

Trade secrets and procedural confidentiality

How to reconcile the protection of secrecy with the right to evidence and to adversarial proceedings and with the effectiveness of adjudication?

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The protection of trade secrets stems from a necessary balancing regarding the level of information needed for markets to function properly: while it is necessary to ensure the information without which economic agents can neither rationally allocate risks and expectations nor assert their claims against agents who violate their rights, it is essential to preserve the value generated by each economic agent, in order to prevent others from unduly benefiting from wealth they did not create, through parasitic conduct or *rent-seeking*.

Protecting the value legitimately created by economic agents is, therefore, one of the functions of trade secret protection, which also serves the public interest related to the preservation of competitive conditions. This is because access to competitors' sensitive information may completely distort rivalry in markets.

Nevertheless, viewed in absolute terms, trade secrets may turn into a true immunity from state or arbitral jurisdiction, which is particularly concerning in certain types of claims, such as those involving non-contractual liability or public, diffuse or vulnerable parties' interests. It is therefore necessary to weigh the protection of the secret holder against numerous other important interests, such as access to evidence, the right to adversarial proceedings and the very effectiveness of adjudication (state or arbitral).

It is for this reason that, despite its importance, trade secrecy does not confer – nor can it confer - absolute protection on its holder in evidentiary

terms. Article 206 of the Industrial Property Law is clear in this regard, showing that a trade secret may be disclosed, provided that this occurs in proceedings conducted under seal and that the other party is prohibited from using it for any purpose other than the proceedings.

In other words, the legislation does not establish an immunity of trade secrets before the courts. On the contrary, it allows evidence concerning secrets and confidential information to be admitted in court, albeit with due care, such as measures to protect against disclosure of or access to the evidence by third parties.

In this context, the aforementioned Article 206 of the LPI is extremely important to the debate, insofar as it makes clear that the broadest protection of trade secrets applies vis-à-vis third parties, but not vis-à-vis the adjudicator or the other party. For this reason, the discussion is relevant both to judicial proceedings, in which publicity is the rule, and to arbitral proceedings, which are commonly subject to confidentiality clauses.

In the first case, the problem of secrecy is resolved by sealing the proceedings, while, in the second case, the problem of secrecy is already resolved by the usual practice of confidentiality. However, the question remains as to whether and to what extent a trade secret may also be asserted against the adjudicator and the opposing party.

Article 206 of the LPI also presents interpretive difficulties, by conditioning the disclosure of the secret to the opposing party on its not being used for other purposes. After all, once the secret has been exposed, it is not possible to control the various future uses by the opposing party, especially if it is a competitor. Consequently, it is essential that judges and arbitrators also consider whether and to what extent the trade secret could also be asserted against the opposing party, especially when the latter is a rival.

To resolve this impasse, it is essential that adjudicators bear certain points in mind. First, however elastic the category may be, trade secrets do not encompass – nor can they encompass – all business information. It is essential to have consistent criteria to distinguish what may or may not be considered a trade secret, as competition authorities usually do when describing in their guidelines, even if not exhaustively, the information that should be considered competitively sensitive.

Second, just as the party alleging a trade secret bears the burden of demonstrating the reasons for the confidentiality of the information, the party requesting the disclosure – total or partial – of the secret bears the burden of justifying why the evidence is necessary, adequate and proportionate. This burden includes specifying the concrete point to be proven by means of the information and demonstrating the congruence between that point and the means of proof, including in order to prevent opportunistic conduct, such as *fishing expedition*.

The issue must necessarily be resolved through a balancing test, by means of which judges and arbitrators must weigh the relevance or even indispensability of the information to the case, the seriousness of the competitive risk arising from access to the information and also any less invasive means of producing the intended evidence.

Third, it is important to understand that procedural confidentiality, whether vis-à-vis third parties or vis-à-vis the opposing party, is not an all-or-nothing judgment. In judicial proceedings, in which publicity is the rule, where it is necessary to produce evidence relating to a trade secret, the proceedings may remain public, with confidentiality ordered only with respect to that specific point.

This is what happened in the well-known Decolar case, in which the practice of *geopricing* and *geoblocking* against consumers was at issue¹. The Superior Court of Justice ruled that the proceedings should be public, but ensured confidentiality restricted to the technical details of the company's algorithm and of the computer forensic examination².

Fourth, in the face of confidential documents or evidence, one may consider a granular procedural confidentiality, in order to reconcile the protection of the secret holder with the other interests – including public ones – related to the disclosure of such information. One way to ensure this is through the existence of multiple versions of the documents, with redactions in the public

¹ I have previously addressed this case in an earlier column: <https://www.jota.info/opiniao-e-analise/colunas/constituicao-empresa-e-mercado/geopricing-e-geoblocking-as-novas-formas-de-discriminacao-de-consumidores>

² STJ, RMS 61.306 - RJ (2019/0199274-6), Reporting Justice Luís Felipe Salomão, judgment of 04.12.2019.

versions or in those intended for the opposing party, as is customary in competition proceedings before CADE.

Fifth, especially in cases in which the secret needs to be protected, totally or partially, also vis-à-vis the opposing party, one may further consider solutions involving a kind of *confidentiality club*, whereby only certain lawyers, experts and the adjudicator would have access to the entirety of the evidence. The experience of competition authorities is also rich in solutions of this kind.

In a recent case, the STJ adopted such a solution, by creating the figure of the digital estate administrator, whose purpose is to access the deceased's electronic devices in order to distinguish what would or would not be subject to succession and what should remain protected even from the heirs³. Similar solutions may be considered in business disputes in which the scope of trade secrecy and what may or may not be accessed by third parties or by the opposing party are at issue.

All these measures may be combined with specific solutions for the production of evidence, for the protection of *data rooms* or even to ensure the immediate destruction or return of the files as soon as they have fulfilled their role in the proceedings.

Such solutions become even more important in the context of the digital economy, given that many unlawful acts are today carried out by obscure and unintelligible algorithms. Thus, if the protection of code were absolute, the agents who use them would enjoy a true immunity to violate the rights of others without those affected being able to prove the violation.

In such cases, it is essential to consider that, even if the protection of code were deemed enforceable against the counterparty and the adjudicator themselves, this does not exempt such agents from providing parameters and explanations for understanding their decisions. It is also necessary to use specific procedural solutions, such as the reversal of the burden of proof or the application of adverse inferences against the party that refuses to contribute to the respective evidence.

In short, a balance must be struck between the protection of trade secrets and the other interests that bear upon judicial and arbitral proceedings, it

³ <https://www.jota.info/opiniao-e-analise/colunas/constituicao-empresa-e-mercado/a-complexa-questao-da-sucessao-dos-bens-digitais>

being imperative that, under no circumstances, such secrets constitute an absolute immunity before jurisdiction itself or allow their holders to benefit from their own wrongdoing or from the obscurity of their actions.

Note: this text is a translation of the original Portuguese version, performed by artificial intelligence (AI).

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Link: <https://www.jota.info/opiniao-e-analise/colunas/constituicao-empresa-e-mercado/segreto-de-empresa-e-sigilo-processual>