

# OVERVIEW OF NATIONAL AND REGIONAL TRADE SECRET SYSTEMS

## INDIA

### 1. Sources of Law

There is no separate and exclusive statute to protect undisclosed information/trade secrets in India. Trade secrets and confidential information can be protected to a large extent by contracts (for example, non-disclosure agreements (NDAs) and confidentiality clauses in employment contracts). Further, they are regulated under common law (torts, breach of confidence, etc.). In some cases, involving the loss of material or the breach of an IT infrastructure, remedies under criminal law or IT law are available.<sup>1</sup>

### 2. Definition of a trade secret

Based on Article 39 of the TRIPS Agreement and common law principles, Indian courts assess the question as to on what amounts to trade secret breach on a case-by-case basis. In general, Indian courts consider protected information that itself has the necessary quality of confidence, the information that was transferred in circumstances imparting an obligation of confidence.

There are no statutory requirements regarding the economic or technical importance of the confidential information, such as whether it is obvious or trivial or not. Indian courts included, for example, formulae, technical know-how or a peculiar mode or method of business adopted by an employer, which is unknown to others. Courts have denied trade secret protection of customer lists or industrial processes otherwise known and not satisfying the above-mentioned conditions. While it is possible to contractually agree to designate information as confidential, the nature of the information itself must be confidential, and the fact that the information is confidential should be seen regardless of any express contractual provision regarding confidentiality of such information.<sup>2</sup>

### 3. Scope of trade secret protection

The scope of trade secret protection depends to a large extent on contractual obligations, such as confidentiality clauses in employer-employee agreements or agreement for service between a client and a provider, license agreements etc. In general, reverse engineering cannot be prevented through a breach of a confidentiality clause.<sup>3</sup>

### 4. Exceptions

Article 19(1)(a) of the Constitution of India<sup>4</sup> guarantees the freedom of speech and expression. In addition, Article 19 (1)(g) of the Constitution of India guarantees the freedom of trade and profession to a person. Accordingly, Indian courts have generally held post-termination restrictive covenants about non-disclosure of confidential information in employment contracts as being barred under Section 27 of the Contract Act (1872)<sup>5</sup> to the extent they impinge on the freedom of trade and profession according to the Constitution.<sup>6</sup>

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<sup>1</sup> This document aims to provide an overview (June 2024). It is not a complete review of the legal situation and case law. For further information, interested readers may consult: Dutt, Anil and Khetarpal, Ayushman and Nanda, Godhuli and Jana, Sutapa and Shekhawat, Sudarshan S. and Mani, Vindhya S., Trade Secrets - India (April 22, 2021). *les Nouvelles - Journal of the Licensing Executives Society*, Volume LVI No. 2, June 2021, p. 111 with further details, Available at SSRN: <https://ssrn.com/abstract=3832088>; Pravin Anand, Tusha Malhotra in *Trade Secrets throughout the World* (Jager et. al.), 2023, Chapter 19. India, § 19:2.

<sup>2</sup> Dutt *et al.*, *loc cit.*, p. 111.

<sup>3</sup> *Ibid.*, p. 112 f. with further details.

<sup>4</sup> Available at: <https://www.wipo.int/wipolex/en/legislation/details/15815>.

<sup>5</sup> Available at: <https://www.indiacode.nic.in/bitstream/123456789/2187/2/A187209.pdf>.

<sup>6</sup> See Dutt *et al.*, *loc. cit.*, p. 112 f. with further details.

## 5. Civil remedies

In the case of a breach of contract, it is possible to file an action for breach of contract under the Contract Act (1872). For example, under Section 73 of the Contract Act, compensation of damages is provided for. Further, a perpetual injunction may be available in case of a breach of an obligation according to Section 38 of the Specific Relief Act (1963)<sup>7</sup>. Interim injunctions according to Section 94(c) in conjunction with Section 151 of the Code of Civil Procedure (1908)<sup>8</sup> against the person disclosing the confidential information/trade secret to a third party may be filed. Further, a court may, under certain circumstances, also grant punitive damages.<sup>9</sup>

If no contract exists, the only remedy available is an action based on tort, which may be used to seek injunctive relief or damages.<sup>10</sup> It is possible to apply for delivery up or destruction of the infringing material and goods or equivalent.<sup>11</sup>

## 6. Criminal sanctions

Trade secret misappropriation in conjunction with Information Technology may be sanctioned according to the Information Technology Act, 2000.<sup>12</sup> For example, hacking of a computer system according to Section 66(1) of the Information Technology Act, 2000 is sanctioned with a fine and/or imprisonment (Section 66(2) of the Information Technology Act, 2000). In addition, breach of confidentiality and privacy according to Section 72 of the Information Technology Act, 2000 are sanctioned with a fine and/or imprisonment.

Criminal sanctions against copyright infringement may also be relevant in case where the trade secret information is also eligible for copyright protection. Sections 65A and 65B of the Copyright Act, 1957 provide for criminal sanctions related to the circumvention of effective technological measure and disclosure of copies of work with the knowledge of altered rights management information.<sup>13</sup>

Unauthorized disclosures of government secrets attract penal sanctions under the Official Secrets Act, 1923.<sup>14</sup>

Severe cases of trade secret misappropriation may rise to criminal offences according to the Indian Penal Code<sup>15</sup>. The relevant provisions are, for example, Sections 378 (theft), 403 (dishonest misappropriation of property), 405 f. (criminal breach of trust), 407 (criminal breach of trust by carrier, etc.), 408 (criminal breach of trust by clerk or servant), 409 (criminal breach of trust by public servant or by banker, merchant or agent) and 418 (cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect).<sup>16</sup>

## 7. Trade secret protection in judicial proceedings

Trade secrets/confidential information may be protected in court proceedings through confidentiality-club arrangements that may limit the number of representatives having access to the confidential information.<sup>17</sup> Judges generally are sensitive as to protection of confidential information in proceedings and will also not include any sensitive information in

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<sup>7</sup> Available at: <https://www.indiacode.nic.in/bitstream/123456789/1583/7/A1963-47.pdf>.

<sup>8</sup> Available at: <https://www.wipo.int/wipolex/en/legislation/details/7667>.

<sup>9</sup> Dutt *et al.*, *loc. cit.*, p.112, p. 114 under 13.

<sup>10</sup> *Ibid.* p.111, 112.

<sup>11</sup> *Ibid.*, p. 114.

<sup>12</sup> Available at: <https://www.wipo.int/wipolex/en/legislation/details/6827>.

<sup>13</sup> Available at: <https://www.wipo.int/wipolex/en/legislation/details/13230>

<sup>14</sup> Available at: <https://www.indiacode.nic.in/bitstream/123456789/2379/1/A1923-19.pdf>.

<sup>15</sup> Available at: <https://www.wipo.int/wipolex/en/legislation/details/7668>.

<sup>16</sup> See also, Dutt *et al.*, *loc. cit.*, p. 115 f; Pravin Anand, Tusha Malhotra, *loc. cit.*, 19:2.

<sup>17</sup> See with further details, Dutt *et al.*, *loc. cit.*, p.114 f.; Pravin Anand, Tusha Malhotra, *loc. cit.*, 19:13.

decisions. A redaction of the judgement may also be claimed and will depend on the facts of the case and lies in the discretion of the court.<sup>18</sup>

### 8. Procedural provisions

There are no specific rules regarding competent courts of trade secret misappropriation, the general rules apply.

Any civil action relating to trade secret misappropriation based on breach of contract or tort is limited to three years from the date the breach is committed or if the breach is continuing, then from the date such a breach ceases according to the Limitation Act, 1963<sup>19,20</sup>

The claimant needs to prove the conditions for trade secret protection through contract/tort that are described above in actions relating to civil remedies.<sup>21</sup>

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<sup>18</sup> *Ibid.* p. 114 f. with further details.

<sup>19</sup> Available at: <https://www.indiacode.nic.in/bitstream/123456789/1565/1/a1963-36.pdf>.

<sup>20</sup> Anil Dutt, Ayushman Khetarpal, Godhuli Nanda, *et al.*, *loc cit.*, p. 111 f.

<sup>21</sup> See with further details, Dutt *et al.*, *loc.cit.*, p. 113.