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## Q247

### Trade secrets: Overlap with restraint of trade, aspects of enforcement

**Responsible Reporters: by Sarah MATHESON, Reporter General John OSHA and Anne Marie VERSCHUUR, Deputy Reporters General Yusuke INUI, Ari LAAKKONEN and Ralph NACK Assistants to the Reporter General**

National/Regional Group	Egypt
Contributors name(s)	Samir HAMZA, Ahmed EL HAKIM, Waleed SHOUKRY and Salma ELBASSOUSSY
e-Mail contact	samir.hamza@bakermckenzie.com
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## I. Current law and practice

Aspect (i) - Overlap with restraint of trade

1)	<p>Is trade secret protection viewed as a form of restraint of trade and, if so, under what circumstances and under which legal regimes (e.g. competition law)?</p> <hr/> <p>no If not please comment.:</p> <p>Pursuant to the Egyptian legislations, including competition law, there are no specific provisions which provide that protecting trade secret is a form of restraint to trade. To the contrary, trade secret protection is regulated by national laws; particularly, the Commercial Law No. 17 of 1999 ("<b>Commercial Law</b>") and the Labor Law No. 12 of 2003 ("<b>Labor Law</b>"). The provisions of the said laws provide for a legal protection to trade secrets, confidential information and undisclosed information. All these provisions in such laws do not constitute per se restraint of trade.</p> <p>Also, Article 687 of the Civil Code provides that excessive non-compete clauses that implies obliging the employee to remain in the employer's industry for a period longer than the one agreed upon contractually, the said clause shall be deemed null and void.</p> <p>On a separate note, in the area of data protection, the Law on Protection of Intellectual Property Rights No. 82 of 2002 ("<b>IPR Law</b>") provides protection for undisclosed information which does not relate to trade secrets as it relates to the proprietary data submitted to regulatory authorities for the purpose of getting marketing authorization. The premise of granting the protection is the "huge efforts" to generate test and other data required by the regulatory authorities as a condition to grant approval.</p>
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Unlike trade secrets, the proprietary data is the property of the companies and yet its disclosure is based on authorities' demand and therefore it is protected for a specific period of time. Data protection of undisclosed information against disclosure is granted for a period of 5 years from the date of submission according to the IPR Law in Egypt, while TRIPS grants it from the date of regulatory approval.

Article 55 of Egypt's IPR Law stipulates that the responsibility of enforcing the data protection rests with the Ministry of Health in case of pharmaceutical products and the Ministry of Agriculture in case of chemical agricultural products.

Please note that our responses below will not address the question of undisclosed information.

a) If so, under what circumstances and under which legal regimes (e.g. competition law)?

Not applicable

2) How does your law distinguish between general skills or knowledge acquired during the course of employment, confidential information, and trade secrets? What protection is extended to each?

A) Labor Law:

With regards to confidential information, the Labor Law provides in Article 56 a general obligation of confidentiality on employees to maintain the secrets of work. Employees are also bound not to divulge information regarding work, once such information is treated as confidential by its nature or upon written instructions issued by the employer. In addition, Article 685 of the Civil Law binds employees to keep confidential all the industrial and commercial secrets of work even after the expiry of the employment contract. Given that the law is silent with regards to the period during which the employees are bound by the confidentiality obligation, such question is left to the nature of the information and to the discretion of the court.

On a relevant note, the Civil Law provides in Article 698 a one year prescription regarding disputes arising from an employment contract. However, the said prescription shall not apply to disputes arising from disclosing confidentiality of commercial secrets and/or the performance of the contract's provisions aiming to guarantee the confidentiality of such information. With respect to the knowledge acquired during the employment relationship, there is no explicit protection or regulation thereto in the Labor Law. Accordingly, the criteria for protection will be whether such knowledge is general skills, and consequently there will be no protection provided thereon; or, such knowledge results in acquiring trade secrets, then it shall fall under the scope of protecting confidential information which shall be maintained by employees.

B) Commercial Law:

Under the Commercial Law, the trade secret protection is provided with regards to transfer of technology cases in which the importer is obliged to maintain the confidentiality and secrecy of the information transferred to him/her including any improvements thereto. Additionally, pursuant to Article 66 of the Commercial Law, infringement of a third party's industrial secrets or inciting employees to divulge the employer's secrets is considered an act of unfair competition.

C) International Agreements to which Egypt is signatory

On an international level, Article 39 of the TRIPS provides that natural and legal persons have the right to prevent information (which includes commercial information) lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest

commercial practices so long as such information:

- i) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- ii) has commercial value because it is secret; and
- iii) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

3) Are employees under a duty of confidence whether or not such a duty is set out in their contract of employment?

yes

If yes please answer the following sub-questions::

a) are express confidentiality clauses to protect classes of information broader than would anyway be protected by the employee's duty of confidence permitted; and

Yes. Pursuant to Article 148 of the Egyptian Civil Code, the contract is the law of the contracting parties. Accordingly, an express confidentiality clause to protect broader information is permitted.

b) how long after the end of employment does an ex-employee's duty of confidence in relation to trade secrets last in the absence of any express confidentiality clause?

There is no statutory regulation for the period for which an employee has a duty of confidence. Accordingly, the said question shall be subject to the discretion of the court and the nature of the information.

4) If not constrained by an enforceable non-compete agreement, may workers use knowledge acquired in the course of earlier employment in their new employment?

yes

If yes, is there any distinction between the types of knowledge they can use?:

General knowledge that does not have any relation with trade secrets.

5) Are certain employees subject to a higher obligation of confidentiality / non-use?

no

Aspect (ii) - Ensuring confidentiality during Court proceedings

6) What measures or provisions are available to preserve the secrecy of trade secrets during Court proceedings?

As a general rule, the Civil and Commercial Procedural Law No. 13 of 1968 ("**Civil and Commercial Procedural Law**") provides in Article 101 that hearings are open to public unless subject to the court's discretion or upon the parties' request, the court decides otherwise for the purposes of protecting the public order, preserving the public decency or the inviolability of the family, specially in economic courts.

For example, do trade secret proprietors have access to the following mechanisms to preserve the secrecy of a trade secret during proceedings (subject to the Court's discretion to allow/disallow such access):

a) restricted access to the hearing and / or evidence;

As mentioned above, the parties may request the hearing to be private. Also, regardless of the parties' request, such decision may be subject to the court discretion. As a general rule, evidence are accessible to all parties to the dispute.

b) disclosure of evidence only to the legal representatives of the opponent, but not to the opponent themselves;

Evidence is only permitted to the legal representative of the opponent.

c) non-confidential versions of documents being provided to all except authorised individuals;

In certain cases. For example, in competition and international trade investigations, which usually include market intelligence data, the investigation authorities may issue a non-confidential report which does not include the individualized data. Such non-confidential documents may be available for public. However, as abovementioned, other decisions (i.e. investigations or interrogation stage; or arbitration awards) are not made available for the public unless a non-confidential version of the decision is made.

d) only non-confidential parts of any judgment / decision publicly available?

With respect to judgments, the Civil and Commercial Procedural Law provides that the court judgments must be publicly announced, otherwise, judgments are considered null and void.

7) If such (or similar) measures are available, do they apply by default, or must the trade secret holder submit sufficient evidence to convince the Court that the information merits protection?

With regards to the secrecy of the hearing, such measure is subject to the court's discretion. Therefore, we believe that the trade secret holder shall submit evidence to convince the court that such information merits protection. However, regarding the judgment, as provided by the Civil and Commercial Procedural Law, courts are under the obligation to announce the ruling publicly. In other cases, it is a statutory obligation on the competent authority to keep the data and information transferred to it by the parties concerned in confidence; such as, interrogations before the Public Prosecution, competition and anti-trust investigations; and international trade remedies investigations.

8) Whether or not such measures are available, does the Court restrict the defendant's or claimant's use - after the proceedings have terminated - of the information they gain during the proceedings?

The Law does not provide any restrictions in this regard.

Aspect (iii) - Valuation of loss

9) Are damages available as a remedy for trade secret violation?

yes

If so please answer the following sub-questions::

a) how (if at all) is that value diluted by publication?

It should be noted that the value of trade secrets are due to their secret nature. However, quantifying the dilution and its effect on the value of trade secrets is subject to the discretion and evaluation of the court based on the circumstances.

b) how are those damages quantified? Specifically, is allowance made for loss of profits; unjust enrichment; and /or what the trade secret holder would or might have charged as a reasonable royalty fee or licence?

According to the Civil Law, if damages are not quantified in the contract or prescribed in the law, it shall be subject to the court's discretion. The amount of damages shall include the losses suffered by the trade secret holder as well as the profits of which he has been deprived, provided that the damages are the normal result of the infringement or violation of trade secret.

c) can damages be awarded for moral prejudice suffered by the trade secret holder? If so, how is moral prejudice defined, and how are such damages quantified?

yes

Please comment:

Damages shall include as well moral prejudice suffered by the trade secret holder. According to the Egyptian Jurisprudence, moral prejudice is defined as harm caused to the feelings, honor and dignity of a person. Also, it shall be noted that the quantification of damages for moral prejudice are subject to the discretion of the court.

d) If so, how is moral prejudice defined and how are such damages quantified?

Please refer to our answer in (c) above.

#### Aspect (iv) - Proving infringement

10) What elements must be proved to establish violation of a trade secret?

It shall be noted that Egyptian Law does not set out the necessary elements to prove the violation of trade secrets. However, as a general rule, the Egyptian Evidence Law provides that the creditor must prove the obligation and the debtor must prove the satisfaction of the said obligation. Accordingly, the claimant/applicant is under the obligation to prove the violation occurred. Additionally, in compliance with Article 43 (1) of the TRIPS, the claimant must present reasonably available evidence sufficient to support the claim.

If the trade secret has a commercial nature, the Commercial Law states that commercial obligations, whatever their value, shall be proved by any means of evidence.

11) What additional elements must be proved (if any) for a trade secret violation in comparison to a breach of confidence, to the extent those are different types of violations?

No additional elements are required to prove the trade secret violation.

12) Can constructive knowledge of a trade secret by an ex-employee or a new employer be imputed, e.g. if the subject-matter of that ex-employee's work was closely linked to the trade secret?

yes

If so, in what circumstances? :

If the employee was closely linked to the trade secret in question.

13) Does your jurisdiction provide for discovery?

no

14) Does the burden of proof switch to the defendant if the applicant is able to demonstrate, to a certain level of probability, that there has been a violation?

no

15) Does your law provide for any other methods for securing evidence, such as seizures or ex parte measures?

no

16) Where seizure is available, for what purposes can it be used? To secure evidence, to prevent items entering into circulation or for other reasons?

The necessary conservatory measures shall be ordered to preserve the products and goods, subject to the claim on the merits, in their state.

## II. Policy considerations and proposals for improvements of the current law

Aspect (i) - Overlaps with restraint of trade

17) Should limits be placed on the protection of trade secrets to avoid unlawful restraints on trade?

no

If not, why?:

At the outset, as mentioned above, under the Egyptian laws, protection of trade secrets are not viewed as unlawful restraints on trade. Thus, additional limits should not be placed on protection of trade secrets. The reasoning for this is that, protection of trade secrets should enhance and encourage research and development and promote efficiency as means to competition in a market. Also, with protection of trade secrets, certain information and data (i.e. know-how) which may constitute the main capital and cornerstone of a business is secured against being exploited or abused by unauthorized parties and free riders.

18) Should different obligations of confidence / non-use apply to different employees? Why/why not?

Aspect (ii) - Ensuring confidentiality during Court proceedings

19) Should a defendant, who is sued unsuccessfully for a trade secret violation, and who learns of the trade

secret during the course of the litigation, be required to not use the trade secret after the proceedings? Why/why not?

We understand that the subject of this question is one trade secret; we also understand from "sued unsuccessfully" that the court decided that there is no trade secret violation. In this event, even if the court decided that there is no violation to trade secret, this shall not release the defendant from defendant's statutory liability not to use such trade secret after the proceedings.

20) Should such obligations of confidentiality attach to information that the defendant developed independently prior to the trade secret proceedings, or develops independently after the trade secret proceedings? Why/why not?

No. The defendant who developed independently the trade secret shall not be subject to the confidentiality obligation, as the said defendant did not violate or seek to violate such trade secret by illegal means.

Aspect (iii) - Valuation of loss

21) Should damages as a remedy be available by default, or only where injunctive relief is (a) not possible, (b) adequate, or (c) not necessary? If by default, why?

no  
If not please comment.:

Damages cannot be available by default.

Aspect (iv) - Proving infringement

22) Should constructive knowledge of a trade secret by an ex-employee be imputed to their new employer?

yes  
If yes, in what circumstances? :

Yes. Constructive knowledge of a trade secret may be imputed by an ex employee to their new employment in case of evidence.

23) Availability of pre-action evidence orders and seizure orders.

a) Should pre-action evidence preservation orders be available?

yes  
If so, should the hearings to decide whether or not to grant them be able to take place ex parte?:

Please refer to our answer of Question 15 above.

b) Should pre-action evidence seizure orders be available?

yes  
If so, should the hearings to decide whether or not to grant them be able to take place ex parte?:

Please refer to our answer of Question 15 above.

24) What if the claimant learns of new trade secrets (of the defendant) during the course of a seizure?

In that case, the defendant will have the right to claim damages in case of the trade secret violation by the claimant who should be under the obligation not to disclose such trade secret. Also, please refer to answer of Question 19 above.

### III. Proposals for harmonisation

25) Is harmonisation in this area desirable?

Yes

If yes, please respond to the following questions without regard to your national or regional laws. Even if no, please address the following questions to the extent you consider your national or regional laws could be improved.

Aspect (i) - Overlaps with restraint of trade

26) Please propose principles for the circumstances in which trade secret enforcement actions should fail, because such actions would be de facto restraints of trade.

The principles that a court of law should apply in this case are:

- Essentiality of trade secret to the development of the business;
- Contrary with Law and Public Order;
- Results in hampering technological developments of other parties.

27) What relief should courts give when a trade secret violation has occurred or is about to occur, but an enforcement action is barred as a restraint of trade?

If the court decides that the protection of trade secret is a restraint of trade, it should regard the violation as an unfair competition action.

28) Should employees subject to a stricter obligation of confidentiality be released from that duty in certain circumstances? If so, in what circumstances?

Yes, if employee developed the trade secret independently.

Aspect (ii) - Ensuring confidentiality during Court proceedings

29) What protection for trade secrets should be available during Court proceedings, and what conditions should be satisfied for that protection to be given?

Limited access to confidential documents involving trade secrets and private hearings in which only the parties to the disputes and their counsels are allowed to attend. Also, a non-confidential version of the rulings in which protected trade secrets are not disclosed to the public may be adopted.

30) If an enforcement action fails (e.g. because the defendant had independently developed the secret



information and did not misappropriate it), what type(s) of confidentiality or non-use obligation, if any, should continue or cease to apply?

All types of confidentiality obligation should continue.

Aspect (iii) - Valuation of loss

31) Please propose the principles for quantifying damages for trade secret violations.

Actual harm, lost profit and expected revenue should be the criteria for quantifying the damages.

32) Should courts award moral damages?

yes

If so, how should they be quantified?:

Yes, only if such disclosure of trade secret caused defamation to the right holder or jeopardized its goodwill.

Aspect (iv) - Proving infringement

33) What measures to secure or preserve evidence should be available?

We do not envisage a measure other than seizure of evidence.

34) What restrictions should apply to the use of seized evidence by the claimant?

Seized evidence should be confidential.

Summary

Under Egyptian Law, trade secret protection is regulated under the Commercial Law No. 17 of 1999 ("**Commercial Law**"), Labor Law No. 12 of 2003 ("**Labor Law**") and the Civil Law ("**Civil Law**"). Accordingly, the provisions of the said laws provide for a general legal protection to trade secrets and confidential information by binding the employees to keep confidential all the industrial and commercial secrets of work, and not to divulge such information. However, the abovementioned laws do not consider trade secret protection as a restraint of trade.

It is worth noting that Egyptian Law does not provide any explicit protection regarding knowledge acquired during the employment relationship. Accordingly, the criteria for protection will be whether such knowledge is general skills, which is not subject to any protection; or, such knowledge results in acquiring trade secrets, then it shall fall under the scope of the protection provided to trade secrets.

Furthermore, the Egyptian Law ensures the confidentiality of trade secrets during court proceedings by providing the possibility for the court to hold private hearings upon its own discretion or upon the parties' request. Also, Egyptian Law authorizes the court to issue provisional orders in an ex parte procedures that must be followed by initiating the case within eight days from the date of issuance of such order, in case the violation of a trade secret is established.

Pursuant to the Egyptian Law, damages - which may include as well moral damages - are available as a remedy of trade secret violation in case such violation is established.

Please comment on any additional issues concerning trade secrets you consider relevant to this Working Question.

None

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