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## PROTECTION OF BUSINESS TRADE SECRETS IN THAILAND

**A**lmost all enterprises have some form of trade secrets concerning their business and day-to-day operations. In the midst of other priorities, however, companies often lose sight of the need to secure proper protection of valuable business secrets, resulting in mismanagement of key intellectual property assets. In today's highly competitive market environment, identifying business trade secrets and taking proper steps to protect them can be crucial to a company's success.

### Trade Secret v. Patent Protection

Generally, trade secret protection applies to information that is not known to the public and that confers on its holder some form of economic benefit or advantage over competitors within the same industry or profession. Importantly, the owner of such information must have engaged in reasonable efforts to maintain its secrecy. Typical types of trade secrets that qualify for legal protection include, but are not limited to, production processes, chemical processes and formulas, blueprints for machines, and various forms of marketing data, such as customer lists.

Often, companies will need to decide whether to patent the invention (thus, publicizing it to all of its competitors) or whether to preserve the information as a trade secret. If the company opts for the latter, all those who receive disclosure of the trade secret must be bound by strong obligations of confidentiality. In addition to competitors never discovering the details of the trade secret, the main advantage of trade secrets is that legal protection may extend indefinitely so long as the information remains secret, whereas patents usually have a limited term of protection (in Thailand, 20 years for a patent and 10 years for a petty patent). Generally speaking, if the information or invention can be reverse engineered, then the company will tend to opt for patenting over trade secret protection.

### What Is a Trade Secret?

In Thailand, trade secrets are protected by the Trade Secrets Act B.E. 2545 (2002) (the Act). The Act provides protection against misappropriation of confidential information, including formulas, programs, patterns, compilations, methods, devices, techniques, and processes. Registration of trade secrets is not required, with the understanding that revealing details of the secret to a third party would

deprive the owner of the benefit of monopolizing that secret.

Not all of a company's secrets are considered trade secrets by the Act. In order for a company secret to be eligible for legal protection in Thailand as a trade secret, the following three criteria must be satisfied:

1. The information must not be publicly known or not yet accessible by persons who are normally connected with the information.
2. The information must be economically valuable because of its secrecy.
3. The controller of the information must have taken appropriate measures to maintain the secrecy.

The actions that constitute "appropriate measures" depend on the nature of the secret, although merely "not telling anyone" is generally not sufficient to meet the third prerequisite. Use of nondisclosure agreements and confidentiality clauses in employment contracts and other agreements is generally the level of caution at which the company must operate.

### Remedies for Trade Secret Infringement

If the information or data qualifies as a trade secret under the Act, then any act of disclosure, deprivation, or usage of such information without the consent of the owner in a manner contrary to fair commercial practice (such as breach of contract, infringement or inducement to infringe confidentiality, bribery, coercion, fraud, theft, etc.) constitutes an infringement of trade secret rights, provided that the infringer knows or has reason to know that his or her action is contrary to fair commercial practice.

Where a trade secret infringement has been committed or is imminent, the trade secret owner can petition the court to stop the infringement temporarily (preliminary injunction) or permanently (permanent injunction) and to award compensation in the form of damages. Criminal penalties are also available under the Act against any

person who discloses a trade secret to the public with malicious intent to damage the business of a trade secret owner. In this regard, the Act imposes criminal penalties of up to one year in prison and/or a fine of up to THB 200,000. In addition to a trade secret infringement

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claim, if there is an agreement between the trade secret owner and the alleged infringer, such as a nondisclosure or confidentiality agreement, whereby the infringer has contractual obligations to keep the information confidential and/or refrain from using the information to compete with the trade secret owner, such contractual claims may also be brought against the infringer in court.

What is clear from the protection under Thai law and options available to companies (e.g., trade secret v. patenting, duties of confidentiality, etc.) is that each company must develop its own policy on this issue, with clear guidelines and strategy. The policy must be communicated clearly at all levels to employees in order to maximize the benefit of any new intellectual property that emanates from the company. 🏠