.

Effective **corporate policies** can protect trade secrets and help enforcement action when necessary. Confidential information should be clearly marked and written acknowledgment obtained when accessed. Entry to areas where sensitive materials/processes can be viewed should be restricted.

Trade Secrets in China: Key Points

- Trade secrets protection strategies should aim to stop leaks happening, and to maximise the chances of success in legal/administrative actions should misappropriation occur.
- Contracts, IT systems & physical site security should be used to protect trade secrets.
- Civil, administrative & criminal remedies are available should misappropriation occur.
- Advice should be sought early from a qualified, experienced legal professional.

IT systems can record when confidential material is accessed and provide password protection for trade secrets. Companies should consider disabling USB drives, and delaying re-assignment of computers and backing up emails for extended periods following employee departures.

Expert advice should be sought to make IT systems secure from cyber espionage. Companies do not have to be physically located in China to be at risk. The Department for Business, Innovation & Skills (BIS) provides further [guidance](#) on cyber security for companies.

Enforcing against trade secrets misappropriation

Should trade secrets misappropriation occur and meet the requirement for enforcement action under Chinese law, three main enforcement channels are available in China:

- **Civil litigation:** Civil remedies – including permanent injunctions and damages – are available for trade secrets misappropriation. The amount of damages are typically assessed based on losses to trade secret owners, profits following misappropriation, reasonable royalty or discretionary damages and additional cost of taking remedial action. For cases involving serious malicious infringements, punitive damages up to five times the aforesaid amount are available. Where a statute of limitation is applicable, trade secret owners may claim up to three years of damages for continuous misappropriation.

Difficulties with bringing trade secrets misappropriation cases in Chinese civil courts include the lack of a discovery process and the evidence burden in proving existence of trade secret and infringement. Companies should consider whether employees NDAs are covered by labour tribunal arbitration clauses. Company should also be aware that the Chinese Anti-Unfair Competition Law (2019) provides for the reversal of the burden of proof in trade secret cases where 1) the suspected infringer has access to the trade secret and is using substantially the same information as the trade secret, and 2) the trade secret has been disclosed and used by the suspected infringer or the risk exists, and 3) evidence shows that the trade secret has been infringed by the suspected infringer.

- **Administrative enforcement:** Local Administrations for Market Regulation (AMRs) can enforce against trade secrets misappropriation. AMRs can impose administrative fines, order the the cessation of illegal acts and confiscate the illegal income. However, administrative enforcement

may not be suitable for complex technical cases and doesn't result in damages awards to trade secrets owners.

- **Criminal enforcement:** Cases exceeding criminal thresholds can be investigated by Public Security Bureau (PSBs). Criminal cases can end in fines and prison sentences. Evidence gathered during administrative and criminal cases can be used as evidence in separate civil cases.

To arrange a discussion of a particular case based on our experience working with other companies in China please contact commercialmail.beijing@fcdo.gov.uk. More information on IP in China – including other factsheets – can be found on the [Embassy IP webpage](#).