



■ SPECIAL REPORT Q&A January 2020

Arbitrating trade secret disputes

FW moderates a discussion on arbitrating trade secret disputes between John M. Williamson at Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Steven M. Levitan at Hogan Lovells US LLP, James R. Ferguson at Mayer Brown LLP and P. Anthony Sammi at Skadden, Arps, Slate, Meagher & Flom LLP.



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THE PANELLISTS



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John Williamson leads the firm's intellectual property specialties practice group. He serves as lead litigation counsel on complex disputes spanning a wide range of technical subject matter areas, including telecommunications, software, consumer electronics, pharmaceuticals and medical devices. He focuses on intellectual property litigation and counselling, with particular emphasis on patent infringement and trade secret misappropriation actions before US district courts, arbitration panels, the US International Trade Commission (ITC) and the US Court of Appeals for the Federal Circuit.



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Steve Levitan is co-chair of Hogan Lovells' global trade secret action group. He has led numerous intellectual property lawsuits, with an emphasis on patent, trade secret, trademark and technology contract disputes. He practices before US federal district and appellate courts, California state courts, the US International Trade Commission (ITC), and in International Chamber of Commerce (ICC) and American Arbitration Association (AAA) arbitrations. He also regularly counsels clients on the protection of trade secrets and confidential information.



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James R. Ferguson focuses his practice on intellectual property (IP), complex commercial litigation, and domestic and international arbitration. He has been lead trial counsel in patent, trademark, trade secret, antitrust, insurance, IT, banking and licensing cases in US courts and international arbitral tribunals. A Fellow of the American College of Trial Lawyers, he has first-chaired more than 30 cases to verdict or decision and argued more than 20 appeals in US appellate courts.



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Tony Sammi is head of Skadden's intellectual property (IP) litigation group. He litigates complex, high-profile IP cases at the trial and appellate levels. Recently, he obtained the sixth-largest verdict ever awarded for copyright, trademark and/or trade secret claims and the 12th-largest intellectual property verdict including patent claims. In addition to his caseload, he is a mentor to associates and recently earned the Litigation Achievement Award from the South Asian Bar Association of New York.

FW: How would you describe the challenges that face companies hoping to protect their trade secrets in today's business world? How have the risks and threat vectors changed in recent years?

Williamson: While companies face many challenges in protecting their trade secrets, widespread employee mobility rises to the top of the list. It is rare to find skilled employees with the sense of loyalty or identity with an employer that might come from a decades-long tenure. In certain industries, breadth of experience is valued more than tenure. Accordingly, skilled employees regularly migrate from company to company in pursuit of new and different experiences. In such environments, there is a strong tendency for employees to view their knowledge and skillsets as their own, rather than something that can be owned or claimed by an employer. These employees often have authorised access to company trade secrets during the term of their employment. And it may be difficult or impossible to detect misappropriation or unauthorised use of trade secrets after the employees have left.

Ferguson: As trade secrets have become more important to innovation and product development, they have also become more vulnerable to theft and misappropriation. This is due in part to the common practice of maintaining proprietary data in an electronic format, which makes the data more accessible to third parties. But equally, if not more important, is the emergence of a highly mobile workforce with access to key information, creating risks that employees will either knowingly or inadvertently transfer proprietary data to another party. In this environment, the major challenge facing companies is to create a 'cyber safe' culture that will adequately protect trade secrets against misappropriation.

Sammi: Protecting trade secrets is more challenging than ever, primarily because risks and threat vectors have increased dramatically. Gone are the days of 'secret' physical documents being photocopied after hours and then physically transported out of the company's office. Today, you can



take a library's worth of exceedingly secret and technical information on a USB drive the size of a packet of chewing gum. Often, a physical presence is not even required, as trade secrets can be remotely accessed, downloaded and copied. Additionally, employee turnover has increased markedly over the last 10 years, particularly in the technology sector. Another risk factor is that intellectual property (IP) trade secrets underpin almost all companies today, not just tech-sector companies like those with apps, software and e-commerce functions, but also those in manufacturing and other industries, which have back-end processes that are imbued with highly technical and secret IP.

Levitan: The risks and threats to trade secret protection are greater than ever, due to a number of factors, including the digital transformation of all data, the ease of transfer of such digital data, rising employee mobility rates, increasing use by employees of agile work and bring your own device (BYOD) arrangements, blurred lines between personal and work-related use of internet and social media platforms, more aggressive forms of industrial espionage, including cross-border, and uncertainties created by different trade secret enforcement

regimes in different countries. All of these factors lead to increased risks of trade secret misappropriation. On the other hand, recognition by companies of the value of their trade secrets and the need for strong policies and procedures to protect those trade secrets also is on the rise, and the technical tools for detecting trade secret threats are ever-improving. These are countervailing factors that somewhat mitigate the rising threat vectors, but not fully.

FW: If a trade secret dispute arises, what initial steps should companies consider to resolve it?

Ferguson: Because trade secret disputes typically arise from an existing licence agreement, parties should always consider a quick resolution through negotiation or mediation. However, an early resolution is possible only if the parties can quickly agree on the terms. In general, an early resolution will be more likely if the licensor is willing to continue the licence in exchange for past and future royalties. But in many cases, the licensor will want to terminate the licence and seek damages in the form of past royalties. In addition, in some cases, the

licensor will first seek an injunction before even initiating negotiations.

Sammi: Companies should find out the facts, as quickly, confidentially and dispassionately as possible, and preserve evidence at every step. If you are a victim of trade secret misappropriation, you must focus on ascertaining how it happened and securing as much factual detail as possible. This information is extremely valuable in pursuing time-sensitive claims in proceedings, such as preliminary injunctions, mandatory arbitrations, mediations or direct negotiations. If your company is accused of misappropriation, the same information is critical to mounting a defence. Moreover, on the defensive side, if you discover an employee's misappropriation or unauthorised acts, take steps to immediately isolate and prevent any further spread of alleged trade secret information that your company may have encountered. Finally, preserve evidence at all costs. Do not let computers or devices that may contain data be reformatted, continue to be used or put back into company circulation or rotation.

Levitan: If a legal action has not yet been filed, and sometimes even if one has been filed, depending on the circumstances, efforts toward a quick and amicable resolution may be possible. For example, the interests of two companies may be

aligned where there is an allegation that a new employee may have introduced a former employer's trade secrets, unbeknown to the new employer. In such circumstances, it may be possible for companies to cooperate with a forensic investigation and remediation if needed, to satisfy both sides' concerns. If a legal action has been filed, early motion practice often can have a significant impact and create leverage for negotiation. Examples of such early motions used in US practice include motions for preliminary injunction, on the plaintiff's side, and motions to dismiss, on the defendant's side, with sufficiency of the allegations and statutes of limitation frequently asserted as grounds for dismissal.

Williamson: From the trade secret owner's perspective, the first communication with the alleged misappropriator is critical. In certain extreme circumstances, the first step might require filing suit and seeking preliminary relief immediately. But in most cases, the first communication involves a cease and desist letter listing several specific demands designed to prevent any further use or dissemination of the claimed trade secret. The trade secret owner should perform a thorough investigation to enable it to make concrete demands supported by a factual record. From the accused misappropriator's perspective, performing a thorough and good faith investigation into the allegations is the

most important initial step. Typically, the accused misappropriator will want to engage with the trade secret owner in a productive dialogue to avoid suit if possible. While formal cease and desist letters and responses are a necessary part of the dialogue, scheduling an in-person meeting can go a long way toward defusing the situation.

FW: What advantages does arbitration offer to parties involved in a trade secret dispute? Conversely, what limitations might the process impose?

Sammi: One advantage is the ability to maintain confidentiality, including limiting or preventing media exposure. From a plaintiff's perspective, the fact that your company's secret information has been misappropriated can potentially interfere with fundraising, market valuation, pending transactions and your reputation. For the defendant, even the accusation of misappropriation, whether proven or not, can interfere with these things as well. In addition, arbitration is often less costly in time and expense than litigation. However, because a private forum like arbitration may limit the amount and scope of discovery available to a plaintiff, or expand it beyond what is customary in litigation, its unpredictability can be a limitation. Additionally, a plaintiff seeking a public forum for airing a dispute, for example to appeal to a jury, get press coverage or make a statement to the market, would likely oppose arbitration.

Williamson: The well-known advantages of arbitration, namely speed, efficiency, cost, privacy and control, are all amplified in the context of a trade secret misappropriation dispute. Because trade secret misappropriation claims involve allegations of theft and intentional wrongdoing, the disputes often include a charged emotional element. It is sometimes difficult for either side to accept commercial terms or a negotiated resolution without the opportunity to present their case. But to get that opportunity in a public forum, such as a US district court, requires patience and extensive investment. Arbitration affords both sides the opportunity to be heard and

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to make their best case in a quick, private, controlled forum.

Levitan: Although not always true, arbitrations can potentially save time and cost. They are not subject to heavy court dockets, and less money typically is spent on discovery, the highest cost component in many litigations. Arbitration is private, which means parties' confidential information is more readily protected from exposure. Arbitrators may be able to devote more time and attention to the dispute, and arbitrators can be selected who have specialised expertise with the technology at issue and applicable trade secret laws. Arbitration also provides parties with more control over procedures, which can be tailored by agreement. Since arbitration results usually are non-reviewable, there is more certainty to the result when rendered. If the dispute is cross-border, arbitration can provide a neutral forum, and it may be possible to resolve a multijurisdictional dispute in one proceeding. In terms of disadvantages, there are usually substantial limitations on discovery in arbitrations, which can be unfavourable for a plaintiff trying to uncover evidence of misappropriation. The arbitration decision usually is final and non-reviewable – thus, if errors are made, there is no avenue for redress. Arbitration is not as well suited to obtaining emergency relief and, generally, dispositive motions are not entertained prior to the hearing. Arbitrations may also be more susceptible to compromise results and enforcement of arbitration awards has to be separately pursued in court.

Ferguson: Many trade secret licences specify arbitration as the method of dispute resolution because it can provide the greatest protection to the confidentiality of proprietary data. In addition, if the licensing parties reside in different countries, international arbitration offers two major advantages over litigation in national courts. First, international arbitration provides a forum that is more likely to be genuinely fair and impartial. Second, international arbitration produces a final result that can usually be enforced in more countries than the judgments of many national courts.

“MANY TRADE SECRET LICENCES SPECIFY ARBITRATION AS THE METHOD OF DISPUTE RESOLUTION BECAUSE IT CAN PROVIDE THE GREATEST PROTECTION TO THE CONFIDENTIALITY OF PROPRIETARY DATA.”

JAMES R. FERGUSON
Mayer Brown LLP

The major limitation of arbitration is that it is generally not subject to any substantive appellate review.

FW: Based on your experience, what are the key aspects of preparing for arbitration to resolve a trade secret dispute?

Levitan: Keys steps in preparing for arbitration of a trade secret dispute include the following. First, evidence preservation and collection. Second, identification of fact witnesses. Third, retention of expert witnesses. Fourth, determination of applicable law to understand the legal standards that will govern. Fifth, if on the plaintiff's side, description, with reasonable particularity, of the trade secrets at issue, the measures used to protect them and the forms of misappropriation to be asserted, such as acquisition, use or disclosure. Sixth, if on the defendant's side, investigation and development of defences, including challenges to the trade secret status of the trade secrets or rebuttal to the misappropriation allegations, such as by independent development or disputing the timeliness of the claims. Seventh, strategy formulation for selecting appropriate arbitrators. Eighth, terms for protection of confidential information to be disclosed during the arbitration. Finally, preparation to address with the arbitrators the scope of discovery that will be allowed.

Ferguson: Trade secret disputes are almost always fact-intensive, which means a critical first step is to gather the relevant facts, and identify key witnesses and supporting evidence. Once the facts have been gathered – and the key witnesses interviewed – a party preparing for a successful arbitration will generally take the following steps. First, identify the kinds of arbitrators the party wants to fairly resolve the major issues. Second, retain the experts necessary to support the party's position on the technical and damages issues. Third, determine what documents the party should request from the opposing party. Fourth, identify the witnesses and documents to be presented at the hearing. Finally, identify the major factual and legal themes to be presented at the hearing.

Williamson: An early internal factual investigation and distillation of key evidence is critical. Trade secret claims and defences require significant evidentiary support. Yet in most arbitrations, the ability to discover and present evidence can be significantly limited. Litigants will often have one chance to put their best foot forward. This means that the identification of key documents and witnesses, an iterative process in district court litigation that can sometimes span years, must be accomplished early. For example, a defence founded on the independent development of a specific technology will need to be supported with

extensive legacy documentation, such as operating budgets, design history files, laboratory notebooks and vendor records, that may require a focused upfront effort.

Sammi: Do your homework on your arbitrator or panel to understand what makes them tick, then refine your presentation to make it more persuasive to your audience. In arbitration, the scope of discovery can be far-ranging and can exceed that of federal or state litigation. That said, more is not always better; just because you have access to more information does not mean your presentation should include the kitchen sink. If parties in arbitration lose their sense of restraint, it can often work to their own disadvantage, turning what might have been a cogent and persuasive case into one that grasps for every lead and goes down every rabbit hole. Salient and central facts regarding misappropriation and causation of damages, or lack thereof, should carry the day, regardless of whether you are operating in court or in arbitration.

FW: What steps should parties take to ensure that the arbitrators appointed possess appropriate trade secrets expertise and knowledge? What key factors should be considered?

Ferguson: Because arbitration is a creature of contract, parties can draft the

contract to require that any future disputes be adjudicated by arbitrators having specific technical or legal qualifications. Furthermore, even if the contract does not contain such a requirement, parties will often have input into the selection of arbitrators and can seek arbitrators possessing the desired background. At a minimum, a party should seek an arbitrator who has substantial experience in arbitrating complex commercial disputes. Indeed, in many cases, an experienced commercial arbitrator may be preferable to an arbitrator with a ‘relevant’ background because the latter may have deeply engrained ideas that do not align with a party’s theory of the case.

Williamson: Most arbitrators are familiar with sophisticated commercial litigation. Many already have significant experience with trade secret misappropriation, breach of non-disclosure agreements, unfair competition, misuse of confidential information and the like. It is often more important to find arbitrators who are comfortable with the technical subject matter at issue than it is to focus on the arbitrator’s specific experience with trade secret law. Where, for instance, the misappropriation involves specialised software innovation, then it may be important that the arbitrators have some general familiarity with software technology and disputes in the software space. Such experience will enable the

parties to present their claims and defences in a more efficient manner than, for instance, if the arbitrators had no technical background in software and, accordingly, required technology tutorials and more extensive expert witness assistance to understand the subject matter of the dispute.

Sammi: Finding arbitrators who have experience with trade secrets, which are a unique type of IP, is critical. Arbitrators with relevant experience understand that trade secrets do not always fit into a neatly defined category, a factor that can be essential when making arguments about what may be defined as a trade secret. Additionally, the trade secrets at issue are often technical in nature. While it is unlikely that you will find arbitrators with technical degrees specific to the issues involved in your case, those with some exposure to technical concepts in litigation, such as patent litigation or other technical disciplines, are often better suited to handling the steep learning curve required in these cases.

Levitan: In selecting arbitrators, parties may wish to consider the arbitrators’ experience with the applicable trade secret laws, and with the industry and technology from which the trade secrets arise. Trade secret laws and precedents are unique, different from other IP laws and precedents, and there are important differences among the trade secret laws and precedents of different nations and, in the US, different states. Thus, the arbitrators’ familiarity with the particular body of trade secret law that pertains to the arbitration can be advantageous. Additionally, although the arbitrators need not be technology experts, having some background with the pertinent industry, or at least a track record that demonstrates openness to, and capability of, learning the relevant technology can similarly be valuable.

FW: What advice would you offer to disputing parties on mitigating the financial and reputational costs associated with a trade secrets-related dispute?

Levitan: Sound advice to any company is to devise and implement trade secret protection policies and procedures

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calculated to avoid such disputes altogether, which reduces costs associated with trade secret loss and legal actions, and preserves and enhances reputation. Such policies and procedures convey the importance the company places on protecting its own trade secrets and excluding trade secrets that belong to others. Once in a dispute, such policies and procedures can be used to the company's benefit in bolstering its claims or defences, and to mitigate reputational costs. As for mitigating financial costs after a dispute has arisen, efforts toward an amicable resolution may be productive where the interests of two companies are aligned, and they are willing to cooperate with a forensic investigation and remediation if needed, to satisfy both sides' concerns. Finally, retaining well-qualified counsel with trade secrets background and expertise can also mitigate both financial and reputational costs. Money will be saved, and a successful outcome is more likely to be achieved, by counsel who know the relevant law and how to navigate and win a trade secret case.

Sammi: Parties should consider arbitration early in the process. This can allow parties to limit reputational harm that could stem from litigating a trade secret dispute in open court. Parties should also attempt to set clear boundaries on the scope and duration of discovery in arbitration, as it is by far the costliest part of any trade secret case. Set a timeline for the dispute that makes sense and provides a workable limit for the duration of the matter. This allows you to expend your time and resources accordingly, as well as continue to run your business with a rough understanding of how long the dispute will last.

Williamson: Risks run high in trade secret disputes when it comes to financial and reputational costs. Unlike other intellectual property-related disputes, patent infringement for instance, trade secret misappropriation is not a strict liability tort; the claims necessarily involve allegations of intentional wrongdoing and misconduct. Once allegations of this nature are placed in the public domain, many disputes become virtually unseizable as reputational injury becomes paramount. The primary avenue

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JOHN M. WILLIAMSON

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to mitigate financial costs and reputational injury is to reach a commercially reasonable negotiated resolution early in the process. This is always challenging, but where divisive accusations are made in a public forum, litigants may become entrenched in their positions and may have a greater incentive to litigate the dispute through final judgment. In the appropriate case, the private nature of an arbitration forum can alleviate some of this pressure.

Ferguson: A key recommendation is that the parties pay close attention to drafting the dispute resolution clause in any trade secret licence or similar agreement. In that clause, parties can not only include provisions implementing strict confidentiality requirements, thereby minimising reputational risks, but also contain costs by agreeing on measures to limit the scope of discovery, the length of the hearing and the extent of any post-hearing briefing.

FW: How do you expect trade secrets disputes to evolve in the years ahead? To what extent do you anticipate that arbitration will become a favoured forum for resolving them?

Sammi: Evidence points to trade secret disputes becoming more prevalent, for several reasons. First, many traditional avenues of IP protection, such as patents, face limitations when applied to software

and e-commerce-based activities. Second, as businesses continue to globalise, companies are increasingly using trade secrets as a form of protection for sensitive IP. Trade secrets do not require a governmental body to 'approve' or 'define' them, nor do they have explicit expiration dates, allowing companies to avoid the complexities that arise with recognising and enforcing other types of IP across jurisdictions. Trade secrets also allow companies to avoid disclosure of their information, as opposed to patents, for example. Given that arbitration can be tailored to the parties' needs, is private and avoids many complex jurisdictional issues, we can expect an increase in trade secrets cases to be accompanied by a rise in arbitration as a preferred forum for resolving these disputes.

Williamson: Trade secret disputes may become more prevalent in the years ahead due to increasing employee mobility, advanced technologies that enable misappropriation, and extensive reliance on global partners and international supply chains. Arbitration will remain attractive for certain types of disputes, such as those between sophisticated parties that want to privately resolve their issues. But other types of trade secret disputes, those between an employer and a former employee, for example, might not be appropriate candidates for arbitration in many instances, such as where immediate injunctive relief

or criminal law enforcement is necessary, or where the ex-employee absconds to a different jurisdiction.

Ferguson: Trade secrets will continue to grow in importance as a preferred form of IP in key segments, such as financial services, information technology and telecommunications. In these areas and others, companies will increasingly enter into trade secret licences for either R&D projects or operational and other purposes. In turn, these licences will give rise to royalty and other disputes involving the proprietary data. Especially in international disputes, arbitration will continue to be a preferred forum because of its confidentiality protections and its ability to provide a fairer and more impartial venue than nation courts.

Levitan: Trade secrets are hot. There is more focus than in the past by companies in using trade secrets as a means to protect their IP assets. This is due to several factors, including changes in patent laws, which some perceive to have devalued certain types of patents to some degree, thereby making trade secrets an attractive alternative. Also, new trade secret laws are being implemented, which bolster confidence in the ability to protect trade secrets. For example, in the US, the Defend Trade Secrets Act (DTSA) has created a federal civil cause of action for trade secret misappropriation in addition to the pre-existing state laws, and, in Europe, the EU Trade Secrets Directive is harmonising the protection of trade secrets across the EU. There is also a widespread perception that trade secret misappropriation, especially across borders, is a growing problem that must be addressed, which has led to more vigorous protection efforts. For these reasons, not only is there more focus on trade secret protection, but there are also more trade secret disputes. I expect this upward trend

in trade secret disputes to continue. I do not expect that arbitration will become more or less favoured as a forum for resolving trade secret disputes. Arbitration makes sense in some circumstances, but not others.

FW: How important is it for companies to review and update their policies around trade secrets with a potential, future dispute in mind?

Ferguson: In most jurisdictions, the law will protect trade secrets only when the company has taken ‘reasonable’ steps to safeguard such secrets. The requirements of ‘reasonableness’ will constantly evolve as technology creates new ways to protect proprietary data – and new ways to misappropriate such data. This means that companies must exercise a continuing review to update their encryption, data protection, network monitoring, anti-virus and employment policies.

Levitan: Part of the definition of a trade secret is that the information has been consistently subject to reasonable measures to protect its secrecy. Reviewing and updating company policies around trade secrets is part of such reasonable measures and supports the continued viability of the trade secrets. A company’s reasonable measures will be assessed in most trade secret disputes that go to litigation or arbitration. The company’s review, and updating as needed, should contemplate all of the types of policies, documents and tools by which the company’s trade secrets are protected, including, for example, employee confidentiality and IP assignment agreements, company non-disclosure agreements (NDAs), employee manuals, HR onboarding and departure procedures, computer and email usage policies, document retention and marking policies, and IT and facility security infrastructure. Company

policies and updates should be clearly communicated to employees in writing, and through training.

Williamson: It is critical for companies to review and update their policies regarding trade secrets, for several reasons. Trade secret laws are changing in various jurisdictions. So, policies must conform to new legislative developments. Moreover, as a company’s business grows and changes, policies must account for new and different aspects of a company’s business. For instance, because new technologies might make misappropriation of certain information easier than it would have been a few years ago, internal corporate policies governing the use of technology and access to information should evolve to account for these advances.

Sammi: Companies often overlook policies regarding trade secrets, allowing them to go stale. It is extremely important for companies to update their policies to reflect today’s real-world business environment, one where digital information, not print materials, rule the day. Businesses should examine their employee onboarding and termination processes to ensure that adequate protections exist for the company. For example, they should create clear, unambiguous policies outlining boundaries involving trade secrets that are affirmed during the hiring process, for instance, “you promise that you are not bringing another company’s trade secrets with you”. Businesses also should create checklists for use in employee terminations or resignations that protect the company, for instance “you promise that you will keep all company information confidential and affirm that you are not taking any such information with you”. While these are oversimplified instructions, baseline policies such as these can make a tremendous difference in any potential ensuing trade secret dispute. ■

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