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Legal Protection of Trade Secrets against Confidentiality Opened in Trial

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This paper is about the legal protection of trade secrets against confidentiality opened in a trial. Confidential information is intellectual property that must be protected from unauthorised use or disclosure. Trade secrets are classified information in the economic field that have commercial value. This research was done at Universitas Kristen Indonesia with the purpose to find out what is the legal protection of trade secrets against confidentiality opened in a trial. The method of the research used was qualitative research with a descriptive design. The instrument of this research was the researcher by analyzing the secondary data from legal materials, such as regulations, related literature and other legal materials related to trade secret law, proof of law and legal protection theory, and research results qualitatively. The results of this research are: a) ensuring the secrecy of the information in the court, article 18 Law Num. 30/2000 should be strictly applied by the ex officio judge; and b) There must be strictly limited use for those trade secrets whose information is open in court to protect the secrecy. In conclusion, the information in the document must be treated secretly because it is of limited exposure and not for public consumption and by applying article 18 Law Num. 30/2000 the exposure of the secret information is done without causing any damage to its secret nature.

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Key words: *Legal protection, trade secret, proof.*



Introduction

Nowadays economic problems are not only related to goods and services but also to information that is useful for business activities and has an economic value in business and trade activities. Such information is confidential and its intellectual property is duly protected. Intellectual property brings wealth to the owner. Intellectual Property Rights (IPRs) give their owners economic benefits as the results of intellectual creativity. The concept of Intellectual Property Rights includes 1) intellectual property rights that are inherent, permanent and exclusive to the owners; 2) the rights obtained by another party upon permission from the owners temporarily. Intellectual Property Rights are assets, protected by law and everyone is required to respect the intellectual property rights of others. Legal protection is therefore regulated to prevent infringement by unauthorised persons (Conley et al., 2011; Chen et al., 2009; Shee, 2019). Protection of intellectual property rights and all aspects of trade have become common rules under the World Trade Organisation (Agreement Establishing World Trade Organisation) and every member of WTO is subject to this rule. As a member of WTO, Indonesia has to be ready to compete in the current competitive era of the global market.

Earlier it was discussed that confidential information is an intellectual property that must be protected from unauthorised use or disclosure. Protection of confidential information is imperative considering the tough competition in the business world and the global conditions of trade and investment (Sy Jr and Sy, 2017; White, 2002; Engelman, 2014). Confidential information is classified into two types, disclosed and secret information. The former can or is appropriate to be opened to the community for its benefits or be widely publicised, the latter is not be disclosed to others except when it is required by officials or authority to execute or keep the secret information. If the secret information leaks or is tapped by other parties, it will lose its confidentiality and the owner will suffer the loss of his/her expected profits from the confidential information.

Confidential or profitable commercial economic information is classified as a trade secret. It is confidential closed information (Almeling, 2012; Risch, 2007). Trade secret laws protect almost all types of commercially valuable information when it is developed and maintained confidentially (Fisk, 2000). There is no limit to how long confidential information is protected and with the increasing economic progress, especially trade, business people must continue to look for developments in both technology and business sectors that aim at increasing profits (Rowe, 2007; Cundiff, 2008; Czapracka, 2007). To create and find discoveries in the form of technology, formulas, strategies, production, and marketing processes, it requires time, energy, and thoughts and also costs and therefore confidentiality of the information needs to be protected. This is known as a trade secret.



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A trade secret is protected by law and this means that competitors have no access to the information concerning trade secrets (VanderBroek and Turner, 2005). In Indonesia secret protection is regulated in Law Num. 30/2000 about Trade Secret (Trade Secret Law), effective 20 September 2000, following the ratification of the WTO agreement in Law Num. 7/1994 and was promulgated of Law Num. 5/1999, about Prohibition of Monopolistic Practices and Unfair Competition. The law is in line with the TRIP, as part of the WTO agreement. Getting trade secret information improperly means a violation of the rights of others and it may harm other companies (Shackelford et al., 2015). If it happens, the violator must be aware of and held responsible of his/her conduct or be sued in court by the laws and regulations as stipulated in Article 11 of Law Num. 30/2000 concerning Trade Secrets. If a trade secret dispute is resolved in court, proof needs to be presented as stipulated in article 163 HIR jo article 1865 of the civil code (Schaller, 2004). Proof means presenting a right to court, whether stated in certain documents, oral statements as witnesses or by other means.

Confidential information is most likely to be disclosed in the verification process. This information is considered classified as a secret before it is made public. The state of a trade secret is when the information is not open to the public. When secret information has to be disclosed at the trial, it has to be protected, and so do the parties who are ordered by the judge to open a trade secret (Risch, 2016). The possibility of disclosure of confidential information is quite high in this case. Further studies need to be done concerning when secret information must be disclosed at the hearing session and protection for those who have been ordered by the judge to reveal trade secrets (Reder and O'Brien, 2011). This study aims at finding out, describing and analysing whether confidential information must be disclosed in court and whether protection of trade secrets that have been opened in the court also includes protection for those who have been ordered by the judge to open trade secrets. To achieve this goal, this study uses a normative approach, being the principles of evidentiary law, trade secrets and principles of legal protection.

This descriptive analysis of the study provides aspects of the protection of trade secret law whose information is opened in court. This study employs secondary data from selected literature and trade secret regulations which relate to trade secret law, evidentiary law and legal protection theory (Sever et al., 2016; Sternlight, 2014). Next step is data analysis by the qualitative method to draw result and conclusion.

Method

The method of the research used was qualitative research with a descriptive design. The instrument of this research was the researcher by analyzing the secondary data from legal materials, such as regulations, related literature and other legal materials related to trade secret law, proof of law and legal protection theory, and research results qualitatively. Then



the results of the analysis were used to answer the problem of this research, so the purpose of this research was achieved.

Discussion

A trade secret is another word for undisclosed information as stated in TRIPs. Undisclosed information guarantees those who wish to keep their business information from public and put it under their control with the following conditions: a) the information is considered secret if it is not a set of exact configuration or assembly of general components that people find in everyday life and b) the secrecy of the information is guarded (Argento, 2012; Dole Jr, 2016). A trade secret is defined as any formula, pattern, device, or compilation of information used in a business which allows the owners to obtain and take advantage over their competitors who do not know or use them (First, 2011; Menell, 2017). According to positive law in Indonesia, Law Num. 30/2000, about Secret Trade, article 1 point (1), Secret Trade is information on technology and/or business, which are not disclosed to the public because of economic values for the business and their secrets are protected by Trade Secret (Lippoldt and Schultz, 2014).

In *Black's Law Dictionary*, trade secret covers formulas, patterns, chemical substance or formulas, industrial process, material maintenance or preservation, patterns of machines or other devices, lists of subscriptions or information compilation tools that a person uses in business and allows him/her to benefit more than those who do not know or do not use it. It also covers planning or processes, devices/tools that one and one's employees need to deliver. Trade secrets cover technological and trade aspects; where the former includes products, models, computer software, quality product formulas, production processes, the latter includes tips on advancing the company/trade, company management, production prospects, production and marketing, company prospect data computerisation (Rowe, 2016).

Law Num. 30/2000 stipulates that trade secret protection covers production methods, processing methods, sales methods or other information in technology and/or business that have economic value and undisclosed to the general public. To find out whether information belonging to a company or owner is classified as a trade secret must fulfil the following criteria: a) *Economic value*, which gives economic benefits to the company that uses it; b) *Secret value*, a new idea, never disclosed to others, which carries strategic values for business competition and has a business prospect through the production process, development and marketing; c) *Scope of industry and trade*. The industrial scope covers technology and trade aspect covers commerce; and d) *Disclosure of secrecy* (Lapousterle et al., 2015; Segal, 2015). This will be detrimental to the owner because the information is used by the competitors.



Trade secret will be protected when the information is classified as secret, with economic values and its secrecy is guarded accordingly. Information becomes secret when it is known only by limited people—not by the public—and its secrecy is guarded when the owner or those who hold its owners have taken necessary and proper steps or fair, feasible, and proper measures. For instance, a company must have a standard procedure based on general practices and/or standards for internal provisions (Cardillo, 2015). Likewise in the case trade secret, how and who is responsible for guiding it. To test whether the information is classified as a trade secret is first and foremost is to see to what extent the public is aware of the existence of the information and the owner of the trade secret has to prove that the information only belongs to the company and not to the public (Sosnova, 2016).

In general, the types of information protected by law in several countries are, among others, a) List of customers; b) Market research; c) Technical research; d) Recipes or formulas used to produce a certain product; e) A certain beneficial work system; f) Ideas or concepts of advertisement or marketing. Scope of trade secret based on article 2 Law Num. 30/2000, such as: a) Technical information or information on research and development, such as, formula, compound, processes, and many others; b) Information of production processes, such as, costs, specific equipment for production, processing technology, specification for production process and its equipment; c) Information on suppliers, for instance: name, data, and cost; d) Information on quality control, such as procedures, manuals, data, and know-how; e) Information on sales and marketing, such as sale forecasts, marketing and sales planning, sales reports, information on competitors, information on customers, research results and reports on sales and marketing; f) Internal financial information, such as financial documents, internal budget, forecasting, computerised printing (hard copy), production margin, profit and loss data, administrative information; and g) Internal administrative information, such as internal organisation, decision making keys, business strategic planning and internal computer software. The scope of a trade secret may cover more; however, the information only covers technical and non-technical matters. The period of protection of trade secrets is not definite, due to its nature of secrecy, therefore it is very important that the owner continues to keep the confidentiality of the information to have it protected by trade secrets (Faruque, 2006).

Trade secret information can be protected with the following conditions: a) it must possess certain quality for that category; b) the information must have been delivered when the owner receives obligation for that; and c) there must be unauthorised use of the information which is detrimental to the parties who are engaged in legal relation (Schermer et al., 2014; Koops, 2009; Davison, 2003). Secret trade is an intangible asset, as mentioned in several theories of protection of trade secret as follows:



Trade secrets fall into the category of ownership due to their high economic value. In Article 570 of the Civil Code, the right covers the full use of the material and full authority to exploit the material as long as it does not violate the Law, the general regulations as imposed by the authority or the rights of others; all without reducing the possibility of revocation of the rights in the public interest based on the provisions of the Law and with compensation. Trade secrets are the results of hard work and ideas of an individual and therefore it has high economic value. However, its existence should not be abusive and detrimental to others (Sumanadasa, 2018; Dobash, 2002). Trade secrets do not need to be registered as intellectual property rights but the legal protection of these trade secrets is guaranteed by law regarding the exercise of its rights and transitions (Hildebrandt and Koops, 2010; Schwarze, 2004).

Contract theory is used most frequently as a basis in litigation regarding trade secrets. The Indonesian legal system adopts the principles of Continental European law, which states that contracts or agreements are generally the sources of engagement (Article 1233 BW). By Article 1338 BW, the legal agreement applies as a law and therefore it cannot be withdrawn unilaterally and the violation of the said matter is a breach of contract (Barents, 2014; Oshima, 2003). These contractual principles also form the basis of the protection of know-how in the Dutch law which defines that the protection covers before it is sealed, when the contract is in progress and when it expires.

Protection of trade secrets is also related to the theory of acts against the law. This principle is also widely adopted by various countries to overcome fraudulent competition by other competitors (Flechsigt, 2013). Someone is considered to have committed an unlawful act or violated the trade information, on the following conditions: a) obtaining the information without procedures; b) disclosure or use results in the violation of the confidentiality obtained from another person who reveals the secret to him; c) learning the trade secret of the third party who obtained it improperly or disclosure from third parties; and d) learning the trade secrets and then revealing them by stating that they are the deliberate disclosure of trade secrets (Harris, 2013; McInturf and Rybacki, 2011). A person is violating a trade secret if obtaining or possessing the secret is unlawful. The exception is made for exposures and use of information for national defence and security, health, and community safety. The exception is also given for a reengineering program of the products of others' trade secret for further development of the products (Menise, 2008).

Concerning the above, in many common law countries, such as Britain, Canada, Australia, violation of secret is due to court decision. In Indonesia, like in the United States, however, the legal secret information is stated in the Law (Cottier and Panizzon, 2004; Hillind, 2016). However, the basic elements of confidential information in some countries are the same, ie., a) obtaining legal protection, information must be confidential; b) defendant must keep the



confidentiality of the information from the plaintiff; c) There is the use of secret information without a permit from the defendant; d) permission to use secret information must harm the plaintiff; e) exposure of secret information will be permitted for the sake of public interest and in a particular condition, and f) many legal efforts can be pursued in court.

⁸ In case of breach of trade secrets, then by Article 11 of Law No. 30 of 2000, the holders of trade secret rights or licensors can sue anyone who intentionally and has no rights to commit violations of trade secrets, with the filing of a lawsuit in court, it is indeed necessary to prove a violation of the trade secret (Schaller, 2018; Tehupeiory and Naibaho, 2020; Rindell, 2016). Proof means presenting a right to court, whether it is contained in a particular document, oral statement of a witness, or stated in other ways (Tyas and Sunarto, 2020; Kearney, 2016). The problem is that not everything in this world is appropriate or can be stated to others or stated in court. If the information is confidential such as trade secrets so should these matters be disclosed in court? Nevertheless, the disclosure of trade secrets in front of a court hearing can be done by the orders of a judge and the provisions of Article 18 of Law No. 30 of 2000 which allows court hearings relating to trade secrets as a closed court (at the request of the parties to the disputes).

Information is confidential if it has not been made public. By opening it to the public, the nature of its secrecy will be lost. Disclosure of this confidential information can negate its confidential nature. Some countries have different concepts. The courts of England and Australia rule that if the issuance of this confidential information is done without the permission or awareness of the owner, it will lose its secret nature. However, whether or not the real nature of confidentiality is lost depends on the analysis of the facts of each case.

The secret will lose its meaning if it is disclosed in public. Australian law dictates that documents must be handed down to the court for limited proposes and for limited disclosure, in other words, not for public consumption to keep its secret nature, whereas when the disclosure made by a witness in a court hearing by the judge's order, the nature of confidentiality is not lost either. To guarantee this, the submission of the testimony must apply the provisions of Article 18, Law Num. 30/2000, which states that a closed session and the disclosure of the confidentiality information does not result in the loss of confidential nature of information, however, there is no strict regulation in Law No. 30/2000 on Trade Secrets.

³ Conclusion

Based on the description and analysis above, it is concluded that 1) In the court hearing examination, proof of law allows you to keep the secret information, however, due to prove violation, the trade secret information can be opened by the judge's order. To ensure the



secrecy of the information, the ex officio judge must strictly apply article 18 Law Num. 30/2000, about Trade Secret being held in private although it is not asked; and 2) Protection for trade secret whose information is open in court means that all documents handed down to court are of strictly limited use, therefore the information in the document must be treated as a secret because it is of limited exposure and not for public consumption. Exposure of the mentioned information by a witness in court by the judge's order must be treated as an exception due to the loss of secrecy. Therefore the delivery of a witness must strictly apply article 18 Law Num. 30/2000, i.e. in a closed hearing since the exposure of the secret information is done without causing any damage to its secret nature.

Recommendation

Strict regulations concerning the secret nature of information exposed in court are strongly recommended to be put in law and that proof of examination must be done in a closed to the public hearing.



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