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Trade Secrets

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1. LEGAL FRAMEWORK

1.1 Sources of Legal Protection for Trade Secrets

The primary source of legal protection for trade secrets in Sweden is legislation. The Trade Secrets Act (SFS 2018:558) came into force 1 July 2018 and implemented Directive 2016/943/EU of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Trade Secrets Directive). The previous legislation governing trade secrets in Sweden, the Trade Secrets Act (SFS 1990:409), remains applicable to the misappropriation of trade secrets that took place prior to 1 July 2018.

The Trade Secrets Directive will be an important source for interpreting the Trade Secrets Act, as well as the CJEU's preliminary rulings on the Directive.

The secondary source of legal protection for trade secrets in Sweden is case law, mainly from the Supreme Court, the Patent and Market Court of Appeal and the Labour Court, as well as the preparatory works. However, the latter may be expected to be less relevant than normally in Swedish legal tradition as it is ultimately the Trade Secrets Directive and the CJEU that will have an impact on the construction of the Trade Secrets Act.

1.2 What Is Protectable as a Trade Secret

There are many different types of information that may be protected as trade secrets under the Trade Secrets Act. This information may consist of complex information of a technical nature, or even simple facts of a commercial or administrative nature. The information is often documented, but undocumented information (ie, the knowledge of a person) may also be protected as a trade secret.

Two "types" of information may explicitly not be protected as a trade secret according to the legal definition in Section 2 of the Trade Secrets Act:

- experience and skills which an employee has gained in the normal course of their employment; and
- information regarding a matter that constitutes a criminal offence or other serious wrongdoing.

All other types of information may, in principle, qualify for trade secret protection, as long as the information fulfils the requirements for protection in Section 2.

1.3 Examples of Trade Secrets

No specific types of information are enumerated as examples of protectable trade secrets in the Trade Secrets Act.

However, as Sweden has had trade secret legislation since 1919, there is a significant body of case law on what specific types of information are generally protectable as trade secrets – for example, a bank's internal documents concerning when to issue credits to customers (NJA 1999 s. 469), a business plan, marketing plan and financial plan for a new business (NJA 1998 s. 663) and the technical design documents for a boat (RH 2002:11).

Modern Swedish trade secret jurisprudence has granted a wide variety of different types of information protection as a trade secret. Customer information broadly speaking appears to be the most common type of trade secret being litigated in Sweden currently – eg, customer databases with contact information (NJA 2001 s. 362). The preparatory works to the Trade Secrets

Act also specifically mention market research, market planning, pricing calculations and plans for advertising campaigns as typical examples of information that commonly constitutes trade secrets. Source codes and computer programs may also constitute trade secrets.

1.4 Elements of Trade Secret Protection

The Trade Secrets Act offers trade secret protection to information that qualifies for protection according to Section 2.

- The information must concern the business or operational circumstances of a trader's business or a research institution's activities – the definition of business is broad and covers all natural and legal persons that professionally run an operation of an economic nature, regardless of whether or not it aims to make a profit. The definition of research institution covers both public and private research institutions and is assumed to be broad but has not yet been the subject of case law (following the implementation of the Trade Secrets Directive in 2018).
- The information must, either as a body or in the precise configuration and assembly of its components, not be generally known or readily accessible to persons who normally have access to information of the type in question – information unrelated to the business or institution can thus not constitute a trade secret. However, under certain circumstances, generally known information can be organised in a way that qualifies it for protection as a trade secret – eg, a large list of customers with information that is in principle publicly available. It also means that the group of people with access to the information has to be limited, definable and closed in the sense that the people with access to it cannot be unreservedly authorised to use or pass it on.
- The trade secret holder must have taken reasonable steps to keep the information secret – reasonable steps can be that the trade secret holder has established confidentiality agreements, rules of internal procedure and/or special access rights to the information.
- The disclosure of the information must likely lead to competitive injury to the holder, in order for the information to qualify as a trade secret – the trade secret information must thus have objective commercial value on account of the information being secret.

1.5 Reasonable Measures

"Reasonable steps" as a prerequisite for trade secret protection was introduced in 2018 with the Trade Secrets Act, implementing the Trade Secrets Directive. The previous Swedish legislation did not explicitly require reasonable precautions, and it was commonly considered sufficient that people with access to the information understood from its character that it was intended to be a trade secret. Swedish trade secret case law generally reflected this understanding (NJA 1998 s. 663).

According to the preparatory works to the Trade Secrets Act, reasonable steps demands that the trade secret holder has been active in protecting the information, but the activity does not have to be extensive and depends largely on the kind of information. Reasonable steps can be instructions on how trade secrets should be handled in the workplace (including confidentiality and non-disclosure agreements), or that trade secrets are only accessible to those with special competence in the organisation. However, it is not enough that employees or others should just understand from the character of the information that it should be kept confidential. The Swedish legislator has understood the requirement as one of substance rather than form.

There is not yet much case law on what concrete actions constitute reasonable steps in this regard. However, courts have so far considered confidentiality agreements with employees and franchisees to constitute reasonable steps (District Court judgment given on 26 of March 2020 in case T-2921-18). Confidentiality clauses in employment agreements have also been considered reasonable steps (Labour Court judgment given on 13 January 2021 in case B 42/20, AD 2021 nr 1).

Ultimately, it will be the CJEU that decides what is required by trade secret holders to protect the confidentiality of their information.

1.6 Disclosure to Employees

The disclosure of a trade secret from the trade secret holder to an employee does not affect the trade secret's protection, as long as the information still qualifies for protection according to Section 2. However, the employees who are given access to the information must not be permitted to freely disclose or use the information.

In order to guarantee that the disclosure of a trade secret to an employee does not negatively impact the protection of the trade secret, the trade secret holder should take active measures to make clear to the employee that the trade secret information is secret and may not be shared. This can be done through written or verbal instructions (with documented written instruction being preferable), and through confidentiality clauses in employment agreement.

A rule of thumb is that the secret should not be available to employees other than those who need it in order to conduct their work.

Similarly, the disclosure of a trade secret from the trade secret holder to a consultant or another third party does not affect the trade secret's protection, as long as the information still qualifies for protection according to Section 2. As a practical matter, however, the more and wider the information is shared, the higher the demands for secrecy become, and the stricter the confidentiality and non-disclosure agreements should be drafted in order to minimise risk to the integrity of the trade secret.

1.7 Independent Discovery

Independent discovery and reverse engineering are natural parts of product and service development in many industries and markets, and are recognised as such in the structure and provisions of the Trade Secrets Act.

Independent discovery and reverse engineering should, in principle, not affect the existence and possible protection of trade secrets. For example:

- Company A is the trade secret holder of certain information about a technical solution to detect fissures in bridges;
- Company B's independent discovery of similar or even theoretically identical information means that Company B may use this information in any way relevant under the Trade Secrets Act, including by using the information or disclosing it freely;
- Company A has developed and sells a sensor to detect fissures in bridges; the sensor functions according to a system that is a trade secret and known only by Company A;
- Company B is allowed to conduct reverse engineering on the sensor (unless Company B has agreed contractually not to do so); Company B may use the information accessed through reverse engineering freely.

In the example above, Company B's act of independent discovery, or reverse engineering, does not affect that information's possible protection as a trade secret for the trade secret holder Company A, as long as Company B keeps the

information secret. But if Company B decides to disclose the information freely, this means Company A's trade secret no longer qualifies for protection under Section 2 since the information is "generally known". The same information may therefore, in theory, be protected as a trade secret by several different trade secret holders, as a result of the companies' independent research and development or reverse engineering.

It may often be advisable to document independent discovery or reverse engineering work in order to be able to establish that this was indeed the way in which the information came to be known by Company B, rather than through misappropriation of trade secrets from Company A.

1.8 Computer Software and Technology

Neither computer software, source code nor technology broadly speaking enjoy any kind of unique protection in the Trade Secrets Act. However, the Swedish legislator is currently considering new revisions to the Act to specifically protect "technical trade secrets" that may correspond to technology (DS 2020:26 *Bättre skydd för tekniska företagshemligheter*). This new legislation only concerns criminal sanctions against trade secret misappropriation and has not yet been adopted into law.

1.9 Duration of Protection for Trade Secrets

Trade secret protection under the Trade Secrets Act has no time limit. The information retains its protection as a trade secret as long as the qualifications in Section 2 are fulfilled.

The effect of the disclosure of a trade secret depends on who discloses the trade secret and how it is disclosed.

If the trade secret holder discloses information without conditioning the disclosure on the trade secret not being disclosed further (ie, through a confidentiality or non-disclosure agreement), the information no longer qualifies for protection under Section 2 since the holder has not taken reasonable steps to keep the information secret. This applies regardless of whether the trade secret was disclosed to one person or more broadly, and regardless of whether the disclosure was accidental or intentional.

If someone other than the trade secret holder discloses the information, the information does not lose its protection unless and until it becomes "generally known" in the relevant circles according to Section 2. There is no specific grace period in this regard, and trade secret holders should act with all due haste when finding evidence of third party illegal disclosure in order to make sure further disclosure is stopped before the information becomes generally known.

Trade secret information may be shared between a trade secret holder and its employees, consultants or business partners and still retain its status as a trade secret, through a "controlled disclosure" if there are contractual agreements in place (confidentiality and non-disclosure agreements) that guarantee that the Section 2 qualifications for trade secret protection are still met.

1.10 Licensing

Trade secrets may be commercialised, for example through licensing agreements between the trade secret holder and a licensee. However, there are no such explicit provisions in the Trade Secrets Act, and the licensor and licensee must instead rely on general principles when entering into commercial relations concerning trade secrets.

For the specific purpose of protecting and commercialising trade secrets, the licensing agreement should contain rigorous confidentiality and non-disclosure clauses to make sure that the secret is not further disclosed (which could lead to the trade secret information becoming "generally known" in the relevant field), and should include detailed routines for how the licensee should keep the information secret in its business (in order for the trade secret holder/licensor to be able to show that reasonable steps have been taken to protect the information).

1.11 What Differentiates Trade Secrets from Other IP Rights

Trade secrets are not considered a traditional IP right in Sweden and there are many differences between trade secret protection and protection as an IP right (patent, copyright, trade mark, design, etc). The most relevant of these differences are as follows.

- An IP right constitutes an exclusive right to use, for example, a patented invention (in a certain country, during a certain time period). Trade secret protection on the other hand only protects against the misappropriation of trade secrets and does not, for example, protect against independent discovery and reverse engineering.
- IP rights have time limits (although some rights can be extended indefinitely). A trade secret has no time limit as long as the qualifications in Section 2 of the Trade Secrets Act are fulfilled.
- Many IP rights need to be registered with a national Patent and Trademark Office, or with an international body like the EUIPO. This is not the case for trade secrets, the protection of which is created without any formalities.
- The Trade Secrets Act does not offer trade secret holders many of the legal tools included in Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Enforcement Directive), such as infringement investigations, which have been implemented in all national IP laws. This means that many of these tools cannot be used in litigation solely concerning trade secret misappropriation.
- Litigation concerning trade secrets is not under the exclusive jurisdiction of the Swedish specialist IP courts, the Patent and Market Court and the Patent and Market Court of Appeal.

1.12 Overlapping IP Rights

An act of misappropriation of trade secrets often simultaneously constitutes an act of IP infringement. As an example, an employee's disclosure of customer information (that constitutes a trade secret) may also constitute copyright infringement if the customer information constitutes a database work or sui generis database and a copy of the database is made in the act of disclosure, or if the disclosure constitutes a making available to the public under the Copyright in Literary and Artistic Works Act (SFS 1960:729).

It is possible to assert trade secret rights in combination with other intellectual property rights in litigation, according to Chapter 14 of the Code of Judicial Procedure. In fact, this is commonly done in Swedish litigation. If the trade secret misappropriation and IP rights infringement is connected, it would be considered highly unusual not to seek to have the cases handled jointly in this manner, and the court may under certain circumstances decide on joint handling even if a party disagrees.

In practice, the ability to combine several rights in the same proceedings may be curtailed by conflicting exclusive jurisdictions such as that of the Labour Court and the IP courts.

1.13 Other Legal Theories

It is possible to bring claims relating to trade secrets, broadly speaking, according to other legal theories than trade secret misappropriation under the Trade Secrets Act.

Fiduciary Duty of an Employee

Employees have a duty of loyalty towards their employer, so it is possible to bring an action against employees that disclose information in order to damage their employer. This is possible even if the information does not qualify as a trade secret. However, the duty of loyalty ends with the employment. An action on the basis of a breach of the fiduciary duty can therefore not be brought against a former employee that discloses information to damage the employer after the employment has ended. Instead, such action has to be brought on the basis of trade secret misappropriation.

Contract

It is also possible to act on the basis of legally binding agreements, such as confidentiality and non-disclosure agreements or exit agreements, if the other party has breached the agreement and that breach constitutes a misappropriation of trade secrets.

1.14 Criminal Liability

Two acts of trade secret misappropriation are criminalised under the Trade Secrets Act.

- According to Section 26, corporate espionage is the act whereby someone intentionally and unlawfully obtains access to a trade secret. This generally excludes employees, consultants and business partners who have lawful access to the information, but someone that accesses the information without permission is, in principle, subject to the sanction. Aggravated corporate espionage can result in imprisonment of up to six years, but such penalties are highly unusual.
- According to Section 27, unlawful dealing in a trade secret is the act whereby a person intentionally acquires a trade secret, with knowledge that the person providing it, or any person prior to him, has obtained access to it through corporate espionage. Aggravated unlawful dealing in a trade secret can result in imprisonment of up to four years, but again such penalties are highly unusual.

Two additional criminal sanctions for the misappropriation of trade secrets are currently contemplated for inclusion in the Trade Secrets Act in DS 2020:26 *Bättre skydd för tekniska företagshemligheter*: the unlawful use of trade secrets and the unlawful disclosure of trade secrets. In both cases, the new criminal sanctions target criminal activity by a person with legal access to the trade secret, thus supplementing the existing criminal provisions that only target criminal activity by a person without legal access to the trade secret.

Additionally, under certain circumstances trade secret misappropriation may fall under the general criminal provision breach of trust in Chapter 10 Section 5 of the Swedish Criminal Code. Breach of trust is the act whereby a person in a position of trust – usually a high ranking official – abuses their position of trust and thereby causes a loss for the principal. Applied specifically to trade secret misappropriation, the abuse has to be in direct relation to the position of trust and the trade secret has to be accessed as a result of the person's position. Aggravated breach of trust can result in imprisonment of up to six years, but such penalties are highly unusual.

There is no formal bar against a trade secret holder pursuing both civil and criminal claims simultaneously – for example, a criminal case against the person who committed corporate espionage by disclosing a trade secret to a third party competitor, and a civil case against

the third party competitor for the misappropriation of trade secrets through subsequent use of the disclosed trade secret. It is highly uncommon for parties themselves to prosecute a claim of criminal liability. Instead, suspected crimes are reported to the authorities. The crimes discussed above fall within the purview of the public prosecutors.

1.15 Extraterritoriality

The Swedish courts have jurisdiction to hear a claim of misappropriation abroad if the defendant is domiciled in Sweden. Under Art 7 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), the courts may have jurisdiction even if the defendant is not domiciled in Sweden but that depends on the facts of the case. A claimant who wishes to bring a claim based on misappropriation abroad will generally not be required to do anything other than if the claim pertained to misappropriation in Sweden. Under the applicable conflicts of law rules, Swedish law may apply to misappropriation that takes place abroad – for example, if both the misappropriating party and the trade secrets holder have their habitual residence in Sweden.

There is also a measure of extraterritoriality in the misappropriation concept. Under Section 3 of the Trade Secrets Act, the import or export of goods, the design, characteristics, functioning, production process or marketing of which benefits significantly from a misappropriated trade secret, is an independent act of misappropriation.

2. MISAPPROPRIATION OF TRADE SECRETS

2.1 The Definition of Misappropriation

According to Section 3 of the Trade Secrets Act, misappropriation of a trade secret is when someone does the following without the consent of the trade secret holder:

- accesses, appropriates or otherwise acquires the trade secret;
- uses the trade secret; or
- discloses the trade secret.

The first type of misappropriation concerns different ways in which a person can obtain the trade secret information for their own use. “Accessing” and “otherwise acquiring” a trade secret are broad terms that cover various circumstances where trade secret information is intentionally obtained by someone who does not have lawful access to the information (corresponding to the criminal sanction corporate espionage). “Appropriating” a trade secret in this context means that a person who already has lawful access to the trade secret information (for example, by being an employee) appropriates that information by making it his own – for example, by copying trade secret information from a computer at work to a USB drive and transferring it to a personal computer at home (without having any work-related reason to do so).

The second type of misappropriation concerns someone other than the trade secret holder commercially using the trade secret in their own business. An employee using the information privately therefore falls outside the scope of use. Use of a trade secret also covers the circumstance where a person manufactures goods, the design, characteristics, functioning, production process or marketing of which significantly benefits from a misappropriated trade secret. The same applies when a person offers such goods

for sale, places them on the market, or imports, exports or stores them for these purposes.

The third type of misappropriation is when someone discloses a trade secret to a third party.

Under Section 4 of the Trade Secrets Act, misappropriation is only actionable if it is unjustified. This is a broad exception meant to allow the use and disclosure of trade secrets where this objectively appears justified. Examples of this include the use or disclosure of trade secrets in court proceedings where doing so is necessary to protect rights, providing documents or information where there is a legal obligation to do so, and whistle-blowing.

2.2 Employee Relationships

Employees have a fiduciary duty towards their employer, but it is advisable for employees to sign confidentiality undertakings with respect to the employer's information.

The misappropriation of trade secrets by an employee is, in principle, dealt with in the same way as a misappropriation by a third party under the Trade Secrets Act.

Both an employee and a third party may misappropriate in various ways according to Section 3, even if certain kinds of violations are more commonly carried out by employees (misappropriation through appropriation) while other kinds of violations are more commonly carried out by a third party (misappropriation through use).

There are, however, important differences when dealing with employees' misappropriation. As for the employee's liability, under Section 7, an employee who intentionally or negligently misappropriates a trade secret of which they learned in the course of their employment, under such circumstances that they knew or should have known that they were not permitted to disclose it, shall compensate the employer for the loss incurred as a result of the action. Importantly, the Swedish trade secret legislation has traditionally been understood to mean that an employee is allowed to use trade secret information in any way he or she chooses after leaving the employment. This follows from Section 7 second paragraph, which states that an employee is only liable for misappropriation through use or disclosure following the termination of employment if there are "exceptional reasons" for holding the former employee liable.

Exceptional reasons may, however, be a somewhat misleading term as such exceptional reasons are often found to be established in trade secret litigation – for example, if the employee planned and prepared their subsequent misappropriation during their employment.

Additionally, the provision for exceptional reasons in Section 7 second paragraph is not legally binding if the parties have agreed otherwise in contract – for example, by entering into a customary non-disclosure agreement that clearly prohibits the misappropriation of trade secrets in the time after the termination of the employment.

2.3 Joint Ventures

There is no specific obligation between joint venturers in respect of trade secrets under the Trade Secrets Act. The general rule on trade secrets shared in confidence applies, if the requirements set out in that rule are met.

However, joint ventures commonly lead to the creation of jointly held trade secrets, which sometimes present complicated legal questions since such joint control is not governed by the Trade Secrets Act and there is limited guidance in Swedish law. Parties should thus endeavour to agree from the outset on how any jointly held secrets should be treated.

A party that enters into a joint venture and agrees with the other party that there is confidentiality between the parties does not have to repeat this every time a trade secret is disclosed in the course of the venture. The joint venturer is bound by the initial confidentiality agreement but the requirement of reasonable steps should be borne in mind and care should be taken to ascertain that the other party understands what information is confidential.

2.4 Industrial Espionage

Section 26 covers corporate espionage (see **1.14 Criminal Liability**).

3. PREVENTING TRADE SECRET MISAPPROPRIATION

3.1 Best Practices for Safeguarding Trade Secrets

As set out above, a trade secret holder must take reasonable steps to protect the information in order for it to qualify for trade secret protection.

Basic best practices recognised in different industries and markets in Sweden to ascertain that reasonable steps are followed include the following:

- including confidentiality clauses in employment agreements, consultancy agreements and commercial agreements like joint ventures;
- educating and instructing employees, consultants and business partners on how trade secrets are to be handled in the workplace, with a special focus on digital storage and access; compartmentalising different levels of trade secret information in internal data systems and physical collections, and only granting employees, consultants and business partners access to trade secrets at the different levels if access is strictly needed; and
- keeping records on who has access to information, especially tracking data traffic.

3.2 Exit Interviews

Exit interviews for departing employees are common in certain industries, especially for high-level employees who are likely to have access to significant amounts of trade secrets.

Since written assurance of confidentiality cannot be required from the departing employee at the time of the exit (ie, such assurances cannot be forced on the departing employee in order to "allow" the employee to leave), the exit interview should be viewed as a reminder to the employee of his or her existing obligations towards the employer post-termination. It is therefore important that confidentiality clauses are included in the employment agreement from the start of employment, or as soon as possible. In the context of exit interviews, it is not prohibited to ask about the employee's new position.

4. SAFEGUARDING AGAINST ALLEGATIONS OF TRADE SECRET MISAPPROPRIATION

4.1 Pre-existing Skills and Expertise

The Trade Secrets Act recognises an important distinction between an employee's own general knowledge and skill and trade secrets belonging to the employer.

Section 2 second paragraph explicitly states that experiences and skills gained by an employee in the normal course of their employment cannot be a trade secret. In the literature, such personal experiences and skills are characterised by not being transferable through instructions, while a trade secret is a piece of information that

can easily be transferable to another employee through instruction. Generally, personal experiences and skills are also not specific to the workplace.

There is no doctrine of "inevitable disclosure" in Swedish trade secret jurisprudence. There is no indication that a court would ever assume that a former employee will misappropriate the former employee's trade secrets in his or her new employment, and such a claim would go against the foundational principles of Swedish trade secret and labour law.

Employers will instead have to rely on non-disclosure and non-compete clauses in high-level employees' employment agreements to protect their interests in this regard. Concerning non-compete clauses specifically, Swedish courts apply these restrictively and generally do not allow them to last longer than 18 months (and in many cases, 18 months would be considered wildly excessive).

4.2 New Employees

Swedish employers may use the following best practices to minimise the likelihood that they will be subject to a trade secret misappropriation claim from a new employee's former employer:

- check whether the employee is bound by any non-disclosure or non-compete agreement;
- if the company has entered into non-compete agreements with employees that are not enforceable (because the duration is too long or the scope is too broad), the employee and the new employer may consider bringing this up with the former employer in order to minimise the risk of subsequent litigation; and
- be flexible in structuring the new employee's work during the onboarding process, or longer, if any legal or public relations risks could be construed from the employee's previous engagement.

5. TRADE SECRET LITIGATION

5.1 Prerequisites to Filing a Lawsuit

According to the Trade Secrets Act or other Swedish law, there are no prerequisites or preliminary steps that a trade secret holder must take before taking civil action based on the misappropriation of trade secrets and filing a lawsuit.

If the trade secret holder is represented by a member of the Swedish Bar Association (*advokat*), the applicable ethics rules dictate contacts between the lawyer and defendant before a suit is filed, in order to let the defendant give its position on the matter (commonly through cease and desist letters). However, the ethics rules do not demand such contacts in matters where a preliminary injunction is sought ex parte, for example, since contacting the defendant in such situations would rob the ex parte injunction of its intended effect.

5.2 Limitations Period

There are limitation periods under Section 24 of the Trade Secrets Act.

A claim for damages under the Trade Secrets Act may only pertain to loss that occurred during the five years immediately preceding the commencement of the action. The limitation is counted from when the actual loss occurred and not when the trade secret holder found out about the loss. Damages for losses suffered prior to the five years are barred.

A claim for an injunction or other measures under the Trade Secrets Act must be commenced within five years of the date on which the trade secret holder became aware, or should have become aware, of the misappropriation or imminent misappropriation of the trade secret on which the action is based. When the holder

should have become aware of the misappropriation is decided on the basis of how the trade secret was misappropriated and what control measures the holder could have taken to realise the misappropriation.

These two different limitations do not necessarily coincide. An injunction claim could, for example, be barred because the misappropriation happened more than five years ago, and the holder should have been aware of this, while it is still possible to claim damages for losses occurred within the five-year period if such losses occurred continuously over the years.

5.3 Initiating a Lawsuit

Following the cease and desist phase (if applicable), trade secret owners initiate a lawsuit simply by filing a summons application with the applicable court. As a practical matter, however, there are several issues that a trade secret holder should tend to before filing a lawsuit.

The trade secret holder or its legal representative should:

- pay the court fees;
- file a physical power of attorney with the summons application (if applicable); and
- file a physical bank guarantee for costs incurred due to a wrongly issued preliminary injunction (if applicable).

A Swedish court will generally not issue a summons or a preliminary injunction, nor make other procedural decisions, before the above documentation has been presented in physical form to the court.

5.4 Jurisdiction of the Courts

Different Swedish courts have jurisdiction in cases concerning the misappropriation of trade secrets under the Trade Secrets Act, depending on the parties involved and the subject matter of the lawsuit.

Courts of General Jurisdiction

The district court at the domicile of the defendant has general jurisdiction in cases of misappropriation of trade secrets where the defendant is not a current or former employee of the claimant.

The district court handles the case according to the normal Swedish procedural rules in the Code of Judicial Procedure. The district court's judgments are appealed to the competent Court of Appeal (leave to appeal is needed and commonly granted), with the Supreme Court being the final instance (leave to appeal is needed and is generally not granted).

Labour Court (as the Court of First Instance)

The Labour Court in Stockholm has exclusive jurisdiction in cases of misappropriation of trade secrets where the defendant is a current or former employee of the claimant, and the employer is bound by a collective labour agreement with a trade union that the employer entered into for itself. The Labour Court's judgment cannot be appealed.

District Court (Labour Dispute)

The district court at the domicile of the defendant has jurisdiction in cases of misappropriation of trade secrets where the defendant is a current or former employee of the claimant, and the employer is not bound by a collective labour agreement with a trade union that the employer entered into for itself.

The district court handles the case in accordance with the procedural rules in Swedish labour law. The district court's judgments are appealed to the Labour Court (leave to appeal is needed and commonly granted).

Patent and Market Court

Claims for the misappropriation of trade secrets are not subject to the exclusive jurisdiction of the Swedish specialist IP courts, the Patent and Market Court and the Patent and Market Court of Appeal in Stockholm. It is, however, not uncommon for cases concerning the misappropriation of trade secrets to also concern IP rights infringement (most commonly copyright or patent infringement), which are under the exclusive jurisdiction of the specialist courts.

IP rights infringement claims may be handled jointly with claims for the misappropriation of trade secrets before the specialist courts, as long as the defendant is not a current or former employee. In such cases, the Patent and Market Court's judgments are appealed to the Patent and Market Court of Appeal (leave to appeal is needed and commonly granted), with the Supreme Court being the final instance (leave to appeal is needed and is generally not granted).

5.5 Initial Pleading Standards

The pleading standards applicable to claims for the misappropriation of trade secrets in Sweden are generally the same standards applicable in other Swedish litigation, including IP litigation.

There are few formalities under Swedish procedural law that apply to a party's calling of evidence. Generally speaking, all kinds of evidence can be called by the parties, and freely evaluated by the court.

A trade secret owner may allege facts in a summons application based on information and belief (according to the authors' understanding of this common law legal term), without substantiating every fact with evidence, especially during the preliminary injunction phase. There are no formal limitations on what can be alleged but if evidence is not offered the court may ultimately reject the claim on the merits. There may be sanctions in very serious cases of unsubstantiated claims.

5.6 Seizure Mechanisms

In cases concerning the misappropriation of trade secrets, the court can order documents or objects containing misappropriated trade secrets to be handed over to the trade secret holder, according to Sections 17-20. The court can also order product recalls or have the products or documents destroyed, modified or subjected to any other measure aimed at preventing misappropriation. The court can only issue seizure orders based on Sections 17–20 in a final judgment.

During the preliminary injunction phase, the claimant must instead rely on the general seizure rules in the Code of Judicial Procedure. According to Chapter 15 Section 3, if a person shows probable cause to believe that he or she has a claim against another (in this case, a claim for the misappropriation of trade secrets), and if it is reasonable to suspect that the opposing party, by carrying on a certain activity, will hinder or render more difficult the exercise of the applicant's right, the court may order seizure measures suitable to secure the applicant's right. The general seizure rules are complicated to apply and may not be used as a substitute to an infringement investigation to simply secure evidence of the misappropriation of trade secrets (NJA 2017 s. 457).

5.7 Obtaining Information and Evidence

There is no discovery phase in Swedish litigation. Instead, there are two legal mechanisms available to obtain information and evidence to support a trade secret claim.

Document Production under Chapter 38 Section 2 of the Code of Judicial Procedure

Document production (edition) is used to obtain written evidence once a claim has been

brought. Anybody holding a written document that is assumed to be of importance as evidence can be ordered by the court to produce it. It is required that the party holds a specific document of importance for the case, so specific, identified documents may be sought but categories of documents can be sufficiently identified if properly delimited. Trade secret information is privileged in this respect, and a court will only order the production of trade secret documents if there are extraordinary reasons for the order. The courts are generally restrictive when it comes to breaking through the privilege.

Infringement Investigations According to Applicable IP Legislation

Infringement investigations, as prescribed in the Enforcement Directive, are not available under the Trade Secrets Act and are thus not (strictly speaking) available to support claims for the misappropriation of trade secrets. Infringement investigations are available in Swedish IP legislation, however. Since an act of misappropriation of trade secrets is often simultaneously an act of IP rights infringement, infringement investigations based on IP rights infringement nonetheless often have practical use also for claims for the misappropriation of trade secrets. An infringement investigation is granted by the court if the reasons for the measure outweigh the inconveniences and other harm it may cause the defendant.

Fact gathering outside the scope of these mechanisms is possible, but caution should be taken, since corporate espionage is criminalised (fact-finding missions should be limited to publicly available information about the defendant).

5.8 Maintaining Secrecy While Litigating

Documents received and produced by Swedish courts are generally publicly available to anyone that requests them. Similarly, hearings and trials before Swedish courts are open to the public. There are mechanisms available under the Trade Secrets Act as well as the Code of Judicial Procedure to ensure that trade secrets are kept secret in litigation and not disclosed to the public.

A party that discloses trade secret information in submissions to the court may request the court to mark the submission as secret, and not make the document publicly available, according to the Public Access to Information and Secrecy Act (2009:400). Similarly, a party that plans to disclose trade secret information in a public hearing or trial may request the court to have the hearing behind closed doors. The court usually grants such requests, and trade secrets disclosed in this manner are covered by secrecy.

There is, however, no possibility under the applicable Swedish legislation to keep the adverse party from having access to submissions that include trade secrets, or from being part of the hearing where trade secret information is discussed. In theory, access may be curtailed with respect to how the adverse party is given access. This power is fairly new, and the courts are expected to be very restrictive in its application.

A party or party representative who intentionally or negligently uses or discloses a trade secret learnt as a result of court proceedings is liable for losses resulting from the disclosure or use, according to Section 8 of the Trade Secrets Act. The same goes for anyone participating in a court proceeding behind closed doors and thereafter intentionally or negligently revealing trade secrets learnt during the proceedings.

5.9 Defending against Allegations of Misappropriation

There are several defences against allegations of trade secret misappropriation, with the most common being lack of protection (ie, the infor-

mation in question does not qualify as a trade secret), the absence of misappropriation, consent, that misappropriation was justified and, with respect to damages, that the necessary subjective element is not met, as well as various objections to the quantum of damages.

The burden of proof that the trade secret has been misappropriated rests with the claimant. In cases where claims for the misappropriation of trade secrets fail, it often comes down to a question of evidence and whether the claimant has been able to substantiate the alleged facts.

5.10 Dispositive Motions

According to Chapter 44 Section 2 of the Code of Judicial Procedure, courts can issue a default judgment (*tredskodom*) fully granting the claimant's claims if the defendant does not file a response to the summons application or does not attend court-ordered hearings.

Courts can only grant such default judgment motions if the case is amenable to out-of-court settlement. If any of the claims made by the claimant are of a nature that the parties cannot fully dispose of through contract, a dispositive motion cannot be issued. The administrative fine with which injunctive relief is combined is an exercise of public authority and is not amenable to settlement. If injunctive relief is sought, it will accordingly not be possible to grant a default judgment.

The courts have no power to grant the claim summarily if the defendant participates in the proceedings.

5.11 Cost of Litigation

Trade secret litigation generally involves significant amounts of evidence and legal argumentation, and may also include expert evidence. Trade secret litigation rarely costs less than EUR100,000 per instance, and often more.

According to Chapter 18 Sections 1 and 8 of the Code of Judicial Procedure, the losing party shall compensate the winning party's reasonable litigation costs, fully covering the costs of preparation for trial and presentation of the action, including fees for representation and counsel. In practice, this means the winning party is often awarded about 75–100% of its actual costs, which is considered high from an international perspective.

Members of the Swedish Bar Association (*advokat*) may not represent clients through a contingency fee arrangement, according to the applicable ethics rules.

Though a fairly new phenomenon on the Swedish legal market, litigation financing is available and is growing in relevance.

6. TRIAL

6.1 Bench or Jury Trial

The Swedish legal system does not use jury trials, except in cases concerning freedom of the press.

6.2 Trial Process

Litigation in Sweden generally follows the below procedure in cases concerning the misappropriation of trade secrets:

- summons application;
- defence;
- if applicable, preliminary injunction decided without a hearing. (If an ex parte injunction is sought, that is decided before the defendant is served the summons application.) A preliminary injunction may be appealed, commonly leading to a period of non-action at the first instance court while the injunction is being litigated;

- additional submissions;
- case management hearing – the court shall work actively for a settlement but if one cannot be reached the hearing is used to plan for the main hearing;
- if applicable, procedural decisions on the production of evidence, orders for information, etc;
- final submissions from the parties, with final lists of evidence; and
- final hearing.

Cases concerning the misappropriation of trade secrets may, in theory, be decided on the papers without a hearing but that requires that no witnesses are adduced and that neither party requests a hearing.

The proceedings are adversarial and not inquisitorial. In Sweden, witnesses give live testimony. The party calling the witness carries out a direct examination and the other party may cross-examine. The court may ask questions to the witnesses but normally only does so to confirm its understanding of answers given on direct or cross.

The hearing consists of three phases: opening statements where the facts and written evidence are presented; the verbal evidence phase in which testimony is given; and lastly the closing arguments.

Typical trade secret proceedings last about 12-18 months, or longer if the case involves significant amounts of evidence, at each instance.

6.3 Use of Expert Witnesses

Expert witnesses are allowed and commonly used in trade secret proceedings. Expert witnesses are generally called by a party and tasked to prepare an expert witness report, which the other party can comment on and call their own expert witness to counter, before the hearing. At the hearing, expert witnesses generally present their testimony like regular witnesses, but are invited to more freely present their findings (instead of only answering questions from counsel) before being cross-examined by the other party. There are no rules curtailing in what respects expert evidence can be adduced.

It is difficult to estimate the cost of expert witness testimony in trade secret cases, since the parties are free to call virtually whoever they wish, but the costs are generally tens of thousands of euros, rather than hundreds of thousands.

7. REMEDIES

7.1 Preliminary Injunctive Relief

Courts can issue preliminary injunctions if the following requirements in Section 14 of the Trade Secrets Act are fulfilled:

- the claimant proves that there is probable cause that a trade secret has been misappropriated (or misappropriation is imminent);
- the claimant proves that there is reasonable cause to believe that the other party, through continued misappropriation, will further diminish the value of the trade secret; and
- the claimant posts a bond, usually in the form of a bank guarantee (the general wording of which follows from case law and must not be limited in several significant ways) covering the defendant's potential damages (including loss of profit). There has recently been a development in Swedish case law, where courts routinely demand higher bonds in the range of several hundred thousand euros.

Preliminary injunctions remain in place until the case is finally decided, unless the court decides otherwise. Where the alleged misappropriation constitutes use of a trade secret, however, under certain circumstances the court may dismiss a

motion for an injunction preventing use of the trade secret, if the defendant posts a bond covering the compensation payable to the trade secret holder, and the defendant's continued use of the trade secret does not lead to disclosure of the trade secret.

7.2 Measures of Damages

There are several viable methods of calculating damages under the Trade Secrets Act. The damages granted shall cover the harm done to the claimant through the defendant's misappropriation; punitive damages or statutory fixed damages are not available. In all circumstances, the damages granted shall not be so low so as to make the misappropriation a financially better solution for the defendant than following the law.

When calculating damages in these cases, all relevant circumstances shall be taken into consideration. Claimants are granted wide latitude in fashioning their claim for damages according to different relevant models, such as:

- direct losses of the claimant, including customers or orders lost as a result of the defendant's misappropriation of trade secrets;
- savings enjoyed by the defendant from misappropriating the trade secrets; or
- the profits of the defendant from misappropriating the trade secrets.

When calculating damages, consideration shall also be given to the interest of the holder of the trade secret in preventing unjustified misappropriation of the trade secret, and to circumstances other than those of purely financial significance. A measure of non-financial damages is thus compensated.

Since damages are hard to prove in trade secret litigation in Sweden, there is a supplemental rule in Chapter 35 Section 5 of the Code of Judicial Procedure that allows the court to estimate the damage to a reasonable amount, if full proof of evidence is difficult or impossible to present. This supplemental rule is often leaned upon in litigation.

7.3 Permanent Injunction

Courts can permanently injunct a defendant from continuing the misappropriation of trade secrets under penalty of a fine, according to Section 12 of the Trade Secrets Act. The fine is set to an amount that is assumed to make the respondent follow the injunction, and is usually significant (if breached, however, the fine accrues not to the trade secret holder, but to the Swedish state).

Courts can also order products to be recalled from the market or have the products or documents destroyed, modified or subjected to any other measure aimed at preventing misappropriation, according to Section 17.

Courts cannot, however, issue an order that limits an employee's subsequent employment in order to protect the plaintiff's trade secrets; there is thus no doctrine of "inevitable disclosure" in Swedish trade secret jurisprudence.

Employers instead have to rely on non-disclosure and non-compete clauses in high-level employees' employment agreements to protect their interests in this regard. Concerning non-compete clauses specifically, Swedish courts apply these restrictively and generally do not allow them to last longer than 18 months (and in many cases, 18 months would be considered wildly excessive).

7.4 Attorneys' Fees

According to Chapter 18 Sections 1 and 8 of the Code of Judicial Procedure, the losing party shall compensate the winning party's reasonable litigation costs in civil litigation, fully covering the costs of preparation for litigation and participating in the proceedings, including counsel's fees

and the party's own work with the dispute. In practice, this means the winning party is often awarded about 75–100% of actual costs, which is considered high from an international perspective.

Awards of litigation costs are decided by the court directly in the judgment.

7.5 Costs

See **7.4 Attorneys' Fees**. Costs incurred for the proceedings are generally recoverable insofar as they are considered reasonable.

8. APPEAL

8.1 Appellate Procedure

As set out at **5.4 Jurisdiction of the Courts**, cases regarding the misappropriation of trade secrets may be decided by several different courts in Sweden, depending on the parties and especially whether the defendant is a current or previous employee of the claimant.

First instance judgments by district courts may be appealed to the competent Court of Appeals, or to the Labour Court. First instance judgments of the Patent and Market Court may be appealed to the Patent and Market Court of Appeal. In all these cases, the losing party can appeal within three weeks (leave to appeal is needed and commonly granted). Appellants often file a pro forma appeal within three weeks and are granted several additional weeks to file a full appeal.

As also set out at **5.4 Jurisdiction of the Courts**, in some rare cases of the misappropriation of trade secrets, the Labour Court is the first and only instance, whose judgment cannot be appealed.

Both parties can appeal, provided that they have lost to some extent.

Appeals entail a de novo examination of the case, but witnesses do not generally give live testimony in the appellate phase. The testimony is filmed in the court of first instance, and the second instance court will watch that recording.

Certain forms of orders may be appealed separately, but most orders may not.

From filing the appeal until a decision is made by the appellate court usually takes 12–18 months.

8.2 Factual or Legal Review

The Swedish appellate courts review factual and legal issues in cases concerning the misappropriation of trade secrets. It is a full de novo examination of the aspect of the judgment being appealed, which does not need to be the entire judgment.

As with first instance procedures, cases concerning the misappropriation of trade secrets may, in theory, be decided on the papers, but generally a new in-person hearing is conducted where the parties are allowed to argue their case and present their evidence (witness testimony is not conducted again; instead, recordings from the first instance hearing are played).

9. CRIMINAL OFFENCES

9.1 Prosecution Process, Penalties and Defences

To initiate criminal prosecution for trade secret misappropriation, a criminal complaint needs to be filed with the police or the Swedish Prosecution Authority. A prosecutor investigates and decides if charges are brought.

The potential penalties for the crimes are up to six years of imprisonment (see **1.14 Criminal Liability**). The defences available to the criminal defendant are the same as in civil cases.

10. ALTERNATIVE DISPUTE RESOLUTION

10.1 Dispute Resolution Mechanisms

It is generally possible to arbitrate trade secrets disputes, and it is not uncommon to do so. This assumes, however, that there is an arbitration specifically covering the trade secrets dispute. There has been an academic debate as to whether there are limits to arbitrability in this respect, but there are no cases to support this.

Arbitration will normally be quicker than court proceedings. According to statistics published by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), final awards were given within 12 months of the case being referred to the tribunal (which happens after all administration associated with appointing the tribunal and paying the advance has taken place) in 77% of arbitrations conducted under the SCC Rules in 2019. There is also the option of agreeing on expedited arbitration, in which case an award will normally be given within six months of the reference to the tribunal.

Cost-wise, an arbitration can be expected to be more expensive, particularly since the fees and expenses of the tribunal and, in the case of institutional arbitration, arbitration institute are borne by the parties. An advance is normally required, and the losing party will normally bear the costs.

The major advantage of arbitration over litigation is the speed with which the proceedings are conducted and the ability to choose arbitrators with expertise in the field of the dispute. A traditionally held view is that confidentiality is one of the benefits of arbitration, but there is no legal obligation to keep arbitration proceedings confidential unless the parties have specifically agreed on such an obligation (NJA 2000 p. 538). It is also noteworthy that Section 8 of the Trade Secrets Act, which restricts the use and disclosure of trade secrets received as a consequence of court proceedings, does not formally apply in arbitration.

Interim relief granted by a tribunal is not enforceable in Sweden, but the arbitration agreement does not bar a party from seeking interim relief from the courts. A tribunal cannot combine its award with administrative fines. An injunction awarded in arbitration can be combined with such fines by the enforcement authorities at the enforcement stage.

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Trends and Developments

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Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (the Trade Secrets Directive) was implemented in Swedish law in 2018 by the enactment of the Trade Secrets Act 2018, which replaced the Trade Secrets Act 1990.

The implementation of the Trade Secrets Directive introduced several important changes that are likely to shape Swedish trade secret jurisprudence for years to come. These and other current trends and developments are described below.

Reasonable Steps to Keep Information Secret

Under the Trade Secrets Act 1990, only information that the holder kept secret could be protected as trade secrets. This was considered to require a degree of activity from the holder to maintain the confidential nature of the information but there were no specific formalities that needed to be observed (eg, Labour Court, judgment given on 1 April 2020 in case B 73/19, AD 2020 No 18). It has been established practice of the Swedish courts to construe the confidentiality requirement rather generously for trade secrets holders. Tacit or implied instruction to keep information confidential has been considered sufficient and so has tacit conditions of confidentiality when trade secret information has been disclosed in commercial relationships.

The Trade Secrets Act 2018 implemented the Trade Secrets Directive's explicit requirement of "reasonable steps" to keep the information secret, under Article 2 (1) (c). The Swedish legislator understood the requirement of reasonable steps to be a more demanding standard than that of the Trade Secrets Act 1990. The principal effect, as the Swedish legislator understood it, is that it will no longer be sufficient that a recipient, in light of the nature of the information, should understand that the trade secret holder intends for the information to be kept secret by the recipient.

However, a prominent authority on Swedish trade secrets law (Professor Emeritus, Reinhold Fahlbeck) does not agree with the legislator and has even suggested that the reasonable steps requirement is less demanding than the previous standard. As of yet there is no Swedish court practice on the subject and ultimately it will be for the CJEU to provide clarity as to what the reasonable steps standard requires of holders of trade secret information. As the issue is central to any litigation concerning the misappropriation of trade secrets, the issue is likely to reach the CJEU in record time.

Until the CJEU has provided clarity, it is advisable for trade secret holders to never share information outside the company without a written non-disclosure agreement and to have confidentiality undertakings in place for employees who come into contact with trade secret information, as well as written policies or instructions on how to treat such information.

Expanded Misappropriation Concept

Under the Trade Secrets Act 1990, there was no criminal or civil liability for a party with lawful access to trade secrets who acquired the

information for himself or herself – for example, a disgruntled employee who plans to start a new competing business. In line with the Trade Secrets Directive, the Trade Secrets Act 2018 expanded the misappropriation concept to include such unlawful acquisition of trade secrets. This is an important addition as misappropriation through disclosure or use may often be more difficult to prove than the taking of the information, which can often be proven through evidence from the company's computer systems. This important development also makes misappropriation actionable before actual use or disclosure has taken place, and thus enables trade secret holders to take action before more serious damage is done to the trade secret.

The first ruling on this issue was delivered by the Labour Court on 13 January 2021 (case no B 42/20, AD 2021 No 1), in which the court held that it was not proven that a former employee had made copies of the trade secrets with the intention to make them his. The court followed the legislator's intention that a distinction be made between copies an employee makes to facilitate his or her loyal work for the employer, and copies made with the intention of taking ownership of the trade secret. The burden to prove that the necessary intent was at hand appears to rest with the trade secret holder, but it should arguably suffice that the intent can be inferred from the circumstances surrounding the making of the copies.

Expanded Criminalisation Proposed

In December 2020, a government committee proposed criminalising the use or disclosure of trade secret information of a "technical nature" to which the misappropriating party had lawful access. This has been a controversial issue in Swedish trade secrets law since 2003, when a much-discussed judgment confirmed that an employee who had lawful access to the information in question could not be held criminally liable for corporate espionage (Svea Court of Appeal judgment given on 20 October 2003 in case no B 5221-03). Legislation has previously been proposed on two separate occasions by government committees, but no bill was submitted to the Swedish parliament on either occasion.

The 2020 proposal distinguishes itself from previous proposals in that the criminalisation is limited to trade secret information of a technical nature, and is thus more limited in scope than earlier proposals. It remains to be seen whether the government will proceed and put a bill before parliament.

Preliminary Relief

The Trade Secrets Act gives the court power to award preliminary injunction. The general rules on interim relief in the Swedish Code of Judicial Procedure apply in parallel, which means that the courts also have the power, for example, to order the interim seizure of documents or computer storage media containing trade secret information. It has not been uncommon to seek a preliminary injunction in parallel with the interim seizure of computer storage media and/or printed documents. The latter interim relief is in that event given to secure the merits of a claim, by giving the claimant possession of the computer storage media or the documents, or for their destruction.

In a 2020 decision, the Labour Court declined to grant such an interim seizure of computer storage media with reference to a balance of convenience test (judgment given on 14 April 2020 in case B 29/20, AD 2020 No 21). In that case, the claimant sought to be given possession of computer storage media that included the claimant's misappropriated trade secrets. The Labour Court reasoned that the computer storage media included both the claimant's trade secrets and significant amounts of other

data that the defendant needed in his business. The Labour Court further reasoned that, since the trade secrets were digital and remained in the possession of the claimant, the claimant had less reason to need to take possession of the computer storage media. Under all circumstances, the claimant was protected from further misappropriation of the information during the course of the proceedings by virtue of the preliminary injunction issued against the defendant. Following this development, it can be expected that it will be harder to be granted both preliminary injunction and interim seizure in the future.

Obtaining Evidence

Just like its predecessor, the Trade Secrets Act 2018 does not provide any remedies for securing evidence about infringement, similar to the infringement investigation orders and information orders available under Swedish IP legislation. In practice, Swedish trade secret litigants commonly tried to accomplish the same result by seeking interim relief in the form of the seizure of property that was reasonably considered to hold misappropriated information, and then subsequently requesting to be allowed to review the materials so seized. This practice was based on the general provision on interim relief in Chapter 15 of the Code of Judicial Procedure. However, in a 2017 decision, the Supreme Court ruled that the interim relief available under the Code only could be granted in order to secure a remedy on the merits and not to secure procedural claims (NJA 2017 s. 457).

The ruling effectively closed the door on this practice and, as the law currently stands, a trade secrets holder's only means of obtaining evidence by way of court order is to seek document production. This is a significant limitation of the ability to protect trade secrets as compared to IP rights, but this limitation is mitigated by the fact that trade secrets disputes often involve overlapping copyrights, databases or patents, for which the remedies in question are available and commonly used.

Vicarious Liability for the Misappropriation of Trade Secrets

Under Swedish damages law, companies generally bear vicarious liability for damages caused by their employees. The other side of that vicarious liability is that employees cannot be held liable for damages caused in their employment, unless there are exceptional reasons for doing so. In recent years, the Labour Court has applied this concept for trade secret misappropriation and ruled in a 2020 judgment (given on 26 February 2020 in case B 34/19, AD 2020 No 11) that a former employee could not be held liable for using trade secrets belonging to his first employer for the benefit of his new employer, unless there are exceptional reasons. In that case, several former employees of the claimant were named defendants but only one was held liable. The court held that the fact that he intentionally disclosed trade secrets to his new employer was sufficient to constitute exceptional reasons.

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