**PROTOCOL OF TRADE SECRETS PROTECTION**

In light of the recent approval of the Law on Trade Secrets, which entered into force in March 13th, 2019, which transposes the Directive on the protection of undisclosed know-how and business information (trade secrets), the Courts of Barcelona have issued a Protocol of Trade Secrets Protection.

This Protocol has been issued by the Commercial Courts of Barcelona on November, and responds to the need to establish homogeneous procedural practices in the procedural treatment to be given to information that may be considered as secret or confidential in the framework of a judicial procedure.

The scope of this Protocol is quite broad. It covers not only those proceedings in which the possible violation of business secrets is prosecuted as unfair conduct under Law on Trade Secrets, and under the Unfair Competition Act, but also for all other civil and commercial proceedings in which, whatever its object, it is declared that certain information filed with the Court constitutes a secret.

The characteristics that the information must comply to be considered a trade secret are established in art. 1 of the Law on Trade Secrets and the Protocol also refers to it:

1. It must be secret, not generally known, nor easily accessible.
2. It must have a business value, potential or real, because it is a secret.
3. It must have been the subject of reasonable measures taken by its proprietor to keep it secret.

First, the Protocol recalls that, in addition to the measures contained therein, the general duties deriving from the professional legal status of those involved in civil-commercial proceedings, such as lawyers, court attorneys or auditors, should not be forgotten. In addition to these general duties, the specific protection of a secret requires or may require in any judicial procedure the adoption of certain measures.

Thus, it is established that either the parties or a third intervening party owner of the trade secret are entitled to request a declaration of the secret nature of the information and any necessary measures to ensure the protection of the trade secret. This requests can be done by the plaintiff in the complaint, preliminary injunction request, preliminary proceedings, verification of facts request, protective letter or any other brief that initiate a judicial procedure.

The defendant may also request in its writ of defence or at any other time in the process suitable for proposing or providing evidence that certain information contained in the documents that are provided or proposed as evidence constitutes trade secrets and it can request that certain protection measures be taken.

In order to ensure the protection of trade secrets, the Courts will hear the parties’ arguments (either orally or in written) on the confidential nature of the information, prior to declare the secrecy of the same.

The Court decision on the confidential nature of the information must necessarily refer to the following three aspects:

1. Specification of the information with respect to which the measures are to be adopted. It is very important to delimit which information is considered as business secret, as well as where the information is located (document, file, digital file...).
2. Grounds for its confidential nature (or business secret). Expression of the principles that inform its decision.
3. Specification of the protection measures.

Once the Court establishes the confidential treatment of the information, it will establish the protection measures which should have been suggested by the requesting party. The measures must be necessary to fulfil the purpose for which they are intended, adequate and proportionate.

Among these measures, the following can be listed:

* Temporary measures - The party concerned may request that certain temporary measures of protection be taken until such time as the Court decides on the secrecy of the information and on the final protection measures.
* Lockable custody in the Courthouse if the documents are filed in physical form.
* Digital security measures – The party concerned may request that the documents containing the secret information will not be digitally transferred to the counterparty. In addition, the procedural management system of the Administration of Justice shall establish security measures to avoid the disclosure of the information declared secret.
* Restrictions on access to a limited number of people - Confidentiality Circles (CC). The judicial decision agreeing this protection measure will identify in detail, with name, surname, function and relationship to the parties, the members who will make up the circle of confidentiality.
* Confidential and non-confidential versions of the information provided by the parties and of the judicial decisions.
* Publicity of oral hearings - The questioning of witnesses, parties or experts regarding information declared secret or confidential should be held in camera.

When granting the measures, the Courts will take into account the legitimate interests of the parties and third parties as well as any harm that may be caused to them, and shall respect the right of the parties to effective judicial protection and to an impartial judge. The measures must be concrete and related to the specific information to be protected.

